



THESIS TITLE

An analysis of how Zimbabwe's international legal obligation to achieve the realisation of the right of access to adequate housing, can be enforced in domestic courts as a constitutional right, notwithstanding the absence of a specific constitutional right of every person to have access to adequate housing.

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A thesis submitted in the Department of Public Law University of Cape Town in fulfilment of the requirements for the degree of Doctor of Philosophy

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Declaration

I, JUSTICE ALFRED MAVEDZENGE, declare that “*An analysis of how Zimbabwe’s international legal obligation to achieve the realisation of the right of access to adequate housing, can be enforced in domestic courts as a constitutional right, notwithstanding the absence of a specific constitutional right of every person to have access to adequate housing.*” is my work and that it has not been previously submitted in whole, or in part, for the award of any degree or qualification at any university. All the sources used, referred to or quoted have been duly acknowledged.

Justice A. Mavedzenge

Signed:

Signed by candidate

14 May 2018

Dedication

To the glory of the Lord God, who gives life and wisdom; and to the legacy of my late parents -Letwin Raurai Hlalanini and Medaldo Nyikadzino Mavedzenge.

Special Dedication

In Honour of Blasio Zivengwa Mavedzenge who tragically died in a car crash when I was just about to submit this thesis and we were making plans regarding my graduation.

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TABLE OF CONTENTS

ABSTRACT	5
CHAPTER ONE: INTRODUCTION AND JUSTIFICATION	6
1.1 Introduction	6
1.2 Purpose of the research	8
1.3 Key research questions.....	8
1.4 Summary of the argument.....	9
1.5 Justification for the thesis.....	9
1.6 Research methodology	18
1.7 Outline of chapters of the thesis.....	19
CHAPTER TWO: THE FOUNDATIONAL THEORIES	22
2.1 Introduction	22
2.2 Justiciability of the right to have access to adequate housing.....	23
2.3 Justiciability of the constitutional right to: life, freedom from arbitrary evictions, equality and children’s right to shelter.....	34
2.4. Rules governing interpretation of constitutional rights in Zimbabwe.....	41
2.5 The culture and attitude of the Zimbabwean judiciary	62
2.6 Conclusion	70
CHAPTER THREE: INTERNATIONAL LEGAL DUTIES UNDER THE RIGHT OF ACCESS TO ADEQUATE HOUSING.	72
3.1 Introduction	72
3.2 Normative standards created by the right of access to adequate housing.	74
3.3 Specific duties created by the right of access to adequate housing.....	80
3.4 Summarising the duties of government under the right of access to adequate housing	90
CHAPTER FOUR: THE FUNDAMENTAL FREEDOM FROM ARBITRARY EVICTIONS AS AN ALTERNATIVE AVENUE FOR THE ENFORCEMENT OF THE RIGHT OF ACCESS TO ADEQUATE HOUSING	93
4.1 Introduction	93
4.2 The fundamental freedom from arbitrary evictions in Zimbabwe	93
4.3 Duty to immediately refrain from forced evictions.....	94
4.4 Duty to confer adequate legal security of tenure	96
4.5 Duty to ensure that evictions comply with minimum requirements	97
4.6 Conclusion	112
CHAPTER FIVE: THE RIGHT TO LIFE AS AN ALTERNATIVE AVENUE FOR THE ENFORCEMENT OF THE RIGHT OF ACCESS TO ADEQUATE HOUSING	114
5.1 Introduction	114
5.2 The right to life under the Constitution of Zimbabwe	115
5.3 The relevance of the value of human dignity when interpreting the right to life.....	116
5.4 Duty to promote the right to live in human dignity	119
5.5 Duty to fulfil the right to live in human dignity.....	122
5.6 The international law argument in support of the right to life as implying the right of access to adequate housing.....	123

5.7 The comparative foreign law argument in support of the right to life as implying the right of access to adequate housing.....	127
5.8 The right to life must incorporate the constitutional objective on adequate housing	135
5.9 Conclusion	139
CHAPTER SIX: THE RIGHT TO SUBSTANTIVE EQUALITY AS AN ALTERNATIVE AVENUE FOR THE ENFORCEMENT OF THE RIGHT TO HAVE ACCESS TO ADEQUATE HOUSING ...	140
6.1 Introduction	140
6.2 The scope and content of the right to equality under the Constitution of Zimbabwe.....	142
6.3 Implications of the right to substantive equality	145
6.4 The value of equality as an interpretive aid	146
6.5 The value of human dignity as an interpretive aid	149
6.6 Providing access to adequate housing as part of the restitutionary positive measures	150
6.7. Conclusion	156
CHAPTER SEVEN: THE CHILDREN’S RIGHT TO SHELTER AS AN ALTERNATIVE AVENUE FOR THE ENFORCEMENT OF THE RIGHT TO HAVE ACCESS TO ADEQUATE HOUSING ...	158
7.1 Introduction	158
7.2 The right to parental care	158
7.3 Why the children’s right to shelter should be interpreted to mean the right to adequate housing for children?	159
7.4 Duty to protect and promote the children’s right to adequate housing	161
7.5 Comparative law in support of the duty of the state to provide material assistance	166
7.6 Conclusion	168
CHAPTER EIGHT: SUMMARY OF THE MAIN FINDINGS.....	169
8.1 Introduction.....	169
8.2 The specific international legal duties under the right of access to adequate housing	169
8.3 Domestic application of the international legal duty to achieve the realisation of the right to have access to adequate housing	172
8.4 Rules of constitutional interpretation	173
8.5 The fundamental freedom from arbitrary evictions	175
8.6 The right to life.....	176
8.7 The right to substantive equality for previously marginalised groups	178
8.8 Children’s right to shelter	181
8.9 Conclusion and possible further research	183
9. LIST OF REFERENCES	186
9.1 Books and Chapters in Books	186
9.2 Journal Articles	194
9.3 Cases from Zimbabwe.....	202
9.4 Cases from South Africa	203
9.5 Cases by the African Commission and the African Court	205
9.6 Cases by the Inter-American Court of Human Rights	205
9.7 Cases from India	205
9.8 Cases from Canada.....	206

9.9 Cases from other Jurisdictions	206
9.10 International Conventions and U N General Comments and Guidelines	207
9.11 United Nations Special Rapporteurs' Reports	209
9.12 National Constitutions and Legislation.....	210
9.13 Unpublished Papers, Reports and Dissertations	210
9.14 Newspaper Articles and Online Sources.....	211

ABBREVIATIONS

ACRWC:	African Charter on the Rights and Welfare of the Child
ACHPR:	African Charter on Human and People's Rights
AJA:	Acting Judge of Appeal
Art:	Article
CEDAW:	Convention on the Elimination of all forms of Discrimination Against Women
CESCR:	Committee on Economic, Social and Cultural Rights
CHRA:	Combined Harare Residents Association
CJ:	Chief Justice
DCJ:	Deputy Chief Justice
DPSP:	Directive Principles of State Policy
HRC:	United Nations Human Rights Committee
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
JA:	Judge of Appeal
MDC:	Movement for Democratic Change
PIE ACT:	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
SADC:	Southern Africa Development Community
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
UNCRC:	United Nations Convention on the Rights of the Child
UN-Habitat:	United Nations Human Settlement Programme
ZANU PF:	Zimbabwe African National Union Patriotic Front
ZLHR:	Zimbabwe Lawyers for Human Rights

ABSTRACT

The Constitution of Zimbabwe of 2013 does not expressly guarantee every person a right to have access to adequate housing. However, the Government of Zimbabwe has an international legal obligation to achieve the progressive realisation of the right to have access to adequate housing by everyone in the country. This obligation is derived from art 11 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Zimbabwe is a dualist state and therefore, this obligation is not directly or automatically enforceable as municipal law in Zimbabwe. It can be enforced in domestic courts only if it has been enacted into legislation or if it is entrenched as a constitutional obligation. The absence of a specific constitutional right, guaranteed for everyone to have access to adequate housing, thus raises the concern that the government may not be held accountable, in the domestic courts, to comply with its international legal obligation to ensure that everyone enjoys access to adequate housing.

There is a national housing crisis in Zimbabwe that is characterised by an acute shortage of adequate housing, mass forced evictions and unfair discrimination in the allocation of housing facilities by government. There is therefore an existing need to compel government to comply with and fulfil its international legal obligations relating to the right of every person to have access to adequate housing. In the absence of an explicit constitutional guarantee of such a right, it is necessary to find alternative constitutional rights which citizens and individuals in Zimbabwe can rely on to compel Government to comply with and fulfil its international legal obligations that arise from art 11 (1) of the ICESCR.

The Constitution of Zimbabwe expressly guarantees for everyone the following rights; the fundamental freedom from arbitrary evictions, the right to life, the right to equality and the children's right to shelter. The scope of each of these rights can be interpreted broadly to include some of the duties that ordinarily arise from the right to have access to adequate housing. Therefore, these rights can be applied together to enforce the international legal duty of the state to ensure the progressive realisation of the right to have access to adequate housing by everyone in Zimbabwe.

CHAPTER ONE: INTRODUCTION AND JUSTIFICATION

Without prejudice to the foregoing, where economic, social and cultural rights are not expressly included in the constitution of a State party, the courts and administrative tribunals should strive to protect the interests and values underlying these rights through an expansive interpretation of other rights, for example, the rights to life, human dignity, security of the person, equality and just administrative action.-the African Commission on Human and People's Rights¹

1.1 Introduction

The Constitution of Zimbabwe Amendment (No. 20) of 2013, hereafter referred to as 'the Constitution of Zimbabwe of 2013' or 'the Constitution of Zimbabwe', was adopted in May 2013. This Constitution was adopted a considerable time after Zimbabwe signed and ratified² the International Covenant of Economic Social and Cultural Rights (ICESCR), an international convention dedicated to the recognition and advancement of economic, social and cultural human rights.³

In terms of Article 2 (1) of the ICESCR, Zimbabwe is obliged to ensure that its domestic legal system protects and gives effect to all the rights recognised under this Covenant so that the people in Zimbabwe are able to enforce these rights in the domestic courts.⁴ The most effective way of domesticating these rights is by entrenching them in the Constitution.⁵

Between 2010 and 2013, Zimbabwe embarked on a constitution making process,⁶ and there was an expectation amongst citizens that the new Constitution would embrace and

¹ See paragraph 24 of the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, adopted by the African Commission on November 2010. Achpr.org. (2010). *Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights / Legal Instruments / ACHPR* [online] Available at: <http://www.achpr.org/instruments/economic-social-cultural/> [Accessed 13 Aug. 2017].

² On 13 May 1991. See the United Nations, Treaty Series Vol. 993 available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en [Accessed on 20 June 2017]

³ See the preamble to the International Covenant on Economic, Social and Cultural Rights, 1966

⁴ UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment no 9: *The domestic application of the Covenant*, 3 December 1998, at para 2.

⁵ This is because, it would give the right prominence by virtue of the supremacy of the Constitution and this would protect the right from being violated or manipulated through other laws or practices. See s 2 (1) of the Constitution of Zimbabwe, 2013.

⁶ The Constitution was negotiated by three political parties namely ZANU PF, MDC and MDC-T which were part of the Government of National Unity that had been established as part of a political settlement facilitated by the Southern Africa Development Community (SADC). See Mavedzenge, J. (2014). *An examination of the relationship between public participation in constitution making processes and the*

domesticate the fundamental human rights recognised under the ICESCR. Several human rights recognised in this Convention were domesticated by way of entrenching them in the Constitution's Declaration of Rights.⁷

However, the Constitution does not explicitly guarantee for everyone, a fundamental right to have access to adequate housing.⁸ It guarantees the fundamental freedom from arbitrary evictions, which is an element of the right to have access to adequate housing,⁹ but it does not give persons who are living under inadequate housing conditions the right to compel the government to make adequate housing accessible to them. The Constitution also provides that the state shall endeavor to make adequate housing accessible to everyone, but this is set out in s 28 as a constitutional objective and not as a fundamental right. As will be demonstrated in the next chapter, constitutional objectives are enforceable only if either they can be read into an expressly guaranteed constitutional right or they can be enforced as guidelines for state policies and legislation.

The Constitution provides for the right to shelter in s 81 (1) (f) but only for children. There is, therefore, no fundamental right that is explicitly provided for under the Constitution of Zimbabwe, for every person to have access to adequate housing. This is a lamentable feature of the new Constitution, given that Zimbabwe is facing an acute housing crisis and the government seems to be doing very little to resolve that crisis.¹⁰

On its own, the entrenchment of a constitutional right of every person to have access to adequate housing would not necessarily have led to the resolution of the housing crisis. There are other factors which need to be considered if a holistic solution to the housing crisis is to be found. For instance, one would have to assess if the judiciary in Zimbabwe is independent and robust enough to enforce duties created by constitutional rights and if

objective to write a democratic constitution: The case of Zimbabwe's 2010-13 constitution making exercise". Master's in Law dissertation. University of Cape Town

⁷ These, in the Constitution of Zimbabwe, 2013, include: the right to health care, provided for in section 76; the right to education, provided for in section 75, the right to water and food, provided for in section 77; the right to use language and participate in the cultural life of choice, provided for in section 63 (a); the right of elderly persons to receive social security, provided for in section 82 and the fundamental freedom from arbitrary eviction that is guaranteed in section 74.

⁸ A similar observation is made by Tinashe Chinopfukutwa in 'House Demolitions in Zimbabwe: A Constitutional and Human Rights Perspective' (2017) *Zimbabwe Rule of Law Journal* at 56

⁹ See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991 at para 8 (a)

¹⁰ See the section below on 'Justification for the research' where I provide details on this.

the government has access to adequate resources that are needed to fulfil this right. These are important factors to consider because a constitutional guarantee of a right to have access to adequate housing remains a mere paper guarantee if the judiciary is not able to enforce the duties created by that right and, if government does not have adequate resources to fulfil the right.

However, the entrenchment of an enforceable right for every person to have access to adequate housing would have provided people in Zimbabwe with a constitutional basis to compel their government to respect this right. It would also give them a legal basis to compel the government to implement positive measures to protect the right against possible violations as well as to promote its realisation by everyone. Without a constitutional basis in the form of an enforceable right to have access to adequate housing, it is more difficult for the people to hold their government accountable.

Given that the Declaration of Rights is heavily entrenched,¹¹ it is not easy for Zimbabweans to amend this Constitution and include in it, an explicit right of every person to have access to adequate housing. This situation has led me to research how best the fundamental rights that are already provided for in the existing Declaration of Rights can be interpreted and applied as alternative avenues to enforce, in domestic courts, the government's international legal duty to fulfil the right of every person in Zimbabwe to have access to adequate housing.

1.2 Purpose of the research

The purpose of this research is to examine how the government's international legal obligation to progressively achieve the realisation of the right to have access to adequate housing, can be enforced in Zimbabwean domestic courts as a constitutional right even though the Constitution does not explicitly guarantee such a right for everyone.

1.3 Key research questions

In developing this thesis, I was guided by the following main research questions:

¹¹ Through section 328 (6) of the Constitution, which imposes a rigorous procedure for amending the Declaration of Rights. An amendment to any provision in the Declaration of Rights can only be done through a Constitutional Bill that is passed by the National Assembly and approved by the majority in a referendum.

- i. What are the international legal obligations of the Government of Zimbabwe under the right to have access to adequate housing?
- ii. Considering that international legal obligations are not directly enforceable in domestic courts, and that the Constitution of Zimbabwe does not explicitly guarantee for everyone the right to have access to adequate housing, are there other rights which exist in this Constitution which can be relied on as alternatives to enforce the government's international legal obligation to achieve the realisation of the right to have access to adequate housing by everyone?

1.4 Summary of the argument

In this thesis I argue that, although the Constitution of Zimbabwe does not explicitly guarantee every person with the right to have access to adequate housing, the government's international legal obligation to fulfil this right as required under art 11 (1) of the ICESCR, may be enforced in domestic courts by relying on other rights that are already provided for under the Constitution. These are the fundamental freedom from arbitrary evictions, the right to life and the right to equality. I argue that the fundamental freedom from arbitrary evictions can be interpreted to guarantee adequate security of tenure to people who already have housing, while the right to life and the right to equality can be interpreted broadly to compel the state to create enabling conditions for people to access adequate housing. In addition to these rights, I also argue that persons who are adults and who are parents or guardians may invoke their children's right of access to adequate housing, in order to compel the government to refrain from interfering with their existing access to housing as well as to compel it to progressively enable them to access adequate housing so that they can provide it to their children.

1.5 Justification for the thesis

One of the preliminary questions which arises in research of this nature is whether there is any justification to embark on it. Therefore, before I actually demonstrate how the duty to achieve the realisation of the right to have access to adequate housing by everyone can be incorporated into the fundamental freedom from arbitrary evictions, the right to life, the right to equality and the children's right to shelter; I must address the following question; is there an existing need for research into how the Government of Zimbabwe

should be compelled to fulfil (as a constitutional responsibility) its international legal obligations under the right to have access to adequate housing?

To answer this question, I begin by describing the housing situation in Zimbabwe in order to show that there is a practical need which necessitated this research to be carried out. Thereafter, I demonstrate that Zimbabwe has an international obligation to ensure the progressive realisation of the right to have access to adequate housing by everyone but, that obligation is not enforceable as municipal law unless it has been domesticated and therefore, there is a need to find existing alternative constitutional rights which can be interpreted to incorporate the right to have access to adequate housing.

1.5.1 A brief assessment of the housing situation in Zimbabwe

There is an acute national housing crisis in Zimbabwe that is characterised by a lack of access to adequate housing by a huge number of individuals,¹² corruption and unfair discrimination in the allocation of housing land,¹³ as well as massive forced evictions being conducted by the government.¹⁴ From a legal point of view, therefore, there is an existing need to explore how the law can be applied to assist people in Zimbabwe to gain access to adequate housing. I therefore provide, hereunder, a brief description of this housing crisis in order to show that this thesis was not developed and argued merely for academic purposes but to suggest practical and viable legal arguments necessary to resolve existing challenges relating to access to adequate housing in Zimbabwe.

In 2005, the United Nations Human Settlement Programme (UN-Habitat) conducted a comprehensive assessment of the impact of ‘Operation Murambatsvina’¹⁵ –a government-

¹² For example it is estimated that 1 300 000 people (in urban areas only, across the country) are living either in the streets or in informal settlements, without basic amenities. See Muchada, T. (2014). *Whither the Right to Shelter: Understanding the Politics of Demolitions*. p. 9

¹³ Housing land is distributed on partisan basis, unfairly discriminating against persons and groups who are not affiliated to the ruling party ZANU PF. For instance See *Newsday Report* (2013). “ZANU PF parcels out Harare”. [online] Available at: <http://www.newsday.co.zw> [Accessed 10 Aug. 2017]

¹⁴ For example government conducted evictions in Epworth which affected 350 families. See *Peter Makani v Epworth Local Board* HH 550–14. Government also conducted evictions in Harare which destroyed several homes. See *Dusabe v Harare City* [2016] ZWHHC 116

¹⁵ This is a Shona word that means ‘Operation Restore Order.’ Government claimed that the purpose of the evictions was to clean up the city while the opposition and civil society argued that the real purpose of the evictions was to punish the communities in urban areas who had voted for the opposition in the previous elections of 2005. See Tibaijuka, A. (2005). *Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in*

sponsored large-scale forced-evictions programme conducted in Zimbabwe. This assessment culminated in the publication of the UN Special Envoy Anna Kajumulo Tibaijuka's 'Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina by the United Nations Special Envoy on Human Settlements Issues in Zimbabwe' (The Tubaijuka Report).¹⁶ As part of this report, the UN-Habitat provides a mini-assessment of the housing situation in Zimbabwe as at the year 2005.

In this report, the UN-Habitat referred to the Government of Zimbabwe's National Housing Delivery Policy of 2000, which acknowledges that as at the year 2000, there existed a backlog of 1000 000 housing units.¹⁷ This means that by the year 2000, an estimated figure of one million families was still waiting for Government to either provide them with housing units or to provide them with facilities to establish their own housing. Since the year 2000, Zimbabwe has been grappling with a severe economic crisis. This has resulted in both national and local government authorities failing to make any significant progress in providing people with basic social services, including housing facilities.¹⁸ Worse still, in 2005, the Government of Zimbabwe conducted a nationwide mass eviction campaign that left over 700 000 people homeless, thereby further worsening the already acute housing crisis in Zimbabwe, particularly in urban areas.¹⁹

In 2008, the Government of Zimbabwe conducted an assessment of the housing situation in Zimbabwe and published a report.²⁰ In this report, it echoed the findings of the 2005

Zimbabwe. [online] UN Habitat. Available at: <http://ww2.unhabitat.org/documents/ZimbabweReport.pdf> [Accessed 10 Apr. 2015], p. 20

¹⁶ Ibid

¹⁷ See National Housing Delivery Policy of 2000, Government of Zimbabwe

¹⁸ Monyau, M. (2014). 'African Economic Outlook: Zimbabwe'. Available at http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2014/PDF/CN_Long_EN/Zimbabwe.pdf, (Accessed on 10 April 2015)

¹⁹ Supra, note 15. Similar claims are made by Miloon Kothari, the United Nations Special Rapporteur on adequate housing in his statement available on <https://reliefweb.int/report/zimbabwe/statement-mr-miloon-kothari-special-rapporteur-adequate-housing-component-right> [Accessed on 7 March 2018]

²⁰ Mlalazi, A and Chatiza, K. (2009). 'Human Settlement Needs Assessment in Zimbabwe: Critical Review and Proposed Methodology'. Government of Zimbabwe, Harare, UN-Habitat available at www.mlg.gov.zw/publications/summary/4-publications/24-human-settlement-needs-analysis [Accessed on 10 April 2015]

UN-Habitat's assessment by confirming that the supply of housing services lags far behind and there are serious backlogs as a result.²¹

According to the Combined Harare Residents Association (CHRA), a civil society organisation based in Harare, the official estimates of the urban national housing waiting list for 2014 stood at one million three hundred thousand people,²² indicating that at least one million three hundred thousand families, in urban areas alone, were waiting to be allocated facilities to establish their own houses. Through its official website, the Government of Zimbabwe acknowledges that, in Harare alone, there are currently five hundred thousand families who are on the housing waiting list.²³ Both the government and the City of Harare, however, acknowledge that the figure of families that are waiting for facilities to establish their own houses in Harare is actually higher than the stated five hundred thousand.²⁴ This is because the majority of the people are not aware of how they can register to join the city's housing waiting list, while others have lost confidence in the city's housing provision system and therefore do not bother to register their names on the list.²⁵

With the number of people on the housing waiting list continuing to increase, government efforts to provide housing facilities remain negligible. For instance in 2012, of the five hundred thousand families who were on the housing waiting list in Harare alone, the City council and the national government were able to allocate a paltry one thousand five hundred and twenty three housing stands.²⁶ Although it is difficult to obtain national statistics, in Harare alone there is an excess of thirty four thousand three hundred and fifty-nine²⁷ families that are either living as illegal squatters or on pieces of land without water supply, electricity, sewerage reticulation facilities and roads.

In a recently decided case on arbitrary evictions, Mathonsi J of the High Court took judicial notice of the national housing crisis in Zimbabwe when he held that:

²¹ Ibid, p. 9

²² Supra note 12

²³ See Government of Zimbabwe's official website: www.zim.gov.zw/index.php/forums/3595-govt-sets-committee-to-audit-illegal-allocation-of-stands [Accessed on 10 April 2015]

²⁴ City of Harare. (2014) '*Gravity of the Housing Situation for Low Income Earners in Harare.*' p. 3

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

There can be no doubt whatsoever in the minds of all well-informed persons that this country currently faces extremely serious problems relating to poverty, unemployment and more importantly housing. The latter problem has, in recent history, manifested itself in illegal occupants of municipal land by hordes of citizens who are without shelter...Illegal settlements are sprouting all over the place with indecent abandon under the watch of local authorities charged with the responsibility of superintending urban settlements...²⁸ [The emphasis is mine]

Amid this housing crisis, the government has been conducting mass forced evictions. In 2015 alone, the government conducted or attempted to conduct mass forced eviction campaigns in Mazowe²⁹, Epworth³⁰ and Chitungwiza.³¹ The Mazowe evictions affected at least two hundred families.³² In October 2016, over four thousand families were left homeless in Masvingo province after their homes were demolished under the government's watch.³³ Some of these evictions are reported to have been motivated by the desire by senior government officials to establish private properties in the places that are already occupied by ordinary persons.³⁴

Furthermore, massive corruption involving land purchase and ownership, especially in urban areas has been reported.³⁵ The government has not meaningfully investigated these allegations nor has it taken relevant steps to prosecute the implicated culprits. This is despite the fact that this was reported and the corresponding evidence was made available to the relevant government authorities.³⁶ Furthermore, there are reports of partisan

²⁸ *Peter Makani v Epworth Local Board* HH 550–14 at 1–2

²⁹ Ndebele, H. (2015). 'Manzou evictions: State to Move in Wildlife' *Zimbabwe Independent* 16, January available at <http://www.theindependent.co.zw/2015/01/16/manzou-evictions-state-move-wildlife/> [Accessed on 23 November 2016]

³⁰ Supra note 28

³¹ Mufaro, M. (2013). 'Illegal Demolitions Underway in Zimbabwe' *HuffPost* 6 November available at https://www.huffingtonpost.com/miriam-mufaro/illegal-demolitions-under_b_4263654.html [Accessed 21 March 2018]

³² Supra note 29

³³ See news report Zimbabwe Broadcasting Corporation. (2016). 'Thousands Left Homeless After Fresh Demolitions in Harare' Available on <http://www.zbc.co.zw/index.php/news-categories/top-stories/71105-thousands-left-homeless-after-fresh-demolitions-in-harare> [Accessed on 23 November 2016.]

³⁴ For instance, it has been reported that the government planned and sanctioned evictions in Mazowe that were done to make way for the First Lady, Grace Mugabe, who allegedly was planning to establish a private university in Mazowe. See The Independent. (2017). "Grace Mugabe Grabs Iconic Mazowe Dam" *The Independent* 7 July 2017, available on <https://www.theindependent.co.zw/2017/07/07/grace-mugabe-grabs-iconic-mazowe-dam/> [Accessed on 10 August 2017]

³⁵ Murisa, T (ed). (2013). 'An Analysis of Transparency and Accountability in Land Sector Governance in Zimbabwe.' Transparency International Zimbabwe. p. 21, available at http://kubatana.kubatananet.netdna-cdn.com/wp-content/uploads/2014/07/tiz_land_sector_governance_140616.pdf, [accessed on 18 May 2015.]

³⁶ *Ibid*, p. 26–27. The details of reports of land corruption were compiled by various municipalities and submitted to the Ministry of Local Government.

distribution of land and housing stands by government officials, especially during election periods.³⁷ For instance, ahead of a by-election conducted in a constituency called Norton, in October 2016, the ruling party (ZANU–PF) promised to allocate five thousand residential stands to its supporters.³⁸

Therefore, there is an existing housing crisis in Zimbabwe that is characterised by a lack of access to housing facilities, large scale forced evictions, corruption and unfair discrimination in the distribution and management of housing land, as well as an absence of effective policy intervention by government. This crisis calls for creative legal ideas on how the government can be compelled to respect, protect and promote the right of every person to have access to adequate housing. In the next paragraphs, I show that the people in Zimbabwe have this right in terms of international law that is binding upon the Government of Zimbabwe.

1.5.2 The international legal obligation to make adequate housing accessible

As noted above, Zimbabwe is a State Party to the ICESCR and thus is bound internationally by the obligations imposed by the Convention. The ICESCR obliges State Parties to take necessary steps to protect and ensure the full realisation of all the fundamental rights recognised in this Convention.³⁹ One of these rights is the right to adequate housing for everyone. This right is recognised in art 11 (1) of the ICESCR, as follows:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

³⁷ Ibid, p. 47

³⁸ See The Herald. (2016). “ZANU PF Hands Over 5000 Norton Stands”. *The Herald*, 20 October 2016, available on <http://www.herald.co.zw/zanu-pf-hands-over-5-000-norton-stands/>. [Accessed on 16 November 2016]

³⁹ See the art 2(1) which provides that ‘Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’

The right to have access to adequate housing is an element of the right to adequate housing.⁴⁰ Generally, the right to have ‘access to adequate housing’ implies the duty of the state to create the necessary conditions for access to adequate housing for people at all economic levels of society.⁴¹ It, therefore, can be argued, as I do in this thesis, that the Government of Zimbabwe is internationally bound to achieve the realisation of the right to have access to adequate housing by all the people within its jurisdiction.

The right to have access to adequate housing is also recognised in the African Charter on Human and Peoples’ Rights (hereafter referred to as the ‘African Charter’). Zimbabwe is a signatory to and has ratified the African Charter.⁴² The African Charter recognises the right to have access to adequate housing as an implied right under the right to the best attainable state of mental and physical health,⁴³ the right to property⁴⁴ and the protection of the family.⁴⁵ This interpretation was confirmed by the African Commission on Human and Peoples’ Rights (the African Commission) when it held that:

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18 reads into the Charter a right to shelter or housing...⁴⁶

Therefore, art 11 (1) of the ICESCR and arts 16, 14 and 18 of the African Charter attest to the claim that the Government of Zimbabwe has an international legal obligation to achieve the realisation of the right to have access to adequate housing by everyone and not just children. In Chapter 3 of this thesis, I discuss the specific duties that the government is expected to perform pursuant to or in order to fulfil this obligation. At this point, I only sought to establish that the government indeed has this international legal

⁴⁰ See *Government of the Republic of South Africa v Irene Grootboom* 2000 (11) BCLR 1169 (CC), para 35-36

⁴¹ Ibid at para 35 where the Court was interpreting the implications of art 11 (1) of the ICESCR

⁴² Zimbabwe ratified on 30 May 1986. See the Ratification Table: African Charter on Human and Peoples’ Rights available at <http://www.achpr.org/instruments/achpr/ratification/>. [Accessed on 20 June 2017]

⁴³ Recognised in article 16 of the African Charter on Human and Peoples’ Rights

⁴⁴ Recognised in article 14 of the African Charter on Human and Peoples’ Rights

⁴⁵ Recognised in article 18 of the African Charter on Human and Peoples’ Rights

⁴⁶ See *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* [155/96] African Commission on Human and Peoples’ Rights, Communication, May 2002, para 63

obligation and therefore, through this thesis I seek to find ways to enforce a legally valid (rather than speculative) government obligation.

Since I have established *prima facie* that this obligation exists as part of the international law that is binding on the Government of Zimbabwe, the question that arises now is; is there a need for people in Zimbabwe to rely on a domestic constitutional right in order for them to enforce this obligation when already they have the right of access to adequate housing in terms of the ICESCR and the African Charter? I now turn to address this question by discussing the application of international law as part of the municipal law in Zimbabwe.

1.5.3 The Application of the international treaty obligation to make adequate housing accessible to everyone in Zimbabwe

The source of the government's international legal obligation to achieve the realisation of the right to have access to adequate housing is art 11 (1) of the ICESCR and arts 16, 14 and 18 of the African Charter, as discussed above. These are international treaties or conventions and therefore, the obligation to fulfil the right to have access to adequate housing is an international treaty obligation, which cannot be applied directly as part of the domestic law in Zimbabwe until and unless certain peremptory constitutional requirements have been fulfilled. I discuss these requirements below.

The application of international treaty obligations as domestic law in Zimbabwe is regulated by s 327 (2) (b) of the Constitution, which provides that: 'An international treaty which has been concluded or executed by the President or under the President's authority does not form part of the law of Zimbabwe unless it has been incorporated into law through an Act of Parliament.'

The above-cited provision of s 327 (2) (b) must be read jointly with s 327 (4) (a) of the Constitution, which prescribes that: 'An Act of Parliament may provide that subsection (2) [cited above] does not apply to any particular international treaty or agreement or any class of such treaties or agreements'.

The implication of these provisions is that they establish a general rule to the effect that international treaty obligations do not apply as law in Zimbabwe until they have been incorporated into municipal law through legislation or a constitutional provision.

However, as an exception to that general rule, the legislature may pass a resolution to allow certain international treaties to apply as law in Zimbabwe without having to incorporate them into legislation or the Constitution.

The Parliament of Zimbabwe has not passed a resolution to allow provisions of art 11 (1) of the ICESCR or arts 16, 14 and 18 of the African Charter to apply directly as municipal law in Zimbabwe, without being incorporated into the Constitution or legislation. The rights and state obligations created by these treaties are therefore not enforceable in Zimbabwean courts until they are domesticated through legislation or in a constitutional provision.

As noted above, whilst the Constitution of Zimbabwe does not expressly guarantee for everyone the right to have access to adequate housing, it does however expressly provide for a right to shelter for children.⁴⁷ Children are defined in the Constitution as any boy or girl who is below the age of 18.⁴⁸ This means that the fundamental right of ‘every person’ to have access to adequate housing as recognised in art 11 (1) of the ICESCR, has not been expressly domesticated in full under the Constitution of Zimbabwe.

Furthermore, the Zimbabwean legislature has not provided for the right to have access to adequate housing for everyone in any of the statutes. As Muderere⁴⁹ rightly observes, Zimbabwe has an array of legislation regulating urban planning as well as land use⁵⁰ but, none of those statutes expressly provide for a right of every person to have access to adequate housing. There is, therefore, neither a legislative nor an expressly guaranteed constitutional right for everyone in Zimbabwe to have access to adequate housing. This has led to the view that the government’s international legal obligations under the right of every person to have access to adequate housing are not enforceable in Zimbabwean courts.⁵¹

⁴⁷ See section 81 (1) (f) of the Constitution of Zimbabwe, 2013

⁴⁸ See Ibid, section 81(1)

⁴⁹ Muderere, T. (2011). ‘Think Globally, Act Locally? The Reverse Osmosis of Housing Rights in Transitional Democracies’ *Journal of Sustainable Development in Africa*.13. p. 18–19

⁵⁰ The key statutes include the Urban Councils Act [Chapter 29:15], the Rural District Councils Act [Chapter 29:13] and the Regional Town and Country Planning Act [Chapter 29:12]

⁵¹ See The Zimbabwe Lawyers for Human Rights. (2014). ‘*Briefing Paper: Analysis of Relevant to Economic, Social, and Cultural Rights in Zimbabwe’s 2013 Constitution.*’ p. 3. The Zimbabwe Lawyers for

However, through this thesis, I challenge this view and argue that although the Constitution does not explicitly guarantee every person the right to have access to adequate housing, the international legal obligation of the state to respect, protect, promote and fulfil this right may be enforced indirectly by broadly interpreting the scope of the following constitutional rights that are explicitly enshrined in the Declaration of Rights: the fundamental freedom from arbitrary evictions,⁵² the right to life,⁵³ the right to equality⁵⁴ and the children's right to shelter.⁵⁵ Therefore, what is demonstrated in this thesis is that the scope and content of these constitutional rights can be interpreted expansively to incorporate the international legal duty of the state to respect, protect and promote access to adequate housing by everyone, and not just the children.

1.6 Research methodology

The method applied to conduct this research is largely desktop analysis, through which I identified and reviewed relevant sources of law and literature. These include legal textbooks, Zimbabwean and relevant foreign case law, general comments published on the interpretation of various international legal conventions, reports and journal articles on the right to adequate housing for everyone, the right to life, the right to equality, the right to privacy, the right to freedom from arbitrary evictions and the children's right to shelter. I also took up a two-and-a-half months' long internship at the Supreme Court of Namibia where I researched and provided legal opinions to the Chief Justice on cases that were before him. In those opinions, I was able to test some of the ideas that I advance in this thesis regarding how fundamental rights should be interpreted. I interned at the Supreme Court of Namibia because that is the only court that was available for an internship at the time and the Namibian rules of interpretation of fundamental rights are similar to Zimbabwe's. The Supreme Court of Namibia, therefore, was a suitable forum to use to test the veracity of some of the ideas discussed in this thesis.

Human Rights (ZLHR) are a prominent civic collective of Zimbabwean lawyers whose mission is to protect and defend human rights in Zimbabwe.

⁵² Supra note 47, section 74

⁵³ Supra note 47, section 48 (1)

⁵⁴ Supra note 47, section 56

⁵⁵ Supra note 47

1.7 Outline of chapters of the thesis

Based on the above stated purpose of this thesis and guided by the main research question, I provide below an outline of the chapters in this thesis.

a) Chapter one: Introduction and justification

This is the current chapter. Through this chapter, I introduced the reader to the thesis being advanced by explaining the purpose of the thesis, summarizing the argument and identifying the research questions. I also provided justification as to why it was necessary to conduct this research.

b) Chapter two: The relevant foundational theories

Through this chapter, I identify and examine the key relevant theoretical and legal concepts upon which this thesis is based. Thus, before I go on to demonstrate how the right to have access to adequate housing can be incorporated into other fundamental rights that are explicitly enshrined in the Constitution of Zimbabwe, this chapter responds to key preliminary questions which the reader may have and those questions include: whether the right to have access to adequate housing is justiciable; whether the fundamental rights that I seek to rely on as alternative rights are fully justiciable constitutional rights; whether the rules of constitutional interpretation in Zimbabwe allow such expansive or broad construction of fundamental rights as I advocate for in the subsequent chapters of this thesis and whether, even if it were to be accepted that the right to have access to adequate housing can be read into certain constitutional rights, is the Zimbabwean judiciary likely to embrace such an approach to constitutional interpretation?

b) Chapter three: International legal duties under the right of access to adequate housing

Through this chapter, I identify and explain the specific international legal duties which the Government of Zimbabwe is required to comply with and implement under the right to have access to adequate housing. This discussion is based on the relevant provisions of art 11 (1) of the ICESCR and the interpretation thereof in the general comments, case law, communications and reports published by the Committee on Economic, Social and Cultural Rights (CESCR) and the Special Rapporteurs on the right to adequate housing.

c) Chapter four: The fundamental freedom from arbitrary evictions as an alternative avenue for the enforcement of the right of access to adequate housing

Through this chapter, I analyse the scope of the constitutionally guaranteed fundamental freedom from arbitrary evictions, in order to establish the extent to which individuals in Zimbabwe can rely on it to enforce the duties of the state under art 11 (1) of the ICESCR.

d) Chapter five: The right to life as an alternative avenue for the enforcement of the right of access to adequate housing

Through this chapter, I argue that the right to life places upon the state the duty to create the necessary conditions to enable individuals and their families to have access to adequate housing, and thus this right can be relied upon to enforce the duties of the state under art 11 (1) of the ICESCR.

e) Chapter six: The right to substantive equality as an alternative avenue for the enforcement of the right to have access to adequate housing

In this chapter I argue that the Constitution of Zimbabwe provides for the right to substantive equality as part of the broad right to equality. I argue that the right to substantive equality requires the state to initiate and implement reasonable restitutionary measures to eradicate existing material disadvantage that is suffered by certain groups as a result of past unfair discrimination. Therefore, persons who live under inadequate housing conditions as a result of past unfair discrimination can compel the state to develop and implement reasonable legislative and other measures to make adequate housing accessible to them.

f) Chapter seven: The children's right to shelter as an alternative avenue for the enforcement of the right to have access to adequate housing

In addition to the right to life and equality, discussed in Chapter 5 and 6; through this chapter, I analyse how adults who are parents or guardians can also rely on their children's right to shelter to claim adequate housing to be made accessible to them by the state.

g) Chapter eight: Summary of the main findings and future research thrusts

In this chapter, I summarise the key observations and conclusions with respect to the extent to which the constitutional rights considered in this thesis may be relied upon as alternative pathways to enforce, in domestic courts, the government's international legal obligation to progressively achieve the realisation of the right of every person to have access to adequate housing. I also identify questions that arise from this thesis which can be considered for future research.

CHAPTER TWO: THE FOUNDATIONAL THEORIES

[When interpreting the Constitution of Zimbabwe] What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits, should be narrowly and strictly construed- Anthony Gubbay CJ ¹

2.1 Introduction

The purpose of this thesis is to show that, although the Constitution of Zimbabwe does not explicitly guarantee every person the right to have access to adequate housing, the international legal obligation of the state to respect, protect, promote and fulfil this right may be incorporated into the scope of the following constitutional rights that are explicitly enshrined in the Declaration of Rights: the fundamental freedom from arbitrary evictions,² the right to life,³ the right to equality⁴ and the children's right to shelter.⁵ Therefore, what I ultimately demonstrate in this thesis is that the scope and content of these constitutional rights can be interpreted expansively to incorporate the international legal duty of the state to respect, protect, promote and fulfil the right of access to adequate housing by everyone. Before I go on to demonstrate this, there is a need to show that this thesis is based on clear and solid theories of constitutional law. This will help to address certain preliminary and conceptual questions which the reader may have, which include: whether the right to have access to adequate housing (as conceptualised in the relevant international law) creates any justiciable legal obligations against the State?⁶ It is critical to discuss this question because critics of my thesis may counter-argue that: if it were to be accepted that the right

¹ *Rattigan v Chief Immigration Officer* 1994(2) ZLR 54 (S), para 57. These guidelines have been adopted and endorsed by the Constitutional Court of Zimbabwe in numerous cases that have been decided since the adoption of the 2013 Constitution of Zimbabwe. See for instance *Mawere v Registrar General* (2015) ZWCC 04, para 20

² See section 74 of the Constitution of Zimbabwe, 2013

³ *Ibid*, section 48 (1)

⁴ *Ibid*, section 56

⁵ *Ibid*, section 81 (1) (f)

⁶ Jesse Hohmann argues that “there is a failure [in human rights instruments] to define the right, symptomatic of a normative weakness in identifying what the right to housing is, and a resulting uncertainty about when, and by whom, it can be claimed”. See (2013). *The Rights to Housing: Law, Concepts, Possibilities*. p. 2. Also see Atangeho, A. (2016) ‘Indirect Constitutional Protection of Economic, Social and Cultural Rights in Cameroon’ In Chirwa, D and Chenwi, L. (eds) *The Protection of Economic, Social and Cultural Rights in Africa*. p. 528

to have access to adequate housing is indeed implied under the Constitution, would it make any difference given the conceptual criticism that this right is not justiciable?

The other preliminary question is: to what extent are the right to life, the fundamental freedom from arbitrary evictions, the right to equality and the children's right to shelter justiciable constitutional rights in Zimbabwe? The extent to which these constitutional rights are justiciable determines whether it will be legally possible to rely on them to enforce the right to have access to adequate housing. The third preliminary question is: whether the rules of constitutional interpretation in Zimbabwe allow courts to expansively or broadly interpret the scope of constitutional rights. For the court to be able to incorporate the right to have access to adequate housing into the scope of the fundamental rights identified above, the constitutional rules of interpretation must in the first place allow such an expansive or broad interpretation of fundamental rights.

The last conceptual issue to be addressed pertains to the judicial culture or attitude in Zimbabwe. Conceptually this is a relevant question because: even though the Constitution of Zimbabwe (technically) requires courts to adopt a value based and broad approach, as well as incorporate international law standards⁷ when interpreting fundamental rights, the reader may want to know if the judges will in practice implement these constitutional interpretive guidelines? In order to deal with this question, I have to discuss the culture and attitude of the judiciary in Zimbabwe. Admittedly this is a huge question which may require a separate doctoral thesis to answer it. However this thesis cannot afford to ignore this question and therefore, I briefly discuss it in this chapter in order to provide an indication as to whether the judges are likely to be robust or conservative in their application of the constitutional interpretive guidelines. I now turn to discussing the first conceptual question which relates to the justiciability of the right to have access to adequate housing.

2.2 Justiciability of the right to have access to adequate housing

⁷ And gives them (the courts) discretion to follow comparative foreign law

At the international law level, it is now trite that access to adequate housing is considered a human right.⁸ The underlying rationale for considering access to adequate housing as a right has been articulated by the United Nations Human Rights Office of the High Commissioner as follows:

Housing is the basis of stability and security for an individual or family. The centre of our social, emotional and sometimes economic lives, a home should be a sanctuary; a place to live in peace, security and dignity. Increasingly viewed as a commodity, housing is most importantly a human right.⁹

Access to adequate housing is part of the nomenclature of socio-economic and cultural rights. One of the challenges confronting the enforcement of social, economic and cultural rights is ‘the question whether these rights can be enforced through a court order and the extent to which they can and should be enforced by a court.’¹⁰

As rightly observed by Aoife Nolan, Bruce Porter and Malcolm Langford¹¹:

Concerns regarding the justiciability of social and economic rights have been based on three general assumptions or propositions: i) that social and economic rights are inherently [vague and therefore] different from civil and political rights; ii) that it is not legitimate or appropriate for courts to intrude into the sphere of social and economic policy; and iii) that courts or other decision-making bodies lack the capacity to properly adjudicate and enforce social and economic rights.

Thus according to Nolan and Langford,¹² there are three arguments that are usually advanced to challenge the justiciability of socio-economic rights and these are that, socio-economic rights are vague and indeterminate rights, their enforcement would violate the separation of powers doctrine and that the courts are technically incompetent to make polycentric decisions. I now turn to deal with each of these arguments.

⁸ See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, para 1

⁹ See <http://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx> [Accessed on 7 March 2018]

¹⁰ See Currie, I. and De Waal, J. (2013). *The Bill of Rights Handbook*. 6th ed. p. 565. Also see Coomans, F. (ed). (2006). *Justiciability of Economic and Social Rights: Experiences from domestic systems*. p. 4-5

¹¹ See (2009). ‘The Justiciability of Social and Economic Rights: An Updated Appraisal.’ *Centre for Human Rights and Global Justice Working Paper No.15*. p. 8. Also see Liebenberg, S. (2016). ‘Direct Constitutional Protection of Economic, Social and Cultural Rights in South Africa’ In Chirwa, D and Chenwi, L. (eds) *The Protection of Economic, Social and Cultural Rights in Africa*. p.305

¹² Ibid

In terms of the ICESCR, the state has the duty to ‘progressively’ fulfil socio-economic rights and this is to be achieved by implementing ‘appropriate measures, subject to the amount of resources that are available to the state.’¹³ This formulation of the state’s duties has led to the belief that the obligations imposed by these rights are vague and indeterminate in contrast to the more precise civil and political rights.¹⁴ Viewed against this background, the right to have access to adequate housing may therefore be criticized as a vague right which does not create any enforceable duties against the government in Zimbabwe.

However such criticism should not hold because, as Henry Shue¹⁵ rightly observes, every socio-economic right (which he calls subsistence right) involves at least three correlative duties namely: the duty to avoid depriving the right bearer (duty to respect), the duty to protect the right bearer from being deprived of his or her right by third parties and the duty to aid the right bearer who has been deprived of the right. The right to have access to adequate housing therefore, should be viewed as a right which creates different types of enforceable legal obligations. At the very minimum, it creates negative duties, which are obligations to refrain from interfering with the existing enjoyment of the right.¹⁶ These obligations are sometimes referred to as ‘duties to respect’ the right.¹⁷ Such obligations include the duty to refrain from discriminating against anyone when developing and implementing measures to make adequate housing accessible.¹⁸ They also include refraining from conducting forced evictions.¹⁹

¹³ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, para 1

¹⁴ See Nolan, A; Porter, B and Langford, M. (2009). ‘The Justiciability of Social and Economic Rights: An Updated Appraisal’ *Centre for Human Rights and Global Justice Working Paper No.15*. p. 9

¹⁵ See (1980). *Basic Rights: Subsistence, Affluence and US Foreign Policy*. p. 60

¹⁶ See Currie, I. and De Waal, J. (2013). *The Bill of Rights Handbook*. 6th ed. p. 568. Also see Brand, D. (2006). ‘Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale’ In Coomans, F (ed). (2006). *Justiciability of Economic and Social Rights: Experiences from domestic systems*. p. 212.

¹⁷ See De Vos, P. (1995). ‘The Economic and Social Rights of Children and South Africa’s Transitional Constitution’ *South African Public Law*. p. 246 and Akintayo, A. (2014). ‘Planning Law Versus the Right of the Poor to Adequate Housing: A Progressive Assessment of the Lagos State of Nigeria’s Urban and Regional Planning and Development Law of 2010’ *African Human Rights Law Journal*. p. 561

¹⁸ See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991 at para 8 (e)

¹⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1):forced evictions*, 20 May 1997, para 8

In addition to the negative duties, the right to have access to adequate housing also creates the obligation of the state to implement certain positive measures such as establishing and enforcing the necessary legislative and administrative frameworks.²⁰ These frameworks must be aimed at guaranteeing individuals with the right to have access to adequate housing in order to protect the right bearers against possible violations of their existing enjoyment of the right, as well as to promote access to the right by those who currently do not enjoy access to adequate housing.²¹ Conceptually, it is therefore clear that the right to have access to adequate housing creates discernible legal obligations against the state.

However, as noted by Nolan, Porter and Langford²², it has also been argued that enforcing socio-economic rights would require courts to venture into the sphere of social and economic policy, thereby undermining the doctrine of separation of powers. Gerard Hogan²³ forcefully makes this argument by asserting that “if social and economic rights are made justiciable and are vindicated by the courts, the result will tend to distort the traditional balance of the separation of powers between the judiciary and other branches of government in that, more power will flow to the judiciary”. Such concerns are likely to arise in the context of Zimbabwe because the Constitution expressly requires respect for separation of powers between the executive, the legislature and the judiciary.²⁴ Under this doctrine, the executive (with oversight from the legislature²⁵) is given the constitutional mandate to develop national policies on how government will deliver socio-economic services such as housing.²⁶ The executive also enjoys the discretion to prioritise socio-

²⁰ See art 2 (1) of the UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 as interpreted by the CESCR in UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, para 3. Also see supra note 14

²¹ See Ibid, *General Comment No. 3*, para 3 and 5. Also see Human Rights Council. “Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context” [A/HRC/7/16] 13 February 2008
13 February 2008, para 88

²² Supra note 14, p. 9

²³ (2001). ‘Judicial Review and Social and economic Rights’ In Binchy and Sarkin (eds.) *Human Rights, the Citizen and the State: South African and Irish Approaches*. p. 8

²⁴ See section 3 (2) (e) of the Constitution of Zimbabwe of 2013 as read together with sections 88 (2), 117 (1) and 162 of the same Constitution.

²⁵ See section 119 of the Constitution of Zimbabwe of 2013

²⁶ See section 110 (3) (d) of the Constitution of Zimbabwe of 2013

economic issues to spend resources on.²⁷ The role of the courts is to interpret and enforce the law.²⁸ Therefore, critics of socio-economic rights would pose the question: to what extent can the courts make orders that have a bearing on policy formulation and resource allocation, on matters to do with access to adequate housing?

I contend that the courts in Zimbabwe have a constitutional mandate, under the separation of powers doctrine, to make orders which enforce duties under the right to have access to adequate housing. Firstly, it must be noted that the Zimbabwean separation of powers model establishes mechanisms for checks and balances between the different branches of government. These include giving the judiciary the power and mandate to review all decisions, policies and laws made by the other branches of the state, in order to ensure compliance with the law and the Constitution.²⁹ Therefore, the courts are legally competent to review the legality of any action, inaction, decision or law made by the other branches as they endeavor to fulfil their legal duties, including the duty to achieve the realisation of the right to have access to adequate housing. For instance, the courts can competently interdict the state from any conduct which undermines the existing enjoyment of the right to have access to adequate housing. Equally in the event of unlawful inaction by the state, the courts can issue a *mandamus*, compelling the state to take action to implement certain positive measures that are necessary to protect or promote the right to have access to adequate housing. I discuss these duties elaborately in Chapter 3 but, at this point I sought to demonstrate that the separation of powers doctrine in Zimbabwe allows courts to enforce the right to have access to adequate housing, if the applicant can prove that such a right is implied under an existing constitutional right.

The other criticism leveled against socio-economic rights is that they cannot be enforced by the courts because the judges and magistrates lack the technical capacity to properly

²⁷ This is so because, in a small and developing economy such as Zimbabwe, there is competition for scarce resources. For more details on this argument, see Mclean, K. (2009). *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*. p. 70-73

²⁸ See section 192 of the Constitution of Zimbabwe of 2013 as interpreted by the Constitutional Court in *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* [2017] ZWCC 13. p. 9

²⁹ See decision of the Constitutional Court of Zimbabwe in *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* [2017] ZWCC 13. p. 9-11

adjudicate and enforce socio-economic issues.³⁰ Kirsty McLean³¹ and Lon Fuller³² call this “the institutional competence argument”. The essence of this argument is that, implementing socio-economic rights involves making complex policy-centric decisions and, the courts cannot review such decisions because they have limited experience, knowledge and resources to assess the consequences of their orders and to respond flexibly to the unexpected results of those orders.³³ Nolan and Langford³⁴ have dismissed this view and they have argued that the judges can be trained and can be given information necessary for them to competently review such polycentric decisions. I however do not think the institutional competence argument should be dismissed totally because there are some legitimate concerns it raises particularly that, no matter how much training and information is given to the courts, it may never be enough for the judges to preside over heavily polycentric socio-economic matters. My view (as well as the view of other scholars³⁵) is that the courts should limit their review to the legality of the policy in question and they should avoid judging the efficacy or desirability of the policy.³⁶ Whatever policy option chosen by the executive should be acceptable to the court unless the policy is illegal or unconstitutional in one way or the other. This approach leads to the following question: what is the appropriate standard of review which the courts must apply when enforcing the state’s duties under the right to have access to adequate housing?

The right to have access to adequate housing creates negative and positive obligations. As Sandra Liebenberg³⁷ rightly observes, the enforcement of negative duties is usually

³⁰ Mclean, K. (2009). *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*. p. 72

³¹ Ibid

³² (1978). ‘The Forms and Limits of Adjudication’ *Harvard Law Review*. p. 353

³³ Supra note 30

³⁴ See supra note 14, p. 16-19

³⁵ Who include Sandra Liebenberg. See (2016). ‘Direct Constitutional Protection of Economic, Social and Cultural Rights in South Africa’ In Chirwa, D and Chenwi, L. (eds) *The Protection of Economic, Social and Cultural Rights in Africa*. p. 315-317

³⁶ Yacoob J makes a similar argument in *Government of the Republic of South Africa v Irene Grootboom* 2000 (11) BCLR 1169 (CC) at 41 where he said: “A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met”

³⁷ Supra note 35, p 321

regarded as less cost-intensive, less polycentric and less intrusive in relation to the functions of the other branches of government than the enforcement of the positive duties. For that reason, negative duties are reviewed using the proportionality test, which (amongst other factors) requires the state to justify its action by demonstrating that: the conduct is done in terms of a law of general application; it is reasonable and justifiable as the conduct is done in pursuit of a sufficiently weighty purpose consistent with the goals of an open and democratic society based on human dignity, equality and freedom and; it is the least restrictive means of achieving the government's purposes.³⁸ Section 86 of the Constitution of Zimbabwe provides for this proportionality test and therefore it is possible to apply it to enforce some of the more straight forward³⁹ negative duties under the right to have access to adequate housing.

However, the greatest challenge regarding the enforcement of socio-economic rights is how to enforce the positive obligations without the judiciary overreaching on both its constitutional mandate (in terms of the separation of powers) and over stretching its technical competence? This question has been answered in the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*⁴⁰ where it is noted that:

When examining communications [allegations of violations of socio-economic rights] under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant. [My own emphasis]

Therefore, when reviewing measures taken by the state under the right to have access to adequate housing, the court must assess the reasonableness of the measure(s) under review. In comparative jurisdictions such as South Africa⁴¹, it has been suggested that in order to be considered reasonable, the measure(s) taken by the state must meet the following requirements: the measures must be coherent in the sense that there must be a

³⁸ This is derived from an analysis of a similar South African constitutional provision by Sandra Liebenberg in supra note 35, p. 319-320

³⁹ Such as the duty to refrain from intruding into someone's home.

⁴⁰ See paragraph 8 (4)

⁴¹ See *Government of the Republic of South Africa v Irene Grootboom* 2000 (11) BCLR 1169 (CC) at paras 39-44. Also see *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696; 1998 (1) SA 765 (CC) at para 43; *Minister of Health v Treatment Action Campaign* [2002] ZACC 15; 2002 (5) SA 721 at para 30-40 and *Residents of Joe Slovo Community; Western Cape v Thubelisha Homes* [2009] ZACC 16; 2010 (3) SA 454 (CC) at para 115-118

logical connection between the measures and the objective to ensure the realisation of the right⁴² and, between the measures and the enabling legislative framework,⁴³ the measures must be inclusive in the sense that they must seek to benefit all the concerned groups and must not unfairly discriminate against other needy persons;⁴⁴ they must make appropriate provision for attention to housing crises and to short, medium and long term needs of the rights bearers;⁴⁵ they must be backed by adequate human and material resources and;⁴⁶ the roles to be played by the different stakeholders (for example national and local government departments) in the implementation of the measures must be indicated clearly and adequately.⁴⁷ Added to these criteria is that there must be transparency⁴⁸ and meaningful engagement between the state and the persons who would be affected by the implementation of the measures in question.⁴⁹

I suggest that the courts in Zimbabwe should take a similar approach because it allows them to review the legality of the measures taken by the state, without necessarily dictating to the executive on the policy options it must choose in order to implement the right to have access to adequate housing.⁵⁰ In recommending this approach, I am aware of the criticisms that have been levelled against the Constitutional Court of South Africa when it adopted this approach.

One such criticism is that the reasonableness test is too flexible (and indeterminate) to the extent that no-one knows its exact scope or boundaries and, this allows the court to come up with any assessment result it thinks is just.⁵¹ The other criticism is that, by focusing on the reasonableness test, the courts have failed to provide a substantive interpretation of

⁴² Supra note 36

⁴³ Supra note 36, para 42

⁴⁴ Supra note 36, para 43

⁴⁵ Ibid

⁴⁶ Supra note 36, para 39

⁴⁷ Ibid

⁴⁸ *Minister of Health v Treatment Action Campaign* [2002] ZACC 15; 2002 (5) SA 721 at para 123

⁴⁹ See *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (5) BCLR 475 (CC); 2008 (3) SA 208 (CC) at para 34 and *Residents of Joe Slovo Community; Western Cape v Thubelisha Homes* [2009] ZACC 16; 2010 (3) SA 454 (CC) at para 7

⁵⁰ Kirsty MacLean makes a similar point at supra note 30, p 172

⁵¹ Supra note 30, p 175

the content of the right and this may render most of the socio-economic rights to be hollow constitutional guarantees.⁵² Jesse Hohmann⁵³ succinctly makes this challenge as follows:

The first criticism...concerns the way in which the Court's reasonableness enquiry has resulted in the undue limitation of the normative content of the right to housing. Although we know that 'there must be land, there must be services, there must be a dwelling'⁵⁴, the Court has yet to define the normative content of section 26 (1) [right to have access to adequate housing] beyond this bald statement. Section 26 (1) is, on its face, qualified only by the word 'adequate': the government is obliged to provide access to housing which reaches the standard of adequacy and not more. However rather than beginning by fleshing out a comprehensive 'right to have access to adequate housing' in section 26 (1), the Court's reasoning in *Grootboom* takes its starting point as section 26 (2) [duty to implement reasonable measures], which concerns itself with limitations on government obligations....Thus the reasonableness test appears to be largely divorced from the question of content.

Thus there seem to be two criticisms against the reasonableness test and they can be summed up as follows: it is an indeterminate test which does not enable the court to enforce the normative content of the right. I agree with these criticisms but, I argue that they can be addressed in order to strengthen (rather than dismiss) the reasonableness test.

One way of addressing them is that the court must establish the normative content of the right by applying the international standards which define what constitutes access to adequate housing. In international law,⁵⁵ this has been defined as the right to have access to housing which meets the following minimum requirements: adequate security of tenure; habitability; culturally sensitivity; where the basic services, materials, facilities and infrastructure are available to the inhabitants; and which is in appropriate location. In the next chapter, I elaborately discuss what these standards entail. However, for now the argument I am making is that, conceptually it is possible to interpret the normative content of the right to have access to adequate housing and this can be done by directly applying the above mentioned standards as recognised in the ICESCR.

Having set the normative standards, the court must also set a minimum core of the right.⁵⁶ Establishing a minimum core content for the right would provide a clear benchmark of

⁵² Bilchitz, D. (2005) 'Health' In S Woolman et al (eds) *Constitutional Law of South Africa*. p. 56

⁵³ (2013). *The Right to Housing: Law, Concepts, Possibilities*. p. 100

⁵⁴ As per the ruling in *Government of the Republic of South Africa v Irene Grootboom* 2000 (11) BCLR 1169 (CC) at para 67

⁵⁵ Supra note 18, para 8

⁵⁶ The CESCR strongly suggested that each state should develop a minimum core content for each socio-economic right. See supra note 13, para 10

what the state is legally required to achieve as the minimum,⁵⁷ while setting the standards of what constitutes adequate housing would establish the ‘maximum’ of what the government is required to provide access to. Once the court has established both the minimum content and the maximum content requirements of the right, it is possible to determine whether the measures taken by government are reasonable or not. I argue that for the measures to qualify as reasonable, their impact must not derogate from the minimum content of the right. For example, assuming that the minimum content is that everyone must have access to basic shelter;⁵⁸ evictions which leave people homeless would be unreasonable because they derogate from the minimum content of the right. Where (economically vulnerable) people already have access to basic shelter but government fails to assist them to obtain access to housing which meets the normative standards of adequacy, the reasonableness of government’s inaction can be assessed by examining if government has resources available to fund the necessary measures. Furthermore, the court must also examine: whether government is doing all it can to mobilise the necessary resources; whether government has meaningfully engaged with the affected communities to try and find a solution and; whether there is a sound plan that is in place to enable the concerned people to realise their right within the shortest possible period of time. If the government: has limited resources; has done all it can (without success yet) to mobilise more resources; has meaningfully engaged the concerned people; and has a solid plan on how it will enable the concerned people to realise their right within the shortest period of time; then its failure to improve the housing conditions should be deemed reasonable for the time being.

What I am suggesting here therefore is that the reasonableness test cannot be applied effectively or meaningfully without having first established or interpreted the minimum and maximum content of the right. The minimum core content, the maximum content and the resources available to the state are the key factors which constitute the context against which the court should assess the reasonableness of the measures taken by the state or the

⁵⁷ David Brand makes a similar argument in (2003). ‘The Proceduralisation of Socio-economic Rights Jurisprudence or What are Socio-economic Rights for?’ In Botha, H. et al (eds) *Rights and Democracy in a Transformative Constitution*. p. 48-49

⁵⁸ Where they have access to basic services and facilities such as water, refuse collection, roads, health facilities, police stations and schools.

failure by the government to take any action. That way, it is possible to identify and enforce the obligations which arise from the right to have access to adequate housing.

I am aware that in certain comparative jurisdictions such as South Africa,⁵⁹ the courts have refused to interpret the minimum core of the right to have access to adequate housing, given the “democratic deficit of the judiciary as an institution and its constraints in adjudicating disputes with complex polycentric implications”⁶⁰ However, it is important to note (as Sandra Liebenberg does⁶¹) that even though the Constitutional Court of South Africa refused to interpret the minimum core content, it indicated that it would be willing to do so if sufficient evidence of the content of such a core obligation is placed before the Court.⁶²

There is a duty on the part of state parties to establish a minimum core content because, as the CESCR has noted:

....a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d’être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.⁶³

However, the critical questions are: whether it is possible for the court to interpret the minimum core content without overreaching into the sphere of the executive and the legislature to distribute resources and; is the court technically competent to interpret a minimum core content of the right given the highly polycentric nature of the issues involved? I argue that one way of establishing the minimum core content, without violating the separation of powers and with due deference to the executive, is to compel the state to propose what it deems to be a minimum core of the right to have access to adequate housing. Using its review powers, the court must assess if the proposal made by

⁵⁹ See Supra note 54, para 33. Also see *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) at paras 60-61 where the court rejected the idea of a minimum core content for the right to access water

⁶⁰ Supra note 35, p. 314

⁶¹ Supra note 35, p. 314-315

⁶² Supra note 54, para 33 and Supra note 48, para 34

⁶³ Supra note 13, para 10

the state is reasonable given the amount of resources available to the government, the (maximum) normative content of the right and any other relevant factors such as, whether the state has meaningfully engaged the right bearers in coming up with the proposed minimum core content of the right. Thus the process of establishing a minimum core should be a collaborative effort between the three arms of government, with the judiciary performing its review powers as mandated under the separation of powers doctrine. The next conceptual issue or question that I now turn to discussing is the justiciability of the constitutional rights which I have identified as alternative rights that can be relied upon in order to enforce the right to have access to adequate housing.

2.3 Justiciability of the constitutional right to: life, freedom from arbitrary evictions, equality and children's right to shelter

All the fundamental rights enshrined in the Zimbabwean Declaration of Rights; which include the right to life, freedom from arbitrary evictions, the right to equality and children's right to shelter are fully justiciable rights. This observation is based on the reading of s 45 (1) and s 85 (1) of the Constitution.

In terms of s 45 (1) of the Constitution, the state and all its branches and agencies are bound by the Declaration of Rights.⁶⁴ Therefore the right to life, the fundamental freedom from arbitrary evictions, the right to equality and the children's right to shelter are enforceable against the state. In order to reinforce the justiciability of these constitutional rights, s 85 (1) sets out the requirements of *locus standi* upon which the bearers of those rights can petition the court for their enforcement.⁶⁵ This further confirms that these constitutional rights are enforceable against the state through court orders. However, to what extent are they justiciable?

In terms of s 44 of the Constitution of Zimbabwe, these rights create both negative and positive obligations which the state and other persons must comply with and fulfil. Section 44 provides as follows: 'The State and every person, including juristic persons, and every

⁶⁴ It reads as follows: 'This Chapter [the Declaration of Rights] binds the State and all executive, legislative and judicial institutions and agencies of government at every level.'

⁶⁵ These are that, any person listed in section 85 (1) 'is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.'

institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter [The Declaration of Rights].’ Therefore, these rights⁶⁶ are fully justiciable as they create both negative⁶⁷ and positive obligations⁶⁸ that are enforceable against the state, through court orders. The fact that these constitutional rights are fully justiciable creates a solid theoretical legal basis for the argument that the right to have access to adequate housing can be enforced as part of the legal duties to respect, protect, promote and or fulfil the right to life, the fundamental freedom from arbitrary evictions, the right to equality and or the children’s right to shelter. Given that throughout this thesis, I will refer to these duties (the duties to respect, protect, promote and fulfil) in order to support my arguments, I now turn to explain in detail what they entail so that it is clear to the reader what I mean when I refer to them in the subsequent chapters. I also briefly indicate how these duties provide a legal basis for certain arguments that I advance in this thesis. This must not be taken as the actual discussion on how the right to have access to adequate housing may be incorporated into the duties to respect, protect, promote and fulfil the right to life, the fundamental freedom from arbitrary evictions, the right to equality and the children’s right to shelter. Whenever I make a connection between these rights and the right to have access to adequate housing in this chapter, it is merely for purposes of illustrating what the duties to respect, protect, promote and fulfil mean and how the entrenchment of these duties under the Constitution provides a legal basis for me to embark on this thesis. The full arguments on how the right to have access to adequate housing can be enforced in Zimbabwe as part of the duties to respect, protect, promote and or fulfil the right to life, the right to equality, the fundamental freedom from arbitrary evictions and the children’s right to shelter, are provided in Chapters 4 to 7. At this point, my interest is restricted to explaining what the duties to respect, protect, promote and fulfil rights entail and how the entrenchment of these different levels of duties in s 44 of the Constitution of Zimbabwe aids my thesis.

⁶⁶ The right to life, the right to equality, the children’s right to shelter and the fundamental freedom from arbitrary evictions

⁶⁷ These subsist in the duty to respect constitutional rights.

⁶⁸ These arise from the duty to protect, promote and fulfil constitutional rights.

2.3.1 The duty to respect constitutional rights

The state has a duty to respect all the fundamental rights that are enshrined in the Constitution, which include the freedom from arbitrary evictions⁶⁹, the right to life⁷⁰, the right to equality⁷¹ and the children's right to shelter.⁷² The duty to respect these rights entails the negative obligation to refrain from acting in any way that would unlawfully prevent or restrict an individual from accessing and enjoying them.⁷³ In this thesis, I argue that the constitutional right to life, freedom from arbitrary evictions, the right to equality and children's right to shelter create negative obligations that are similar to those that arise from the right to have access to adequate housing. For instance, the duty to refrain from conducting forced evictions is a negative obligation which arises from the right to have access to adequate housing.⁷⁴ However, as I show in this thesis, a similar obligation also arises from the right to life and the fundamental freedom from arbitrary evictions. Thus, I contend in Chapters 4 and 5 that families can rely on their constitutional freedom from arbitrary evictions or their fundamental right to life in order to compel the state to refrain from conducting forced evictions. The basis of the litigant's argument in such a case would be that the destruction of shelter without the provision of suitable alternative housing will expose the evictee to homelessness and this threatens the evictee's right to life.⁷⁵ It also undermines the fundamental freedom from arbitrary evictions because forced evictions are arbitrary in nature⁷⁶ and therefore are forbidden under the Constitution, as I demonstrate in Chapter 4.

⁶⁹ Section 74 of the Constitution of Zimbabwe, 2013

⁷⁰ Ibid, section 48 (1)

⁷¹ Ibid, section 56

⁷² Ibid, section 81 (1) (f)

⁷³ See De Vos, P. (1995). 'The Economic and Social Rights of Children and South Africa's Transitional Constitution.' *South African Public Law*. p. 246; Brand, D. (2006) 'Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale' In Coomans, F (ed). (2006). *Justiciability of Economic and Social Rights: Experiences from domestic systems*. p. 212; Akintayo, A. (2014). 'Planning Law Versus the Right of the Poor to Adequate Housing: A Progressive Assessment of the Lagos State of Nigeria's Urban and Regional Planning and Development Law of 2010'. *African Human Rights Law Journal*. p. 561; Liebenberg, S. and Pillay, K, eds. (2000). *Socio-Economic Rights in South Africa: A resource book*. p. 28; *Farai Mushoriwa v City of Harare [2014] ZWHHC 195* and *Dusabe v Harare City [2016] ZWHHC 116*

⁷⁴ Supra note 18, para 8

⁷⁵ *Olga Tellis v Bombay Municipal Council* (1985) 2 Supp SCR 51

⁷⁶ Supra note 19, para 3

2.3.2 The duty to protect constitutional rights

In this thesis, I argue that the Government of Zimbabwe may be compelled in domestic courts, to comply with and fulfil its international legal obligations under the right to have access to adequate housing as part of its duty to ‘protect’ the constitutional freedom from arbitrary evictions, the right to life, the right to equality and the children’s right to shelter. What does the duty to protect constitutional rights entail?

Craig Scott and Patrick Macklem⁷⁷ describe the duty to protect human rights as the obligation to protect the existing enjoyment of the right from violation by third parties. In *Social and Economic Rights Action Center v Nigeria*, the African Commission on Human and Peoples' Rights said the duty to protect fundamental rights obliges governments to take action to prevent the violation of the individual’s right by state organs or by other persons.⁷⁸ But at a practical level, what sort of duties is the state obliged to perform in order to prevent rights from being infringed?

Henry Shue⁷⁹ responds to this question by suggesting that the duty to protect rights entails that the state must protect the right bearers against impending and ongoing violations of their right by third parties. In order to perform this obligation, the state is required to put in place the necessary legal and policy framework that effectively protects the constitutional rights from being infringed by third parties.⁸⁰ As Pierre de Vos⁸¹ contends, the state has an obligation to enact the relevant laws and regulations that grant individuals the legal status, rights and privileges required to ensure adequate protection of their rights. Therefore, although the Constitution of Zimbabwe explicitly guarantees for everyone the fundamental right to life, freedom from arbitrary evictions, the right to equality and

⁷⁷ See (1992). ‘Constitutional Ropes of Sand or Justiciable Guarantees? Social rights in a new South African Constitution.’ *University of Pennsylvania Law Review*. p.74. Also, see Brand, D. (2006). ‘Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale’ In Coomans, F (ed). (2006). *Justiciability of Economic and Social Rights: Experiences from domestic systems*. p. 216

⁷⁸ *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* 155/1996 at para 64

⁷⁹ *Supra* note 15, p 60

⁸⁰ Liebenberg, S. and Pillay, K, eds. (2000). *Socio-Economic Rights in South Africa: A Resource Book*. p. 28

⁸¹ See (1997). ‘Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights Under the South African 1996 Constitution’ *South African Journal on Human Rights*. p. 83

guarantees the right to shelter for children; the state has the positive duty to enact the necessary legislation, regulations and policies which provide for mechanisms to protect the enjoyment of these rights against unlawful interference. In this thesis, I argue that the duty to protect the constitutional right to life, freedom from arbitrary evictions, the right to equality and children's right to shelter create positive obligations to adopt legislative and administrative measures that are similar to those which the government is required to implement under the duty to protect the right of access to adequate housing. For instance, I argue that the constitutional right to life means the right to live in human dignity.⁸² In order to enjoy this right, individuals need to have access to adequate housing. There are people who already have access to adequate housing and are therefore enjoying some elements of their right to live in human dignity. In order to protect their existing enjoyment of the right to live in human dignity, the state has a positive duty to enact legislation which protects people against arbitrary deprivation of housing by third parties. These arguments are elaborately explained in Chapters 5 of this thesis.

It must also be noted that creating the necessary legislative framework is not exhaustive of the measures which the state is required to undertake in order to fulfil its duty to protect constitutional rights. The state has to implement other positive measures that are necessary to remove the threats to the right. The exact nature of the measures will depend on the nature of the threat. In circumstances where the threat or the violation is unavoidable, the duty of the state is to implement measures to mitigate the impact of the violation.⁸³ An example of this would be that the state has a duty to protect the right to life by providing suitable temporary housing to victims of forced evictions that have been necessitated by a natural disaster such as floods or a volcanic eruption.

2.3.3 The duty to promote and fulfil fundamental rights

In addition to the duty to respect and protect the existing enjoyment of the rights, the state has a duty to promote⁸⁴ and fulfil⁸⁵ the enjoyment of these rights by those who currently

⁸² See Chapter five of this thesis.

⁸³ Brand, D. (2006) 'Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale' In Coomans, F (ed). (2006). *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*. p. 212

⁸⁴ See section 44 of the Constitution of Zimbabwe, 2013.

⁸⁵ Ibid

are unable to access and enjoy them. According to Henry Shue's⁸⁶ conception of the correlative duties of human rights, the duties to promote and fulfil rights fall under what he calls the obligation to 'aid' those who are unable to access and enjoy the rights that are guaranteed for them under the Constitution. In that sense, the duty to promote constitutional rights entails the obligations to implement measures to promote the full realisation of the right by its bearers.⁸⁷ This means that the state should not just concern itself with protecting those who are already enjoying the right, but it also has a duty to implement measures to enable the realisation of those rights by the people who are currently unable to access them for one reason or another.

The measures to be implemented include those aimed at creating awareness of the rights.⁸⁸ In addition to that, they include creating and implementing policies and laws which establish mechanisms to enable rights bearers to access and enjoy their rights which they are currently being deprived of.⁸⁹ In this thesis I therefore, argue that access to adequate housing is a necessary means for every person to enjoy their right to life, as in their right to live in human dignity.⁹⁰ Therefore, as part of the duty of the state to create enabling conditions to promote the realisation of the right to enjoy life in human dignity, the state may be compelled to undertake reasonable legislative and other measures to make adequate housing accessible to those who currently are homeless or live under inadequate housing. The argument is not that the state must deliver adequate housing to every person who lives under inadequate housing conditions. Rather, the argument is that as part of its duty to promote access to life in human dignity, the state must implement reasonable legislative and other measures to enable the people who do not have access to decent

⁸⁶ Supra note 15, p 60

⁸⁷ Supra note 84, p.219. Also, see Eide, A. (1995). 'Economic, Social and Cultural Rights as Human Rights' In Eide, A etal (eds) *Economic, Social and Cultural Rights: A Textbook*. p. 38; De Vos, P. (1997). 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights under the South African 1996 Constitution'. *South African Journal on Human Rights*. p 86. Also see Scott, C and Macklem, P. (1992). 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution'. *University of Pennsylvania Law Review*. p. 17

⁸⁸ Liebenberg, S. and Pillay, K, eds. (2000). *Socio-Economic Rights in South Africa: A resource book*. p. 29

⁸⁹ Khoza, S. (2007) *Socio-Economic Rights in South Africa 2nd edition*. p. 36

⁹⁰ See Chapter five of this thesis

homes to have access to the resources and materials that they need so that they can establish for themselves adequate housing.⁹¹

However, it must also be noted that the state has a duty to fulfil constitutional rights.⁹² This requires the state to do more than just creating policies and laws which enable everyone to access their rights. Under the duty to fulfil rights, the state is required to adopt and implement measures that are aimed at creating, extending and enhancing access to the rights by those who have no means to access the rights on their own.⁹³ In practice, this implies the duty of the state to provide a service or resource that is required for the individuals to access and enjoy their rights.⁹⁴ There are groups of people who have no means to access adequate housing on their own.⁹⁵ Consequently, such people are denied access to their right to live in human dignity.⁹⁶ They are also denied their right to equality, as in their right to live as equals in human dignity with the rest of the society.⁹⁷ Under the duty to fulfil the right to live in human dignity and the right to equality, the state may be compelled to provide temporary basic shelter to such people and adopt reasonable legislative and other measures to progressively ensure that they gain access to adequate housing.

As indicated earlier, the above discussion sought to explain what the duties of the state to respect, protect, promote and fulfil constitutional rights entail. The entrenchment of these duties under the Constitution of Zimbabwe is a catalyst for the arguments which I advance in this thesis because, it allows for the enforcement of both the negative and the positive

⁹¹ Supra note 90, p 34

⁹² See section 44 of the Constitution of Zimbabwe, 2013

⁹³ See Supra note 84, p 219. Also, see Eide, A. (1995). 'Economic, Social and Cultural Rights as Human Rights' In Eide, A. et al. (eds) *Economic, Social and Cultural Rights: A Textbook*. p. 38. Similar views are also echoed in UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003 at para 25

⁹⁴ De Vos, P. (1997). 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights under the South African 1996 Constitution'. *South African Journal on Human Rights*. p 8. Also see Eide, A. (1995). 'Economic, Social and Cultural Rights as Human Rights' In Eide, A. et al. (eds) *Economic, Social and Cultural Rights: A Textbook*. p. 37-38. Also see the decision of the Constitutional Court of Zimbabwe in *Mawere v Registrar General* [2015] ZWCC 04 and the decision of the Supreme Court of India in *State of Himachal Pradesh v Umed Ram Sharma* AIR (1986) SC 847. In both cases, although the courts do not explicitly indicate that the governments involved have a duty to provide a basic service, they issue orders for the state to provide a specific service necessary for the individual to realise their rights.

⁹⁵ As a result of poverty.

⁹⁶ Supra note 54, para 23

⁹⁷ Ibid

duties of the state under the right to have access to adequate housing. These can be enforced indirectly as part of the duties to respect, protect, promote and fulfil the right to life, the fundamental freedom from arbitrary evictions, the right to equality and the children's right to shelter, as is demonstrated from Chapters 4 to 7.

Having established that the right to life, the right to equality, the freedom from arbitrary evictions and the children's right to equality are fully justiciable constitutional rights, and that they create various levels of obligations which can be relied on to indirectly enforce both the negative and positive obligations under the right of access to adequate housing; the question that arises now is whether there is a valid theoretical legal basis to claim that these constitutional rights can be interpreted so broadly to include the right to have access to adequate housing? To address this question, I now turn to examine the rules governing the interpretation of these constitutional rights in order to show that they can be interpreted broadly to accommodate the right to have access to adequate housing.

2.4. Rules governing interpretation of constitutional rights in Zimbabwe

The rules governing the interpretation of constitutional rights are set out in s 46 of the Constitution of Zimbabwe. I identify these as follows: courts must adopt a broad, purposive and value-based approach, without disregarding the words used to formulate the right;⁹⁸ courts must interpret fundamental rights in a manner that upholds the relevant international law norms and standards;⁹⁹ fundamental rights must be interpreted in a manner that promotes the attainment of the national objectives set out in Chapter 2 of the Constitution;¹⁰⁰ courts must embrace the concept of interdependence of fundamental rights when interpreting constitutional rights;¹⁰¹ the courts must interpret the Declaration

⁹⁸ See section 46 (1) (b) of the Constitution of Zimbabwe, 2013 as interpreted by the Constitutional Court of Zimbabwe in the following cases: *Mawere v Registrar General* [2015] ZWCC 04 at 20; *Madzimbamuto v Registrar General* [2014] ZWCC 5 at 5-6 and *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs* [2015] ZWCC at 25 to 26

⁹⁹ See section 46 (1) (c) of the Constitution of Zimbabwe, 2013 and the decision of the Constitutional Court in *Mudzuru v Ministry of Justice, Legal & Parliamentary Affairs* [2015] ZWCC at 25 to 26

¹⁰⁰ See section 46 (1) (d) of the Constitution of Zimbabwe, 2013

¹⁰¹ See section 46 (1) (a) of the Constitution of Zimbabwe, 2013 and the views of Scott, C. (1989). 'Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights': *Osgoode Hall Law Journal*. p. 769-878 as well as the Constitutional Court of Zimbabwe's decision in *Mawere v Registrar General* [2015] ZWCC 04 at 20

of Rights as a ‘living instrument’¹⁰² and courts may refer to comparative foreign law.¹⁰³ I now turn to discuss each of these rules below, demonstrating that they allow courts to adopt the approach that I am arguing for in this thesis, which is to interpret broadly the duties created by the right to life, the fundamental freedom from arbitrary evictions, the right to equality and the children’s right to shelter; to include the government’s international legal obligation to respect, protect, promote and fulfil the right of every person to have access to adequate housing.

2.4.1 Broad, purposive and value-based interpretation of fundamental rights

The Constitution of Zimbabwe requires courts to adopt a broad, purposive and value-based approach when interpreting the provisions and fundamental rights enshrined in the Declaration of Rights. Section 46 (1) (a) and (b) provide as follows:

When interpreting this Chapter [the Declaration of Rights], a court, tribunal, forum or body- (a) must give full effect to the rights and freedoms enshrined in this Chapter, (b) must 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 [of the Constitution].

In *Mawere v Registrar General*,¹⁰⁴ the Constitutional Court of Zimbabwe interpreted the above provisions to mean that they require courts to interpret fundamental rights broadly, purposively and with flexibility, in order to protect the values underpinning Zimbabwe’s constitutional democracy. The Court confirmed this when it held that:

[When interpreting constitutional rights] what is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one [an interpretation] which serves the interests of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits, should be narrowly and strictly construed.¹⁰⁵ [My emphasis.]

¹⁰² See the decision of the Supreme Court of Zimbabwe in *Rattigan v Chief Immigration Officer* 1994 (2) ZLR 54 (S) at 57 F to H and the decision of the High Court of Zimbabwe in *Kufa v President of the Republic of Zimbabwe* (HC 3045/10) [2011] ZWHHC 86 at 7-10. Also, see the views of Kavanagh, A. (2003). ‘The Idea of a Living Constitution.’ *Canadian Journal of Law and Jurisprudence*. p. 56

¹⁰³ See section 46 (1) (e) of the Constitution of Zimbabwe, 2013

¹⁰⁴ *Mawere v Registrar General* (2015) ZWCC 04. Although this case concerns the enforcement of the right to citizenship, it thoroughly discussed principles and rules of constitutional interpretation that are relevant to this thesis.

¹⁰⁵ *Ibid*, para 20, where the court adopted the ruling of the Supreme Court in *Rattigan v Chief Immigration Officer* 1994 (2) ZLR 54 (S) at 57 F–H

The Constitutional Court applied a similar approach in *Madzimbamuto v Registrar General*.¹⁰⁶ Therefore, it should be accepted with certainty that the above is the Court's preferred interpretation of s 46 of the Constitution of Zimbabwe relating to how constitutional rights must be construed.

Three requirements of interpretation are outlined by the Constitutional Court in the above-cited *dictum*. First is that courts must prefer a wide rather than a narrow meaning of constitutional rights. Secondly, courts must prefer an interpretation that 'serves the interests of the Constitution'.¹⁰⁷ These interests are set out in ss 46 (1) (a) and (b) as promoting the constitutional values and ensuring that fundamental rights are given their full effect. The third requirement is that courts must prefer an interpretation which 'best carries out [the Constitution's] objects and promotes its purpose',¹⁰⁸ implying that the courts must interpret constitutional rights in a manner that best achieves the object and purpose of the fundamental right.

In summary, therefore, the Constitutional Court has interpreted s 46 of the Constitution of Zimbabwe to mean that it requires fundamental rights to be interpreted purposively, broadly and in a manner that protects the underlying constitutional values. However, this does not mean that the text used to frame the constitutional rights should be disregarded. The Constitutional Court of Zimbabwe has embraced the position that fundamental rights should always be interpreted generously, but the interpretation must be grounded on the text used to frame that provision and the text sets the limits of what is permissible as the scope and content of the right.¹⁰⁹ This rule does not undermine the arguments that I seek to make in this thesis. A broad and purposive interpretation of the right to life, the right to equality and the children's right to shelter is still possible because these rights are framed in broad terms and therefore, the words used to frame these rights permit the courts to read into the scope of these rights, the right to have access to adequate housing.

¹⁰⁶ *Madzimbamuto v Registrar General* [2014] ZWCC 5 at 5–6. Again this case concerns the interpretation of the right to citizenship and in the process, the Court explained the rules of constitutional interpretation that are relevant to the present study.

¹⁰⁷ *Mawere v Registrar General* (2015) ZWCC at para 20

¹⁰⁸ *Ibid*

¹⁰⁹ See the judgment by Kentridge in *S V Zuma* 1995 (2) SA 642 (CC) at 17. This was cited with approval by the Constitutional Court of Zimbabwe in *supra* note 108, para 20. 4

In the paragraphs below, I discuss the purposive, broad, value based and other approaches to constitutional interpretation; demonstrating that they allow courts in Zimbabwe to expansively interpret the scope of fundamental rights and therefore, they are a catalyst for the argument that the constitutional rights that I identified in this thesis can be interpreted generously to include the right to have access to adequate housing.

(i) Purposive interpretation of fundamental rights

Academics¹¹⁰ describe purposive interpretation as an approach which requires that the interpretation of legal provisions must not exclusively be limited to the literal meaning of words, but should also consider the context in order to infer the design or purpose which lies behind the legal provision. The Supreme Court of Canada explained and illustrated this approach as follows:

The meaning of a right or freedom guaranteed by the Charter [must] be ascertained by an analysis of the purpose of such a guarantee; it [must] be understood, in other words, in the light of the interests it was meant to protect. In my view...the purpose of the right or freedom in question is to be sought by reference to; the character and larger objects of the Charter [and] the language chosen to articulate the specific rights 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.¹¹¹

The above has been cited with approval by the Constitutional Court of Zimbabwe¹¹² and is therefore an applicable approach to interpreting rights under the Constitution of Zimbabwe. It is an approach which requires the court to go beyond the grammatical construction of the right and ascertain the purpose of the fundamental right in question. The court must therefore seek not only to give effect to the meaning of the words used to construct the right, but also to give full effect to the purpose for which the fundamental right has been enshrined.

Some authorities¹¹³ suggest that the purpose of the provision is the most important consideration of the interpretation process, and therefore, the court must give effect to the intended purpose of the provision, even when that purpose is in conflict with the language

¹¹⁰ Devenish, G. (1992). *Interpretation of Statutes*. p. 36. Also see Du Plessis, L. (2002). *Re-Interpretation of Statutes*. p. 96 and Botha, C. (2005). *Statutory Interpretation: An introduction for Students* 4th ed. p. 51

¹¹¹ *R v Big M Drug Mart Ltd* 1985 18 DLR (4th) 321, para 395-396

¹¹² See *Zimbabwe Electoral Commission v Commissioner General, ZRP* (2014) ZWCC 3, para 8

¹¹³ See Du Plessis, L. (2002). *Re-Interpretation of Statutes*. p. 96

used to frame the right. This approach has been criticized by scholars who include Anton Fagan,¹¹⁴ who have argued that it allows judges to over-reach by disregarding the law as written by the legislature and instead, develop their own law and impose their own meaning of the law.

However, Fagan's criticism of the purposive approach to constitutional interpretation should not hold in Zimbabwe because the Constitutional Court¹¹⁵ has already indicated that the court cannot ignore the language used in the provision. Therefore the guideline that the constitution must be interpreted purposively should not be taken as a licence for constitutional flights of fancy.¹¹⁶ The court must give effect to the object and purpose of the right to the best extent allowed by the words used to formulate the right and without disregarding the words used to construct the right.¹¹⁷

Therefore, when this approach is applied, it should be possible to incorporate the obligation to make adequate housing accessible to everyone, into the scope of certain fundamental rights in order to protect or achieve the purpose of those rights. For instance, I will argue that the purpose of the fundamental right to life is to guarantee for every person the right to live in human dignity.¹¹⁸ Therefore, the duties to protect, promote and fulfil the right to life include the positive obligation of the state to make basic social services, such as adequate housing accessible to every person. Similarly, I argue that the purpose of the constitutional right to equality is to establish an egalitarian society where every human being's dignity is equally respected and protected. Therefore, the duties arising from the constitutional right to equality should include the obligation to guarantee and create equal access to basic social services, such as adequate housing, because there can never be equality for people who live without access to such services.¹¹⁹ I also apply the same interpretation principle to argue that the right to 'shelter' for children implies the

¹¹⁴ See Fagan, A. (1997). *Constitutional Adjudication in South Africa*. (D Phil Thesis in Law submitted to Oxford University) p. 92

¹¹⁵ Supra note 113

¹¹⁶ This phrase is derived from a dictum of Strydom C.J in *Chairperson of the Immigration Selection Board v Frank* [2001] NASC 1, para101

¹¹⁷ Supra note 113

¹¹⁸ This interpretation was accepted in *Chameli Singh v State of U.P* (1995) Supp 6 SCR 827, para 8. I will advance the argument in Chapter five of this thesis.

¹¹⁹ Supra note 54, para 23 and 44

right to adequate housing for children,¹²⁰ and therefore, the state must make adequate housing accessible to every parent or guardian so that they can secure and ‘provide’ adequate housing to their children or the minors who are under their care. The purposive approach must also be applied in conjunction with the broad approach to interpretation of fundamental rights. I discuss the latter in the paragraphs below.

(ii) Broad approach to interpreting fundamental rights

As noted above, the Constitution of Zimbabwe requires fundamental rights to be given their full effect.¹²¹ In most cases this can only be achieved if courts apply a broad approach to interpretation of constitutional rights. The broad approach requires the courts to refrain from taking a minimalist approach when interpreting the scope and content of a fundamental right.¹²² Instead, it requires the courts to ensure that the fundamental right in question is given the widest possible scope and content, to the extent that its language permits.¹²³ By giving the right its widest possible scope and meaning, the court will be able to produce an interpretation which gives the fundamental right its full effect, save for exceptional cases where the purpose of the right requires it to be given a minimum scope.¹²⁴ Therefore, a broad approach to interpretation is usually indispensable if fundamental rights are to be given their full effect, as required by the Constitution.¹²⁵

For instance, in order to give full effect to the fundamental right to life, courts must interpret that right to imply the right to live life in human dignity, where a human being has access to the basic necessities of life, such as access to adequate housing.¹²⁶ This approach allows the scope of the right to life to be interpreted expansively (as I do in

¹²⁰ Supra note 54, para 73

¹²¹ See section 46 (1) (a) of the Constitution of Zimbabwe, 2013

¹²² *Madzimbamuto v Registrar General* [2014] ZWCC 5 at para 5. Also see supra note 108, para 20 and *Rattigan v Chief Immigration Officer* 1994 (2) ZLR 54 (S) at 57 F-H

¹²³ Supra note 108, para 20. Also see Currie, I and De Waal, J. (2013). *The Bill of Rights Handbook* 6th ed. p. 138

¹²⁴ For example the right to property for private hospital owners may have to be given a restricted scope to allow the enforcement of the right not to be denied emergency medical treatment and care as required by section 76 (3) of the Constitution of Zimbabwe of 2013

¹²⁵ Supra note 108, para 20 and *Madzimbamuto v Registrar General* [2014] ZWCC 5 at para 5

¹²⁶ See *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1981) 2 SCR 516, at 529 B–F; *Maneka Gandhi v Union of India* (1978) 1 SCC 248; *Shantistar Builders v Narayan Khimalal Totame* AIR (1990) SC 630; *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* (1996) 10 SC 10; *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295 and *Sunil Batra v Delhi Administration* AIR 1978 SC 1675

Chapter 5 of this thesis) to include the obligation to respect, protect and promote access to adequate housing by everyone. It also makes it possible to interpret the fundamental right to equality as the right to equal protection of human dignity, which in turn creates the duty to guarantee and make adequate housing accessible to everyone in order to ensure equal protection of human dignity.

(iii) Value-based approach to interpreting the Declaration of Rights

As noted above, the Constitution of Zimbabwe also requires courts to apply a value based approach when interpreting constitutional rights.¹²⁷ Christo Botha defines value-based interpretation as an approach which entails ‘a value-coherent construction - the aim and purpose of which must be ascertained against the fundamental constitutional values.’¹²⁸ In practice this means that, where there is more than one interpretation to a constitutional right, the court must ascertain the constitutional values involved and adopt an interpretation that best protects and promotes those values.¹²⁹

Botha’s view has been supported by the Constitutional Court of Zimbabwe, when the Court unequivocally held that the ‘interests of the constitution’¹³⁰ must be promoted when interpreting fundamental rights. Section 46 (1) (b) defines these interests to include the protection and promotion of constitutional values. These values include equality and human dignity.¹³¹ In Chapters to follow, I explain what the values of equality and human dignity entail when incorporated into fundamental rights.

However, what must be noted at this point is that the Constitution requires Zimbabwean courts to interpret fundamental rights in a manner that captures and underpins these constitutional values, of course subject to the words used to construct the right. Where

¹²⁷ See section 46 (1) (b) of the Constitution of Zimbabwe, 2013

¹²⁸ Botha, C. (2005). *Statutory Interpretation: An Introduction for Students* 4th ed. p 193

¹²⁹ See *Capital Radio (Pvt) Ltd. v Broadcasting Authority of Zimbabwe* (2003) ZWSC 65 in which the Supreme Court of Zimbabwe (sitting as the Constitutional Court), while deciding a matter under the previous Constitution of Zimbabwe Amendment Act 1981, held that where a fundamental right is framed in a manner that is ambiguous, giving rise to more than one interpretation, the court must (to the extent allowed by the grammatical construction of the right) consider and prefer the interpretation that best protects underlying constitutional values of a democratic state. Using this principle, the court preferred an interpretation of the right to press freedom that include the right to freedom of expression, and rejected the interpretation which excluded freedom of expression.

¹³⁰ *Supra* note 108, para 20

¹³¹ See section 3 (1) (e) and (f) of the Constitution of Zimbabwe, 2013

there is more than one possible meaning to a constitutional right, the meaning that goes furthest to promote and protect the constitutional values involved must carry the day. However, as the Constitutional Court of Zimbabwe cautioned;

[When interpreting constitutional rights] 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...I would say that a Constitution embodying fundamental principles should as far as its language permits be given a broad construction.¹³²

Therefore the rule is to ensure that, without disregarding the words used to frame the fundamental right in question, the court must prefer a meaning which upholds and promotes the implementation of these constitutional values. As noted above, the Constitution of Zimbabwe entrenches the values of human dignity and equality. Therefore, human dignity and equality must permeate through the content of the right to life, the right to equality and the children's right to shelter.

Using this approach, it is legally permissible to incorporate the state's international legal obligation to make adequate housing accessible, into the scope of the right to life or the right to equality and the right to shelter for children. For instance, I argue that, in order to interpret the right to life in a manner that upholds and promotes the constitutional value of human dignity, the court must take the view that the right to life means the right to live in human dignity and therefore, the duties imposed by the right to life include the positive obligation to make basic services, such as adequate housing, accessible to everyone in Zimbabwe. Similarly, I also argue that the constitutional right to equality means the right to equal protection of human dignity, and this creates the duty of the state to guarantee for everyone, equal access to basic social services such as adequate housing. In addition (and as I show in Chapter 6), when the right to equality is interpreted as the right to equal protection of human dignity, it also creates the duty of the state to implement reasonable affirmative action measures¹³³ to make basic social services (such as adequate housing) accessible to those people who have no means to access such services on their own.

¹³² This is Kentridge AJ's ruling in *State v Zuma* 1995 (2) SA 642 (CC). The ruling was endorsed by the Constitutional Court of Zimbabwe in *supra* note 108, para 20.

¹³³ As required by section 56 (6) of the Constitution of Zimbabwe, 2013

The principles of broad, purposive and value-based interpretation of constitutional rights are related to and should be applied in conjunction with the principle of interdependence and indivisibility of human rights, which I now turn to explaining in the paragraphs below.

2.4.2 Interdependence and indivisibility of socio-economic and civil and political rights

The obligation to make adequate housing accessible arises from a socio-economic right. However, in this thesis, I argue that this obligation may arise from certain civil and political rights namely, the fundamental right to life and the right to equality. This is legally permissible because there is a relationship of interdependence and indivisibility between civil and political rights on one hand, and socio-economic rights on the other.¹³⁴ As I demonstrate below, s 46 of the Constitution of Zimbabwe requires courts to recognise and uphold this relationship when interpreting the fundamental rights enshrined in the Declaration of Rights.

As noted earlier, s 46 (1) (a) of the Constitution of Zimbabwe obliges courts to interpret the Declaration of Rights in a manner that gives full effect to the fundamental rights enshrined therein, while ss (b) obliges courts to interpret the Declaration of Rights in a manner that promotes human dignity and equality, as some of the entrenched values. The effect of s 46 (1) (a) and (b) is therefore that courts must interpret fundamental rights in a manner which ensures that those rights and the underlying constitutional values are protected effectively. Effective protection of constitutional rights and values can only be achieved if courts apply the principle of indivisibility and interdependence of rights when they interpret the duties created by the constitutional rights.¹³⁵

Craig Scott suggests that there are two types of relationships of interdependence between human rights, and these are the ‘organic interdependence’ and the ‘related interdependence’.¹³⁶ Organic interdependence is the relationship where:

one right forms a part of another right and may therefore be incorporated into that latter right. From the organic rights perspective, interdependent rights are inseparable or

¹³⁴ Scott, C. (1989). ‘Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights’: *Osgoode Hall Law Journal*. p. 781. Also see Liebenberg, S. (2010). *Socio-economic Rights: Adjudication under a Transformative Constitution*. p. 51

¹³⁵ Ibid

¹³⁶ Scott, C. (1989). ‘Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights’: *Osgoode Hall Law Journal*. p. 779

indissoluble in the sense that one right (the core right) justifies the other (the derivative right). To protect right x will mean directly protecting right y...¹³⁷

Thus the concept of organic interdependence treats certain rights as constituent elements of other rights. Scott uses the example of the right to life and the right to adequate housing.¹³⁸ He argues that if the fundamental right to life is interpreted broadly to mean the right to live a life in human dignity, then one cannot live such a life without having access to adequate housing. When one lives under inadequate housing conditions, his or her inherent worth (human dignity) is violated. Therefore, it can be argued that the right to adequate housing is an implied element of the fundamental right to life.

According to Scott, the organic interdependence of fundamental rights can be explained on the basis of two theories. First is what he describes as the ‘logical or semantic entailment.’¹³⁹ It is the idea that certain fundamental rights are to be regarded as ‘general core rights’ and such rights logically imply other rights (derivative rights).¹⁴⁰ Thus the ‘derivative right’ is a logical consequence of the ‘core right’. For example, it can be argued that the right to life (as in the right to live in human dignity) is a ‘general core right’ which logically implies the right to have access to basic social services that are necessary for human life. The right to have access to adequate housing is, therefore, a right that is logically derived from the right to life. The relationship between the right to life (as the core right) and the right to have access to adequate housing (as a derivative right) is that of logical entailment in the sense that, it is illogical to expect individuals to enjoy their fundamental right to life if they are not guaranteed access to a basic livelihood such as adequate housing. Similarly, it can be argued (as I do in Chapter 6 of this thesis) that the fundamental right to equality is a general core right which logically takes within its scope, the right of equal access to basic social services that are needed for the equal protection of human dignity for all persons in Zimbabwe. Thus the right to equality implies a guarantee of equal access to adequate housing. It also implies the duty to achieve substantive equality by implementing affirmative action measures that are aimed at

¹³⁷ Ibid

¹³⁸ Ibid, p. 780

¹³⁹ Ibid, p. 781

¹⁴⁰ Ibid

making adequate housing accessible to certain disadvantaged groups, as I demonstrate in Chapter 6.

Scott identifies the second form of organic interdependence as the ‘effectivist or foundational conception’ that asserts, for example, ‘that the right to an adequate standard of living is part of or is justified by the right to life because the effectiveness of the latter right depends on it’.¹⁴¹ Thus the ‘effectivist conception’ entails that the enforcement of one right cannot be effective without simultaneously enforcing another. As I show in this thesis, the right to life (which means the right to live in human dignity) cannot be protected effectively without enforcing the state’s international legal obligation to provide access to adequate housing because, access to decent housing is a basic necessity which must be fulfilled if a human being is to live in human dignity.¹⁴² Therefore, the effective enforcement of the constitutionally guaranteed right to life requires the simultaneous enforcement of certain elements of the international law right of access to adequate housing.¹⁴³ As noted earlier, the Zimbabwean Constitutional Court has already ruled that fundamental rights must be interpreted in a manner that gives them their full effect.¹⁴⁴ Therefore, the ‘effectivist conception’ of the rights indivisibility theory is applicable in Zimbabwe and it provides a legal basis for the kind of interpretation of constitutional rights that I propose in this thesis.

2.4.3 Interpreting the constitutional Declaration of Rights as a ‘living instrument’

As discussed earlier, s 46 (1) (a) of the Constitution, requires courts to interpret the fundamental rights enshrined in the Declaration of Rights in a manner that gives full effect to those rights, while s 46 (1) (b)¹⁴⁵ obliges courts to interpret fundamental rights in a manner that effectively upholds the entrenched constitutional values. In order to give

¹⁴¹ Ibid

¹⁴² See the decision of the Supreme Court of India (which has a persuasive value in Zimbabwe) in *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1981) 2 SCR 516 at 518, in which the Court held that the right to life would be meaningless without including in it the right to access the ‘bare necessities of life such as adequate nutrition, clothing and shelter’. Also see the decision of the Indian Supreme Court in *Supra* note 79, para 55, in which the Court held that the right to life would be meaningless without recognising the right to the means of living.

¹⁴³ See, for example, the decision of the Supreme Court of India in *Chameli Singh v State Of U.P* 1995 SUPP 6 SCR 827 at p. 8

¹⁴⁴ *Supra* note 108, para 20

¹⁴⁵ Of the Constitution of Zimbabwe, 2013

constitutional rights their full effect and to protect the underlying constitutional values, the Constitution of Zimbabwe requires courts to refrain from rigidly holding on to the traditional and age old interpretations of fundamental rights.¹⁴⁶ Instead, the courts are encouraged to develop and embrace new and updated meaning of fundamental rights in order to address contemporary challenges. The Constitutional Court of Zimbabwe confirmed this when it upheld the view 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.¹⁴⁷

Thus, the courts must treat the Declaration of Rights as an evolving instrument that is capable of assuming updated and newer meaning, and therefore the courts must be flexible to develop and embrace the new meaning of fundamental rights as long as the new interpretation does not disregard or distort the words used in framing the right.¹⁴⁸ This approach to constitutional interpretation is derived from the theory of the living constitution, which originally is an American constitutional law concept but, has now been embraced by the Constitution of Zimbabwe, as explained above.¹⁴⁹

The theory of a living constitution is described by Aileen Kavanagh as;

The claim that the courts should develop and update constitutional law when interpreting it. In other words, the idea of the living Constitution forms part of an exhortation to the courts to interpret the Constitution in a certain way, [that is], to interpret it so as to develop its content, to keep it abreast of changes in society, to update it and adapt it to modern needs and circumstances.¹⁵⁰

Thus, the idea of interpreting the Constitution as a living instrument is essentially defined by both the courts¹⁵¹ and constitutional law scholars¹⁵² as the principle that the constitution

¹⁴⁶ Supra note 108, para 20

¹⁴⁷ Supra note 108, para 20 where the Court cited with approval the dictum of Mahomed CJ in *Government of the Republic of Namibia v Cultura 2000* 1994(1) S.A. 407 (Nm S), 418 F-H. Also see *Capital Radio Pvt Ltd v Broadcasting Authority of Zimbabwe* 2003 (2) ZLR 236 (5), p 247 b-d

¹⁴⁸ Supra note 108, para 20

¹⁴⁹ Ibid

¹⁵⁰ See Kavanagh, A. (2003). 'The Idea of a Living Constitution.' *Canadian Journal of Law and Jurisprudence*. P. 56

¹⁵¹ See *Hunter v Southam* (1984) 11 D.L.R. (4th) 641 at 649 and *Attorney-General (Manitoba) v Metropolitan Stores (MTS) Ltd* (1987) 38 D.L.R.(4th) 321, para 330

¹⁵² See for example Strauss, D. (2010). *The Living Constitution*. p. 2

must always be interpreted in a manner which adapts the meaning of its provisions to the present day realities and the interpretation generated must be one which is in sync with the contemporary needs and circumstances. This therefore, allows courts to depart from the traditionally accepted meaning of certain constitutional rights, and without disregarding the words used to formulate the fundamental right, this theory therefore, encourages courts to expand and adapt the scope of these rights in order to address contemporary challenges.

For instance, in Zimbabwe, the right to life may have originally been conceptualised to protect individuals from unlawfully being deprived of their life,¹⁵³ perhaps because the major threat to that right was arbitrary or extrajudicial killings. Following certain radical changes in contemporary society, new threats to human life have also emerged. The threat to human life is no longer limited to the act of arbitrary killing by another human being, but they now also include loss of life due to vicious diseases and epidemics (such as HIV and AIDS) or due to malnutrition and poverty. If the ultimate purpose of the constitutional right to life is to protect human life, then the scope of the obligations of the duty bearer can no longer be interpreted as limited to refraining from or protecting people from arbitrary killings. The interpretation of the fundamental right to life has to be adapted to the contemporary needs of society which is to protect human beings from contemporary threats to human life which now include poverty and the resultant lack of access to necessities of livelihood such as adequate housing. Thus the right to life, which originally may have meant the right to be protected from arbitrary killing, should now also be interpreted as the right to receive reasonable assistance in order to access basic necessities of life in order to prevent loss of human life and to protect human dignity.¹⁵⁴ This approach, therefore provides a legal basis for me to argue that the right of access to adequate housing should be viewed as an implied right under the fundamental right to life, as I demonstrate in Chapter 5 of this thesis.

Similarly, this theory also allows me to argue that the duty to make adequate housing accessible should be treated as an implied obligation under the right to equality. As I show

¹⁵³ See section 12 (1) of the previous Constitution the Lancaster House Constitution of Zimbabwe, 1979

¹⁵⁴ *Chameli Singh v State of U.P* (1995) Supp 6 SCR 827, para 5 and 8. Also see Hansaria, B. (1993). *Right to Life and Liberty under the Constitution: A Critical Analysis of Article 21*. p. 24

in Chapter 6, in order to achieve genuine equality, the state must not only address formal inequalities, but it must also deal with entrenched or systemic inequalities. Therefore, the court should embrace the view that equality implies much more than just guaranteeing equal access to social services but it also means achieving substantive equality through affirmative action measures that are meant to make social services, such as adequate housing, accessible to those who have no means to access them on their own.

However, as Kavanagh cautions, ‘constitutional interpretation by the courts can be creative in order to bring it up to date with the contemporary needs and circumstances, but this creativity should take place within certain constraints.’¹⁵⁵ Thus the Constitution cannot mean whatever the judge wishes it to mean. There has to be a perimeter within which the court exercises its creativity to adapt or develop the scope of the constitutional rights to meet the contemporary needs of the society. As I discussed earlier, the Constitution of Zimbabwe requires courts to respect the text used in framing the constitutional right, when interpreting the Declaration of Rights.¹⁵⁶ This is implicitly prescribed in section 46 (1) (d) that requires courts to take into account the relevant provisions, when interpreting constitutional rights. Therefore, as pointed out earlier, the scope of the right must be interpreted to address contemporary needs but within the confines of the words used to frame the right.

To illustrate this point, Rebecca Wilkinson¹⁵⁷ argues as follows in respect of the Constitution of the United States of America:

Many clauses of the Constitution are unequivocal and leave no room for [such] interpretation. For example, the prescribed age requirement for Senators requires no [creative] interpretation because its meaning cannot change. Yet some clauses are couched in general phraseology. The Constitution does not provide explicit guidance on how to interpret provisions such as ‘cruel and unusual’ or ‘unreasonable searches and seizures’. These terms are ‘value-laden’ and consequently, various interpretations are possible.¹⁵⁸

A similar approach should be taken when interpreting fundamental rights that are guaranteed in the Constitution of Zimbabwe of 2013 and this will allow the courts to

¹⁵⁵ Supra note 152, p. 57

¹⁵⁶ See section 46 (1) (d) of the Constitution of Zimbabwe, 2013 and *Zimbabwe Electoral Commission v Commissioner General*, ZRP (2014) ZWCC 3, para 8

¹⁵⁷ See Wilkinson, R. (2015). ‘Interpreting a Living Constitution’ *North East Law Review* 7-13

¹⁵⁸ Ibid, p. 7

creatively interpret the scope of the right to life and the right to equality to imply the duty to make adequate housing accessible. This is because the constitutional right to life and the right to equality are broadly framed. The right to life is framed in s 48 (1) as ‘Every person has the right to life.’ This is a broad formulation which gives adequate room for the court to interpret this right creatively to address contemporary threats to human life and reach the conclusion that this right implies the duty of the state to make adequate housing accessible in order to protect life in human dignity.

Similarly, the right to equality entrenches the duty to achieve substantive equality and this duty is framed in broad terms in s 56 (6)¹⁵⁹ as follows: ‘The State must take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination.’ This allows the courts the flexibility to give content to this obligation and it can be argued that the measures contemplated therein include making adequate housing accessible to disadvantaged groups, in order to achieve substantive equal protection of their human dignity.

2.4.4 Application of international law standards when interpreting the Declaration of Rights

The Constitution also obliges courts to consider international law (to which Zimbabwe is party) when interpreting provisions of the Declaration of Rights. This rule of interpretation is enunciated in s 46 (1) (c) as follows: ‘When interpreting this Chapter [The Declaration of Rights], a court, tribunal, forum or body – (c) must take into account international law and all treaties and conventions to which Zimbabwe is a party.’

The above rule implies that courts must interpret constitutional rights in a manner that meets and incorporates the applicable standards as recognised in the relevant international law, except in instances where the Constitution outlaws those standards. This was confirmed by the Constitutional Court of Zimbabwe in *Mudzuru v Ministry of Justice, Legal and Parliamentary Affairs*.¹⁶⁰ In this case, the Court was asked to interpret the meaning of the right to marry, which is enshrined in the Declaration of Rights in section

¹⁵⁹ Of the Constitution of Zimbabwe, 2013

¹⁶⁰ *Mudzuru v Minister of Justice, Legal & Parliamentary Affairs* (2015) ZWCC 12, para 25– 26

78 (1) of the Constitution. The Court held as follows concerning the role of international law when interpreting Zimbabwean constitutional rights:

Section 46(1)(c) of the Constitution imposes an obligation on a court when interpreting any provision of the Constitution contained in Chapter 4, to take into account international law and all treaties and conventions to which Zimbabwe is a party. Both s 22(1) of the Marriage Act and s 78(1) of the Constitution were born out of provisions of international human rights law prevailing at the time of their respective enactment. The meaning of s 78(1) of the Constitution [the right to marry] is not ascertainable without regard being had to the context of the obligations undertaken by Zimbabwe under the international treaties and conventions on matters of marriage and family relations at the time it was enacted on 22 May 2013. The object of the interpretation of s 78(1) as read with s 81(1) of the Constitution and of s 22(1) of the Marriage Act should be to ensure that the interpretation resonates with the founding values and principles of a democratic society based on openness, justice, human dignity, equality and freedom set out in s 3 of the Constitution, and regional and international human rights law.¹⁶¹

As pointed out earlier, the Constitutional Court is the highest court in all constitutional matters, and therefore its interpretation of constitutional provisions is final and binds all courts.¹⁶² Although the focus of the Court was on the interpretation of the right to marry, the Court interpreted s 46 (1) (c) of the Constitution by holding that courts are required to interpret constitutional rights in a manner that resonates with the norms and standards ascribed to those rights by the relevant international law. This means that, when interpreting constitutional rights, courts must incorporate and uphold the norms and standards stipulated in the relevant international law. The relevant international law refers to principles of customary international law and the international treaties which Zimbabwe has ratified.¹⁶³

However, this does not mean that courts can incorporate international standards without paying due regard to the actual words that have been used to construct the right. As Botha¹⁶⁴ rightly argues; when interpreting constitutional provisions, the court must be guided by the words used to construct the fundamental right. This principle also applies in Zimbabwe by virtue of s 46 (1) (d) that provides that: ‘When interpreting this Chapter [The Declaration of Rights], a court, tribunal, forum or body — (d) must pay due regard to all the provisions of this Constitution...’ This has been interpreted by the Constitutional

¹⁶¹ Ibid

¹⁶² See section 167 (1) (a) of the Constitution of Zimbabwe, 2013

¹⁶³ See section 46 (1) (c) of the Constitution of Zimbabwe, 2013 as interpreted in *supra* note 162

¹⁶⁴ *Supra* note 130, p. 120

Court to mean that the court should not distort the words used to construct the fundamental right.¹⁶⁵

Therefore, there is a qualification or limitation to how far the courts may incorporate international law standards when interpreting constitutional rights. They should incorporate these standards without disregarding the text or words used to frame the right. Notwithstanding this limitation, there is still much room to incorporate international law standards when interpreting these rights because in most cases, constitutional rights are formulated broadly.¹⁶⁶

Furthermore, the fact that these rights are broadly formulated means that, there are numerous potential interpretations that can be ascribed to these rights.¹⁶⁷ The Supreme Court of Zimbabwe has held that where there is more than one potential meaning to a fundamental right, the court must prefer the meaning that best captures and upholds the relevant international law standards.¹⁶⁸

Section 46 (1) (c), therefore, provides me with the legal basis to refer to international law to demonstrate that the scope of duties created by the fundamental right to life and the right to equality can be interpreted broadly to include the state's international law obligation to protect and make adequate housing accessible to everyone, while the right to shelter for children can be interpreted to imply the duty of the state to make adequate housing accessible to parents and guardians.

Throughout this thesis, when I interpret these rights, I refer to the General Comments produced under the auspices of the ICESCR, the International Covenant on Civil and Political Rights (ICCPR), the United Nations Convention on the Rights of the Child (UNCRC), the African Charter on Human and Peoples' Rights (African Charter) and the African Charter on the Rights and Welfare of the Child (ACRWC). The criteria used to select international law instruments to refer to in this thesis are that the instrument must

¹⁶⁵ Supra note 108, para 20

¹⁶⁶ For instance, the rights to life, the right to human dignity, the right to equality and children's right to shelter. See sections 48, 51, 56 and 81 (1) (f) of the Constitution of Zimbabwe, 2013 respectively.

¹⁶⁷ In most cases, a fundamental right has the potential to give rise to a narrow and a wider interpretation.

¹⁶⁸ *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & others* [2003] ZWSC 65. The essence of that judgment is that when a fundamental right is framed in a manner that is ambiguous, giving rise to more than one interpretation, the court must (to the extent allowed by the grammatical construction of the right) consider and prefer the interpretation that best captures the relevant international law standards.

have been ratified by Zimbabwe and it must be the most comprehensive instrument on that particular right. These criteria help me to be systematic and consistent in selecting sources of international law to refer to in order to interpret these rights as avenues for the enforcement of the government's international legal obligation to make adequate housing accessible to everyone in Zimbabwe.

In order to interpret the scope and meaning of the rights recognised under these international conventions, I refer to the General Comments produced by the respective bodies. It may be counter-argued that the duties outlined in these General Comments are not binding upon States. This argument however, cannot be sustained in Zimbabwe. The debate regarding the legal status of General Comments has been settled by the Supreme Court of Zimbabwe (sitting as the Constitutional Court) when it held that these General Comments provide 'legitimate and authoritative guidelines on the interpretation of [Zimbabwe's] international legal duties',¹⁶⁹ which must be taken into account when interpreting fundamental rights under the Constitution of Zimbabwe. I also refer to the comments contained in reports that have been produced by the successive United Nations Special Rapporteurs on the right to adequate housing and the right to life. These comments may not have the binding force of law but, they are useful in so far as they provide further clarity on the existing interpretation of the right to adequate housing as recognised in the ICESCR and the right to life as recognised in the ICCPR.

2.4.5 Application of comparative foreign law when interpreting the Declaration of Rights

The Constitution of Zimbabwe also provides courts with discretion to consider adopting and adapting interpretations made by foreign superior courts on the meaning of constitutional rights that are similar to those that are entrenched in the Zimbabwean Declaration of Rights. Such discretion is provided in s 46 (1) (e) as follows: 'When interpreting this Chapter [The Declaration of Rights], a court, tribunal, forum or body may consider the relevant foreign law.' Therefore, when interpreting the meaning of

¹⁶⁹ *Capital Radio (Pvt) Ltd. v Broadcasting Authority of Zimbabwe* [2003] ZWSC 65 at p. 9. It is also critical to note that the Courts have consistently referred to these General Comments when interpreting international norms and standards. See *Mudzuru v Minister of Justice, Legal & Parliamentary Affairs* [2015] ZWCC 12] at p. 37-40 and *Madanhire v AG* [2014] ZWCC 2 at p. 14-16

constitutional rights, courts may refer to the relevant decisions of superior courts of comparative jurisdictions.

Foreign law is more useful to persuade the court in instances where there is ambiguity regarding the meaning of a right, and where there is no appropriate domestic precedent on the interpretation of that right. Given that the Constitution of Zimbabwe was adopted in May 2013, there is not much domestic jurisprudence on the interpretation of the constitutional rights that I discuss in this thesis. Although the constitutional right to life was guaranteed under the previous 1979 Lancaster House Constitution, it was narrowly entrenched as freedom from arbitrary deprivation of life.¹⁷⁰ As noted earlier, the 2013 Constitution entrenches this right in broader terms and therefore it now implies much more than it used to imply prior to the 2013 Constitution. The right to shelter for children is a new right that did not exist under the previous Constitution. There is, therefore, a dearth of local jurisprudence on the meaning of these rights and the courts have to make use of their discretion, as allowed in s 46 (1) (e)¹⁷¹ to look to comparative foreign law for ideas and suggestions on their interpretation. Therefore, the Constitution through s 46 (1) (e) provides me with the legal basis to refer to comparative foreign law to illustrate the argument that the constitutional rights that I have identified in this research can indeed be interpreted broadly in order to accommodate the enforcement of the government's international legal obligation to make adequate housing accessible to everyone.

I acknowledge that there are many national and regional jurisdictions which I could refer to in order to support the thesis that I am advocating for here. For instance in a line of cases decided by the Inter American Court of Human Rights, it has been accepted that the right to life means the right to live in human dignity (the right to *vida digna*) which implies the right to have access to adequate housing.¹⁷² In Nigeria, there are instances when rights such as the right to life have also been given an expansive meaning by the courts in order

¹⁷⁰ See section 12 (1) of the Constitution of Zimbabwe, 1979

¹⁷¹ Of the Constitution

¹⁷² See the Opinion of Judge Sergio Garcia Ramirez in *Sawhoyamaya Indigenous Community v Paraguay*, IACtHR, Judgment 29 March 2006, Series C no 146 (2006) at para 19. Also see *Yakye Axa Indigenous Community v Paraguay*, IACtHR, Judgment 17 June 2005, Series C no 125 (2005) at paras 162-164 and *Juvenile Re-education Institute v Paraguay* IACtHR, Judgment 2 September 2004, Series C no 112 (2004) at paras 170-171; *Ximenes-Lopes (Brazil)* IACtHR, Judgment 4 July 2006, Series C no 149 (2006) at paras 3 and *Baldeon-Garcia (Peru)* IACtHR, Judgment 6 April 2006, Series C no 147 (2006)

to protect certain socio-economic rights that are not expressly guaranteed in the Constitution.¹⁷³ Similar approaches have also been applied by the courts in Cameroon¹⁷⁴ and in Kenya.¹⁷⁵ However, in order to be systematic in the manner that I refer to comparative foreign law I have developed a criterion for selecting relevant comparative foreign law jurisdictions. This criterion is based on three considerations. Firstly, the foreign law must be that of a state that has a written constitution because Zimbabwe has a written Constitution. Secondly, the country must be a signatory to any of the following international law instruments: the ICESCR, the African Charter, the ACRWC, the UNDHR, the UNCRC and the ICCPR.¹⁷⁶ Thirdly, there must be similarities between the jurisdiction's Bill of Rights and the Zimbabwean Declaration of Rights. Fourthly, the jurisdiction must contain an extensive body of case law on the right to have access to adequate housing, the right to life, the right to equality and the right to shelter for children. In terms of the criteria set out above, I refer mostly to South Africa, India and Canada as comparative foreign law jurisdictions. There are significant similarities between the Zimbabwean Declaration of Rights and the Bills of Rights for India, South Africa and Canada.¹⁷⁷ I identify and discuss these similarities whenever I make reference to particular decisions of the Supreme Court of India, the Supreme Court of Canada and the Constitutional Court of South Africa, to discuss the interpretation of a constitutional right.

¹⁷³ See *Jonah Gbemre v Shell Petroleum Development Corporation* (2005) AHRLR 151 (Ng HC 2005)

¹⁷⁴ For a detailed discussion on this, see Akonumbo, A (2016). 'Indirect Constitutional Protection of Economic, Social and Cultural Rights in Cameroon' In Chirwa, D and Chenwi, L. (eds) *The Protection of Economic, Social and Cultural Rights in Africa : International, Regional and National Perspectives*. p. 527-549

¹⁷⁵ See for example *Satrose Ayuma v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme* Petition 65 of 2010 at para 70 (Unreported and available on <http://kenyalaw.org/caselaw/cases/view/90359/>), accessed on 21 March 2018. Also see *Susan Waithera Kariuki v Town Clerk, Nairobi City Council* [2011] eKLR and *Ibrahim Osman v The Minister of State for Provincial Administration* Constitutional Petition 2 of 2011 at page 5 (Unreported and available at http://www.hakijamii.com/wp-content/uploads/2018/02/Constitutional_Petition_2_of_2011.pdf), accessed on 21 March 2018

¹⁷⁶ This is largely because I have selected these specific instruments as the sources of international law for the different fundamental rights under consideration in this thesis.

¹⁷⁷ One key similarity is that all these Bills of Rights guarantee the right to life, the right to human dignity and the right to equality. These are the rights discussed under this thesis as pathways towards enforcing in Zimbabwe the ICESCR's State duties under the right to adequate housing.

2.4.6 Application of national objectives

The Constitution of Zimbabwe also requires courts to interpret fundamental rights in a manner that furthers, rather than undermines, the objectives set out in Chapter 2 of the Constitution. This rule is enunciated in s 46 (1) (d) of the Constitution as follows: ‘When interpreting this Chapter, a court, tribunal, forum or body—(d) must pay due regard to all the provisions of this Constitution, in particular, the principles and objectives set out in Chapter 2 [of the Constitution].’

There is yet to be a judgment given by a local court to interpret the above provision. However, I interpret this provision by referring to comparative foreign law, which has persuasive force in Zimbabwean courts. The Constitution of India, 1950¹⁷⁸ provides for a set of objectives that are known as ‘Directive Principles on State Policy’ (DPSP). In terms of art 37 of the Constitution of India: ‘The provisions contained in this Part [which are the DPSP) shall not be enforceable by any court [as fundamental rights], but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.’

The Indian Supreme Court, which is the court of final appeal of the land, interpreted this provision to mean that, although the provisions of the DPSP are not fundamental rights, they must inform the content of legislation and they must also be applied to determine the scope and content of constitutional rights.¹⁷⁹ A case in point is *Bandhua Mukti Morcha v. Union of India*,¹⁸⁰ in which the Supreme Court of India incorporated the DPSP on health into the constitutional right to human dignity by holding as follows: ‘The right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Article 41 and 42 [national objective on health].’¹⁸¹

Courts in Zimbabwe should be able to follow a similar approach because, in addition to s 46 (1) (d) that requires courts to consider the national objectives when interpreting

¹⁷⁸ See part IV of the Constitution of India

¹⁷⁹ *Olga Tellis v Bombay Municipal Council* (1985) 2 Supp SCR 51, para 22

¹⁸⁰ *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161, para 10

¹⁸¹ Also, see See De Villers, B. (1992). ‘Directive Principles on State Policy and Fundamental Rights: The Indian Experience.’ *South African Journal on Human Rights*. p. 45

constitutional rights, there is s 8 that prescribes that: ‘Regard must be had to the objectives set out in this Chapter when interpreting the State’s obligations under this Constitution and any other law.’ Therefore, when interpreting the duties created for the state by the various constitutional rights, the courts must take into account the need to attain the objectives set out in Chapter 2 of the Constitution. The court, therefore, must choose an interpretation which furthers the attainment of these objectives, to the extent permitted by the language used to formulate the right.

One of these objectives relates to access to adequate housing. It is set out in s 28 of the Constitution as follows: ‘The State and all institutions and agencies of government at every level must take reasonable legislative and other measures, within the limits of the resources available to them, to enable every person to have access to adequate shelter.’

There is, therefore, a constitutional commitment to make adequate housing accessible to everyone. This commitment is not a fundamental right¹⁸² but it should inform the content and scope of relevant fundamental rights that are set out in the Declaration of Rights.¹⁸³ As I show in Chapter 5, this objective should (together with the value of human dignity) be incorporated into the fundamental right to life. This creates for the state the duty to make adequate housing accessible in order to protect, promote and fulfil the right to live in human dignity.

2.5 The culture and attitude of the Zimbabwean judiciary

Writing in the context of pre-1994 South Africa, Martin Chanock¹⁸⁴ remarkably observes that:

It is evident that no set of rules is self-enforcing, and that huge ‘gaps’ [often] exist between [the] idealised statements of rules and principles, the practices of the institutions that administer them and actual patterns of public behaviour....Thinking about law in terms of endowment of powers obliges one to look beyond the sources which the lawyers usually use to find out where the law really is, and it also requires another look at ‘law in action’...

¹⁸² *Madzara v Stanbic Bank Zimbabwe Ltd* (2015) ZWHHC 546, para 14

¹⁸³ As Tinashe Chinopfukutwa in (2017) ‘House Demolitions in Zimbabwe: A Constitutional and Human Rights Perspective’ *Zimbabwe Rule of Law Journal* at 55 argues: “section 28 [which appears under the constitutional objectives] provides the textual background against which the content and scope of” of fundamental rights in Zimbabwe must be interpreted.

¹⁸⁴ (2001). *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice*. p. 22

What is fundamentally true and yet chilling about Chanock's observation is that there is often a difference between what is technically prescribed by legal rules and what is done in practice. Although technically, the Constitution of Zimbabwe requires certain values and norms to be applied when interpreting fundamental rights, the judges may not fully apply these rules. Zimbabwean judges have often been criticised for failing to uphold the Constitution, especially in cases where there are high political stakes.¹⁸⁵ There is therefore a need to assess and make an indication as to whether Zimbabwean judges are likely in practice, to implement the value based and broad approach to constitutional interpretation as technically required by the Constitution. In order to discuss this issue, I start off by posing a few sub-questions based on literature review.

David Robertson¹⁸⁶ argues that the exercise of judicial review powers usually involves making choices between more than one possible interpretations of a constitutional or statutory provision. For example, in the context of this thesis, courts are required to make a choice between the narrow interpretation of the right to life as the right to be protected from extra judicial execution or its broad conception-as encompassing the right to a dignified life (*vida digna*) where one has access to basic livelihoods such as adequate housing. Technically, the Constitution¹⁸⁷ requires the courts to adopt the later interpretation but are the judges likely to do so in practice?

Dennis Davis¹⁸⁸ observes (in the context of South Africa) that the judges' willingness to borrow interpretations from international law and comparative foreign jurisdictions has positively impacted on the way in which the country's constitutional jurisprudence has developed. In the context of Zimbabwe, the question can be asked that: although the Constitution gives courts the discretion to borrow from progressive comparative foreign

¹⁸⁵ See Manyatera, G and Hamadziripi, C. (2014) 'Electoral Law, The Constitution and Democracy in Zimbabwe: A Critique of Jealousy Mbiriro Mawarire v Robert Mugabe NO and 4 Others CCZ 1/13' *Midlands State University Law Review*. p. 72-82. Also see Madhuku, L. (2004) 'Law, Politics and the Land Reform Process in Zimbabwe' In Masiwa, M. (ed). *Post-Independence Land Reform in Zimbabwe: Controversies and Impact on the Economy*. p. 123 and 143. Also see Gwisai, M. (1998) 'Judges in the Storm: The Judicial Review Debate' *Zimbabwe Law Review*. p. 61

¹⁸⁶ (2010). *The Judge as Political Theorist: Contemporary Constitutional Review*. p. 15

¹⁸⁷ See section 46 (1) (a) and (b) of the Constitution of Zimbabwe of 2013

¹⁸⁸ (2003). 'Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence. The South African Experience' *International Journal of Constitutional Law*. p.192

jurisdictions when interpreting rights, will they be willing to do so in practice? And will they be willing to incorporate international human rights law norms and standards, when interpreting constitutional rights?

The questions posed above require one to take a quick look into the culture and attitude(s) of the judiciary in Zimbabwe when it comes to interpretation of the Constitution. In order to properly analyse this culture, one has to go back and look at the legal history of the country. Zimbabwe's legal history is long but what is important for the purposes of this thesis is to take note of certain critical historical episodes.

Zimbabwe was under direct and indirect British colonial rule from 1890 up to 1980. The country gained independence in 1980 after a liberation struggle which culminated in a political settlement. As part of this political settlement, a new Constitution¹⁸⁹ was negotiated and agreed upon as the governance charter for the post independent Zimbabwe. As indicated earlier, this Constitution did not guarantee socio-economic rights. Furthermore, the judicial appointments mechanisms under this Constitution allowed the executive to single handedly handpick and appoint judges.¹⁹⁰ This created a judiciary that was largely dependent on and overly deferential towards the executive and the ruling party.¹⁹¹ This Constitution remained in force until 2013. However a new Constitution was enacted in May 2013, which not only guarantees socio-economic rights but gives the judiciary extensive powers to interpret those rights and, review executive conduct in order to protect the Constitution.¹⁹² It also introduces new and strong mechanisms for judicial appointments, which require the President to appoint judges from a list of candidates who have been publicly interviewed and recommended by an independent Judicial Services Commission.¹⁹³ These mechanisms are likely to bring about an independent judiciary that is likely to be robust in enforcing the Constitution, including the rights enshrined therein.

¹⁸⁹ Known as the Lancaster House Constitution

¹⁹⁰ See *Ibid*, section 84 (1) which provides as follows: 'The Chief Justice and other judges of the Supreme Court and the High Court shall be appointed by the President after consultation with the Judicial Service Commission.' This meant that the President was not bound to make the appointments in accordance to what is recommended by the Judiciary Services Commission.

¹⁹¹ *Supra* note 187

¹⁹² *In Re: Prosecutor General of Zimbabwe on his Constitutional Independence and Protection from Direction and Control* [2017] ZWCC 13 at p. 9-11

¹⁹³ See section 180 of the Constitution of Zimbabwe of 2013

However, although there is a new and stronger judicial appointments mechanism enshrined in the Constitution, the current judiciary is still dominated by the judges who were appointed using the pre-2013 Constitution and therefore, there may be a concern that such judges are unlikely to be robust when reviewing executive action and enforcing the Constitution. Furthermore, it can also be argued that for almost a century Zimbabwe was a British colony and the administration of justice was in accordance to the British legal system and traditions. The local courts heavily relied on the British case law, particularly that of the Appellate Division. This practice has almost become a tradition that has continued even into the post- 2013 constitutional era.¹⁹⁴ Judicial review in the British legal system is notoriously based on the Westminster principle of parliamentary sovereignty¹⁹⁵, which Hugh Corder¹⁹⁶ calls the principle of legislative omnicompetence- according to which the legislature is supreme and is not restrained by the Constitution, when making laws. This principle may be a restraining force which constraints the court's robustness when reviewing laws made by the legislature and policies adopted by the executive, to give effect to fundamental rights.¹⁹⁷ The concern therefore is that, when Zimbabwean courts rely on British case law on judicial review, they are likely to be conservative and overly defer to the executive and the legislature on polycentric issues regarding the implementation of socio-economic rights.

However, recent decisions made by the High Court and the Constitutional Court seem to suggest otherwise. Since 2013, the Zimbabwean judiciary (High Court and Constitutional Court) has decided a number of cases which concern judicial review and the implementation of socio-economic rights. I now turn to discussing some of these cases briefly and examine what they reveal about the attitude of the judiciary towards the enforcement of socio-economic rights. The criterion which I have used to select cases for discussion is that the case must involve the interpretation of the scope of judicial review

¹⁹⁴ See for example supra note 194, where the Constitutional Court referred to a line of British cases from the Appellate Division.

¹⁹⁵ See *R v Home Secretary, Ex parte Fine Brigades Union* [1995] 2 AC 513 at 567; [1995] 2 WLR 464 (HL)

¹⁹⁶ (2010). 'Building a Nation: The Judicial Role in South Africa' *Law in Context: A Socio-Legal Journal*. p. 64

¹⁹⁷ See Freeman, S. (1990) 'Constitutional Democracy and the Legitimacy of Judicial Review' *Law and Philosophy*. p. 327-370

powers and the right to have access to adequate housing. This is because this discussion is limited to providing an indication of the attitude of the judiciary towards the enforcement of the right of access to adequate housing. For reasons given earlier, this should not be taken as a comprehensive assessment of the attitude of the judiciary in Zimbabwe towards enforcing the Constitution.

2.5.1 The judiciary's attitude towards interpreting its review powers

The Constitutional Court had the opportunity to interpret the constitutional provisions relating to the scope and extent of judicial review powers in *In RE: Prosecutor-General of Zimbabwe*.¹⁹⁸ The brief background of this case¹⁹⁹ was that the Prosecutor General had declined to conduct prosecutions against certain high profile politicians who had been accused of having committed crimes. The victims of the alleged crimes requested the Prosecutor General to issue them with certificates *nolle prosequi* so that they could conduct private prosecutions. The Prosecutor General turned down the requests and the victims sought the High Court to review his decision. The High Court found the decision by the Prosecutor General to be unconstitutional on the grounds that it was irrational and it violated the constitutional right of access to justice.²⁰⁰ The Prosecutor General approached the Constitutional Court to rule on the question whether the courts have the authority to direct him to take any action, including issuing the certificates *nolle prosequi*. The Prosecutor General argued that the separation of powers doctrine prevented the courts from doing so. The Constitutional Court heavily criticised the Prosecutor General's position as follows:

Where a court interprets a law, it fulfils its role under the separation of powers framework. When it interprets a certain law to compel someone to do something, it is not the court but the law that compels that person to do so. This application is founded on the wrong premise that the applicant must not be compelled to abide by the law, whether by an order of *mandamus* or otherwise. That premise is fundamentally flawed and patently untenable.²⁰¹

This case involved highly placed individuals in the executive, and yet the Constitutional Court emphatically insisted and clarified that it has powers to review all executive

¹⁹⁸ Supra note 194

¹⁹⁹ Supra note 194, p. 2-4

²⁰⁰ Ibid

²⁰¹ Supra note 194, p. 10

conduct. The Court took a similar approach in other cases that came before it, invalidating certain politically sensitive legislation.²⁰² Therefore, it may rightly be argued that the judiciary is willing to embrace and exercise its authority to review executive conduct, even in cases that are politically sensitive.

2.5.2 The judiciary's attitude towards the enforcement of the right of access to adequate housing

A few cases involving the enforcement of certain aspects of the right of access to adequate housing have been decided by the Zimbabwean judiciary and they indicate that the courts have (in practice) adopted a robust approach in interpreting and enforcing this right. Of note is the decision of the Court in the following cases: *Peter Makani v Epworth Local Board*,²⁰³ *Farai Mushoriwa v City of Harare*²⁰⁴ and *Dusabe v Harare City*.²⁰⁵

Peter Makani v Epworth Local Board was the first socio-economic rights case to be heard by the court under the 2013 Constitution. But the most important aspect of this case is that it involved high profile individuals in government who sought to use the local municipality authority to evict a community so that they could establish their private commercial industries on the land. A private citizen challenged the constitutionality of these evictions and the Court emphatically enforced the Constitution by stating that:

The socio-economic rights that have been incorporated in the new constitution were informed by past experiences which the law giver saw fit to guard against. Municipal authorities which stood *akimbo* as informal settlements mushroomed all over cannot be allowed to now ride on such rights rough shod operating under the cover of darkness to perform forcible evictions and demolitions of houses they allowed to be constructed in broad daylight. They must now follow the law and approach the courts for authority to do so. To allow authorities to proceed in razzmatazz style as they are fond of doing would render nugatory the socio-economic rights enshrined in the constitution.²⁰⁶

²⁰² See for instance *Madanhire v Attorney General* [2014] ZWCC 2- a case where the Constitutional Court invalidated a law which criminalised the publication of 'defamatory' newspaper reports. This law was being used by the government to suppress and harass private media journalists who wrote articles that were critical of government officials.

²⁰³ HH 550-14

²⁰⁴ [2014] ZWHHC 195

²⁰⁵ [2016] ZWHHC 116

²⁰⁶ *Supra* note 205, p. 6

The facts in this case are analogous to those in *Dusabe v Harare City* where again the Court was unapologetic in enforcing the Constitution, as revealed in the following passage of the judgement:

The unlawful conduct of the respondents of demolishing the applicants' houses without notice and without a court order was deplorable and not justifiable in a democratic society. For the avoidance of doubt, and in the spirit of guiding future conduct by these government departments, the notice of intention to evict must be in writing, not given verbally at a meeting held under a tree. The notice must give those likely to be affected sufficient time within which to relocate. If this requirement is not complied with, then the demolitions and eviction will be unconstitutional and unlawful. Under no circumstances are the government departments at liberty to demolish any structures in the absence of a court order authorizing them to do so, whether the structures are illegal, or an eyesore.²⁰⁷

Similar emphasis is evident in the High Court's judgment in *Nyazvigo v Gushungo Holdings*, where the President's wife was interdicted from forcibly evicting people from a piece of land where she wanted to establish her commercial enterprise.²⁰⁸ Despite the involvement of highly powerful government officials in all these cases, the strong language used by the court in the judgments signals that some of the judges might be willing to enforce these rights, despite the judiciary having a tainted long history of deferring too much to the executive and the ruling party.

I must however take note of the failure by the Court in *Dusabe v Harare City* to enforce the right to suitable alternative housing for the victims of forced evictions. This is one of the international law standards, which evictions must comply with.²⁰⁹ While accepting that the evictions on review were indeed arbitrary²¹⁰, the Court surprisingly turned down the evictees' prayer for an order declaring that they had a right to be provided with suitable alternative housing.²¹¹ Critics may argue that this signals the reluctance by the Court to incorporate international law standards when interpreting these constitutional rights. Whilst such criticism may be fair, one must also take note of the reason given by the Court for its failure to grant this request. On behalf of the Court, Chigumba J said:

²⁰⁷ Supra note 207, p. 13

²⁰⁸ See "Zimbabwe Court Stops Mazowe Farm Evictions" available on <https://reliefweb.int/report/zimbabwe/zimbabwe-court-stops-mazowe-farm-evictions> [Accessed on 13 March 2018)

²⁰⁹ Supra note 19, para 1

²¹⁰ Supra note 207, p. 6

²¹¹ Ibid

I am unable to follow the submissions made on behalf of the applicants, and find myself constrained from making a finding that our Constitution provides a person evicted without notice and without a court order, with the right to be provided with alternative accommodation.²¹² [My own emphasis]

It therefore may be argued that the Court's failure to incorporate the international law standards on the right to alternative suitable housing was not because it was unwilling to do so but, this was because (in the judge's opinion) the applicant's legal representatives had failed to make a coherent and sufficient case for their argument.

Notwithstanding the above, the concerns regarding the Zimbabwean judiciary's general attitude and tradition of deferring too much to the executive are genuine. However, what must be avoided is the temptation to paint the entire judiciary with one brush. The jurisprudence that has emerged from both the High Court and the Constitutional Court on matters related to socio-economic rights, since the enactment of the 2013 Constitution, shows that there are some progressive judges who are eager to interpret and enforce these rights in a robust manner. This creates a reasonable hope that indeed the judiciary is likely to embrace the value based and broad approach when interpreting the constitutional rights as advocated in this thesis. Furthermore, the implementation of the new judicial appointments mechanisms will in the long run most likely result in the current crop of judges being replaced by new judges, with a culture and attitudes which embraces judicial activism when it comes to the interpretation and protection of constitutional rights.

2.5.3 The nature of institutional relationships between the judiciary and the other branches of government

Related to the issue of judicial attitude is the question whether the relationship between the judiciary and the other branches of the state is conducive for judges to be robust when applying the value based and broad approach to the interpretation of constitutional rights. Hugh Corder²¹³ argues (in his assessment of the first 17 years of the Constitutional Court of South Africa) that, the cooperative nature of the relationship between the executive, legislature and the judiciary contributed immensely towards creating an environment where judges were free and vigorous in their application of the constitutional standards,

²¹² Ibid, p. 12

²¹³ Supra note 198, p. 68

when deciding cases. In Zimbabwe, the institutional relationship between the judiciary and the executive under the leadership of President Robert Gabriel Mugabe, has been tense and sometimes characterised with acrimony as well as open disregard of court orders by the executive.²¹⁴ Lovemore Madhuku argues²¹⁵ that, notwithstanding such toxic attitudes by the executive, judges are still expected to enforce the Constitution without fear. I agree with Madhuku but it must be appreciated that judges are human beings who also fear for their safety and, may in reality become cautious when called upon to enforce the Constitution in cases that involve high political stakes, if the political environment is dominated by a dictatorship that openly disregards the rule of law. However, the dramatic fall of President Gabriel Mugabe from power in November 2017 and the emergence of a new leader who has promised to respect the rule of law,²¹⁶ has created some hope that a new political culture is taking shape²¹⁷, which will likely create a positive relationship between the judiciary and the executive.

2.6 Conclusion

The discussion in this chapter can be summed up as follows: Despite the conceptual concerns that have been raised in literature, the right to have access to adequate housing is a fully justiciable right. The same is true about the fundamental freedom from arbitrary evictions, the right to life, the right to equality and the children's right to shelter; which are expressly guaranteed in the Constitution of Zimbabwe and which I seek to rely on in order to enforce the right to have access to adequate housing.

²¹⁴ See Kaseke, P. "*The Abusive Relationship Between the Executive and Judiciary*", 20 September 2016. The Newsday newspaper. Available on <https://www.newsday.co.zw/2016/09/abusive-relationship-executive-judiciary/> (Accessed on 27 March 2018). Also see the British Broadcasting Corporation report "*Robert Mugabe lambasts Zimbabwe judges over protests*", 4 September 2016, available on <http://www.bbc.com/news/world-africa-37270873> (Accessed on 27 March 2018)

²¹⁵ See Lovemore Madhuku's views in Mambo, E. "*On trial: The rule of law in Zimbabwe*", 9 September 2016, The Zimbabwe Independent newspaper. Available on <https://www.theindependent.co.zw/2016/09/09/trial-rule-law-zim/> (Accessed on 27 March 2018)

²¹⁶ See the British Broadcasting Corporation report "*Zimbabwe's new president Mnangagwa vows to 're-engage' with world*", 24 November 2017, available on <http://www.bbc.com/news/world-africa-42115622> (Accessed on 27 March 2018)

²¹⁷ See Masechaba, S. "*Some Zimbabweans Optimistic after Mnangagwa's Inauguration Speech*," 25 November 2017, Eye Witness News, Available on <http://ewn.co.za/2017/11/25/some-zimbabweans-optimistic-after-mnangagwa-s-inauguration-speech> (Accessed 27 March 2018)

As a catalyst for this thesis, the Constitution allows courts to adopt a broad approach when interpreting fundamental rights. This allows me to advocate for the broad interpretation of the fundamental freedom from arbitrary evictions, the right to life and the right to equality to include or incorporate the right of every person to access adequate housing. The Constitution also allows me to argue for an expansive interpretation of the children's right to shelter to imply the duty of the state to make adequate housing accessible to every parent and guardian. Having established that the Constitution allows for an expansive interpretation of these rights to possibly include the right to have access to adequate housing, it is now necessary to elaborately discuss the specific duties which Zimbabwe is expected to perform under the right to have access to adequate housing? I do so in the next chapter.

CHAPTER THREE: INTERNATIONAL LEGAL DUTIES UNDER THE RIGHT OF ACCESS TO ADEQUATE HOUSING.

All citizens, poor as they may be, have a right to expect their Governments to be concerned about their shelter needs and to accept a fundamental obligation to protect and improve houses and neighbourhoods. - Abul Hasnat Monjurul Kabir¹

3.1 Introduction

The purpose of this chapter is to identify and explain the specific international legal obligations which the Government of Zimbabwe is required to comply with and fulfil in order to achieve the realisation of the right to have access to adequate housing by everyone. As explained in the previous chapters, the purpose of this thesis is to show how the international legal duties under the right to have access to adequate housing may be enforced by broadly interpreting the scope of the right to life, the right to equality, the fundamental freedom from arbitrary evictions and the children's right to shelter.² It is, therefore, crucial to explain and illustrate what these international legal duties are so that it is clear what it is that I advocate to be incorporated under the rights that I identified above.

In order to identify the international legal duties of the state under the right to have access to adequate housing, I begin this chapter by discussing the norms and standards created by the right of access to adequate housing. Thereafter, I identify and explain the specific international legal duties which the Government of Zimbabwe is required to comply with and perform in order to facilitate the realisation of this right. Throughout this chapter, I refer to art 11 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), even though the same right is also recognised in various other treaties.³ It is

¹ Kabir, A. (2002). Development and Human Rights: Litigating the Right to Adequate Housing. *Asia-Pacific Journal on Human Rights and Law*. p. 104

² These are enshrined in sections 48 (1), 56, 74 and 81 (1) (f) of the Constitution of Zimbabwe, 2013 respectively.

³ These include the UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948; UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951; UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965; UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979; and UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989

appropriate to refer to the ICESCR because this Covenant has been ratified by Zimbabwe⁴ and it is the most comprehensive international instrument spelling out the scope and content of the right to have access to adequate housing for everyone, and not just a group of people.⁵

It would have been appropriate to also refer to the African Charter on Human and Peoples' Rights (the African Charter). However, I am constrained from doing so because the African Charter, just like the Constitution of Zimbabwe of 2013, does not expressly guarantee the right to have access to adequate housing. The African Commission on Human and Peoples' Rights (the African Commission) has indeed held that this right is implied under the various provisions of the African Charter.⁶ However, the African Commission has (not yet) developed much jurisprudence on the interpretation of the positive obligations which arise from this right. The cases decided so far by the African Commission involve the duties of the state with regards to forced evictions⁷, and not the positive obligations to make adequate housing accessible to the poor who may not necessarily be under threat from evictions. It is therefore more useful to rely on the ICESCR, where adequate jurisprudence has been developed to interpret both the negative and positive obligations that are intended for the state under the right to have access to adequate housing.

⁴ Zimbabwe ratified the International Covenant on Economic, Social and Cultural Rights on 13 May 1992. See the treaty ratification table available on https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en [Accessed on 07 August 2017]

⁵ Unlike other conventions, the right to adequate housing in the ICESCR is given substantive content through the authoritative interpretation given by the Committee on Economic, Social and Cultural Rights (CESCR), which describe duties imposed upon States Parties by the right to adequate housing. In Zimbabwe, these General Comments have been accepted as authoritative sources of interpretation of the rights recognised in these conventions. See *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & others* [2003] ZWSC 65. See also *Mudzuru & another v Ministry of Justice, Legal & Parliamentary Affairs & others* [2015] ZWCC 12

⁶ These include art 14 of the African Charter. See for example *Nubian Community in Kenya v The Republic of Kenya*, Communication 317 / 2006 at paras 162-166

⁷ See for example *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Communication 155/96; *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communication 279/03-296/05 and *Nubian Community in Kenya v The Republic of Kenya*, Communication 317 / 2006

3.2 Normative standards created by the right of access to adequate housing.

The right to have access to adequate housing is recognised in art 11 (1) of the ICESCR, as part of the broad ‘right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.’ Thus housing is recognised as an element of the standard of living which every individual is entitled to.

Although art 11 (1) of the ICESCR uses the word ‘housing’, the nature or quality of housing contemplated therein is one that meets the standards of ‘adequacy’.⁸ This interpretation is confirmed by the CESCR when it said:

In the Committee’s view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.⁹

Thus the right to housing, in art 11 (1) of the ICESCR, must be interpreted broadly and this implies therefore that, people should have access to housing whose quality meets the standards of adequacy. What do these standards of adequacy entail?

The CESCR acknowledges that ‘adequacy’ of housing is determined ultimately by the socio-economic circumstances of each country.¹⁰ Zimbabwe is a developing country¹¹ and therefore, the duty of its government to ensure the realisation of the right to have access to ‘adequate’ housing must be interpreted in the context of the country’s economic challenges. However, the CESCR has interpreted art 11 (1) of the ICESCR to also mean that, regardless of the prevailing economic conditions, there are minimum standards that

⁸ Pillay, K. (2000). ‘The Rights to Accommodation, Housing and Shelter in the South African Constitution.’ In: Bekker, G. (ed). *A Compilation of Essential Documents on the Right to Housing. Economic and Social Rights Series Volume 5*. p. 2

⁹ See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991 at para 7

¹⁰ Ibid at para 8

¹¹ See World Bank’s list of developing economies at [Datahelpdesk.worldbank.org](https://datahelpdesk.worldbank.org). (2017). *World Bank Country and Lending Groups – World Bank Data Help Desk*. [online] Available at: <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> [Accessed 7 Aug. 2017]

constitute ‘adequate housing’, to which each States Party must adhere.¹² Therefore, despite Zimbabwe’s economic challenges, its government has a duty to provide access to housing which meets certain minimum standards of adequacy. These are identified by the CESCR as adequate security of tenure and adequate protection from forced evictions or other forms of harassment; availability of basic services, materials, facilities and infrastructure; affordability; habitability; accessibility for all; appropriateness of location and cultural adequacy.¹³

Before discussing these standards, it should be noted that there are overlaps between these standards. For instance, all the requirements relating to the availability of services, appropriateness of location and cultural adequacy translate to the habitability of housing because they all prescribe minimum conditions and services that must be available for the home to be deemed habitable. Therefore, for the purpose of this thesis, I have narrowed the discussion on the adequacy of housing to three minimum requirements which are; habitability, accessibility and security of tenure. I discuss these in the paragraphs below in order to illustrate the nature of housing that the Government of Zimbabwe is expected to make accessible under art 11 (1) of the ICESCR. I am not yet discussing the specific obligations which the state is required to perform. That discussion will follow after establishing the norms and standards which the state is required to uphold under this right.

i) Habitability of housing

In order to be considered adequate, the housing must be habitable. The CESCR interprets the meaning of this standard as follows:

Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages States parties to comprehensively apply the Health Principles of Housing [(1990) developed by the World Health Organisation].¹⁴

Habitability, therefore, means that the houses must provide adequate space, they must be constructed in such a way that the building structure does not endanger the physical

¹² See Supra note 9, para 8 and Supra note 8. Also see Liebenberg, S. and Pillay, K, eds. (2000). *Socio-Economic Rights in South Africa*. p.192-194

¹³ These were derived from the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000. See Supra note 9, para 8

¹⁴ Supra note 9, para 8 (d)

security of the inhabitants and the buildings must be capable of protecting the inhabitants from weather hazards.¹⁵

In addition, the houses must meet the standards of habitability in the sense that they must be located in areas where the inhabitants have access to certain essential services, facilities and infrastructure. This is explained as follows by the CESCR;

An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.¹⁶

This was recently confirmed in the Special Rapporteur's communication to Ireland.¹⁷ Furthermore, habitability includes that the houses must be located in places where the physical environment is not harmful to the inhabitants' health and wellbeing, and they should be located in places where the inhabitants can access critical public social services which include health care, recreation and educational institutions.¹⁸

As Abul Hasnat Kabir¹⁹ and Sandra Liebenberg²⁰ rightly argue, these standards of habitability should be adhered to in order to achieve the purpose and objective of the right to have access to adequate housing, which is to provide individuals with access to decent homes that protect their human dignity and provide them with security and an environment which is conducive for the fulfilment of their psychological needs.

In view of the CESCR's interpretation of habitability, it should therefore be noted that the Government of Zimbabwe's obligation under art 11 (1) includes providing access to houses whose building structure and location do not endanger the physical and health security of the inhabitants, and where the inhabitants enjoy access to certain facilities, amenities and infrastructure that are necessary for the protection of human dignity and advancement of human development.

¹⁵ Ibid

¹⁶ Supra note 9, para 8 (b)

¹⁷ See AL IRL 2/2015 at paras 2-3

¹⁸ Supra note 9, para 8 (f)

¹⁹ Supra note 1

²⁰ See Liebenberg, S. (2005). 'The Value of Human Dignity in Interpreting Socio-Economic Rights.' *South African Journal on Human Rights*. p. 6-8

It should also be noted that, as a result of the increase of public-private partnerships²¹ (popularly known as PPPs), governments often contract or authorise private companies to provide essential housing services, such as the construction of housing units, refuse collection, electricity and water supply. Whether provided by the state or private companies, the houses must be habitable in the sense that they should meet the standards described above. It is the duty of the Government of Zimbabwe to ensure that these standards are adhered to by whoever is providing the housing services to the people in the country.

ii) Legal security of tenure

In addition to the requirement of habitability discussed above, the inhabitants must enjoy security of tenure in order for the housing to be considered adequate. This standard of adequacy is confirmed and explained by the CESCR as follows: ‘[the right to housing] should be seen as the right to live somewhere in security, peace and dignity’²² The CESCR goes on to note that therefore, ‘all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.’²³ Therefore, security of tenure, as a standard of adequacy, implies that the inhabitants must be guaranteed that they will live in the houses without interference or any form of harassment. They must enjoy adequate protection from forced evictions or any other threats of harassment which could make them feel insecure to continue living in those houses.²⁴ This interpretation of security of tenure has been affirmed by the Special Rapporteur on the right to adequate housing in the recent communication to Albania.²⁵

²¹ These are cooperative agreements of partnership between public and private entities which normally result in governments contracting private entities to perform or provide services that ordinarily are supposed to be performed or provided by government.

²² Supra note 9 para 7

²³ Supra note 9 para 8 (a)

²⁴ Supra note 8

²⁵ See Farha, L and Izsák, R. “*Mandates of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context; and the Special Rapporteur on Minority Issues*” [UA/ALB 1/2015] p. 3. Also see Farha, L et al. “*Mandates of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context; and the Special Rapporteur on Minority Issues*” [UA BRA 2/2015] p. 3 and Farha, L et al. “*Mandates of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context*” [OL AUS 1/2017] p. 3

Sue-Mari Maass²⁶ rightly explains that guaranteeing security of tenure is fundamental for the achievement of the objective of the right to have access to adequate housing. Given that the objective for recognising this right in art 11 (1) of the ICESCR has been interpreted by the CESCR as to provide individuals and their families with access to a place where they can in security, peace and dignity,²⁷ it would be impossible to achieve this objective if the inhabitants are not provided with adequate security of tenure. Without sufficient security of tenure, individuals cannot live in their homes in peace or security, as they would be vulnerable to arbitrary evictions, harassments and various other threats. This is why the CESCR emphasises that security of tenure is part of the standards of adequacy. Therefore, in view of this, the obligation of the Government of Zimbabwe, as a States Party under art 11 (1) of the ICESCR, includes ensuring that inhabitants enjoy adequate security of housing tenure and adequate protection from arbitrary evictions, harassment and all other forms of threats which could undermine their peace and security.

iii) Universal accessibility

Another norm or standard created by the right of access to adequate housing is that the state must ensure that adequate housing is made accessible to everyone without discriminating.²⁸ I refer to this as the principle or norm of equality and non-discrimination.

The principle of equality and non-discrimination is enunciated in art 2 (2) of the ICESCR, as follows: ‘The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ The grounds listed above are not meant to be the only prohibited grounds of discrimination.²⁹ They are mentioned merely for purposes of

²⁶ See Maass, S. (2011). ‘Rental Housing as Adequate Housing’. *Stellenbosch Law Review*. p.759-774

²⁷ Supra note 9, para 7

²⁸ Supra note 9 para 8 (e)

²⁹ See art 36 of UN Commission on Human Rights, *Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles")*, 8 January 1987

illustration and are never meant to be exhaustive of the nature of prohibited grounds of discrimination.³⁰ But what is discrimination?

The CESCR defines discrimination as ‘any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination, and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of [the rights enshrined in the] Covenant.’³¹ With respect to access to adequate housing, discrimination is any differential treatment (based on any of the prohibited grounds listed in the ICESCR or in the relevant country’s laws) whose impact is to undermine the ability of certain individuals or groups from accessing adequate housing. Such differential treatment (discrimination) can be direct or indirect.

Direct discrimination ‘occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground’³² such as sex, gender, political or economic status. With respect to providing access to adequate housing, States Parties must, therefore, ensure that similarly situated persons are treated alike. As is discussed later under the section on specific obligations, States Parties must guarantee formal equality, which implies that individuals in comparable situations must be put on equal footing regarding their chances and what is required of them to access adequate housing.³³ Requirements and conditions for accessing adequate housing should, therefore, not differentiate between individuals who are similarly situated.

However, ensuring formal equality is not enough to achieve access to adequate housing by everyone, as intended under art 11 (1) of the ICESCR. State parties have to address what is known as ‘indirect discrimination’, which is a form of discrimination that is

³⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009 at para 15

³¹ *Ibid*, para 6

³² *Ibid* at para 10 (a)

³³ See Currie, I. and De Waal, J. (2013). *The Bill of Rights Handbook. 6th ed.* p.213; Albertyn, C. and Kentridge, J. (1994). ‘Introducing the Right to Equality in the Interim Constitution’ *South African Journal on Human Rights*. p. 152-153; and Smith, A. (2014). ‘Equality Constitutional Adjudication in South Africa’. *African Human Rights Law Journal*. p. 611

usually systemic in nature³⁴ and is perpetuated through laws, policies, or practices that appear to be neutral yet they have a disproportionate effect on the enjoyment of the rights enshrined in the Covenant.³⁵ This is because such policies and practices insist on formal equal treatment of individuals but they do not take into account the underlying inequalities regarding access to resources. For instance, where there is unequal access to income generation, the idea of stipulating uniform prices for accessing housing will not result in everyone accessing adequate housing because those who are poor will still be unable to afford access to housing while those who are rich will obtain access to adequate housing. Thus States Parties are required to undertake measures to achieve substantive equal access to adequate housing. I discuss these measures under the next section on specific obligations.

In the foregoing discussion, I have identified the normative standards or principles that are implied under the right to have access to adequate housing, as provided for under art 11 (1) of the ICESCR. Having done so, the question that arises now is: what is it that the government is required to do by the ICESCR in order to translate these normative standards or principles (which make up the right of access to adequate housing) into reality for people in Zimbabwe? Put differently, what are the specific obligations which the Government of Zimbabwe is required to perform in order to implement or fulfil these standards? I now turn to addressing this question.

3.3 Specific duties created by the right of access to adequate housing

The Government of Zimbabwe, as a State Party to the ICESCR, has an obligation to achieve the realisation of the right of access to adequate housing by every person. This is made clear in art 2 (1) of the ICESCR which states that:

Each States Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

³⁴ In the sense that it is pervasive, persistent and deeply entrenched in laws, policies, social behaviour and organizations in either the public or private sector. See supra note 26 para 12

³⁵ Supra note 30, para 10 (b)

There is, therefore, a duty on the part of the government ‘to take steps’ to ensure that every person in Zimbabwe enjoys access to adequate housing. The nature of duties created by this right may be divided into two categories namely, the immediate obligations and progressive obligations. This is confirmed by the CESCR in its interpretation of art 2 (1) of the ICESCR when it noted that art 2 (1) of the ICESCR creates ‘obligations of conduct’ which are of immediate effect and ‘obligations of result’ which are progressive in nature.³⁶ I explain these obligations below.

3.3.1 The obligation to progressively achieve the realisation of the right to have access to adequate housing.

The Government of Zimbabwe was not expected to immediately fulfil the right of access to adequate housing upon ratifying the ICESCR on 13 May 1991.³⁷ Instead, the duty to achieve the realisation of this right is to be fulfilled on a progressive basis, and the progress achieved should be proportional to the resources available to the government.³⁸ This does not however, mean that the government can indefinitely postpone its efforts to achieve the realisation of this right.³⁹ The concept of progressive realisation means the government has the obligation to move as quickly and effectively as possible towards achieving the goal of making adequate housing accessible to everyone.⁴⁰ Therefore, upon

³⁶ See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990 at para 1. Also see principle 8 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly*.

³⁷ See United Nations, *Treaty Series* depositary notification [C.N.781.2001](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en). Treaties.un.org. (2017). *United Nations, Treaty Series, vol. 993, p. 3*. [online] Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en [Accessed 25 Jun. 2017]

³⁸ See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990 at para 9; Also see Liebenberg, S. and Pillay, K, eds. (2000). *Socio-Economic Rights in South Africa*. p.192-194

³⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990 at 2. Also see supra note 8, p.2 and Principle 21 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. (1987). *Human Rights Quarterly*.

⁴⁰ The CESCR has explained the concept of progressive realisation as follows: ‘The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time...Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand the phrase must be read in the light of the overall objective, indeed the *raison d'être* of the Covenant, which is to establish clear obligations for

ratifying the ICESCR, the government assumed the duty to immediately take steps towards the realisation of the right of access to adequate housing by everyone.⁴¹ These steps include complying and implementing certain immediate obligations.

3.3.2 Immediate obligations

These obligations can be analysed into two groups which are the negative and positive obligations.⁴² Under the negative obligations, the government has the duty to refrain from engaging in retrogressive conduct.⁴³ Measures are retrogressive if they undermine or reverse the progress towards achieving the full realisation of the right.⁴⁴ Such measures include conducting forced evictions.⁴⁵ Therefore, the government is required to abstain from carrying out, condoning or advocating the forced or arbitrary removal of persons or groups from their homes.⁴⁶ Retrogressive measures also include measures or practices which unfairly discriminate against certain people from accessing adequate housing.⁴⁷ It is not possible to identify all of the retrogressive measures here, but what must be taken note of is that the Government of Zimbabwe has an immediate obligation to refrain from any conduct which deprives, prevents or obstructs individuals' access to adequate housing

States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. [My emphasis.] See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990 at para 9

⁴¹ See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990 at para 2 and Principle 16 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. (1987). *Human Rights Quarterly*.

⁴² See Akintayo, A. (2014). 'Planning Law Versus the Right of the Poor to Adequate Housing: A Progressive Assessment of the Lagos State of Nigeria's Urban and Regional Planning and Development Law of 2010'. *African Human Rights Law Journal*. p. 561-562. Also see Alston, P and Quinn, G. (1987). 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights. *Human Rights Quarterly*. p. 184 and See Currie, I. and De Waal, J. (2013). *The Bill of Rights Handbook*. 6th ed. p. 568-570

⁴³ See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997 at para 1

⁴⁴ See Currie, I. and De Waal, J. (2013). *The Bill of Rights Handbook*. 6th ed. p. 568

⁴⁵ See supra note 43

⁴⁶ Ibid and supra note 8. See also Juma, I. (2012). 'Nothing but a Mass of Debris: Urban Evictions and the Right of Access to Adequate Housing in Kenya'. *African Human Rights Law Journal*. p. 492

⁴⁷ Supra note 9, para 8 (e)

or which unfairly discriminates against an individual or group's access to adequate housing.⁴⁸

In addition to the obligation to refrain from retrogressive measures, the government also has certain positive obligations which it must begin to perform within a reasonably short period of time after ratifying the ICESCR.⁴⁹ It is generally recognised that the duty to perform these positive obligations requires the government to take two forms of action.⁵⁰ The first is adopting legislative and administrative measures.⁵¹ The second is implementing 'other' measures or programmes that are meant to facilitate the realisation of the right.⁵² I discuss these two forms of action in the paragraphs below to illustrate the specific duties which the government must perform.

a) Duty to enact the necessary legislation and administrative policies

In terms of art 2 (1) of the ICESCR, when Zimbabwe ratified the Covenant, it assumed the duty to immediately enact the necessary legislation and administrative policies to achieve the progressive realisation of the right of access to adequate housing by every person in the country.⁵³ Although some academics⁵⁴ have argued that States Parties have a discretion whether or not to enact legislation as a means to achieve the realisation of this right, the CESCR has rejected this notion and has emphasised that the duty to enact legislation is an inevitable implication of art 2 (1) of the ICESCR.⁵⁵ Commenting specifically on the right to have access to adequate housing, the CESCR has noted that

⁴⁸ Supra note 8, p. 9

⁴⁹ The phrase 'positive obligations' has been coined by academics to classify those duties which the state is required to perform (rather than abstain from) in order to ensure the realisation of the rights. See Akintayo, A. (2014). 'Planning Law Versus the Right of the Poor to Adequate Housing: A Progressive Assessment of the Lagos State of Nigeria's Urban and Regional Planning and Development Law of 2010'. *African Human Rights Law Journal*. p. 562. Also see Currie, I. and De Waal, J. (2013). *The Bill of Rights Handbook*. 6th ed. p. 569-572

⁵⁰ Supra note 44, p. 572

⁵¹ See art 2 (1) of the UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 as interpreted by the CESCR in UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990 at para 3

⁵² Ibid

⁵³ Ibid

⁵⁴ Such as Philip Alston and Gerard Quinn. See Alston, P and Quinn, G. (1987). 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights. *Human Rights Quarterly*. p. 167

⁵⁵ Supra note 51

enacting legislation is a necessary and unavoidable duty which States Parties have to perform.⁵⁶ The CESCR has reiterated this in its recent review of Australia's⁵⁷ and Uruguay's⁵⁸ compliance with its duties under the ICESCR.

Without promulgating the legislation and relevant administrative policies, the Government of Zimbabwe cannot take the required action to fulfil its obligations under the right to have access to adequate housing. This is because government in Zimbabwe is supposed to be based on the principle of legality⁵⁹ and therefore, whatever action to be taken by public authorities to fulfil the obligations under art 11 (1) of the ICESCR must be provided for in the domestic legal system.⁶⁰ I indicate, below, the nature of legislation which the government is required to enact under art 11 (1) of the ICESCR.

i) Guaranteeing every person the right of access to adequate housing

Under the duty to adopt legislative measures, the state is required to enact the necessary legislation to guarantee the progressive realisation by every individual of the right to have access to adequate housing.⁶¹ This obligation was recently confirmed by the Special Rapporteur on the right to adequate housing in his report on his mission to Canada as follows:

The Special Rapporteur believes that the legal recognition of the right to adequate housing is an essential first step for any State to implement the human rights to adequate housing of the people under its protection. Therefore, the Special Rapporteur strongly recommends that the right to adequate housing be recognized in federal and provincial legislations as an inherent part of the Canadian legal system.⁶²

⁵⁶ See supra note 9, para 12 and para 15. Also see Principle 17 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. (1987). *Human Rights Quarterly*.

⁵⁷ See Committee on Economic, Social and Cultural Rights “*Concluding Observations on the Fifth Periodic Report of Australia*” [E/C.12/AUS/CO/5] at para 6

⁵⁸ See Committee on Economic, Social and Cultural Rights “*Concluding Observations on the Fifth Periodic Report of Uruguay*” [E/C.12/URY/CO] at para 8

⁵⁹ See section 3 (1) (b) of the Constitution of Zimbabwe, 2013 which prescribes that governance in Zimbabwe shall be based on the principle of the rule of law.

⁶⁰ International law is not directly applicable until it is domesticated through legislation or the Constitution. See section 327 of the Constitution of Zimbabwe, 2013.

⁶¹ See supra note 51, para 3 and 5. Also see supra note 44, p. 572

⁶² Farha, L et al. “*Mandates of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; and the Special Rapporteur on minority issues*” [A/HRC/10/7/Add.3.2009] at para 88

The legislation must set out the scope and content of the right. In doing so, the legislation must give full effect to the minimum standards of the quality of housing as required under the ICESCR.⁶³ The right must be enforceable in the domestic legal system and the courts must be given the authority to grant effective remedies in order to enforce the realisation of the right as well as protect it when it is threatened or violated.⁶⁴ This has been confirmed by the CESCR in its recent decision of *IDG v Spain* where it held that:

This requirement includes the adoption of measures that ensure access to effective judicial remedies for the protection of the rights recognized in the Covenant, since, as the Committee noted in its general comment No. 9, there cannot be a right without a remedy to protect it.⁶⁵

ii) Entrenchment of the principle of equality and non-discrimination in all legislation

In order to achieve the progressive realisation of the right of access to adequate housing by everyone, legislative measures must be taken to address all forms of discrimination.⁶⁶ In practice, this means the government has to mainstream the principle of equality and non-discrimination in all the legislation and policies which regulate access to resources and services that are necessary for individuals and their families to secure adequate housing.⁶⁷ For instance, in its review of Uruguay's compliance with the ICESCR, the CESCR stated that:

The Committee draws the State party's attention to its earlier recommendation.. and urges it to introduce legislation that will establish an express prohibition of discrimination and provide sufficient protection against discrimination and that will, inter alia: (a) Explicitly include all the forms of discrimination that are prohibited under article 2 of the Covenant as interpreted in the Committee's general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights; (b) Define direct and indirect discrimination in a manner that is consistent with the State party's obligations under the Covenant; (c) Prohibit discrimination in both the public and private spheres;....

As noted earlier, there are various forms of discrimination which include direct and indirect discrimination.⁶⁸ The legislation and administrative policies must address both forms of discrimination and therefore, must guarantee both formal and substantive equal

⁶³ These include that: the housing must be accessible to all; it must be habitable, and inhabitants must enjoy adequate security of tenure. See supra note 9, para 8

⁶⁴ See supra note 51, para 5. Also see supra note 8, p. 9

⁶⁵ [E/C.12/55/D/2/2014] at para 11.3

⁶⁶ Supra note 51, para 3

⁶⁷ Supra note 9, para 8 (e)

⁶⁸ Supra note 30, para 10

access to resources and materials that are needed for an individual to secure adequate housing.⁶⁹ Thus, government has a duty to enact legislation that guarantees everyone with equal access to adequate housing as noted above but, the legislation or the administrative policies must also provide for affirmative action measures aimed at enabling certain disadvantaged groups to access adequate housing.⁷⁰

iii) Guaranteeing adequate legal security of tenure and protection against forced evictions

The right of access to adequate housing includes the obligation of the States Party to ensure that families enjoy access to housing where they are guaranteed adequate legal security of tenure, and are protected from forced evictions.⁷¹ In order to achieve this, the CESCR notes that State Parties must ‘take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups’.⁷² Thus the Government of Zimbabwe has an immediate duty to provide security of tenure to all persons who live in houses where they do not have security of tenure. This includes people leasing houses from landlords and those who live in informal settlements that are mushrooming across the cities in Zimbabwe.⁷³ What sort of measures is the government required to undertake in order to fulfil this obligation?

Although the CESCR does not explicitly say States Parties should undertake legislative and administrative measures to confer security of tenure, reference to ‘legal security of tenure’ in the CESCR’s General Comment⁷⁴ indicates that the duty includes conferring security of tenure through laws. Therefore, the government has a duty to enact and implement laws and or administrative policies that guarantee adequate security of tenure for families and which protect them from forced evictions.

⁶⁹ Supra note 30, para 38

⁷⁰ These include women, elderly persons and persons with disabilities

⁷¹ Supra note 9, para 8 (a)

⁷² Ibid

⁷³ Such as Epworth, Hopley farm and Domboshava. See International Institute of Environmental and Development (2017). Harare Slum Profiles Report | Environment & Urbanization. [online] Environmentandurbanization.org. Available at: <https://www.environmentandurbanization.org/harare-slum-profiles-report> [Accessed 7 August. 2017]

⁷⁴ Supra note 9, para 8 (a)

In order to achieve that purpose, the legislation adopted by the government must clearly stipulate requirements which must be complied with when conducting evictions. These requirements must conform to and give full effect to both the procedural and substantive standards recognised under the ICESCR.⁷⁵ They include the following: evictions should only be conducted as a last resort after considering all other possible solutions or options, there must be adequate consultation with the affected families prior to the evictions, all affected families must be given adequate and reasonable notice prior to the evictions, the evictions must not be conducted at night or during bad weather unless the affected persons consent otherwise and, evictions must not be conducted in a manner that violates any human rights, the evictions should not be conducted before providing the affected families with suitable alternative housing.⁷⁶

iv) Regular monitoring and evaluation of the national housing situation

Upon ratifying the ICESCR, the government is also required to conduct an assessment of the national housing situation, aimed at establishing the scope, nature and extent of challenges that need to be addressed in order to progressively achieve the realisation of the right of access to adequate housing by everyone in Zimbabwe.⁷⁷ In particular, the government is required to assess and collect information on the full extent of homelessness and inadequate housing within its jurisdiction, and to provide details regarding persons living in ‘illegal’ settlements and persons affected by evictions.⁷⁸ This information must be included in the government’s periodic reports to the CESCR.⁷⁹ Furthermore, these assessments must be done regularly in order to ensure that the measures adopted by the government to fulfil this right are informed by up to date

⁷⁵ See supra note 39, para 15 and para 16

⁷⁶ See *ibid.* Also see Barber, R. J. (2008). ‘Protecting the Right to Housing in the Aftermath of Natural Disaster: Standards in International Human Rights Law.’ *Oxford University Press*. p. 461

⁷⁷ See supra note 9, para 13

⁷⁸ *Ibid.* This duty was confirmed by the CESCR when it noted that: ‘Effective monitoring of the situation with respect to housing is another obligation of immediate effect....In this regard, the revised general guidelines regarding the form and contents of reports adopted by the Committee (E/C.12/1991/1) emphasize the need to “provide detailed information about those groups within society that are vulnerable and disadvantaged with regard to housing”. They include, in particular, homeless persons and families, those inadequately housed and without ready access to basic amenities, those living in illegal settlements, those subject to forced evictions and low-income groups.’

⁷⁹ *Ibid*

information on the state of the national housing situation.⁸⁰ This was confirmed by the CESCR in its report on Costa Rica's compliance with the obligations under the ICESCR right to adequate housing.⁸¹

v) Adopting a national housing strategy

Within a reasonably short period of time after ratifying the ICESCR, States Parties are also required to develop and adopt a national strategy on how they intend to achieve the progressive realisation of the right of access to adequate housing by everyone within their jurisdictions. The existence of this obligation is confirmed by the CESCR when it noted that:

While the most appropriate means of achieving the full realization of the right to adequate housing will inevitably vary significantly from one State party to another, the Covenant clearly requires that each State party take whatever steps are necessary for that purpose. This will almost invariably require the adoption of a national housing strategy...⁸²

Therefore, under art 11 (1) of the ICESCR, the Government of Zimbabwe has a duty to immediately develop a national housing strategy.

By virtue of the doctrine of separation of powers⁸³, the government enjoys the discretion to choose the specific measures to include in the national strategy but the mandatory obligation to develop a national strategy on housing remains. The measures chosen to constitute the national housing policy strategy must be appropriate and reasonable.⁸⁴ Thus, government has an immediate duty to adopt a national strategy policy on housing that is made up of measures that are deliberate, concrete and targeted as clearly as possible towards the expeditious achievement of the goal of ensuring that every person enjoys access to adequate housing.⁸⁵

It should also be noted that the content and quality of the national housing strategy must meet certain minimum requirements. These have been identified by the CESCR⁸⁶ as follows: the strategy must set out clear objectives and measures that will be undertaken;

⁸⁰ This arises from the duty to adopt measures that are "appropriate". See supra note 51, para 2

⁸¹ See Committee on Economic, Social and Cultural Rights "*Concluding Observations on the Fifth Periodic Report of Costa Rica*" [E/C.12/CRI/CO/5] at para 47 (d)

⁸² See supra note 9, para 12

⁸³ Enshrined in section 3 (2) (e) of the Constitution of Zimbabwe, 2013. See supra note 9, para 12

⁸⁴ Supra note 51, para 9

⁸⁵ Supra note 51, para 2. See also supra note 8, p. 6

⁸⁶ See supra note 9, para 12

it must identify the stakeholders involved and set out how coordination between different government departments will be achieved; and it must show how resources will be allocated and timeframes determined for the delivery of the relevant services.⁸⁷ The national housing policy strategy must also indicate how the government will ensure that the costs of accessing adequate housing are commensurate with the average income levels of the general population, in order to ensure that the poor are not discriminated from accessing adequate housing.⁸⁸ In addition to these requirements, the United Nations Special Rapporteur on the Right to adequate housing has said the national housing strategy must include clear indicators which the government will use to monitor and assess progress made towards the realisation of the right to have access to adequate housing.⁸⁹ Three types of indicators must be included in the housing strategy and these are: structural indicators which indicate the level of progress in establishing the necessary legislative and institutional frameworks;⁹⁰ process indicators-which reflect progress in setting into motion activities and programmes necessary to facilitate the realisation of the right⁹¹ and; outcome indicators-which show the results of the different programmes undertaken by government.⁹²

b) The duty to implement other measures

It is important to also note that the immediate obligations that arise from the right of access to adequate housing are not limited to the negative duties as well as the legislative or administrative measures discussed above. As the CESCR notes;

[...] States parties have generally been conscientious in detailing at least some of the legislative measures that they have taken in this regard. It wishes to emphasize, however, that the adoption of legislative measures, as specifically foreseen by the Covenant, is by

⁸⁷ For guidelines on formulation of national housing strategy, see The Annexure to the Global Strategy for Shelter to the Year 2000 adopted by the UN General Assembly on 20 December 1988 through Resolution A/RES/43/181. See supra note 9, para 12

⁸⁸ Supra note 9, para 8 (c). Also see supra note 8, p 9. Also see Human Rights Council. “*Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context*” [A/HRC/10/7/Add.3] 17 February 2009, para 90

⁸⁹ See Human Rights Council. “*Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living.*” [A/HRC/4/18] 5 February 2007

⁹⁰ Ibid, para 10

⁹¹ Ibid, para 11

⁹² Ibid, para 12

no means exhaustive of the obligations of States parties. Rather, the phrase “by all appropriate means” must be given its full and natural meaning.⁹³

It is clear therefore that, as part of its immediate obligations, the government must do everything in its power and capacity, subject to the resources available, to ensure the expeditious and progressive realisation of the right of access to adequate housing by everyone in Zimbabwe. This includes undertaking the legislative and administrative measures that I discussed above, but as the CESCR notes, the States Parties must adopt other measures to do ‘whatever is necessary’⁹⁴ to progressively enable access to adequate housing by everyone. However, the States Parties enjoy discretion to choose the measures they want to implement as long as they can demonstrate that they have undertaken all the appropriate measures to the extent permitted by the resources available to the state and progress is being achieved towards the realisation of the right to have access to adequate housing.⁹⁵

3.4 Summarising the duties of government under the right of access to adequate housing

In view of the foregoing, it can be concluded that, subject to resources available, the Government of Zimbabwe is required to progressively achieve the realisation of the right of access to adequate housing by everyone. The duty to progressively achieve this right entails taking steps to expeditiously and effectively enable everyone to enjoy access to adequate housing. In order to move as quickly and effectively as possible towards achieving this goal, the government is required to immediately comply with and perform the following duties: refrain from and protect people from retrogressive conduct;⁹⁶ enact and implement legislation and administrative policies specifically to: guarantee every individual with the right to have access to adequate housing, to entrench the principle of equality and non-discrimination in all laws and policies which regulate access to adequate housing, to guarantee legal security of tenure and adequate protection against forced

⁹³ Supra note 51, para 4

⁹⁴ See supra note 9, para 12

⁹⁵ Supra note 51, para 4 and supra note 44, p. 572. Also see Principle no.8 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. (1987). *Human Rights Quarterly*

⁹⁶ Such as pursuing unfairly discriminatory policies and practices in relation to the provision of access to adequate housing and conducting forced evictions. See supra note 51, para 1

evictions, to provide for regular assessments on the national housing situation and to provide for the adoption and implementation of the national housing strategy.

As demonstrated in Chapter one, these international legal duties are enforceable in Zimbabwe only if they have been domesticated into the municipal legal system through either legislation or the Constitution. I have already indicated in Chapter 1 that there is no legislation that has been enacted to domesticate these duties and that the Constitution does not explicitly provide for a right of every person to have access to adequate housing. It provides for the fundamental freedom from arbitrary evictions, the right to life, the right to equality and the children's right to shelter. In this thesis, I argue that these constitutional rights can be interpreted broadly in order to indirectly enforce the duties of the state that arise from the right of access to adequate housing as identified and discussed in this chapter. In the next chapter, I examine how and to what extent these duties can be read into the fundamental freedom from arbitrary evictions, enshrined in s 74 of the Constitution.

CHAPTER FOUR: THE FUNDAMENTAL FREEDOM FROM ARBITRARY EVICTIONS AS AN ALTERNATIVE AVENUE FOR THE ENFORCEMENT OF THE RIGHT OF ACCESS TO ADEQUATE HOUSING

As a result of forced evictions, people are often left homeless and destitute, without means of earning a livelihood and, in practice, with no effective access to legal or other remedies. Forced evictions intensify inequality, social conflict, segregation and invariably affect the poorest, most socially and economically vulnerable and marginalized sectors of society-UN Human Rights, Office of the High Commissioner¹

4.1 Introduction

Section 74 of the Constitution of Zimbabwe guarantees every person the fundamental freedom from arbitrary evictions.² In this chapter, I analyse the extent to which this fundamental freedom domesticates the international law duties of the state under the right to have access to adequate housing.³ To achieve this purpose, I explain what the fundamental freedom from arbitrary evictions entail and, how it can be interpreted to incorporate the duties of the state which arise from art 11 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

4.2 The fundamental freedom from arbitrary evictions in Zimbabwe

The fundamental freedom from arbitrary evictions is framed in the Constitution as follows: ‘Freedom from arbitrary eviction. No person may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.’⁴ As is the case with every fundamental right and freedom enshrined in the Constitution, the state has a duty to respect and protect this constitutional freedom.⁵ I contend that, as part of the duties to respect and protect this fundamental freedom, the government may be compelled in domestic courts, to comply with and perform the following international legal duties of the state which arise from the right to have access to adequate housing: the duty to refrain from forced evictions⁶, the duty to ensure that certain procedural requirements are adhered to when evictions are being

¹ See ‘Basic Principles and Guidelines on Development-based Evictions and Displacement’ available at <http://www.ohchr.org/EN/Issues/Housing/Pages/ForcedEvictions.aspx> (Accessed on 13 August 2017)

² See section 74 of the Constitution of Zimbabwe, 2013

³ That is recognised under art 11 (1) of the ICESCR. UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1):forced evictions*, 20 May 1997

⁴ See supra note 2

⁵ See section 44 of the Constitution of Zimbabwe, 2013 which provides as follows: ‘The State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter [the Declaration of Rights]’

⁶ Provided for in supra note 3, para 8

conducted⁷, the duty to confer adequate security of tenure to all people who are lacking security of tenure⁸, and the duty to ensure the provision of alternative suitable housing prior to the evictions.⁹ I now turn to explain how the fundamental freedom from arbitrary evictions should be interpreted to imply each of these duties.

4.3 Duty to immediately refrain from forced evictions

In terms of art 11 (1) of the ICESCR, the state has a negative duty to abstain from forced evictions.¹⁰ Compliance with this duty means the organs of the state shall refrain from carrying out, condoning or advocating the forced removal of individuals and their families from their homes.¹¹ Notwithstanding the absence of an explicit constitutional guarantee of the right to have access to adequate housing, the Government of Zimbabwe can be compelled to comply with the duty outlined above, as part of its obligation to respect the fundamental freedom from arbitrary evictions.

In terms of s 74, the Constitution prohibits evictions that are arbitrary. It, however, does not define the term ‘arbitrary evictions’. The Zimbabwean legislature has not yet enacted legislation to interpret what arbitrary evictions are. A few eviction cases have been determined by the courts¹², but there is yet to be a judgment in which the term ‘arbitrary evictions’ is defined. I suggest a definition of this term in this chapter.

As explained at length in Chapter 2, the courts must uphold the relevant international legal standards when interpreting the meaning of the fundamental freedoms and provisions enshrined under the Declaration of Rights.¹³ This rule allows courts to adopt certain definitions of arbitrary

⁷ Supra note 3, para 15

⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991 at para 8 (a) and supra note 3, para 9

⁹ Supra note 3, para 16

¹⁰ Supra note 3, para 8. Also see Farha, L et al. “*Mandates of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context; and the Special Rapporteur on Minority Issues*” [UA ALB 1/2015] p. 3

¹¹ Ibid and Pillay, K. (2000). ‘The Rights to Accommodation, Housing and Shelter in the South African Constitution.’ In: Bekker, G. ed. *A Compilation of Essential Documents on the Right to Housing. Economic and Social Rights Series Volume 5*. p. 9

¹² These include *Dusabe v Harare City* [2016] ZWHHC 116; *Peter Makani v Epworth Local Board* HH 550–14 and *Mavis Marange v Chitungwiza Municipality and Glory-to-Glory Housing Cooperative* 106/14

¹³ This is required by section 46 (1) (c) of the Constitution of Zimbabwe, 2013 as interpreted by the Constitutional Court of Zimbabwe in *Mudzuru v Minister of Justice, Legal & Parliamentary Affairs* [2015] ZWCC at para 25

evictions that are recognised in international law which Zimbabwe has ratified. Thus, the courts must adopt the definition of arbitrary evictions provided under the ICESCR.¹⁴

The Committee on Economic, Social and Cultural Rights (CESCR) recognises arbitrary evictions to be part of what it calls forced evictions.¹⁵ It defines forced evictions as ‘the permanent or temporary removal against their will of individuals, families and or communities from the homes and or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.’¹⁶ Further clarity to this definition has been provided by the United Nations Special Rapporteur on the right to adequate housing where he defined forced evictions as:

acts and/or omissions involving the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and common property resources that were occupied or depended upon, thus eliminating or limiting the ability of an individual, group or community to reside or work in a particular dwelling, residence or location, without the provision of, and access to, appropriate forms of legal or other protection.¹⁷

Such evictions are arbitrary because the people are forcibly removed from their homes, without recourse to the law and in violation of the requirements of the law.¹⁸ I explain these legal requirements a little later but, at this point, it must be noted that the government can be compelled to abstain from forcibly evicting people from their homes in violation of the law. It also can be compelled to refrain from condoning, facilitating and advocating people or groups to be forcibly removed from their homes without following the procedural and substantive requirements of the law.¹⁹ These are some of the government’s international legal duties under the right to have access to adequate housing which, therefore, can be enforced as part of the constitutional duty of the state to respect the fundamental freedom from arbitrary evictions.

¹⁴ I acknowledge that there are several international instruments that define arbitrary evictions. These include the UN Commission on Human Rights Resolution 1993/7. However, the definition provided under art 11 (1) of the ICESCR. UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1):forced evictions*, 20 May 1997 is the most comprehensive.

¹⁵ *Supra* note 3, para 3

¹⁶ *Ibid*

¹⁷ See Basic Principles and Guidelines on Development-based Evictions and Displacement [A/HRC/4/18] para 4

¹⁸ *Ibid* and also see definition of the term arbitrary in Greenberg, D. and Millbrook, A. (2000). *Stroud’s Judicial Dictionary of Words and Phrases*. 6th ed . p. 166 and Robertson, D. (1997). *A Dictionary of Human Rights*. p 16. Also see Simons, M. (2002) Emergence of a Norm Against Arbitrary Forced Relocation. *Columbia Human Rights Law Review*. p. 102. Also see Chinopfukutwa, T. (2016). ‘House Demolitions in Zimbabwe: A Constitutional and Human Rights Perspective. *Zimbabwe Rule of Law Journal*. p. 141

¹⁹ Pillay, K. (2000). ‘The Rights to Accommodation, Housing and Shelter in the South African Constitution.’ In: Bekker, G. ed. *A Compilation of Essential Documents on the Right to Housing. Economic and Social Rights Series Volume 5*. p. 9

4.4 Duty to confer adequate legal security of tenure

In addition to refraining from forced evictions, the state has an international legal obligation to protect every person from such evictions.²⁰ This duty entails that the state must confer adequate legal security of tenure on all persons who are living in households or settlements without security of tenure.²¹ As explained in Chapter 3, this is to be done through enacting and implementing the necessary legislation which protects the right of every person to have access to adequate housing.²²

Although this right is not explicitly guaranteed by the Constitution or legislation in Zimbabwe, the government's duty to confer adequate legal security of tenure can be read into the scope of the duty of the state to protect the fundamental freedom from arbitrary evictions. This can be achieved through a purposive interpretation of the meaning of the fundamental freedom from arbitrary evictions. As explained in Chapter 2, courts must prefer and adopt an interpretation which best protects the purpose of the right or freedom.²³ This, however, must be done without disregarding the words used to frame the constitutional freedom.²⁴

The fundamental freedom from arbitrary evictions is framed so broadly²⁵ that it can accommodate a purposive interpretation which takes into account the historical developments prior to the enactment of this freedom in the Constitution. This Constitution was enacted after the country suffered a horrendous experience of mass forced evictions.²⁶ Therefore, as already confirmed by the High Court of Zimbabwe²⁷, the purpose of entrenching the fundamental freedom from arbitrary evictions is to guarantee people with protection from forced evictions that are similar to what they suffered prior to this Constitution. In order to give full effect to this purpose, the state has a duty to take legislative and other measures aimed at conferring adequate security of tenure on

²⁰ See supra note 3, para 9

²¹ Supra note 8, para 8 (a)

²² Supra note 3, para 9

²³ See *Mawere v Registrar General* [2015] ZWCC 04 at 20, *Mudzuru v Minister of Justice, Legal & Parliamentary Affairs* [2015] ZWCC 12 and *Rattigan v Chief Immigration Officer* 1994 (2) ZLR 54 (S) at para 57 F–H

²⁴ *Ibid Rattigan v Chief Immigration Officer*. Also see Currie, I. and De Waal, J. (2013). *The Bill of Rights Handbook*. 6th ed. p. 135-136

²⁵ See supra note 2

²⁶ This includes the government sponsored mass forced evictions campaign code named 'Operation Restore Order' which was conducted in 2005, and resulted in 700 000 people being forcibly removed from their homes. See Tibaijuka, A. (2005). *Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe*. [online] UN Habitat. Available at: <http://ww2.unhabitat.org/documents/ZimbabweReport.pdf> [Accessed 10 Apr. 2015]

²⁷ *Peter Makani v Epworth Local Board* HH 550–14

individuals, in order to guarantee them the protection against forced or arbitrary evictions.²⁸ Thus, the fundamental freedom from arbitrary evictions can be applied to enforce in domestic courts, the international law duty of the state to take legislative and other measures to confer adequate legal security of tenure, especially upon those who are living without security of tenure.

4.5 Duty to ensure that evictions comply with minimum requirements

Under art 11 (1) of the ICESCR, the state has a duty to ensure that evictions are only conducted when they are unavoidable and as a measure of last resort.²⁹ In such circumstances, the government has an international legal duty to ensure that the evictions are conducted in a manner that complies with certain minimum requirements. These are procedural and substantive in nature.

4.5.1 The minimum procedural requirements

The minimum procedural requirements have been identified by the CESCR as follows:³⁰ there must be adequate consultation with the affected families prior to the evictions; all affected families must be given adequate and reasonable notice prior to the evictions; the notice must set out the proposed reason for the evictions and the steps to be taken towards the eviction; government representatives must be present to monitor the evictions where they involve groups of people; there must be sufficient identification of all the persons who will carry out the eviction; the evictions must not be conducted at night or during bad weather unless the affected persons consent otherwise; legal remedies must be provided to the affected persons; subject to resources available, legal aid must also be provided to persons who are in need of it to seek redress from the courts.³¹ As noted above, the duty of the state is to follow these requirements when carrying out evictions as well as to ensure that they are adhered to by third parties where evictions have become unavoidable. Thus, under the right to have access to adequate housing, the state has an international legal obligation to entrench these requirements into legislation and enforce them adequately.

²⁸ Supra note 3, para 9

²⁹ Supra note 3, para 18. Also see Barber, R. (2008). 'Protecting the Right to Housing in the Aftermath of Natural Disaster: Standards in International Human Rights Law.' *Oxford University Press*. p. 442. Also see Farha, L et al. "*Mandate of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context*" [OL AUS 1/2017] p. 3

³⁰ Supra note 3, para 15

³¹ For more details on these procedural requirements, also see report produced by the UN Special Rapporteur on the Right to Adequate Housing, supra note 17, para 39-42

Notwithstanding the absence of an explicit constitutional or legislative guarantee of the right to have access to adequate housing, the Government of Zimbabwe can be compelled to comply with the duties outlined above, as part of its obligation to respect and protect³² the fundamental freedom from arbitrary evictions. The duty to protect this fundamental freedom entails that the state must enact and enforce legislation in order to protect individuals against arbitrary evictions.³³ In order to adequately protect individuals, such legislation must clearly set out procedural requirements which need to be adhered to when evicting people. These requirements must be derived from art 11 (1) of the ICESCR because the constitutional freedom from arbitrary evictions must be interpreted in a manner that incorporates the relevant international values and norms.³⁴ Therefore the state can be compelled to enact legislation which entrenches the procedural requirements outlined by the CDESCR, as part of its constitutional duty to protect the fundamental freedom from arbitrary evictions.

It must be noted that s 74 of the Constitution prescribes that no evictions will be conducted without authorisation from the court.³⁵ Therefore, even under the current circumstances where the state has not yet enacted legislation which entrenches the procedural requirements described above; the courts are bound to enforce them when they evaluate the constitutionality of a proposed eviction. The authority to enforce these requirements is derived from the rule that says the courts must interpret constitutional rights and freedoms in a manner that promotes and incorporates the relevant international law values and norms.³⁶ Thus the international law procedural requirements with which evictions must comply are indirectly enforceable in Zimbabwe through the fundamental freedom from arbitrary evictions.

In addition to what has been argued above, it is also critical to note that the courts have a duty under section 46 (2) of the Constitution, to develop common law and customary law in a manner that is consistent with and which gives adequate expression to the rights enshrined in the Declaration of Rights. In the absence of legislation regulating evictions in Zimbabwe, the court's

³² See supra note 5

³³ Supra note 3, para 9. See also De Vos, P. (1997) 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights under the South African 1996 Constitution'. *South African Journal on Human Rights*. p. 83

³⁴ As required by section 46 (1) (c) of the Constitution of Zimbabwe, 2013. See *Mudzuru v Minister of Justice, Legal & Parliamentary Affairs* [2015] ZWCC 12

³⁵ A similar argument is made by Tinashe Chinopfukutwa in (2017) 'House Demolitions in Zimbabwe: A Constitutional and Human Rights Perspective' *Zimbabwe Rule of Law Journal*. p. 55 and, has been confirmed in *Dusabe v Harare City* [2016] ZWHHC 116. p. 6

³⁶ *Ibid*, Tinashe Chinopfukutwa

role in developing both common law and customary law becomes pertinent, to ensure that such law does not violate the freedom from arbitrary evictions. Generally, customary law plays a critical role in Zimbabwe's rural communities where traditional leaders administer it on their subjects.³⁷ For instance, traditional leaders are the custodians of certain communal lands and to some extent have the authority to evict people from those lands for failure to obey certain rules of customary law.³⁸ The effect of the constitutional freedom from arbitrary evictions is that the traditional chiefs can no longer evict anyone from their homes without adhering to the procedural requirements identified above, as well as without satisfying the substantive requirements discussed below.

4.5.2 The minimum substantive requirements

In addition to the procedural requirements discussed above, the government has an international legal obligation to ensure that where evictions have become necessary, they must not be conducted until suitable alternative housing has been provided to the individuals and families targeted for the eviction.³⁹ Where there is an urgent need for evictions to be conducted⁴⁰ or where people have already been evicted and are now homeless, the state is required to provide suitable temporary housing for the affected families. These are international legal obligations that arise from the right to have access to adequate housing, as discussed in detail in the previous chapter.

Notwithstanding the absence of an explicit constitutional guarantee of the right to have access to adequate housing, the Government of Zimbabwe can still be compelled, in domestic courts, to ensure that no one is evicted before they are provided with suitable alternative housing. Compliance with this duty can be enforced as part of the state's constitutional obligation to protect people against arbitrary evictions, as required by s 74. There are three avenues through which the fundamental freedom from arbitrary evictions can be interpreted to imply the duty of the state to ensure that no-one is evicted from their home without being provided with suitable alternative housing. One avenue is when the fundamental freedom from arbitrary evictions is interpreted in

³⁷ See section 5 (1) of the Traditional leaders Act [Chapter 29:17]

³⁸ See section 15 of the Customary Law and Local Courts Act [Chapter 7:05]

³⁹ See supra note 3, where the CESCR noted that: 'Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.'

⁴⁰ For instance to avoid loss of life due to an impending natural disaster such as floods or veld fires.

compliance with the constitutional values.⁴¹ The second avenue is that Zimbabwean courts should be persuaded by the approach taken by courts in comparative jurisdictions when interpreting the meaning of arbitrary evictions. The third avenue is when this fundamental freedom is interpreted in compliance with international law norms and standards. I explore these avenues separately below.

a) Compliance with the constitutional values of justice, equality and human dignity

As explained in Chapter 2, all constitutional rights and freedoms must be interpreted in a manner that upholds and promotes the constitutionally entrenched values.⁴² These values are justice, equality and human dignity.⁴³ Therefore, I contend that when interpreting the norms and standards which evictions must comply with, the courts must derive these from the constitutional values. I hereunder demonstrate that these values require that the families targeted for eviction must first be provided with alternative suitable housing, especially in cases where those families are economically vulnerable people who are unable to access alternative housing on their own. It is also important to point out that the argument that I make here relates only to evictions that are conducted against economically vulnerable families that would have illegally settled on a piece of land for a relatively long period of time.⁴⁴ My argument cannot be applied in scenarios where people illegally occupy land and their eviction is sought immediately. Such people would have to rely on the right to life (as I demonstrate in the next chapter) in order to compel the state to make temporary housing accessible to them, subject to the resources available.

When deciding an eviction case, the court must come up with a decision that is fair. In order to arrive at a fair decision, the court must consider ‘all the relevant circumstances’ of the case.⁴⁵ This includes taking into account the reasons given to motivate for the proposed eviction, and the fact that persons targeted for eviction have a right not to be evicted in a manner that violates their

⁴¹ As is required in terms of section 46 (1) (b) of the Constitution of Zimbabwe, 2013, which provides that when interpreting fundamental rights the court ‘must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality...’

⁴² Ibid

⁴³ Ibid

⁴⁴ In comparative jurisdictions, the courts have considered periods ranging from 6 months and above to be long. See *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread* 2012 (4) BCLR 372 (CC) 2012 (2) SA 337 (CC) at 7. Also see *Port Elizabeth Municipality v Various Occupiers* [2004] (12) BCLR 1268 (CC), 2005 (1) SA217 (CC) at 2 where the Court considered that the persons targeted for eviction had become settled on the land because they had occupied the land for periods ranging from two to eight years.

⁴⁵ Supra note 2

constitutional freedom from arbitrary evictions.⁴⁶ As Tinashe Chinopfukutwa⁴⁷ rightly points out, evictions are arbitrary if they are conducted in violation of the constitutional values of equality and human dignity.⁴⁸ Therefore, I contend that regardless of the reasons given to motivate for the eviction, the court must not allow the evictions to be conducted in a manner that trumps or undermines the constitutional goal of establishing a society that is based on the values of equality and human dignity. What do these values entail?

The Constitution does not explain in detail what the normative values of equality and human dignity entail. Zimbabwean courts have the daunting task to develop an interpretation of these values. As Laurie Ackermann⁴⁹ rightly argues, in order to interpret the meaning of these values, the courts would have to engage with the philosophical theories that led to the development of these values. Thus in the paragraphs below, I refer to certain philosophical views in order to suggest an interpretation of the values of equality and human dignity.

(i) The constitutional value of equality

The entrenchment of equality as a value signifies a constitutional commitment towards the goal of creating an egalitarian society.⁵⁰ Therefore, when the Constitution prescribes that fundamental rights and freedoms must be interpreted in a manner that protects and advances the value of equality, it means that these rights and freedoms must be interpreted in a manner that advances the attainment of the constitutional goal of establishing an egalitarian society. As noted above, individuals have a right not to be evicted arbitrarily. In order to interpret this right in compliance with the value of equality, the courts must hold that evictions are arbitrary if they are conducted in a manner that undermines the goal of establishing an egalitarian society.

There are multiple dimensions to the concept of an egalitarian society. According to Ronald Dworkin, a society based on the value of equality is one where the state shows equal concern for

⁴⁶ See *Dusabe v Harare City* [2016] ZWHHC 116 and *Peter Makani v Epworth Local Board* HH 550–14

⁴⁷ (2017) ‘House Demolitions in Zimbabwe: A Constitutional and Human Rights Perspective.’ *Zimbabwe Rule of Law Journal*. p. 55

⁴⁸ As required by s 46 (1) (b) of the Constitution of Zimbabwe, 2013

⁴⁹ Ackermann, L. (2013). *Human Dignity: Lodestar for Equality in South Africa*. p.28-29

⁵⁰ This is clearly indicated in the Preamble to the Constitution which states that ‘We the people of Zimbabwe... resolve by the tenets of this Constitution to commit ourselves to build a united, just and prosperous nation, founded on the values of transparency, equality, freedom...’ Also see Chiviru, T. (2014). ‘Socio-Economic Rights in Zimbabwe’s New Constitution’ *Strategic Review for Southern Africa*. p. 112

the life and welfare of every citizen.⁵¹ Thus for Dworkin, the value of equality requires that decisions and policies made by the government must always reflect that the state is concerned about protecting the welfare of all citizens. However, for Nancy Fraser, equality means that citizens must enjoy equal participation in platforms where key social, economic and political decisions are made.⁵² Thus for Nancy Fraser, the emphasis is on parity of citizen participation in decision making processes led by the state. For Amartya Sen, an egalitarian society is one where there is ‘equality of capability,’ which is the notion that each person must enjoy the capability to make decisions about how they want to live their life.⁵³ According to John Rawls, in order for people to function as equals, their society must be based on a set of principles and these include that; certain basic rights and freedoms must be guaranteed for all, there must be equal opportunities to participate in socio-economic and political spheres of life, and there must be equal opportunities to acquire wealth and income.⁵⁴ Rawls also developed the theory of a social minimum in which he argues that in addition to extending basic liberties to all, there must be a guarantee for access to the bare minimums of life in order to enable the individual to enjoy an equal sense of belonging to his or her society.⁵⁵

Although the above cited philosophers hold different views about what equality entails, their views are not necessarily mutually exclusive. They are expressions of the different dimensions of what constitutes a society based on equality. In light of the above cited philosophical views, it therefore can be argued that the constitutional value of equality signifies a commitment towards the creation of an egalitarian Zimbabwean society where; basic liberties are guaranteed for all, there is parity of participation in key decision making processes, every individual enjoys the capability to decide to live their life the way they want, the state shows equal concern for the welfare of each person and every person enjoys access to the basic necessities of life.

Therefore, when assessing whether evictions comply with the value of equality or the goal to establish an egalitarian society, one must evaluate the impact of the eviction on these different dimensions of an egalitarian society. Where an eviction undermines any of these dimensions, it

⁵¹ Dworkin, R. (2000). *Sovereign Virtue: The Theory and Practice of Equality*. p.1

⁵² Fraser, N. (1992) ‘Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy’ In Calhoun, C. (ed) *Habermas and the Public Sphere*. p.121-126

⁵³ Sen, A. (1999). *Development as Freedom*. p. 74-75. Also see Sen, A (2010) *The Idea of Justice*. p. 231-235

⁵⁴ Rawls, J (2005). *Political Liberalism*. p.180-181

⁵⁵ Rawls, J. (2001). *Justice as Fairness: A Restatement*. p.162

can be argued that the eviction fails to comply with the value of equality. I contend that an eviction which leaves people homeless undermines all the above described dimensions of equality. For instance, Dworkin's equal concern theory implies that the decisions of the state must not undermine or neglect the welfare of other citizens. Access to adequate housing is a basic necessity for the welfare of human beings, and therefore, where people are being threatened with deprivation of housing through evictions, the state has an obligation to intervene and ensure that the evictions are not conducted in a manner that leaves the affected people homeless. Failure by the state to intervene in this regard would amount to abdication of its duty to show equal concern for the welfare of the evictees.

Access to adequate housing is also central to Nanny Fraser's theory of 'parity of participation' because when an individual is deprived of access to a home, their capability to effectively participate in public decision making processes is undermined. A home provides an individual with a tranquil environment which allows them to develop, process and formulate personal thoughts, opinions or views. When deprived of such an environment, it is difficult for the individual to organise their thoughts and make an input in public decision making processes as an equal with others. Therefore, evictions that are conducted without providing the evictees with suitable alternative housing undermine the value of equality in the sense that such evictions undermine the ability of the evictees to continue actively participating in public life.

A similar argument can also be made even when one looks at the value of equality from Amartya Sen's understanding of it as 'equality of capabilities'. Although it is true that the individual needs to enjoy certain civil liberties in order to have the capability to make personal life choices, it is also true that without access to certain socio economic basic necessities, the individual's capability to make life choices is seriously constrained. A home is one of these socio-economic basic necessities, without which an individual cannot be said to enjoy the capability to make personal life choices. As noted above, a home provides an environment for individuals to organise their personal lives. Thus, a home adds to the individual's capability to make decisions about how they want to leave their life, and therefore, to achieve a society where there is 'equality of capabilities', it is essential that everyone must enjoy access to adequate housing. Therefore, evictions that are conducted without providing suitable alternative housing undermine the value of equality.

John Rawls's 'social minimum theory' is also supportive of the need for every individual to access adequate housing because, when a human being is deprived of a home, they are deprived of a basic necessity and as a result they are denied a decent life. Thus evictions that leave people homeless perpetuate unequal access to housing as a basic necessity and therefore, such evictions undermine the value of equality.

(ii) The Constitutional value of human dignity

A similar argument can also be made that, evictions that leave people homeless are arbitrary because such evictions fail to comply with the constitutional value of human dignity. Human rights law scholars⁵⁶ acknowledge that the constitutional value of human dignity is derived from the theoretical or philosophical concept of human dignity. Therefore, in order to interpret the meaning of human dignity as a constitutional value, one has to start by examining how human dignity was conceptualised and is now perceived as an academic theory or a philosophical concept.

The concept of human dignity is originally an idea that was developed as part of Immanuel Kant's moral philosophy.⁵⁷ It entails that every human being has intrinsic or inherent worthiness.⁵⁸ The phrase 'inherent worthiness', as an element of human dignity, is a descriptive phrase used to articulate the idea that, by virtue of being a human being, the individual is worthy to be treated with a certain measure of respect and concern by the society and other human beings.⁵⁹ Such worthiness arises from certain characteristics that are inherent to human beings, which differentiate humans from the impersonality of nature.⁶⁰ These characteristics include the human beings' capability to exercise their own judgement, to have self-awareness and a sense of self-worth, to exercise self-determination, to shape themselves and nature, to develop their personalities, to strive for self-fulfilment in their lives and to enter into meaningful relationships with others.⁶¹ This view

⁵⁶ See Liebenberg, S. (2005). 'The Value of Human Dignity in Interpreting Socio-economic rights'. *South African Journal on Human Rights*. p. 6 and supra note 49, p. 99. See also Chaskalson, A. (2000). 'Human Dignity as a Foundational Value under Our Constitutional Order.' *South African Journal on Human Rights*. p. 204

⁵⁷ See Gregor, M. (ed). (1996). *Immanuel Kant: Practical Philosophy*. p. 557 and Ackermann, L. (2000). 'Equality and the South African Constitution: The Role of Dignity'. *Heidelberg Journal of International Law*. p. 537 and 540

⁵⁸ Nussbaum, M. (2000) *Women and Development: The Capabilities Approach*. p. 23. Also see Ibid, Gregor and Ackermann

⁵⁹ Supra note 49, p. 56

⁶⁰ Supra note 49, p. 23-24

⁶¹ Ibid. Also see Liebenberg, S. (2005). 'The Value of Human Dignity in Interpreting Socio-economic Rights'. *South African Journal on Human Rights*. p. 7

of human dignity, as a theory, has been supported by a number of contemporary scholars.⁶² I also take a similar position that human dignity, as a theoretical or philosophical concept, entails the recognition that human beings have inherent worthiness which arises from certain capabilities which they are born with as humans and these capabilities include the capability to develop intellectually, to determine their personal lives, to experience self-worth and to actively participate in public life in order to shape their society.

By entrenching human dignity as a value, the Constitution of Zimbabwe therefore entrenches the goal to establish a Zimbabwean society where the inherent worthiness of the human being is valued and protected at all times. It has been argued⁶³ that to protect the inherent worthiness of a human being and to promote his or her innate capabilities, the state must allow the individual to exercise certain civil and political liberties such as freedom of expression, freedom of association, freedom from torture, the right to privacy and the right to vote. However, as Sandra Liebenberg⁶⁴ rightly argues, the exercise of civil and political liberties on its own is not sufficient to enable the human being to live a life in which their inherent worthiness is fully protected and their capability to develop intellectually, determine their private lives and actively participate in public life can flourish. In order to attain the constitutional goal of establishing a society based on human dignity, it is imperative that human beings must enjoy access to certain basic social and economic necessities that are necessary for the protection of their inherent worthiness and development of their innate capabilities.⁶⁵ These basic necessities include access to adequate housing.⁶⁶

As discussed in Chapter 3, access to adequate housing includes having access to a place where a person enjoys access to essential services such as potable water, electricity, adequate space and privacy.⁶⁷ These living conditions are indispensable for the protection of the inherent worthiness of the person. As argued earlier, a human being has inherent worthiness because she has certain

⁶² See McCrudden, C. (2008). 'Human Dignity and the Interpretation of Human Rights'. *The European Journal of International Law*. p. 679 and Carozza, P. (2008). 'Human Dignity and Judicial Interpretation of Human Rights: A Reply.' *The European Journal of International Law*. p. 931 and 944

⁶³ See Supra note 49, p. 25 and 102. Also see Chaskalson, A. (2002). 'Human Dignity as a Constitutional Value.' In Kretzmer, D and Klein, E. ed. *The Concept of Human Dignity in Human Rights Discourse*. p.140

⁶⁴ Liebenberg, S. (2005). The Value of Human Dignity in Interpreting Socio-Economic Rights. *South African Journal on Human Rights*. p. 7

⁶⁵ Ibid at p. 2-3 and Schachter, O. (1983). 'Human Dignity as a Normative Concept.' *American Journal of International Law*. p. 851

⁶⁶ See Stewart, F. (1989). 'Basic Needs Strategies, Human Rights, and the Right to Development.' *Human Rights Quarterly*. p. 348

⁶⁷ Supra note 8, para 8 (f)

capabilities that are inherent in her and these include the capability to develop intellectually, to determine their own private life and to participate in public life. These capabilities are violated and or undermined when an individual lives without access to a decent home. Thus, ensuring that every person enjoys access to adequate housing is central to the achievement of the constitutional goal of establishing a society that is based on human dignity. As noted above, the value of human dignity is not a justiciable right and therefore does not give people the right to claim access to adequate housing. However, this value must be incorporated when interpreting fundamental rights.⁶⁸ Therefore, when interpreting the right not to be evicted arbitrarily, the courts must do so in a manner that protects and advances the goal to establish a society where every person enjoys access to adequate housing as a basic amenity that is necessary for the protection of the inherent worthiness. This will lead to the conclusion that evictions that are conducted in a manner that creates or perpetuates homelessness do not comply with the value of human dignity because, they undermine the goal of creating a society where every person enjoys access to basic necessities. In order to comply with the value of human dignity, evictions must only be conducted after the targeted families have been provided with suitable alternative housing.

b) Comparative law in support of the argument on the provision of suitable alternative housing

The proposition that economically vulnerable persons who have been targeted for eviction must be provided with suitable alternative housing before their eviction is also supported in the comparative foreign jurisdiction of South Africa. As indicated in Chapter 2, Zimbabwean courts are permitted by the Constitution to adopt interpretations made by foreign superior courts on similar fundamental rights and freedoms.⁶⁹ I therefore refer to the decisions of the Constitutional Court of South Africa to provide further support for the argument that evictions are arbitrary if they are conducted in a manner that leaves the affected families homeless. However, before I refer to that jurisprudence, I must justify why South Africa should be regarded as a foreign jurisdiction that is comparable to Zimbabwe on this particular subject.

First, both the Constitution of South Africa and that of Zimbabwe provide for the fundamental freedom from arbitrary evictions.⁷⁰ Interestingly, this fundamental freedom is worded similarly in

⁶⁸ See s 46 (1) (b) of the Constitution of Zimbabwe

⁶⁹ See section 46 (1) (e) of the Constitution of Zimbabwe, 2013 which provides that ‘courts may consider relevant foreign law’ when interpreting the Declaration of Rights.

⁷⁰ See section 26 (3) of the Constitution of South Africa, 1996 and section 74 of the Constitution of Zimbabwe, 2013

both Constitutions, to the extent that it would seem as if Zimbabwe borrowed this provision from South Africa. Secondly, similar to the Constitution of Zimbabwe, the Constitution of South Africa requires courts to interpret fundamental rights and freedoms in a manner that promotes and upholds the values of justice, human dignity and equality.⁷¹ Therefore, as Zimbabwean courts and academics set out to develop their own jurisprudence on the interpretation of arbitrary evictions, they should look up to South Africa and be persuaded by the approach taken by the Constitutional Court of South Africa.

Andre van der Walt⁷² notes that evictions in South Africa are a constitutional matter. Endorsing this view, Stuart Wilson rightly observes⁷³ that the Constitutional Court of South Africa has upheld the view that when making an eviction order, the court must come up with a just and equitable decision.⁷⁴ The court has emphasised that fairness depends on the particular circumstances of each case but,⁷⁵ evictions must always be conducted in a manner that upholds the values of equality and human dignity.⁷⁶ In order to identify obligations which these values place upon the state in eviction cases, the Constitutional Court of South Africa appears to have applied the views of Ronald Dworkin, Nancy Fraser and Immanuel Kant to interpret what the values of equality and human dignity mean. The Constitutional Court seems to have adopted Immanuel Kant's understanding of human dignity as the idea that the human being has inherent worthiness which must be protected

⁷¹ See s 39 (1) (a) of the Constitution of South Africa, 1996. These values are enforced through the application of the PIE Act. For instance see *Port Elizabeth Municipality v various occupiers* [2004] (12) BCLR 1268 (CC), 2005 (1) SA 217 (CC) at 11 where the court said 'The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was adopted with the manifest objective of overcoming the above abuses [arbitrary evictions] and ensuring that evictions in future took place in a manner consistent with the values of the new constitutional dispensation. Its provisions have to be interpreted against this background'. Also see *Residents of Joe Slovo Community; Western Cape v Thubelisha Homes* [2009] ZACC 16; 2010 (3) SA 454 (CC) at 231 where the court said 'The Constitution requires that all evictions must be carried out in accordance with the values that underlie our constitutional democracy. These include human dignity, equality and respect for fundamental human rights and freedoms.'

⁷² (2005) 'The State's Duty to Protect Property Owners v The State's Duty to Provide Housing: Thoughts on the Modderklip Case.' *South Africa Journal on Human Rights*. p. 149

⁷³ (2006). 'Judicial Enforcement of the Right to Protection from Arbitrary Eviction: Lessons from Mandelaville.' *South African Journal on Human Rights*. p. 537

⁷⁴ See for example, *Port Elizabeth Municipality v Various Occupiers* (2005) (1) SA 217 (CC); 2004 (12) BCLR (CC) at para 23 and *Residents of Joe Slovo Community; Western Cape v Thubelisha Homes* [2009] ZACC 16; 2010 (3) SA 454 (CC) at para 66. Also see the decision of the Constitutional Court of South Africa in *Malan v City of Cape Town* (2014) (6) SA 315 (CC); 2014 (11) BCLR 1265 (CC) at para 51

⁷⁵ *Ibid* *Residents of Joe Slovo Community*; para 104 and *Port Elizabeth*, para 31

⁷⁶ *Ibid*, *Port Elizabeth*, paras 11, 15 and 32; *Residents of Joe Slovo Community*, paras 231 and 233. Also see *Government of the Republic of South Africa v Irene Grootboom* 2000 (11) BCLR 1169 (CC) at paras 23 and 88

at all times.⁷⁷ Therefore to comply with the value of human dignity, the Court has held that evictions must be conducted in a manner that upholds the dignity of the affected families.⁷⁸ The Court also seems to have applied Ronald Dworkin's equal concern theory to uphold the argument that the value of equality requires the state to show equal concern for the inherent worthiness and welfare of the economically vulnerable groups when such people are targeted for eviction.⁷⁹ To do this, the state must ensure that evictions are not conducted without giving the affected families alternative housing.⁸⁰ The Court seem to have also applied Nancy Fraser's theory of parity of participation to hold that in eviction cases, the state must ensure that there is meaningful engagement that is characterised by 'equality of voice for all concerned.'⁸¹ In order to be meaningful, the engagement must address issues that include the provision of suitable alternative housing for the affected families.⁸²

It should be noted though, that the Constitutional Court of South Africa has cautioned that there is no unqualified duty on the state to provide alternative housing in all eviction cases.⁸³ A verdict on whether the state has a duty to provide suitable alternative housing will ultimately depend on the circumstances of each case, but the Court must certainly consider the vulnerability of the persons targeted for eviction and the period for which they had settled on the land.⁸⁴ The Constitutional Court of South Africa has embraced the reasoning that, unless suitable alternative housing is provided prior to the evictions, the court should be reluctant to authorise an eviction targeted at economically marginalised groups who had become relatively settled on a piece of land.⁸⁵

⁷⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at paras 12 and 41. Also see *Residents of Joe Slovo Community; Western Cape v Thubelisha Homes* [2009] ZACC 16; 2010 (3) SA 454 (CC) at para 209

⁷⁸ *Ibid* and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (5) BCLR 475 (CC); 2008 (3) SA 208 (CC) at para 83

⁷⁹ See *Residents of Joe Slovo Community; Western Cape v Thubelisha Homes* [2009] ZACC 16; 2010 (3) SA 454 (CC) at para 76; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at paras 29 and 39; and *Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at paras 44 and 82-3

⁸⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at paras 27-28

⁸¹ *Ibid* at paras 30-31. Also see *Residents of Joe Slovo Community; Western Cape v Thubelisha Homes* [2009] ZACC 16; 2010 (3) SA 454 (CC) at para 238 and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (5) BCLR 475 (CC); 2008 (3) SA 208 (CC) at para 14-15

⁸² *Ibid* *Residents of Joe Slovo Community*

⁸³ *Supra* note 80

⁸⁴ *Supra* note 80, paras 27 to 30 and *Residents of Joe Slovo Community; Western Cape v Thubelisha Homes* [2009] ZACC 16; 2010 (3) SA 454 (CC) at para 148

⁸⁵ *Ibid* *Residents of Joe Slovo Community*; *Supra* Note 76 and *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) at para 56

Given that the Constitution of Zimbabwe entrenches similar constitutional values of equality and human dignity, Zimbabwean courts should be persuaded to follow the position taken by the Constitutional Court of South Africa and interpret evictions to be arbitrary if they are to be conducted against economically vulnerable groups, who had become settled on the land and if the evictions are to be carried out without offering them suitable alternative housing.

In suggesting that Zimbabwean courts should consider adopting the above approach as taken by the Constitutional Court of South Africa, I take note of the arguments made by academics⁸⁶ in South Africa that the South African Constitutional Court has been able to take that approach because its judges have decided to use their discretion under s 26 (3)⁸⁷ to push the state towards achieving social justice for all. Zimbabwean judges enjoy similar discretion⁸⁸ and I do not deny that they may not necessarily be similarly committed towards social justice and therefore may not easily apply their discretion to take a similar approach as the South African judges have done. However, I argue that they should take a similar approach especially given that in addition to entrenching the values of equality and human dignity, the Constitution of Zimbabwe also makes an explicit call that the state and its organs must strive to create a just and prosperous society for all.⁸⁹ It seems therefore that the discretion given to the Zimbabwean courts to make a just decision on evictions after ‘consider all the relevant circumstances’⁹⁰ is not unqualified. This discretion must be applied to enforce the spirit of the Constitution, which is to achieve a society that is prosperous not only for certain classes of people but for all. In eviction cases, this can only be enforced if the court uses its discretion to consider the plight of the families targeted for eviction, the constitutional values of equality and human dignity and uphold the view that evictions against economically vulnerable people must not be conducted until such people have been provided with suitable alternative housing.

c) Direct incorporation of international law standards into the fundamental freedom from arbitrary evictions

⁸⁶ Supra note 73

⁸⁷ Of the Constitution of South Africa, 1996

⁸⁸ See s 74 of the Constitution of Zimbabwe, 2013

⁸⁹ See preamble to the Constitution of Zimbabwe, 2013

⁹⁰ Supra note 2

Earlier, I promised that I would also examine the third avenue through which the fundamental freedom from arbitrary evictions may be interpreted to imply the duty of the state to ensure that no person is evicted without first being given suitable alternative housing. I do so now.

In addition to relying on the constitutional values of fairness, equality and human dignity, the international legal duty of the state to ensure that no person is evicted without first being given suitable alternative housing can be incorporated directly into the fundamental freedom from arbitrary evictions, provided in s 74 of the Constitution. As noted earlier, this fundamental freedom must be interpreted in a manner that upholds the relevant international law standards.⁹¹ However, as discussed in Chapter 2, these norms and standards may be incorporated into the scope of a constitutional right or freedom only if the words used to frame that freedom allows such an interpretation.

The fundamental freedom from arbitrary evictions is framed so broadly⁹² that it is possible to directly incorporate international standards into it. Under this fundamental freedom, the courts are given a wide discretion to consider all the relevant circumstances and factors,⁹³ when interpreting the duties of the state and the rights of the people facing an eviction. Amongst the factors to be considered by the court is that the evictees have a right to be protected from evictions that are arbitrary⁹⁴ and the scope of the duties of the state under this right must be interpreted in light of the standards imposed by the relevant international law⁹⁵-in this case- the ICESCR (as interpreted by the CESCR) and the African Charter on Human and Peoples Rights.

According to the CESCR, these standards include that the state must ensure that persons targeted for eviction are not evicted without first being given suitable alternative housing.⁹⁶ In its communication to Brazil,⁹⁷ the Special Rapporteur affirmed this legal position as follows:

...we wish to express serious concern that thousands of families residing in the settlements in the region of Isidoro face an imminent eviction without any resettlement or alternative accommodation proposed by the relevant authorities, contrary to international human rights law. Eviction of these

⁹¹ As required by s 46 (1) (c) of the Constitution of Zimbabwe, 2013

⁹² It is framed as follows in supra note 2: ‘No person may be evicted from their home or have their home demolished, without an order of court made after considering all the relevant circumstances.’

⁹³ Ibid

⁹⁴ Ibid. Also, see supra note 27, p. 5

⁹⁵ See s 46 (1) (c) of the Constitution of Zimbabwe, 2013

⁹⁶ See supra note 3, para 16

⁹⁷ See Farha, L etal. “*Mandates of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context*” [UA BRA 2/2015] p. 3

families may result in homelessness for thousands of people, which is strictly forbidden under international human rights standards.

The international law position that people targeted for eviction must be provided with suitable alternative housing prior to their eviction, has also been upheld by the African Commission on Human and People's Rights in *Nubian Community in Kenya v The Republic of Kenya*.⁹⁸ Where the state is the one seeking the eviction, it must provide the suitable alternative housing.⁹⁹ Where a third party is seeking the eviction, the duty of the state is to ensure that the housing is provided prior to the eviction.¹⁰⁰ If the eviction has already been conducted and the evictees are now homeless, the state must provide the evictees with suitable temporary shelter.¹⁰¹ Thus the international legal duty of the state to provide suitable alternative housing, which arises from the right to have access to adequate housing, can be enforced through the constitutionally entrenched fundamental freedom from arbitrary evictions.

4.5.3 Quality of alternative housing

The general rule is that for the alternative housing to qualify as suitable, it does not have to meet the standards of adequacy¹⁰² but its quality must be consistent with the rights of the evictees.¹⁰³ In Zimbabwe, these rights include the right to human dignity,¹⁰⁴ the right to life,¹⁰⁵ the right to safe, clean and potable water,¹⁰⁶ the right to health care,¹⁰⁷ the right to education¹⁰⁸ and the right to an environment which is not harmful to one's health or well-being.¹⁰⁹ Therefore, the alternative

⁹⁸ Communication 317 / 2006 at para 162

⁹⁹ See supra note 3, para 16

¹⁰⁰ Ibid. Also see Chenwi, L. (2008). *Evictions in South Africa: Relevant International and National Standards*. p 6-7

¹⁰¹ Supra note 3, para 16. Also see United Nations Commission on Human Rights Resolution 1993/77 at para 4, which urges Governments to: 'Provide immediate restitution, compensation or appropriate and sufficient alternative accommodation or land to persons and communities that have been forcibly evicted. This has to be based on mutually satisfactory negotiations with those affected and be consistent with their lives, rights and needs.'

¹⁰² As discussed in Chapter 2 of this thesis

¹⁰³ See supra note 3, para 16 where the CESCR noted that: 'Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.'

¹⁰⁴ See section 51 of the Constitution of Zimbabwe, 2013

¹⁰⁵ Ibid, section 48 (1)

¹⁰⁶ Ibid, section 77 (a)

¹⁰⁷ Ibid, section 76

¹⁰⁸ Ibid, section 75

¹⁰⁹ Ibid, section 73 (1) (a)

housing must afford the occupants access to the basic necessities of life.¹¹⁰ Details on these basic facilities or necessities of life are enumerated in the report of the United Nations Special Rapporteur on the right to adequate housing.¹¹¹ If the government or the party seeking the evictions does not have sufficient resources to provide such quality of alternative suitable housing, then the evictions should not be conducted. Where the evictions are urgent and unavoidable, the government may be compelled to provide the quality of alternative housing that is permitted by the resources at its disposal, including those that can be accessed through international cooperation institutions.¹¹²

4.6 Conclusion

The fundamental freedom from arbitrary evictions domesticates some of the international legal obligations of the state under the right of access to adequate housing. These are: the duty of the state to abstain from conducting forced evictions; the duty to confer adequate legal security of tenure; the duty to ensure that evictions comply with certain minimum procedural requirements; and the duty to ensure that no-one is evicted without first being given suitable alternative housing. However, the scope of the fundamental freedom from arbitrary evictions is limited to guaranteeing security of tenure against forced evictions, for people who already enjoy some form of shelter. The international legal obligation of the state to progressively achieve the realisation of the right of access to adequate housing also requires that the state must implement positive measures to create conditions that enable those who currently live under inadequate housing, to gain access to

¹¹⁰ These include sustainable access to basic social services such as clean and potable water, health facilities, education facilities, infrastructure and the housing must be situated within a physical environment that is not harmful to human life.

¹¹¹ See *Supra* note 31, para 55 where the Special Rapporteur noted that: 'Identified relocation sites must fulfil the criteria for adequate housing according to international human rights law. These include: (a) security of tenure; (b) services, materials, facilities and infrastructure such as potable water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services, and to natural and common resources, where appropriate; (c) affordable housing; (d) habitable housing providing inhabitants with adequate space, protection from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors, and ensuring the physical safety of occupants; (e) accessibility for disadvantaged groups; (f) access to employment options, health-care services, schools, childcare centres and other social facilities, whether in urban or rural areas; and (g) culturally appropriate housing. In order to ensure security of the home, adequate housing should also include the following essential elements: privacy and security; participation in decision-making; freedom from violence; and access to remedies for any violations suffered.'

¹¹² UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990 at para 13

adequate housing.¹¹³ To enforce this aspect of the right of access to adequate housing, I argue that individuals should rely on the constitutional right to life and equality, while parents and guardians who live with their children can also rely on their children's constitutional right to shelter. In the next chapter, I examine how the constitutional right to life can be interpreted to enforce the positive obligation of the state to create conditions that enable individuals to progressively realise their right to have access to adequate housing.

¹¹³ See Akintayo, A. (2014). 'Planning Law Versus the Right of the Poor to Adequate Housing: A Progressive Assessment of the Lagos State of Nigeria's Urban and Regional Planning and Development Law of 2010'. *African Human Rights Law Journal*. p. 562. Also see Currie, I. and De Waal, J. (2013). *The Bill of Rights Handbook*. 6th ed. p. 569-572

CHAPTER FIVE: THE RIGHT TO LIFE AS AN ALTERNATIVE AVENUE FOR THE ENFORCEMENT OF THE RIGHT OF ACCESS TO ADEQUATE HOUSING

The right to life [...] may be interpreted as not merely prohibiting killing, but also requiring the state to protect the quality of life of its people, including for example provision of shelter. In addition, a powerful argument for implementation of the right to housing can be made by invoking the right to dignity. - Evadne Grant¹

5.1 Introduction

In his study of the interdependence and permeability of human rights conducted in the late 1980s, Craig Scott observed that:

Increasingly challenging and controversial claims may soon follow, such as arguments for directly incorporating the right to an adequate standard of living, found in Article 11 of the [International Covenant on Economic, Social and Cultural Rights], into the right to life found in Article 6 of the [International Covenant on Civil and Political Rights].²

The constitutional duty to make adequate housing accessible does not only arise when the Constitution expressly says so in the Bill of Rights. Such an obligation can also be a consequence of the entrenchment of the constitutional right to life. Inspired by the views of Craig Scott (cited above) the purpose of this chapter is to show that even though the Constitution of Zimbabwe does not explicitly guarantee for every person, the right to have access to adequate housing, the international legal duty of the state to make adequate housing accessible to everyone can still be enforced (in domestic courts) as part of the constitutional duties to promote and fulfil the right to life. As noted in Chapter 1, my argument is not that the state must deliver houses to every individual, but that it can be compelled to undertake appropriate measures, discussed in Chapter 3, to create enabling conditions for individuals and their families to access adequate housing in Zimbabwe.

To sustain my argument, I have divided this chapter into three parts, which will appear in the following order. In part one, I explain why the right to life under the Constitution of Zimbabwe should not be interpreted minimally³ but should be given a wider meaning. I also explain why the value of human dignity must be incorporated when interpreting the right to life, in order to create

¹ Grant, E. (2007). 'Enforcing Economic, Social and Cultural Rights: The Right to Adequate Housing in South Africa'. *African Journal on International and Comparative Law*. p.16

² Scott, C. (1989). 'Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights'. *Osgoode Hall Law Journal*. p. 773

³ As the right to mere existence.

the right to live in human dignity. Thereafter, I explain how and why the right to live in human dignity should imply the duty of the state to undertake reasonable measures to make adequate housing accessible to every person. In the second part, I show that the argument in favour of enforcing the duty to make adequate housing accessible as a positive obligation under the right to live in human dignity is well supported in international law that is binding on Zimbabwe, as well as in comparative law that has persuasive force in Zimbabwean courts. In part three, I demonstrate that the argument in favour of incorporating the duty of the state to make adequate housing accessible to everyone, into the scope of the right to live in human dignity is further supported by the constitutional objective on adequate housing, which is provided for in s 28 of the Constitution.

Part I

5.2 The right to life under the Constitution of Zimbabwe

The right to life is capable of either a wide or a narrow interpretation, depending on how it is framed under the Constitution. In some jurisdictions⁴, it is framed narrowly as the right not to be deprived of life, while in other jurisdictions⁵ it is framed broadly as the right to live or the right to life. It has been argued⁶ that where the right to life is framed narrowly, its scope may not be the same as in jurisdictions where it is framed widely.⁷

In Zimbabwe, the right to life used to be framed narrowly under the previous Constitution of 1979.⁸ However, under the current Constitution, it is now framed widely as follows in s 48 (1): ‘Every person has the right to life’. Thus Zimbabwe now falls under the category of jurisdictions where

⁴ These include Botswana. See section 4 (1) of the Constitution of Botswana where it is framed as ‘No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted’. Also see Amendment no. 5 of the Constitution of the United States of America where it is framed as follows: ‘No person shall be held to answer for a capital, or otherwise infamous crime...nor be deprived of life, liberty, or property, without due process of law’.

⁵ For example South Africa (under the 1996 Constitution of South Africa), Kenya (under the 2010 Constitution of Kenya), Tanzania (under the 1984 Constitution of United Republic of Tanzania) and Canada (under the Canadian Charter of Rights and Freedoms)

⁶ This is because the interpretation of constitutional rights must be grounded on the words used to frame the rights. See Currie, I. and De Waal, J. (2013). *The Bill of Rights Handbook*. 6th ed. p. 136 and Kentridge J’s judgment in *S v Zuma* 1995 (2) SA 642 1995 (4) BCLR 401 (CC) at para 17

⁷ India is an exception. Even though the right to life is framed narrowly, the Supreme Court of India has given it a wide interpretation to imply the right to live in human dignity. This is because the Indian Constitution requires fundamental rights to be interpreted in a manner that protects and promotes human dignity. See for example *Maneka Gandhi v Union of India* (1978) 1 SCC 248 and *Chameli Singh v State of U.P* (1995) Supp 6 SCR 827

⁸ It was framed as follows under s 12 (1): ‘No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted’

the right to life is framed widely and ought to be given a broad interpretation. I contend that this right implies the right to have access to socio-economic living conditions that are adequate for the protection of human dignity.⁹ I explain this in the paragraphs below

5.3 The relevance of the value of human dignity when interpreting the right to life

When interpreting constitutional rights, Zimbabwean courts are required to apply a value based approach. As explained in Chapter 2, such an approach entails that, to the extent permitted by the words used to frame the fundamental right, the court must develop and uphold an interpretation that incorporates the relevant constitutional values.¹⁰ In both s 3 (1) (e) and s 46 (1) (b) of the Constitution, human dignity is entrenched as one of the constitutional values. The fundamental right to life, therefore, must be interpreted in a manner that upholds and promotes the value of human dignity. To achieve that, the court must incorporate human dignity into the scope and content of the constitutional right to life. As a consequence of this approach, the right to life implies the right to live a dignified human life or the right to live in human dignity.

I do acknowledge that this approach can be viewed with scepticism in certain academic and legal circles, as it has been argued that the right to life is incapable of being interpreted expansively to imply the right to a dignified human life.¹¹ It has also been argued that the idea of incorporating human dignity into fundamental rights is futile because the value of human dignity is indeterminate.¹² I quickly address these counter-arguments before I proceed to demonstrate that the right to a dignified human life implies the duty of the state to create enabling conditions for everyone to have access to adequate housing.

It has been argued in certain foreign jurisdictions that the right to life cannot be interpreted to imply the right to a dignified human life. For instance, in Lesotho¹³ the Court of Appeal reinforced

⁹ Chaskalson, A. (2002). 'Human Dignity as a Constitutional Value'. In: Kretzmer, D and Klein, E. (eds). *The Concept of Human Dignity in Human Rights Discourse*. p. 141. Also see Devenish, G. (1999). *A Commentary on the South African Bill of Rights*. 1st ed. p. 110 where he argues that the right to life be given a wider meaning to take into account the socio-economic living conditions.

¹⁰ This approach is enunciated in section 46 (1) (b) of the Constitution of Zimbabwe, 2013 which provides as follows: 'When interpreting this Chapter [The Declaration of Rights], a court, tribunal, forum or body must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, must consider the values and principles set out in Section 3.' Also see *Mudzuru v Minister of Justice, Legal & Parliamentary Affairs*, para 26

¹¹ See for instance the decision of the Lesotho Supreme Court of Appeal in *Baitsokoli v Maseru City Council* [2005] LSCA 13

¹² Davis, D (1999). 'Equality: The Majesty of Legoland Jurisprudence' *South African Law Journal*. p. 413

¹³ Supra note 11

this idea by holding that the meaning of the right to life is restricted to the freedom from arbitrary deprivation of life. In Zimbabwe, such an interpretation would be inappropriate because the right to life is formulated broadly under the Constitution as follows: ‘Every person has the right to life’.¹⁴ In addition to that, the Constitution of Zimbabwe requires courts to broadly interpret the words used to formulate fundamental rights¹⁵ and therefore, the right to life cannot be restricted to mean freedom from arbitrary deprivation of life. Furthermore, and as explained earlier, the Constitution of Zimbabwe requires courts to incorporate the value of human dignity when interpreting constitutional rights.¹⁶ Therefore, the right to life under the Constitution of Zimbabwe is capable of an expansive interpretation which incorporates human dignity, to imply the right to live in human dignity.

It has also been argued that human dignity is a vague normative value in the sense that it is not precise as to what it means.¹⁷ Therefore, if human dignity as a concept is vague, then the meaning of the right to live in human dignity is also unclear.¹⁸ I disagree with this view because it is possible to interpret the meaning of human dignity as a value. As discussed elaborately in the previous chapter, the meaning of the concept of human dignity can be traced back to Immanuel Kant’s moral philosophy, who suggested it as the idea that every human being has intrinsic or inherent worthiness which must be protected.¹⁹ Contemporary scholars such as Martha Nussbaum²⁰ and Laurie Ackermann²¹ have further analysed this concept and have rightly argued that human dignity has various facets to it. These include the idea that every person has inherent worthiness (as Immanuel Kant initially suggested) and that human beings have certain capabilities which enable them to perform certain functions such as: to exercise their own judgement; to have a sense of self-worth; to exercise self-determination; to develop their own personalities and to strive for self-fulfilment in their lives.²² Thus the value of human dignity is not vague.

¹⁴ See s 48 (1) of the Constitution of Zimbabwe, 2013

¹⁵ See *Mawere v Registrar General* (2015) ZWCC 04 at para 20 and *Madzimbamuto v Registrar General* [2014] ZWCC 5 at para 5–6.

¹⁶ See Supra note 10

¹⁷ Supra note 12

¹⁸ Ibid

¹⁹ Nussbaum, M. (2000). *Women and Development: The Capabilities Approach*. p. 72. Also see Gregor, M. (ed). (1996). *Immanuel Kant: Practical Philosophy*. p. 557; Also see Ackermann, L. (2000). ‘Equality and the South African Constitution: The Role of Dignity’. *Heidelberg Journal of International Law*. p. 537 and 540- 542

²⁰ Nussbaum, M. (2000). *Women and Development: The Capabilities Approach*. p. 72

²¹ Ackermann, L. (2013). *Human Dignity: Lodestar for Equality in South Africa*. p. 86

²² Ibid. Also see supra note 20

It can be argued that, when incorporated into the right to life, the value of human dignity places the protection of the inherent worthiness of human beings at the centre of the purpose of the right to life. Therefore, the right to live in human dignity, as implied under the right to life means the right to live a life in which one's inherent worthiness is protected and where the growth of his or her inherent capabilities is promoted. If this is the meaning of the right to live in human dignity, what then are the duties that it creates for the state and how do those duties include the obligation to create enabling conditions for people to access adequate housing?

As already demonstrated in the previous chapter, access to adequate housing is central to the idea that a human being has inherent worthiness and capabilities which must be protected and promoted. When a person has access to adequate housing, it means the person has access to a decent home which provides him or her with an environment of privacy and proximity to essential services such as potable water, electricity, healthcare and education.²³ The absence of a decent home means a person is left to live under conditions that violate his or her inherent worthiness and which stifle the growth of his or her inherent capabilities. For instance, when a human being lives without a decent home, he is deprived of an environment of tranquillity and consequently his capability to develop intellectually is undermined. He is also deprived of privacy and resultantly, his capability to organise his private life is undermined. Without enjoying access to adequate housing, the individual is constrained from actively participating in public political, economic and social life.²⁴ His or her sense of self-worth is also impaired.²⁵ In summary, the inherent worthiness of a human being is impaired when he or she lives without adequate housing. Therefore, when a human being lacks access to adequate housing, his or her constitutional right to live in human dignity is being violated and the state has a duty to protect, promote and fulfil that right.²⁶

However, making adequate housing accessible is an obligation that is to be performed progressively and subject to resources available to the state.²⁷ It is not feasible for a government

²³ See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991 at para 8

²⁴ Liebenberg, S. (2005). 'The Value of Human Dignity in Interpreting Socio-Economic Rights.' *South African Journal on Human Rights*. p. 2

²⁵ Chaskalson, A. (2000). 'Human Dignity as a Foundational Value under Our Constitutional Order.' *South African Journal on Human Rights*. p. 204

²⁶ As required under section 44 of the Constitution of Zimbabwe, 2013

²⁷ See art 2 (1) of the International Covenant on Economic, Social and Cultural Rights as interpreted in UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990 at para 2-3. Also see Principle 8 of Limburg

of a developing country such as Zimbabwe, to provide adequate housing to every person. What is to be expected from the state is that it must create conditions that enable every person to access adequate housing on their own, while in exceptional circumstances, it may be required to provide temporary shelter. I demonstrate these arguments below.

5.4 Duty to promote the right to live in human dignity

I argue that the state can be compelled to implement reasonable measures to make adequate housing accessible, as part of its constitutional obligation to promote the realisation by every person, of their right to live in human dignity.²⁸ The obligation to promote fundamental rights entails the positive duty to create conditions that are necessary for an individual to be able to realise his or her fundamental rights.²⁹ The duty to promote the right to live in human dignity therefore means that the state must undertake measures to create the necessary conditions which enable individuals to access the basic living conditions that protect their inherent worthiness, and which promote the optimum growth of their inherent capabilities to develop intellectually, experience self-worth, organise private life and actively participate in public life.³⁰ Access to adequate housing, as noted above, provides an individual with the necessary environment or social living conditions to develop intellectually, experience self-worth, organise their private life and actively participate in public life. Therefore, as part of the obligation to promote the realisation of the constitutional right to live in human dignity, the state must create the enabling conditions for individuals to access adequate housing. This brings me to explaining the nature of measures which the state is required to implement.

The duty to create the necessary enabling conditions will not be satisfied by implementing any kind of measures. The state is required to implement measures that are deliberate, concrete and targeted as clearly as possible towards addressing what the individuals require in order for them to

Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1987) *Human Rights Quarterly*.

²⁸ Duty to promote constitutional rights is prescribed in supra note 26

²⁹ De Vos, P. (1997). 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights under the South African 1996 Constitution'. *South African Journal on Human Rights*. p. 83

³⁰ See Supra note 24, p. 9 where Sandra Liebenberg argues that 'Human dignity undeniably requires respect for personal autonomy and choices. But at the same time our commitment to respecting each person's substantive freedom and life choices requires the creation of the social conditions in which people's capacity for personal fulfilment and agency depend'. Also see supra note 20, p. 5–6 and 89

access adequate housing.³¹ Such measures must include establishing the necessary legal and policy framework that enables them to access adequate housing, as means to access and realise their right to live in human dignity.³² The state has to enact legislation which guarantees people with the right to access essential resources such as land and other building materials as well as other resources, to enable them to secure adequate housing for themselves. The legislation must also set out enforceable duties which the government will perform in order to make adequate housing accessible to everyone³³, as part of its duty to promote their right to live in human dignity.

In addition, the state must develop and implement coherent administrative measures to enable people to access adequate housing as means to realise their constitutional right to live in human dignity. Such administrative measures must necessarily include adopting and implementing a national housing strategic plan which ‘defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them and sets out the responsibilities and time frame for the implementation of the necessary measures.’³⁴ It can be argued that the absence of a coherent national housing strategic plan leaves people, especially the poor, to continue living in perpetual homelessness, and as a result, their right to live in human dignity remains illusory. The development of the national strategy is, therefore, an indispensable measure under the duty to create enabling conditions for people to realise their right to live in human dignity.

As discussed in Chapter 3, the state enjoys the discretion to choose the specific policy strategies on how to make adequate housing accessible to everyone.³⁵ However, the state has a duty to identify policy strategies that are appropriate in that they should be deliberate, concrete and targeted as clearly as possible towards achieving the realisation of the right to have access to adequate housing, within the shortest possible period of time.³⁶ The implementation of this national housing strategy must also be supported by the establishment of effective public administrative

³¹ This is the standard developed by the CESCR to measure the appropriateness of steps or policies undertaken by States Parties. See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990 at para 2

³² *Ibid*, para 3 and 5. Also see *supra* note 22, para 15

³³ *Supra* note 30, para 5

³⁴ *Supra* note 23, para 12

³⁵ *Ibid*. Also see section 3 (2) (e) of the Constitution of Zimbabwe, 2013 which entrenches the doctrine of separation of powers.

³⁶ *Supra* note 31, para 2 and 9

institutions.³⁷ The nature of the measures included in the national strategy plan will also depend on the resources available to the state but, at least there must be a coherent national policy and a clear commitment towards implementing it to enabling people to access adequate housing, as means to realise their right to live in human dignity. Thus, as part of its duty to create an enabling environment for people to access adequate housing as a means to realise their right to live in dignity, the state may be compelled to undertake appropriate legislative and administrative measures, similar to those that the government is required to implement under art 11 (1) of the ICESCR.

Furthermore, as part of the duty to create enabling conditions for people to access adequate housing, the state must eliminate discrimination against certain individuals or groups which unfairly excludes them from accessing adequate housing. In some cases, the government itself has to abstain from practising discrimination when distributing land and other resources. Some of the discrimination is heavily entrenched in policies and laws,³⁸ while some is perpetuated through abuse of power.³⁹ Such discrimination makes it impossible for certain individuals to access adequate housing and therefore they are denied realisation of their constitutional right to live in human dignity. The state must, therefore, eliminate discrimination through reforming the laws and policies to mainstream the principle of equality and non-discrimination.⁴⁰ The state must also take steps to protect people from discrimination that is perpetuated through abuse of power by officials who manage or who have influence over the public's access to resources such as land and other materials necessary for one to secure adequate housing for themselves. Thus, as part of its duty to create an enabling environment for every person to access adequate housing as a means to realise their right to live in dignity, the state may be compelled to eliminate discrimination by implementing legislative and other measures, similar to those which the government is required to implement under art 11 (1) of the ICESCR.

³⁷ This is because, government functions through administrative institutions and, therefore, without these the national strategy is unlikely to be implemented effectively

³⁸ For example those policies which set the costs of accessing housing materials beyond the affordability of certain groups.

³⁹ For example corruption by public officials in the management and distribution of land

⁴⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009 at para 37

The duty to promote constitutional rights also entails providing adequate information and raising public awareness about their fundamental rights and how they can enforce or realise them.⁴¹ Therefore, the state must provide the public with adequate and relevant information about their right to live in human dignity. The information must include details about what this right entails, and the policies and measures that have been put in place by the state; particularly those aimed at enabling them to have access to adequate housing.⁴² Such information creates an enabling environment for people to access life in human dignity because they would be aware of the state policies which they need to apply or make use of in order to access adequate housing. The state has a duty to provide similar information and education to its officials, in order to create awareness amongst them (as duty bearers) of their responsibilities regarding facilitating public access to adequate housing, as means towards the realisation of the public's right to live in human dignity.

5.5 Duty to fulfil the right to live in human dignity

In addition to the above, the state has the duty to 'fulfil' the constitutional right to live in human dignity. The duty to fulfil a right entails that the state must directly provide a service or resource to enable an individual or groups of people to realise their constitutional right.⁴³ Adequate housing is a basic social service which individuals require in order to realise their right to live in human dignity. In circumstances where groups of people are unable to realise this right because they have no means to access adequate housing on their own, the state has a duty to intervene through appropriate measures⁴⁴ to assist those people to gain access to adequate housing. Such measures include providing land for housing and other resources or basic shelter for groups of people who are homeless. It is, however, important to acknowledge that the nature of these measures is ultimately determined by the amount of resources available to the state, including those which can be accessed by the government through international technical cooperation institutions.⁴⁵ However, the state can still be held accountable to fulfil the right to live in human dignity by providing basic shelter or housing land and the onus is upon the government to convince the court

⁴¹ See Liebenberg, S. and Pillay, K, eds. (2000). *Socio-Economic Rights in South Africa*. p. 29

⁴² Ibid. Also see Khoza, S. (2007) *Socio-Economic Rights in South Africa 2nd e.d.* p. 36

⁴³ Brand, D. (2006). 'Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale'. In Coomans, F.(ed). *Justiciability of Economic and Social Rights: Experience from Domestic Systems*. p. 219

⁴⁴ For measures to be appropriate, they must be deliberate, concrete and as clearly as possible targeted at enabling the rights bearers to access or realise their right. See supra note 31, para 2

⁴⁵ Supra note 31, paras 9-10

that it has done everything within its capacity but, is unable to provide these because it lacks resources to do so.

Part 11

5.6 The international law argument in support of the right to life as implying the right of access to adequate housing

When interpreting duties created by the constitutional right to life, Zimbabwean courts must incorporate the relevant norms and standards that are recognised in international conventions which the country has ratified.⁴⁶ The above proposition that the right to life implies the duty of the state to create enabling conditions for people to access adequate housing, is well recognised in the international law treaties that have been ratified by Zimbabwe.⁴⁷ In the paragraphs below, I show that the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (the African Charter) require human dignity to be incorporated into the right to life so that this right implies the right to live in human dignity and this, in turn, creates the positive obligation to make adequate housing accessible to everyone, as argued above. I choose to refer to the ICCPR and the African Charter because these are the two key international instruments, ratified by Zimbabwe and which recognise the right to life. I also refer to the ICESCR because the Special Rapporteur on the right to adequate housing has made some findings on the relationship between the right to life and the right to have access to adequate housing.

5.6.1 The International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights

The ICCPR recognises the fundamental right to life as follows in art 6 (1): 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' Zimbabwe ratified⁴⁸ the ICCPR in 1991 and therefore, courts must incorporate the standards recognised in art 6 (1) of this Covenant when interpreting the fundamental right to life under the Constitution of Zimbabwe.

⁴⁶ This rule of constitutional interpretation is provided for in section 46 (1) (c) of the Constitution of Zimbabwe, 2013 as follows: 'When interpreting this Chapter [The Declaration of Right], a court, tribunal, forum or body must take into account international law and all treaties and conventions to which Zimbabwe is a party'. Also see *Mudzuru v Minister of Justice, Legal & Parliamentary Affairs* [2015] ZWCC at para 25

⁴⁷ See Smith, R. (2005). *International Human Rights 2nd ed.* p. 205 and 207

⁴⁸ See Ratification Status by country table on: [Tbinternet.ohchr.org.](http://tbinternet.ohchr.org/) (2017). *Ratification status by country or by treaty.* [online] Available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx [Accessed 30 Jun. 2017].

The purpose of recognising the right to life in art 6 (1) of the ICCPR is to protect the human dignity of persons.⁴⁹ This interpretation is confirmed in the preamble to the ICCPR which declares that all the fundamental rights recognised in the Covenant ‘derive from the inherent dignity of the human person.’ The right to life is one of the fundamental rights recognised in the Covenant, as noted above. Therefore, as Craig Scott⁵⁰ rightly argues, if the fundamental right to life is derived from human dignity, it may as well be argued that this right is meant to protect human dignity. This therefore implies that the right to life in art 6 (1) of the ICCPR should be interpreted to mean the right to a dignified human existence.⁵¹ As noted above, Zimbabwean courts are obliged to incorporate this interpretation into the scope of the constitutional right to life. When they do so, they will reach the conclusion that the fundamental right to life recognised in s 48 (1) of the Constitution of Zimbabwe implies the right to live in human dignity.

The argument that the right to life in art 6 (1) of the ICCPR includes the right to live in human dignity is further supported by the United Nations Human Rights Committee (HRC) in its General Comment⁵² on art 6 (1) of the ICCPR. The HRC has noted that:

The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.⁵³

Thus, although the fundamental right to life is traditionally viewed as the right to respect life and refrain from killing an individual, the ICCPR requires this right to be given a wider meaning. This approach to interpretation broadens the scope of the right and allows for the incorporation of the value of human dignity into the scope of the right to life. Subsequently, it creates positive obligations for States Parties to protect, promote and fulfil this right by making sure that individuals have access to certain basic socio-economic services that are needed for them to enjoy life in human dignity.⁵⁴ Access to adequate housing is one of these services which States Parties

⁴⁹ See Wicks, E. (2012). ‘The Meaning of Life: Dignity and the Right to Life in International Human Rights Treaties.’ *Human Rights Law Review*. p. 206. Also, see the preamble to the ICCPR and the preamble to the UNDHR which both recognise that the fundamental rights recognised under the two instruments are derived from human dignity and aimed at protecting the dignity of the person.

⁵⁰ *Supra* note 2, p. 878

⁵¹ See Wicks, E. (2012). ‘The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties.’ *Human Rights Law Review* 2012. 12. p. 206

⁵² UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982

⁵³ *Ibid*, para 5

⁵⁴ See *supra* note 51, p. 204-205

must provide so that individuals and their families are able to live their lives in dignity. Therefore, it can be argued that the right to life under the ICCPR implies the right to a dignified human existence.⁵⁵ This argument has been affirmed by the Special Rapporteur on the right to adequate housing in his report when he noted that:

Lived experience illustrates that adequate housing, dignity, security and life are so closely intertwined as to be essentially inseparable. The same is true in international human rights law. The right to life cannot be separated from the right to a secure place to live, and the right to a secure place to live only has meaning in the context of a right to live in dignity and security, free of violence.⁵⁶

It is therefore clear that under both the ICESCR and the ICCPR, the State is obliged to undertake positive measures to make adequate housing accessible to every person as part of its duty to protect, promote and fulfil the right to dignified human existence. As noted earlier, Zimbabwean courts are required by s 46 (1) (c)⁵⁷ of the Constitution of Zimbabwe to apply this approach when interpreting the constitutional right to life. This reinforces the argument made above, which is that the constitutional right to live in human dignity can be interpreted to imply the right to have access to adequate housing and thus, it can be relied upon as an alternative right⁵⁸ in Zimbabwe to enforce the duty of the state to create enabling conditions for everyone to access adequate housing.⁵⁹

5.6.2 The African Charter on Human and Peoples' Rights

The above argument is also supported by the African Charter as confirmed by the following comment made by the African Commission on Human and People's Rights (the African Commission)⁶⁰:

⁵⁵ Supra note 51, p. 206

⁵⁶ See UN General Assembly *"Promotion and Protection of Human Rights: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms"*[A/71/310] 8 August 2016, para 27. Also see Amnesty International. (2015) *"The UN Human Rights Committee's Proposed General Comment on the Right to Life: Amnesty International's Preliminary Observations."* p. 6

⁵⁷ Which requires courts to uphold international law values and norms when interpreting constitutional rights.

⁵⁸ Given the absence of an explicit constitutional guarantee of a right for every person to access adequate housing.

⁵⁹ As argued earlier, this does not mean that the state must always build houses for every person. It means the government may be compelled to perform the following duties: establish a legal and administrative framework that enables people to access adequate housing; eliminate all forms of discrimination which undermine access to adequate housing by certain groups or individuals, adopt and implement a coherent national strategy on housing which is coherent and constitutes of appropriate measures; provide adequate public education on the right of every person to access adequate housing and the available policies which assist them to do that; subject to the availability of resources- directly provide resources such as land and or basic shelter to the vulnerable groups.

⁶⁰ The African Commission is a panel of 11 independent experts, established in terms of art 31 of the African Charter, to protect and promote human rights in Africa through the interpretation and application of the African Charter.

Without prejudice to the foregoing, where economic, social and cultural rights are not expressly included in the constitution of a State party, the courts and administrative tribunals should strive to protect the interests and values underlying these rights through an expansive interpretation of other rights, for example, the rights to life, human dignity, security of the person, equality and just administrative action. Domestic law must be interpreted as far as possible in a way which conforms to States parties' obligations under the African Charter.⁶¹

The African Charter recognises the fundamental right to life in art 4 which states that: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person...' Although art 4 of the African Charter recognises the duty to 'respect' life⁶² and the integrity of the person, the phrase 'human beings are inviolable' must be given a wider meaning to imply that the States Parties have a positive duty to protect individuals from having their human dignity violated by poverty and other living conditions such as lack of access to adequate housing.⁶³ To do so, the governments would have to implement positive measures to address poverty and that would by necessity, include measures to enable their people to access basic socio-economic livelihoods such as adequate housing.

This interpretation was further confirmed in both *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan*⁶⁴ and in *Social and Economic Rights Action Centre v Nigeria (SERAC)*.⁶⁵ In *SERAC*, the African Commission upheld the principle that the fundamental right to life imposes both negative and positive obligations.⁶⁶ Under the positive obligations, the State Parties are required to ensure that their people gain access to socio-economic services that meet their basic necessities.⁶⁷ This obligation includes implementing measures to create conditions that enable people to access adequate housing. According to the African Commission, such measures include legislation and national policies which amongst other things: guarantee every person with the right of access to adequate housing; make access to adequate

⁶¹ See paragraph 24 and 25 of the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, adopted by the African Commission on November 2010. Available at: <http://www.achpr.org/instruments/economic-social-cultural/> [Accessed 13 Aug. 2017]

⁶² Which could be argued to imply that the duties of the state are confined to refraining from interfering with life and they do not extend to implementing positive obligations to enable a person to access a certain quality of life.

⁶³ Coomans, F. (2003). 'Ongoni case before the African Commission on Human and Peoples' Rights' *International and Comparative law quarterly*. p. 751. Also see supra note 61, para 24

⁶⁴ [279/03-296/05] African Commission on Human and Peoples' Rights, May 2009, para 146

⁶⁵ In *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* [155/1996] African Commission on Human and Peoples' Rights, May 2002

⁶⁶ *Ibid*, para 44

⁶⁷ Supra note 65, para 44 and 64. Although the African Commission identified the provision of access to food as an example, it can also be argued that access to adequate housing should be incorporated into the scope of this right because it is a basic social service, without which an individual cannot live in dignity.

housing affordable especially for the poor; eliminate discrimination and provide basic shelter to the vulnerable groups during emergency circumstances.⁶⁸ Thus the position in the African Charter underscores the argument that I make in this chapter and this should be upheld by Zimbabwean courts when they interpret the duties of the state under the constitutional right to life.

5.7 The comparative foreign law argument in support of the right to life as implying the right of access to adequate housing

The proposition that the right to live in human dignity implies the positive duty to make adequate housing accessible to everyone has also been confirmed by superior courts in foreign jurisdictions that are comparable to Zimbabwe. Zimbabwean courts are permitted by the Constitution to adopt approaches taken by foreign courts when interpreting fundamental rights. This is confirmed by s 46 (1) (e) of the Constitution which provides that, ‘When interpreting this Chapter [The Declaration of Rights], a court, tribunal, forum or body may consider relevant foreign law; in addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.’ As discussed in Chapter 2 of this thesis; when interpreting the constitutional right to life, Zimbabwean courts may adopt interpretations made by courts in comparative foreign jurisdictions on a similar right. I hereunder refer to the jurisprudence of the Constitutional Court of South Africa and the Supreme Court of India to support the argument in favour of enforcing the state’s duty to make adequate housing accessible as part of the right to life. As indicated in Chapter 2 of this thesis, I have selected South Africa and India as comparative jurisdictions for this thesis because similar to Zimbabwe, these countries have ratified the ICESCR⁶⁹ and their Constitutions are comparable to Zimbabwe.

5.7.1 South Africa

Regarding the question whether it is legally possible to interpret the right to life as the right to a dignified human existence, South Africa is comparable to Zimbabwe at least on two grounds. Firstly similar to the Constitution of Zimbabwe 2013,⁷⁰ the Interim Constitution of South Africa,

⁶⁸ See supra note 61, para 79

⁶⁹ South Africa ratified on 12 January 2015, while India ratified on 10 April 1979. See ICESCR Ratification table available on https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en (Accessed on 08 August 2017)

⁷⁰ See section 3 (1) (e) of the Constitution of Zimbabwe, 2013

1993 guaranteed the fundamental right to life⁷¹ and protection of human dignity⁷². Under the Interim Constitution of 1993, the Constitutional Court of South Africa decided a landmark case⁷³ involving the interpretation of the fundamental right to life and in this case, the Court applied an approach which should be of persuasive force in Zimbabwe as the Zimbabwean courts seek to interpret the constitutional right to life.

The Constitutional Court of South Africa endorsed the view that human dignity must be incorporated into the scope of the fundamental right to life, to imply the right to live in human dignity. This approach was confirmed in *S v Makwanyane*⁷⁴ when the court held as follows:

But the right to life was included in the Constitution [of South Africa] not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished.⁷⁵

Thus the Court integrated human dignity into the scope of the constitutional right to life and consequently that right was interpreted to imply the right to live in human dignity. Zimbabwean courts must be able to adopt a similar interpretation given that the Constitution of Zimbabwe requires constitutional rights to be interpreted in a manner that upholds the value of human dignity.⁷⁶ Therefore, it should be possible to incorporate human dignity into the constitutional right to life, as I argued for above, and reach the conclusion that the fundamental right to life implies the right to have access to basic socio-economic livelihoods that are necessary for the protection of the individual's inherent worthiness (human dignity).

In making the suggestion that Zimbabwean courts should be persuaded by the South African jurisprudence, I am aware of counter-arguments made by some academics such as Darrel Moellendorf,⁷⁷ who has claimed that the Constitutional Court of South Africa has rejected the interpretation of the right to life as the right to access the means to sustain one's life. Moellendorf

⁷¹ See section 9 of the Interim Constitution of South Africa, 1993

⁷² *Ibid*, section 10

⁷³ *S v Makwanyane* 1995 (3) SA 391 (CC)

⁷⁴ *Ibid*

⁷⁵ *Ibid*, paras 326 and 327

⁷⁶ See section 46 (1) (b) of the Constitution of Zimbabwe, 2013

⁷⁷ See (1998). 'Reasoning about Resources: Soobramoney and the Future of Socio-Economic Rights' *South African Journal on Human Rights*. p. 327-328

based his argument on the decision of the Court in *Soobramoney v Minister of Health, KwaZulu-Natal*.⁷⁸ In this case, the applicant suffered from chronic renal failure and needed renal dialysis in order to remain alive.⁷⁹ One of his arguments in court was that the state has a duty to protect his right to life and as part of that, the state was required to immediately provide him with renal dialysis.⁸⁰ In response to this argument, Chaskalson P (who wrote for the majority of the Court) held that the right to receive such medical treatment ‘does not have to be inferred from’ the right to life.⁸¹ It is important to note that the Court did not say that ‘the right to life does not imply’ the right to receive basic medical treatment. The reason for rejecting the applicant’s argument was precisely that the right to receive medical treatment is guaranteed as a clear and separate right,⁸² which is to be fulfilled progressively and subject to the resources available to the state. Therefore, the correct way of dealing with the applicant’s case was to evaluate if the state had failed to discharge its duty to adopt reasonable measures to enable him to access health care services, subject to the resources available.⁸³ Thus in this case, the Court applied the right to access health care, which unfortunately did not entitle the applicant to immediately receive the medical treatment he sought. The decision of the Court therefore turned on whether the applicant’s claim for medical treatment was valid under the right to access health care.⁸⁴ The Court’s decision did not turn on whether the right to life accorded the applicant the right to receive the medical treatment he sought. To rely on the right to life would be inappropriate in a situation where the Constitution specifically pronounces itself regarding how medical treatment should be accessed under the right to health care. Thus, the Court did not reject the idea that the right to life can be interpreted to imply the duty of the state to undertake reasonable measures in order to create enabling conditions for people to access basic socio-economic livelihoods such as housing. In actual fact, Chaskalson P explicitly

⁷⁸ 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC)

⁷⁹ *Ibid*, para 1

⁸⁰ *Ibid*, para 7

⁸¹ See *Ibid*, para 19 where Chaskalson P said ‘In our Constitution the right to medical treatment does not have to be inferred from the nature of the state established by the Constitution or from the right to life which it guarantees. It is dealt with directly in section 27. If section 27(3) were to be construed in accordance with the appellant’s contention it would make it substantially more difficult for the state to fulfil its primary obligations under sections 27(1) and (2) to provide health care services to everyone within its available resources.’

⁸² See s 27 of the Constitution of South Africa, 1996

⁸³ *Supra* Note 78, para 25

⁸⁴ *Supra* Note 78, para 22 where Chaskalson said ‘The appellant’s demand to receive dialysis treatment at a state hospital must be determined in accordance with the provisions of sections 27(1) and (2) [Right to health care] and not section 27(3). These sections entitle everyone to have access to health care services provided by the state within its available resources’

admitted that the right to life encompasses the right to access these basic socio-economic livelihoods but, subject to the resources available to the state.⁸⁵ What he rejected is the approach of using the right to life in order to claim immediate access to these livelihoods when the Constitution specifically says, access to these livelihoods is to be provided progressively and as part of certain specific socio-economic rights.⁸⁶

After *Soobramoney v Minister of Health, KwaZulu-Natal*, the Constitutional Court of South Africa dealt with another socio-economic rights matter, and the Court made it even clearer that it accepts the notion that the right to life means the right to access the means to live life in human dignity. This case is *Government of South Africa v Grootboom*,⁸⁷ a matter that concerned the right to adequate housing. Writing for the Court, Yacoob J remarked that: ‘There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people, therefore, enables them to enjoy the other rights enshrined in Chapter 2.’ [My emphasis] These rights include the right to live in human dignity.⁸⁸ Thus, although the Court disposed the matter by applying the right to have access to adequate housing, it also acknowledged that: ‘The right of access to adequate housing is entrenched because we [South Africans] value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality.’⁸⁹ If the purpose for entrenching the right of access to adequate housing is to ensure that a person attains life in human dignity, it should also be accepted that the right to live in human dignity implies the right to have access to adequate housing. It can therefore be argued that in *Government of South Africa v Grootboom* the Constitutional Court of South Africa reinforced the idea that the right to live in human dignity can be relied upon to compel the state to undertake reasonable measures to make adequate housing accessible. This proposition should have persuasive force in Zimbabwe, given that the Constitution does not explicitly guarantee the right to have access to adequate housing but, it expressly guarantees the right to life and requires that right to be interpreted as the right to live in human dignity.

⁸⁵ Supra Note 78, para 31

⁸⁶ Supra Note 78, para 31 and 32

⁸⁷ *Government of the Republic of South Africa v Irene Grootboom* 2000 (11) BCLR 1169 (CC), para 23

⁸⁸ Which is derived from the right to life as confirmed in Supra Note 73, para 326-27

⁸⁹ Supra Note 87, para 44

5.7.2 India

The view that the fundamental right to life implies the right to live in human dignity, which in turn creates the duty of the state to make adequate housing accessible is also supported by the Supreme Court of India.⁹⁰ Similar to the 2013 Constitution of Zimbabwe, the Constitution of India does not expressly provide for a fundamental right of access to adequate housing for everyone. However, both Constitutions entrench the right to life⁹¹ and require human rights to be interpreted in a manner that promotes the underlying value of human dignity.⁹² Therefore, Zimbabwean courts should be persuaded by the approach taken by the Supreme Court of India when interpreting the relationship between the value of human dignity and the right to life as well as the nature of duties of the state under that right.

The Supreme Court of India has endorsed the interpretation of the right to life as implying the right to live in human dignity.⁹³ The Court confirmed this in *Francis Coralie Mullin v The Administrator, Union Territory of Delhi*⁹⁴ where it held that ‘the right to life includes the right to live with human dignity’. Thus the Supreme Court of India incorporated human dignity into the constitutional right to life and consequently, it developed the idea of a right to a dignified human existence.⁹⁵ As noted above, Zimbabwean courts should be able to adopt a similar interpretation given that they are required to interpret the constitutional right to life in a manner that incorporates human dignity.⁹⁶

The Supreme Court of India has gone further to interpret the right to live in human dignity as implying the right to access basic socio-economic services. For instance, in *Shantistar Builders v*

⁹⁰ *Maneka Gandhi v Union of India* (1978) 1 SCC 248. For a compilation of cases which affirm this position, see Jain, R. (2015). ‘Article 21 of the Constitution of India – Right to Life and Personal Liberty’. *Panjab University* (Unpublished). Available on <https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/> [Accessed on 8 August 2017]

⁹¹ See section 48 (1) of the Constitution of Zimbabwe and art 21 of the Constitution of India, 1950

⁹² As confirmed in *Chameli Singh v State of U.P* (1995) Supp 6 SCR 827, para 5 and 8. See also the preamble to the Constitution of India, 1950.

⁹³ Hansaria, B. (1993). *Right to Life and Liberty under the Constitution: A Critical Analysis of Article 21*. p. 24

⁹⁴ *Francis Coralie Mullin v the Administrator, Union Territory of Delhi* (1981) 2 SCR 516, para 518

⁹⁵ The Court made a similar interpretation in the following cases: *Maneka Gandhi v Union of India* (1978) 1 SCC 248; *Shantistar Builders v Narayan Khimalal Totame* AIR (1990) SC 630; *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* laws (SC)-1996-10-10; *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295 and *Sunil Batra v Delhi Administration* AIR 1978 SC 1675; *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1981) 2 SCR 516, para 518

⁹⁶ *Supra* note 10

*Narayan Khimala Totame*⁹⁷ the Supreme Court held that: ‘The right to life is guaranteed in any civilised society. That would take within its sweep, the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in....’⁹⁸ The Court made a similar interpretation in *Chameli Singh v State of U.P*⁹⁹ when it said:

[The] right to live guarantee[d] in any civilised society implies the right to food, water, decent environment education, medical care and shelter. These are basic human rights known to any civilised society. All civil, political, social and cultural rights enshrined in the Universal Declaration of Human Rights and Convention or under the Constitution of India cannot be exercised without these basic human rights [basic human needs].¹⁰⁰

Thus, the Supreme Court of India has identified adequate housing as a necessary social service which the human being must have access to in order to realise their right to live in human dignity. This supports the argument advanced above that the state may be compelled to make adequate housing accessible as part of its obligations to promote and fulfil the right to life, which has been interpreted as the right to live in human dignity. Given the similarities described above¹⁰¹ between the Constitution of India and that of Zimbabwe, the Zimbabwean courts should be persuaded by the approach taken by the Supreme Court of India in this regard.

However, in making the suggestion that the Zimbabwean courts should follow the approach taken by the Supreme Court of India to interpret the right to life to imply the right to access the means to live a dignified human life, I am also aware that the Supreme Court of India has been accused of being inconsistent in its interpretation of the right to life. For instance, Paul O’Connell¹⁰² argues that despite its earlier progressive position of inferring socio-economic rights from the right to life,

⁹⁷ AIR (1990) SC 630

⁹⁸ Ibid, para 5.

⁹⁹ *Chameli Singh v State of U.P* (1995) Supp 6 SCR 827, para 8

¹⁰⁰ See also *Bandhua Mukti Morcha v Union of India* 1984 AIR 802, 1984 SCR (2) 67, para 23 where the Court held as follows ‘It is the fundamental right of everyone in this country... to live with human dignity free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State neither the Central Government nor any State Government-has the right to take any action which will deprive a person of the enjoyment of these basic essentials.’ Also see *Peoples Union for Democratic Rights v Union of India* 1982 AIR 1473, 1983 SCR (1) 456 and *Olga Tellis v. Bombay Municipal Corporation* AIR 1986 SC 180

¹⁰¹ Ibid, *Bandhua Mukti Morcha v Union of India*

¹⁰² See (2011). ‘The Death of Socio-Economic Rights’. *The Modern Law Review*. p. 547

the Supreme Court of India has chosen to backtrack in favour of the logic of neo-liberalism. He goes on to say:

...the Supreme Court decisions in both the *Narmada Valley* [*Narmada Bachao Andolan v Union of India*] and *Tehri Valley* [*N.D.Jayal v Union of India*] cases, in which the Court completely disregarded the right to shelter of tens of thousands of people in deference to neo-liberal 'development' programs, show how in the contemporary era the Court's activism increasingly manifests several biases - in favour of the state and development, in favour of the rich against workers, in favour of the urban middle-class against rural farmers, and in favour of a globalitarian class and against the distributive ethos of the Indian Constitution.¹⁰³

O'Connell's views are also echoed by a number of other academics,¹⁰⁴ who also cite *Narmada Bachao Andolan v Union of India*¹⁰⁵ and *N.D.Jayal v Union of India*.¹⁰⁶ as evidence that the Supreme Court of India has backtracked on its earlier expansive interpretation of the right to life. I analyse these two cases below and show that the accusations made against the Supreme Court of India are misplaced.

Whilst it may be true that the Supreme Court of India may have shown some biases towards neo-liberalism, it is not true that the Court has done so by backtracking on its earlier interpretation of the right to life as the right to access basic livelihoods. In *Narmada Bachao Andolan v Union of India*, the applicant sought the court to issue an interdict against the construction of a dam beyond a certain size that would necessitate the relocation of people living in the nearby areas. The applicant's argument was summarised by the Court as follows:

The forcible displacement of tribals and other marginal farmers from their land and other sources of livelihood for a project which was not in the national or public interest was a violation of their fundamental rights under Article 21 [Right to life] of the Constitution of India read with ILO Convention 107 to which India is a signatory. Elaborating this contention, it was submitted that this Court had held in a large number of cases that international treaties and covenants could be read into the domestic law of the country and could be used by the courts to elucidate the interpretation of fundamental rights guaranteed by the Constitution....In this connection, our attention was drawn to the ILO Convention 107 which stipulated that tribal populations shall not be removed from their lands without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security or in the interest of national economic development. It was further stated that the said Convention provided that in such cases where removal of this population is necessary as an exceptional measure, they shall be provided with

¹⁰³ Ibid, p. 548

¹⁰⁴ Who include Bhushan, P. (2009) 'Misplaced Priorities and Class Bias of the Judiciary' *Economic and Political Weekly* and Rajagopal, B. (2007). 'Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective'. *Human Rights Review*. p. 157-186

¹⁰⁵ 10 SCC 664

¹⁰⁶ (2004) 9 SCC 362

lands of quality at least equal to that of lands previously occupied by them, suitable to provide for their present needs and future development.¹⁰⁷

It is critical to note that, the applicant's argument was that the evictees' right to life would be violated because the relocation would deprive them of their sources of livelihoods. Contrary to what has been claimed by the academics cited above,¹⁰⁸ the Court did not reject the interpretation that where people are deprived of their sources of livelihood, their right to life is violated. What the Court said was, in this case the applicants' right to life was not violated because government had offered to give them access to better sources of livelihoods after the relocation. The Court confirmed this when it said:

The displacement of the tribals and other persons would not per se result in the violation of their fundamental or other rights. The effect is to see that on their rehabilitation at new locations they are better off than what they were. At the rehabilitation sites they will have more and better amenities than which they enjoyed in their tribal hamlets. The gradual assimilation in the main stream of the society will lead to betterment and progress.¹⁰⁹

Thus, the accusation that the Court backtracked on its earlier stance that the right to life implies the right to access livelihoods is misplaced because, that accusation fails to take into account the particular circumstances of the case.

Another case that has been pointed out as evidence that the Supreme Court of India has backtracked on its earlier interpretation of the right to life as the right to access basic livelihoods is *N.D.Jayal v Union of India*. Again in this case, the Court had to deal with the question whether the right to life would be violated if people were to be relocated to make way for a development project. Contrary to the accusations that the Court refused the notion that the right to life entails the right to access livelihoods, the Court held as follows:

Rehabilitation is not only about providing just food, clothes or shelter. It is also about extending support to rebuild livelihood by ensuring necessary amenities of life. Rehabilitation of the oustees is a logical corollary of Article 21.[Right to life]. The oustees should be in a better position to lead a decent life and earn livelihood in the rehabilitated locations...The overarching projected benefits from the dam should not be counted as an alibi to deprive the fundamental rights of oustees. They should be rehabilitated as soon as they are uprooted. And none of them should be allowed to wait for rehabilitation.¹¹⁰

Thus clearly the Court accepted the notion that the right to life means the right to have access to basic livelihoods and this right had to be respected when people are being relocated in favour of a

¹⁰⁷ Supra note 105

¹⁰⁸ See supra note 104

¹⁰⁹ Supra note 105

¹¹⁰ Supra note 106

development project. The Court authorised the relocation because in its view, the right to life would not be violated given that the government had suggested a comprehensive rehabilitation programme that would see the evictees' livelihoods being restored immediately. Thus I contend that the Supreme Court of India still views the right to life as a source of the right to have access to basic livelihoods such as adequate housing, and my argument that Zimbabwean courts should be persuaded to follow the Indian approach still stands.

Part II 1

5.8 The right to life must incorporate the constitutional objective on adequate housing

The argument that the constitutional right to life implies the duty of the state to undertake reasonable measures to make adequate housing accessible to everyone is further supported by a rule of interpretation which requires the right to life to be interpreted in a manner that promotes the achievement of the constitutional objective on adequate housing. This rule is enshrined in s 46 (1) (d) of the Constitution of Zimbabwe which prescribes that: 'When interpreting this Chapter [the Declaration of Rights], a court, tribunal, forum or body must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2.' As explained in Chapter 2 of this thesis, this rule implies that when interpreting fundamental rights, courts must prefer a meaning that incorporates and promotes the achievement of the relevant constitutional objectives.¹¹¹

This rule is also provided for in s 8 (2) of the Constitution which prescribes that 'Regard must be had to the objectives set out in this Chapter [of the Constitution] when interpreting the state's obligations under this Constitution and any other law.' All fundamental rights create duties for the state and the Constitution defines them broadly as the obligations to respect, protect, promote and fulfil.¹¹² When interpreting what these obligations entail, the courts are therefore required to incorporate the relevant constitutional objectives.

One of these objectives is on adequate housing and it is formulated as follows: 'The State and all institutions and agencies of government at every level must take reasonable legislative and other

¹¹¹ Chinopfukutwa, T. (2016). 'House Demolitions in Zimbabwe: A Constitutional and Human Rights Perspective.' *Zimbabwe Rule of Law Journal*. p. 143

¹¹² See section 44 of the Constitution of Zimbabwe, 2013

measures, within the limits of the resources available to them, to enable every person to access adequate shelter.’¹¹³ The duty to achieve or implement this objective is not directly enforceable as a constitutional right.¹¹⁴ However, this obligation can be enforced as part of a constitutional right and this can be achieved by incorporating it into the scope of a fundamental right, as required by s 46 (1) (d) and 8 (2) cited above. Thus, the duty to make adequate housing accessible to everyone, which is enshrined as a constitutional objective can be incorporated into the scope of the right to life, and this creates the duty of the state to undertake reasonable legislative and other measures to make adequate housing accessible in order to protect or promote the right to life.

This argument has not yet been dealt with in Zimbabwean case law. However, as noted above, it is permissible to refer to comparative foreign law to support this argument. Below, I refer to the jurisprudence of the Supreme Court of India as comparative foreign law and argue that Zimbabwean courts must adopt a similar approach when interpreting the constitutional right to life¹¹⁵ and its relationship with the constitutional objective on adequate housing.¹¹⁶

The Constitution of India provides for a set of constitutional objectives in a manner that is similar to Chapter 2 of the Constitution of Zimbabwe. These objectives are set out as ‘Directive Principles on State Policy’ (DPSP) in part IV of the Constitution of India. The Constitution of India prescribes that the DPSP are not directly enforceable as constitutional rights, but they are ‘fundamental in the governance of the country’,¹¹⁷ in the sense that they provide content or meaning to constitutional rights.¹¹⁸ Similarly and as noted above, the Constitution of Zimbabwe provides for a set of constitutional objectives and prescribes a similar rule that these objectives must be incorporated into the duties created by constitutional rights.¹¹⁹ Given these similarities between India and Zimbabwe, I argue that as Zimbabwean courts develop their own jurisprudence on the meaning of the constitutional right to life, they should consider adopting and adapting the approach taken by the Supreme Court of India on how the DPSP have been applied when interpreting this right.

¹¹³ See section 28 of the Constitution of Zimbabwe, 2013

¹¹⁴ See decision by the High Court of Zimbabwe in *Madzara v Stanbic Bank Zimbabwe Ltd* [2015] ZWHHC 546, para 14

¹¹⁵ Enshrined in section 48 (1) of the Constitution of Zimbabwe, 2013

¹¹⁶ Provided for in section 28 of the Constitution of Zimbabwe, 2013

¹¹⁷ See art 37 of the Constitution of India, 1950

¹¹⁸ See De Villers, B. (1992). ‘Directive Principles on State Policy and Fundamental Rights: The Indian Experience’ *South African Journal on Human Rights*. p. 45

¹¹⁹ See section 46 (1) (d) and section 8 (2) of the Constitution of Zimbabwe

The Supreme Court of India has taken the position that, although the DPSP are not justiciable fundamental rights, they are to be used as aids for interpreting the scope and content of fundamental rights.¹²⁰ For instance in *Bandhua MuktiMorcha v Union of India*¹²¹ the Indian Supreme Court observed that the Constitution of India does not specifically provide for a fundamental right to health but provides for a directive principle to protect and promote health care.¹²² The Court also observed that the Constitution of India provides for the fundamental right to life.¹²³ In the end, the Court incorporated the directive principle on health into the right to life by holding as follows:

The right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Article 41 and 42 [national objective on health] and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State has the right to take any action which will deprive a person of the enjoyment of these basic essentials.¹²⁴ [My emphasis]

Thus, this case stands out as an illustration of how the Supreme Court of India applied national constitutional objectives to interpret the content or meaning of a fundamental right to life. The same Court followed a similar approach in *Olga Tellis v Bombay Municipal Corporation*.¹²⁵ In this case, the Court held that:

Article 39(a) of the Constitution, which is a Directive Principle of State Policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Article 41, which is another Directive Principle, provides, inter alia, that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. Article 37 provides that the Directive Principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country. The Principles contained in Articles 39 (a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life.¹²⁶ [My emphasis]

¹²⁰ See Govindjee, A. (2005). 'Lessons for South African Social Assistance Law from India: The Ties That Bind.' *Obiter*. p. 585–586. See also supra note 118, p. 45

¹²¹ *Bandhua MuktiMorcha v Union of India* (1984) 3 SCC 161

¹²² *Ibid*, para 10

¹²³ *Ibid*

¹²⁴ *Ibid*, para 11

¹²⁵ 1985 2 Supp SCR 51

¹²⁶ *Ibid*, para 22

Thus, although the duty of the state to ensure everyone has adequate livelihoods is entrenched as a DPSP, the Supreme Court of India has incorporated it into the scope of the constitutional right to life. The Court did this because of the rule that requires fundamental rights to be interpreted in a manner that promotes the achievement of constitutional objectives. Thus the Court reached the conclusion that the obligation to protect the constitutional right to life includes the duty of the state to enable citizens to have access to the livelihoods that are necessary for them to enjoy life in human dignity. Thus the DPSP, which are an equivalent of the Zimbabwean national objectives, have been used to define the scope and content of the duties of the state to protect the fundamental right to life.

As argued earlier, Zimbabwean courts should follow a similar approach when interpreting the constitutional right to life. They should incorporate the objective to make adequate housing accessible to everyone, into the scope of the duties created by the constitutional right to life. It is particularly important for Zimbabwean courts to do this considering that the right to life implies the right to live in human dignity. Human beings require access to adequate housing in order to live in human dignity, as indicated above. Therefore, the objective to make adequate housing accessible must be incorporated into the duties of the state to protect and promote the realisation of the right to live in human dignity. This means that individuals may rely on the right to life to compel the government to implement reasonable legislative and other measures to make adequate housing accessible to everyone in Zimbabwe.

As indicated earlier, legislative measures include measures to guarantee every person the right to access resources and materials which they need in order for them to access and establish adequate housing for themselves.¹²⁷ Administratively, the measures also include adopting a coherent and comprehensive set of strategies on how the state will make adequate housing accessible to everyone, without discrimination.¹²⁸ They also include the immediate duty to provide temporary suitable¹²⁹ housing to those who are currently homeless because they have no means to access adequate housing on their own.

¹²⁷ Supra note 23, para 8

¹²⁸ Supra note 23, para 12

¹²⁹ For the protection of human dignity

5.9 Conclusion

The discussion in this chapter can be summed up as follows: the Constitution of Zimbabwe guarantees every person the fundamental right to life. This right must be interpreted in a manner that incorporates the value of human dignity, to imply the right to live in human dignity. The right to live in human dignity implies the right to have access to basic socio-economic living conditions which protect one's inherent worthiness and promotes the growth and development of the human being's inherent capabilities. Adequate housing is part of these living conditions which every human being needs to have access to, in order to enjoy life in dignity. Therefore, the right to live in human dignity incorporates the right to have access to adequate housing. This creates the obligation of the state to implement positive measures¹³⁰ targeted at creating conditions which enable individuals and their families to access adequate housing. These measures must include enacting and implementing the necessary legislation and administrative policies, as well as undertaking other appropriate measures similar to those which the government is required to implement under art 11 (1) of the ICESCR.

This argument is further supported by the rule of interpretation which requires constitutional objectives to be incorporated into the scope of fundamental rights. There is a constitutional objective entrenched in s 28,¹³¹ which requires the state to implement reasonable legislative and other measures to make adequate housing accessible to everyone. This duty is not directly enforceable as a fundamental right but it must be incorporated into the right to life and therefore, can be enforced as part of the duties to protect and promote that right. It is, therefore, possible to rely on the constitutional right to life to compel the government to make adequate housing accessible to everyone, without discrimination, even though the Constitution of Zimbabwe does not explicitly guarantee for every person, the right to have access to adequate housing. In the next Chapter, I examine how, and the extent to which, the same obligation may also be incorporated into the scope of the right to equality.

¹³⁰ Although it must also be acknowledged that the constitutional right to life creates negative obligations which include the duty to refrain from interfering with the existing enjoyment of life in human dignity. Thus, this right can be applied together with the fundamental freedom from arbitrary evictions to enforce the obligation of the state to refrain from conducting forced evictions. The duty to protect life also means the government may be compelled to protect people from forced evictions by conferring them with adequate security of tenure. I however did not discuss these duties under this chapter because these can be enforced as part of the fundamental freedom from arbitrary evictions as demonstrated in the previous chapter. The purpose of this chapter was to examine how the positive duty to make adequate housing can be enforced as part of the right to life.

¹³¹ Of the Constitution of Zimbabwe, 2013

CHAPTER SIX: THE RIGHT TO SUBSTANTIVE EQUALITY AS AN ALTERNATIVE AVENUE FOR THE ENFORCEMENT OF THE RIGHT TO HAVE ACCESS TO ADEQUATE HOUSING

A constitutional commitment to substantive equality is thus also a commitment to the eradication of such systemic inequalities. It establishes an aspirational ideal - the achievement of a society based on equality- and presumes that this is (at least partly) possible through law. In a constitutional sense, therefore, substantive equality is both a value and a legally enforceable right-Catherine Albertyn¹

6.1 Introduction

The Constitution of Zimbabwe guarantees every person the fundamental right to equality.² As part of this right, persons who are still disadvantaged by past unfair discrimination have a right to substantive equality. Under this right, they are entitled to restitutionary measures aimed at ameliorating the existing material disadvantage that has resulted from past unfair discrimination and, which is preventing them from living and participating in society as equals with others. I argue that, persons who have been deprived of access to adequate housing as a result of past unfair discrimination qualify for restitutionary measures aimed at enabling them to obtain access to adequate housing. They can invoke their right to substantive equality to compel the state to implement such measures.

In order to advance this argument, I begin this chapter by demonstrating that there is a right to substantive equality that is provided for under s 56 (6) of the Constitution of Zimbabwe. Thereafter, I show that this right requires the state to implement reasonable legislative and other restitutionary measures to eradicate material disadvantage that is being suffered by previously marginalised groups. Amongst these groups are economically vulnerable people who lost their homes and sources of livelihoods after being unfairly targeted for forced evictions prior to the enactment of the 2013 Constitution. I argue that such people can invoke their right to substantive equality to claim adequate housing to be made accessible to them by the state.

Owing to the dearth of literature and jurisprudence on the right to substantive equality in Zimbabwe, I advance my argument in this chapter by referring to scholarly and judicial views from the comparative jurisdictions of South Africa and Canada. The Constitution of Zimbabwe allows

¹ Albertyn, C. (2007). 'Substantive Equality and Transformation in South Africa' *South African Journal on Human Rights*. p. 254

² See section 56 of the Constitution of Zimbabwe, 2013

courts to borrow interpretations of similar constitutional provisions from comparable foreign jurisdictions.

It is appropriate to refer to the jurisprudence of the Canadian Supreme Court and the South African Constitutional Court because the enactment of the right to equality under their Constitutions was preceded by historical developments that are similar to those that preceded the enactment of the right to equality under the Constitution of Zimbabwe. These include that, similar to Zimbabwe, the two countries experienced racial segregation, based on patriarchal systems of power; which created deep rooted inequalities that continue to exist between individuals and between groups of people.³ The right to equality was entrenched as a constitutional commitment to addressing these inequalities.⁴ Therefore, Zimbabwean judges should be persuaded by how their counter parts in these jurisdictions have referred to historical and social context when interpreting the meaning of the right to equality.⁵

Furthermore, there is a chain of influence which links the development of the Constitutions of these three countries. The South African Bill of Rights borrowed heavily from the Canadian Charter of Rights and Freedoms (the Canadian Charter) because the drafters of the South African Constitution⁶ considered Canada as a comparative jurisdiction,⁷ while the drafters of the Zimbabwean Declaration of Rights were significantly influenced by the South African Bill of Rights, as they considered South Africa to be a best practice jurisdiction on several aspects of the Bill of Rights.⁸ As a result, the right to equality is similarly framed under the three Constitutions.⁹ Therefore, as Zimbabwean courts develop their own jurisprudence on the meaning of the right to equality, they should be persuaded by how the Constitutional Court of South Africa and the Supreme Court of Canada have interpreted the same right under their respective Constitutions.

³ See supra note 1, p. 254-255. Also see Albertyn, C. (1994). 'Women and the Transition to Democracy in South Africa.' In Murray, C. (ed). *Gender and The New South African Legal Order* and Hassim, S. (2006). *Women's Organizations and Democracy in South Africa*.

⁴ Supra note 1, p. 254-255

⁵ As illustrated in *Brink v Kitshoff* 1996 (4) SA 197 (CC) at para 40 and *President of the Republic of South Africa v Hugo* (6) BCLR 708; 1997 (4) SA 1 at para 41

⁶ Both the Interim Constitution of South Africa, 1993 and the Final Constitution of South Africa, 1996

⁷ See Sarkin, J. (1998). 'The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions.' *Journal of constitutional law*. p. 1

⁸ These include the fundamental right to equality, the right to life, guidelines for the interpretation of constitutional rights and the entrenchment of constitutional values.

⁹ See section 9 of the Constitution of South Africa, 1996; section 56 of the Constitution of Zimbabwe, 2013 and art 15 of the Canadian Charter on Rights and Freedoms

In addition to the above, it is also crucial to note that both the Constitution of South Africa and that of Canada entrench the rule that all fundamental rights must be interpreted in a manner that promotes equality and human dignity as a constitutional value.¹⁰ As noted above, this rule of interpretation is similarly entrenched through s 46 (1) (b) of the Constitution of Zimbabwe.¹¹ Therefore, as Zimbabwean courts develop their own jurisprudence on how the values of human dignity and equality can be incorporated into the scope and content of the right to equality, they ought to be persuaded by how the same has been achieved by the Constitutional Court of South Africa and the Supreme Court of Canada.

I however acknowledge that there are some differences between how substantive equality is entrenched under the Constitution of Zimbabwe and how it is entrenched in the Canadian Charter and the 1996 Constitution of South Africa. One major difference is that in Zimbabwe the state has a mandatory constitutional duty to initiate and implement restitutory measures to achieve substantive equality¹², while in both Canada¹³ and South Africa,¹⁴ the state has discretion to initiate measures or not. This difference has an impact on the nature of the role of the courts when enforcing substantive equality. However, although this is a major difference, some of the scholarly and judicial views on substantive equality in Canada and South Africa remain very useful to Zimbabwean courts and academics as they try to develop jurisprudence on the right to substantive equality. Therefore, I will still make use of and engage with both the supportive and dissenting views from Canada and South Africa in order to advance my thesis in this chapter.

6.2 The scope and content of the right to equality under the Constitution of Zimbabwe

¹⁰ See section 39 (1) (a) of the Constitution of South Africa, 1996. Although this rule is not explicitly provided for under the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada has held that it is implied under the Charter. See the following case: *R v Oakes*, [1986] 1 SCR 103 at para 64; *Health Services and Support - Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27 at para 81 and *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 88. Also see Sossin, L. (2014). 'Charter values and administrative justice.' *Osgoode Legal Studies Research Paper Series*. p. 10-11

¹¹ It is entrenched as follows 'When interpreting this Chapter, a court, tribunal, forum or body- must 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'

¹² See s 56 (6) of the Constitution of Zimbabwe, 2013

¹³ See art 15 (2) of the Canadian Charter on Rights and Freedoms as interpreted in *Thibaudeau v Canada* [1995] 2 SCR 627 at p. 655 and *Egan v Canada* [1995] 2 SCR 513 at p. 596

¹⁴ See s 9 (2) of the Constitution of South Africa, 1996

The Constitution of Zimbabwe guarantees every individual the fundamental right to equality.¹⁵ I contend that this right implies the right to formal equality for everyone and the right to substantive equality for groups that have been marginalised by past unfair discrimination. I seek to prove this contention first and thereafter explain how the right to substantive equality can be deployed to enforce the duty of the state to make adequate housing accessible to members of social groups who have been marginalised by past unfair discrimination.

The right to formal equality emanates from the principle of formal equality, which is the idea that similarly situated persons must be treated alike.¹⁶ Under this principle, all people are entitled to derive equal benefit of the law and are protected from being directly or indirectly subjected to a condition or restriction which other persons are not subjected to. This principle is entrenched in s 56 (1) (3) and (4) of the Constitution of Zimbabwe as follows:

(1) All persons are equal before the law and have the right to equal protection and benefit of the law...

(3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.

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

Thus the Constitution guarantees a right to formal equality, which creates the duty of the state to protect people from any form of discrimination that is based on any of the grounds mentioned above in s 56 (3).

However, in addition to entrenching the duty of the state to protect formal equality, the Constitution also requires the state to achieve substantive equality. In comparative jurisdictions, substantive equality has been described as ‘equality in lived, social and economic circumstances and opportunities needed to experience human self-realization’¹⁷ or a form of equality where all

¹⁵ Supra note 2

¹⁶ See Smith, A. (2014). ‘Equality Constitutional Adjudication in South Africa.’ *African Human Rights Law Journal*. p. 611. Also see De Vos, P. (2001). ‘Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness.’ *South Africa Journal on Human Rights*. p. 274 and Currie, I. and De Waal, J. (2013). *The Bill of Rights Handbook*. 6th ed. p. 213

¹⁷ Klare, K. (1998). ‘Legal Culture and Transformative Constitutionalism’ *South African Journal on Human Rights*. p. 146

people enjoy access to resources and the opportunities which they need in order to develop, participate and flourish equally as human beings.¹⁸ Thus substantive equality is a form of equality which focuses on ensuring that all people live in circumstances and conditions where they genuinely enjoy equal access to opportunities and their human dignity is equally protected and promoted. To achieve this form of equality, it has been argued that the state must implement positive measures to eradicate systemic forms of domination and material disadvantage.¹⁹ In order to address the attendant material disadvantage, it is inevitable that the state may have to implement measures that favour a particular group in order to improve the living conditions of the members of that group so that those people are able to access opportunities which they currently cannot access as a result of their existing material disadvantage.²⁰ For example, the state may have to provide bursaries to a particular group of people in order to enable the members of that group to access education so that they gain skills to compete for opportunities on equal footing with the rest of the society.

The duty to achieve this form of equality (substantive equality) is entrenched in s 56 (6) of the Constitution of Zimbabwe as follows:

The State must take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination. (a) Such measures must be taken to redress circumstances of genuine need; (b) No such measure is to be regarded as unfair for the purposes of subsection (3). [My emphasis].

A careful reading of the above cited provisions shows that the state is not only permitted to undertake measures that favour previously marginalised groups but, it has an obligation to implement those measures in order to protect and promote the achievement of equality for such groups. I therefore argue that the above cited s 56 (6) guarantees a right to substantive equality for people who are still disadvantaged as a result of past unfair discrimination.

In making this argument, I acknowledge that it could be counter-argued that the duty of the state to achieve substantive equality does not necessarily imply a justiciable right of previously marginalised groups to compel the state to implement affirmative action measures to benefit them. This counter-argument is likely to emerge from jurisdictions where the duty to achieve substantive

¹⁸ Liebenberg, S. and Goldblatt, B. (2007). 'The Interrelationship Between Equality and Socio-economic Rights under South Africa's Transformative Constitution' *South African Journal on Human Rights*. p. 342-343

¹⁹ Albertyn, C and Goldblatt, B. (1998). 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' *South African Journal on Human Rights*. p. 249

²⁰ Supra note 18, p. 342

equality is couched as a discretion which the state enjoys. In Zimbabwe, the situation is different. Unlike in other jurisdictions²¹ where the state ‘may’ undertake affirmative action measures, in Zimbabwe this is framed as a peremptory duty which the state ‘must’ perform as part of protecting and promoting the right to equality for groups who have been disadvantaged by past unfair discrimination. Thus the right to substantive equality in Zimbabwe is provided for in s 56 (6) as a sub-right under the right to equality.

It however should be noted that the right to substantive equality can be claimed only by ‘people or classes of people who have been disadvantaged by unfair discrimination.’²² In terms of s 56 (4) of the Constitution of Zimbabwe, unfair discrimination occurs when a person is ‘subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or other people are accorded directly or indirectly a privilege or advantage which they are not accorded.’ Therefore, the right to substantive equality can only be invoked if individuals are able to show that they are or they belong to a social group that has been unfairly marginalised prior to the enactment of the 2013 Constitution of Zimbabwe, and as a result of that marginalisation, they are currently experiencing some form of disadvantage. The question that arises next is; what is it that these groups or members of these groups are entitled to under the right to substantive equality? I discuss this in the next paragraphs.

6.3 Implications of the right to substantive equality

In his book on equality, Laurie Ackermann has argued that the over-arching objective of substantive equality is to authorise public law and constitutional restitution remedies in favour of those who are still disadvantaged as a result of past unfair discrimination.²³ According to Sandra Fredman, these restitution remedies should be provided in the form of positive measures that are adopted by the state in order to promote equality.²⁴ I acknowledge that these views were expressed in the context of analysing the nature of positive obligations that arise from s 9 of the South African Bill of Rights. However, these views are also relevant and useful when one is analysing the implications of the right to substantive equality in Zimbabwe because of the nature in which this

²¹ Such as Canada. See article 15 (2) of the Canadian Charter as interpreted in *Thibaudeau v Canada* [1995] 2 SCR 627 at p. 655 and *Egan v Canada* [1995] 2 SCR 513 at p. 596

²² *Supra* note 12

²³ Ackermann, L. (2013). *Human Dignity: Lodestar for Equality in South Africa*. p. 345

²⁴ Fredman, S. (2005). ‘Providing Equality: Substantive Equality and the Positive Duty to Provide’. *South African Journal on Human Rights*. p. 163

right is framed under s 56 (6) of the Constitution. In explicit language, s 56 (6) of the Constitution of Zimbabwe prescribes that the state must implement reasonable legislative and other measures to promote the achievement of equality for people who are still disadvantaged as a result of past unfair discrimination. Therefore, under the right to substantive equality, the members of marginalised groups who are still disadvantaged as a result of past unfair discrimination, are entitled to preferential treatment by the state, and such treatment should be provided through undertaking reasonable legislative and other measures that are aimed at achieving or promoting equality for them.

The question however remains as to what sort of tangible measures is the state expected to implement in order to achieve equality for these groups? In response to a similar question, Sandra Liebenberg suggested that ‘Dignity, alongside the value of equality, is capable of being (and should be) developed as an important interpretive vehicle for a substantive understanding of equality’²⁵ Although she made this suggestion in the context of the South African Bill of Rights, this suggestion also holds in Zimbabwe because the Zimbabwean Constitution requires all fundamental rights to be interpreted in a manner that upholds the values of equality and human dignity.²⁶ Therefore, I also make a similar argument here that in order to interpret the measures which the Constitution envisages under the duty of the state to achieve substantive equality, courts must resort to the values of equality and human dignity as interpretive aids. In the paragraphs below, I demonstrate how these two values shed light on the nature of measures contemplated under the duty to achieve substantive equality.

6.4 The value of equality as an interpretive aid

As indicated earlier, the Constitution entrenches equality as a value and this signifies a commitment towards achieving the goal of establishing a society that is based on equality.²⁷ The duties of the state under the right to substantive equality should be interpreted in a manner that advances the achievement of this goal. As noted in Chapter 4, the value of equality has multiple dimensions to it, all of which are important when one is trying to understand what the constitutional goal of establishing an equal society entails. I argue that when these dimensions are incorporated

²⁵ Supra note 18, p. 344. Also see Alibertyn, C and Goldblatt, B. (2007) 'Equality' In Woolman, S et al. (eds) *Constitutional Law of South Africa* (2 ed) p. 14

²⁶ See s 46 (1) (b)

²⁷ Also see preamble to the Constitution of Zimbabwe, 2013

into the right to substantive equality, they reveal that the nature of measures which the state is required to implement under the right to substantive equality include measures that are aimed at addressing material disadvantage that is suffered by previously marginalised groups.

Viewed through Ronald Dworkin's lens, a society based on the value of equality is one where the state demonstrates equal concern for the welfare of all its citizens.²⁸ Therefore, by entrenching the right to substantive equality, the Constitution seeks to advance the achievement of an egalitarian society by empowering poverty stricken and previously marginalised groups with a justiciable right to demand that the state must show equal concern for their welfare. The measures contemplated under the duty to achieve substantive equality therefore, should involve measures that are aimed at improving the living conditions for the previously marginalised groups.

A similar conclusion will be reached if one applies Amartya Sen's view of a society based on equality as one where all people enjoy equal capability to make decisions regarding how they want to live their lives.²⁹ As a result of material disadvantage, certain groups in society are constrained from making certain choices in life. For instance, a person who cannot afford to access adequate housing may not be able to freely make a decision to marry and establish a family because he or she will not have a place to settle with that family. Another example is that of a person who cannot afford access to education, who is then constrained from choosing to pursue certain career paths. Thus, there can never be equality of capabilities in a society where certain groups of people live in material disadvantage, while others are privileged. If the right to substantive equality is to be interpreted in a manner that advances the achievement of an egalitarian society, as envisioned under s 46 (1) (b) of the Constitution, then the measures envisaged under that right must by necessity aim at creating equality of capabilities amongst the people and to achieve that, it is inevitable that such measures must aim at improving the living conditions for the previously marginalised groups.

According to Nancy Fraser, for a society to be based on the value of equality, there must be equal access to and equal participation in decision making processes.³⁰ Despite a guarantee of formal equality, previously marginalised groups remain marginalised from crucial public decision making

²⁸ Dworkin, R. (2000). *Sovereign Virtue: The Theory and Practice of Equality*. p. 1

²⁹ Sen, A. (1999). *Development as Freedom*. p. 74-75. Also see Sen, A. (2010) *The Idea of Justice*. p. 231-235

³⁰ Fraser N (1992) 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' In Calhoun, C. (ed) *Habermas and the Public Sphere* p.121-126

processes because they are constrained from accessing and taking part in those processes as a result of poverty and other forms of material disadvantage. For example, homeless persons in Zimbabwe may not be able to register as voters because they do not have official residences and cannot obtain proof of residence.³¹ Therefore, although the law formally gives them the right to vote³², they nonetheless remain marginalised from participating in electoral decision making processes because of the material disadvantage of not having access to a home. Thus there can never be parity of participation in decision making processes if there is no parity of access to basic livelihoods. If the right to substantive equality is to be interpreted in a manner that promotes the achievement of a society based on the value of equality, then the measures contemplated under this right must also seek to address conditions of material disadvantage in order to enable the marginalised groups to access decision making processes and participate in those processes with an equal voice.

Viewed from John Rawls's social minimum theory, a society can only be said to be truly based on the value of equality if all the people have access to basic necessities.³³ The achievement of such a society remains an illusory dream if the right to substantive equality is not interpreted as the right to receive reasonable support from the state, to access basic necessities of life.

Thus when the value of equality is incorporated into the right to substantive equality, it necessitates that the measures adopted by the state in pursuit of substantive equality must seek to eradicate material disadvantage in order to advance the establishment of an equal society. I acknowledge this argument could be viewed with scepticism by those who perceive the value of equality as limited to formal equality, which entails the idea that people must simply be guaranteed with equal basic civil liberties and there is no obligation on the state to address issues of material disadvantage. As mentioned above, equality has multiple dimensions to it and all of them are equally important and should be taken into account if the goal of establishing an equal society is to be realised. Therefore, it is correct that in order to achieve a society based on the value of equality, people must equally enjoy the basic liberties. However, this is just one dimension of equality. There are many other dimensions, which include the one I discussed above, namely that the state must ensure that the basic amenities of life are accessible to everyone. When this

³¹ See s 5 of Electoral (Voter Registration) Regulations, SI 85 of 2017

³² See s 67 (1) of the Constitution of Zimbabwe, 2013

³³ Rawls, J. (2001). *Justice as Fairness: A Restatement* p. 162

dimension of the value of equality is incorporated into the right to substantive equality, the court will reach the conclusion that the nature of measures that are envisaged under the right to substantive equality includes measures that seek to address conditions of material disadvantage which are being suffered by the members of the previously marginalised groups.

6.5 The value of human dignity as an interpretive aid

As indicated earlier, the Constitution also entrenches human dignity as a value and this signifies a commitment towards achieving the goal of establishing a society that is based on human dignity. The duties of the state under the right to substantive equality should be interpreted in a manner that advances the achievement of this goal.

As noted in the previous chapter, the constitutional goal of establishing a society based on the value of human dignity entails a vision of a Zimbabwean society where the inherent worthiness of all human beings is equally protected.³⁴ It also entails the establishment of a society where every human being is able to exercise and develop their inherent human capabilities which include the capabilities: to exercise their own judgement; to have a sense of self-worth; to exercise self-determination; to develop their own personalities and to strive for self-fulfilment in their lives.³⁵ Therefore, if the right to substantive equality is to be interpreted in a manner that promotes the attainment of this constitutional goal, then the measures contemplated under the duty of the state to achieve substantive equality should include measures that seek to protect the inherent worthiness of the members of the previously marginalised groups. The inherent worthiness of these people is violated by their living conditions that are characterised by lack of access to basic livelihoods. The growth of their inherent capabilities is undermined because of the attendant material disadvantage. For instance, when an individual is unable to access a decent home, they live in the open, without privacy and their sense of self-worth is violated. Thus the constitutional vision for a society based on human dignity can never be achieved where there are groups of people who live without access to basic livelihoods. If the duties of the state under the right to substantive equality are to be interpreted in a manner that promotes the achievement of this constitutional goal, then the nature of measures to be undertaken by the state in pursuit of substantive equality should necessarily

³⁴ See Gregor, M. (ed). (1996). *Immanuel Kant: Practical Philosophy*. p. 557. Also see supra note 24, p. 56

³⁵ Supra note 24, p. 86

target the eradication of material disadvantage and empowering the previously marginalised groups to improve their living conditions.

Thus whether one applies the value of equality or the value of human dignity as an aid to interpret the nature of measures contemplated under the duty of the state to achieve substantive equality, it is inevitable to come to the conclusion that these measures must include legislative and other measures that are aimed at eradicating material disadvantage which is currently preventing members of previously marginalised groups from accessing opportunities and living life as equals with the rest of the society.

6.6 Providing access to adequate housing as part of the restitutionary positive measures

When persons live without access to adequate housing, they are constrained from accessing certain opportunities in life and they cannot actively participate in public life as equals with others. Thus lack of access to adequate housing is a material disadvantage that deprives people of their capability to function to their optimum as human beings and live as equals with others.³⁶ The right to substantive equality is guaranteed in the Constitution to assist such people provided the reason why they are constrained from accessing adequate housing is because of past unfair discrimination.

There are a number of identifiable social groups in Zimbabwe who are constrained from accessing adequate housing because of past unfair discrimination. For example, in 2005, the Government of Zimbabwe conducted a mass eviction campaign which resulted in the displacement of over 700 000 people.³⁷ This eviction campaign unfairly targeted certain communities who were perceived to be supporters of the then newly formed opposition political movement.³⁸ Thus these communities were unfairly targeted on the basis of their political affiliation. As a result of the forced eviction campaign, they lost their homes and they also lost their sources of livelihoods, as some of them had their informal (backyard) industries destroyed.³⁹ In an effort to protect themselves from similar evictions in future, Zimbabweans successfully advocated for the entrenchment of the fundamental freedom from arbitrary evictions when the new Constitution of

³⁶ Liebenberg, S. (2005). 'The Value of Human Dignity in Interpreting Socio-Economic Rights.' *South African Journal on Human Rights*. p. 7

³⁷ See Tibaijuka, A. (2005). 'Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe.' p. 8. Available at: <http://ww2.unhabitat.org/documents/ZimbabweReport.pdf> [Accessed 10 Apr. 2015]

³⁸ Ibid, p. 20-21

³⁹ Supra note 38, p. 7

Zimbabwe was adopted in 2013.⁴⁰ However the impact and disadvantage caused by the 2005 mass forced eviction campaign is still being experienced by the survivors of this campaign. They are materially disadvantaged in the sense that they are still living under inadequate housing conditions and have no means to access housing on their own, as a result of the 2005 mass forced eviction campaign which unfairly targeted them on the basis of their political beliefs and, destroyed their homes as well as their sources of economic livelihoods. These people can invoke their right to substantive equality to claim positive restitutionary or remedial action to be taken by the state in order to enable them to gain access to adequate housing.

In making this claim, I recognise Sandra Fredman's call for caution regarding the role of courts in enforcing substantive equality.⁴¹ She rightly argues that in some welfare states, the achievement of substantive equality exists as a political commitment as opposed to a constitutional right.⁴² In such jurisdictions, Fredman argues that the role of the courts is limited to scrutinising the appropriateness of the restitutionary measures taken by the state, as opposed to compelling the state to initiate restitutionary measures.⁴³ In other words, there is no mandatory duty on the part of the state to initiate restitutionary measures but, if the state decides to implement the measures, the appropriateness of such measures can be reviewed by the courts.

In Zimbabwe, substantive equality is entrenched as a justiciable constitutional right which must be respected, protected, promoted and fulfilled by the state.⁴⁴ Therefore the role of the court is not limited to reviewing what the state has already initiated as restitutionary measures. Where the state has failed to initiate positive reasonable remedial measures, the courts have the competency to compel it to do so. It is therefore legally possible for people who live under conditions of inadequate housing as a result of past unfair discrimination, to seek the courts' intervention to compel the state to initiate positive restitutionary measures that enable them to access adequate housing.

In making the above argument, I recognise that even in comparative jurisdictions where the achievement of substantive equality is entrenched as a constitutional obligation, the role of the

⁴⁰ See s 74 of the Constitution as interpreted in *Peter Makani v Epworth Local Board* HH 550–14 at p. 1-2

⁴¹ *Supra* note 25

⁴² *Supra* note 25, p. 164

⁴³ *Ibid*

⁴⁴ As required by s 44 of the Constitution of Zimbabwe, 2013

courts is not as clear as I suggested above. For instance in Canada, the notion of substantive equality is entrenched in art 15 (2) of the Canadian Charter.⁴⁵ However, the Canadian Supreme Court has not given a decisive interpretation on whether art 15 (2) implies that the state can be compelled to initiate positive restitutionary action where it has failed to do so, or the role of the court is limited to reviewing the appropriateness of what the state has decided to initiate.

In *Andrews v Law Society of British Columbia*⁴⁶, the Supreme Court of Canada confirmed that art 15 (2) allows the state to undertake restitutionary measures in favour of certain groups and, such measures shall not be deemed to be unfairly discriminatory.⁴⁷ This however did not answer the question whether in the event that the state has failed to take any action, a group of people who are still disadvantaged by past unfair discrimination can approach the Court under art 15 (2) and claim that the state must initiate restitutionary measures to ameliorate their disadvantage. That question remained unanswered until *Haig v Canada (Chief Electoral Officer)*⁴⁸, when the Court said ‘the government may be required to take positive steps to ensure the equality of people or groups who come within the scope of section 15 [of the Charter]’ Thus the Court confirmed that, where the state has failed to act, it is possible to compel it to initiate positive measures to ameliorate the disadvantage suffered by a group as a result of past unfair discrimination. A similar interpretation was made in *Schachter v Canada*.⁴⁹

However, in *Thibaudeau v Canada*⁵⁰ L'Heureux-Dube J dissented as follows: ‘Although section 15 of the Charter does not impose upon governments the obligation to take positive actions to remedy the symptoms of systemic inequality, it does require that the government not be the source of further inequality.’ Thus she rejected the earlier position that the state can be compelled to initiate restitutionary measures if it fails to do so. This interpretation was maintained in *Egan v Canada*,⁵¹ where Cory and Lacobucci JJ said ‘It is clear that Parliament does not have any

⁴⁵ It is enshrined as follows: ‘Subsection (1) [Freedom from unfair discrimination] does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

⁴⁶ [1989] 1 S.C.R. 143

⁴⁷ A similar interpretation was reiterated in *Weatherall v Canada (Attorney General)* [1993] 2 S.C.R. at p. 874

⁴⁸ [1993] 2 S.C.R. 995 at p. 1041

⁴⁹ [1992] 2 S.C.R. 679 at p.721 where Chief Justice Lamer (who wrote for the majority) said ‘Similarly, the equality right is a hybrid of sorts since it is neither purely positive nor purely negative. In some contexts it will be proper to characterize section 15 as providing positive rights.’

⁵⁰ [1995] 2 SCR 627 at p. 655

⁵¹ *Egan v Canada* [1995] 2 SCR 513 at p. 596

constitutional obligation to provide benefits. However, once the decision has been made to confer a benefit, it cannot be applied in a discriminatory manner.’ Thus the Court seemed to suggest that its role was limited to reviewing the appropriateness of action taken by the state as opposed to compelling the state to initiate restitutionary measures. The Court then made another reverse turn in *Eldridge v British Columbia*⁵², where La Forest wrote that: ‘It has been suggested that section 15(1) of the Charter does not oblige the state to take positive actions, such as providing services to ameliorate the symptoms of systemic or general inequality. Whether or not this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case is of a wholly different order.’ In *Vriend v Alberta*⁵³, the majority of the Court suggested that art 15 provides a basis for the Court to compel the state to legislate or to act in some circumstances, but still left the question unanswered. Thus, when one compares the interpretation of art 15 of the Canadian Charter in *Andrews v Law Society of British Columbia*, *Haig v Canada*, *Schachter v Canada*, *Thibaudeau v Canada*, *Egan v Canada*, *Eldridge v. British Columbia* and *Vriend v. Alberta*, it is evident as Bruce Porter⁵⁴ and Paul O’Connell⁵⁵ alleges that, the Supreme Court of Canada has been indecisive.

Therefore, even in jurisdictions where substantive equality is entrenched as a constitutional duty, there is still a raging debate on whether this means the state can be compelled to initiate restitutionary measures or the court’s role is limited to reviewing the appropriateness of what the state has in its discretion decided to initiate. However, I argue that in Zimbabwe, that debate should not arise because unlike in Canada, the duty to initiate restitutionary measures is framed as a mandatory obligation which the state must undertake⁵⁶ as opposed to a discretionary power which the state may exercise or chose not to exercise.⁵⁷ Therefore, if the state in Zimbabwe fails to initiate restitutionary measures, there should not be any doubt that the courts can be relied upon to compel the government to develop and implement those measures. Thus, if the state fails to initiate restitutionary measures to ameliorate the housing challenges being experienced as a result of past

⁵²[1997] 3 S.C.R. at p. 678

⁵³ [1998] 1 S.C.R. at p. 533-534

⁵⁴ See (1998). ‘Beyond Andrews: Substantive Equality and Positive Obligations after Eldridge and Vriend’ *Constitutional Forum*. p. 73

⁵⁵ See (2011). ‘The Death of Socio-Economic Rights’. *The Modern Law Review*. p. 543-544

⁵⁶ See Supra note 12

⁵⁷ As is the case with art 15 (2) of the Canadian Charter of Rights and Freedoms.

unfair discrimination, the courts can be requested to intervene and issue an order which compels to government to initiate the measures.

Some academics have rightly argued that the constitutional agenda to achieve substantive equality is a long term vision.⁵⁸ Therefore, the right to substantive equality is a right that is to be progressively fulfilled, as opposed to being an immediate right. I agree with this view because the ability of the state to eradicate material disadvantage will in most cases be determined by the resources available to the state. Therefore, the duty of the state to undertake restitutionary or remedial action to enable previously marginalised groups to access adequate housing is meant to be fulfilled progressively, subject to the amount of resources available to the state.

However, whilst the right to restitutionary measures is to be fulfilled progressively, there are certain immediate steps that the state is required to take and these do not require substantial resources. This interpretation accords well with the manner in which the right to substantive equality is framed in s 56 (6) of the Constitution. Under this right, the state ‘must take reasonable legislative and other measures’ to promote the achievement of equality for the previously marginalised individuals and groups. Therefore, the state is also required to develop and adopt legislative measures. Thus the state can be compelled to enact legislation and or administrative policies which indicate how it plans to address the attendant material disadvantage as remedial action for previously marginalised groups. Therefore, people who are constrained from accessing adequate housing as a result of past unfair discrimination, can invoke their right to substantive equality to compel the state to develop reasonable plans and policies which indicate how it intends to make adequate housing accessible to them. These plans should be developed in genuine consultation with the affected groups.⁵⁹

In addition to developing these plans, the state can also be compelled to implement other immediate measures such as providing the affected groups with suitable temporary adequate housing, in the event that these people are homeless as a result of past unfair discrimination. In comparative jurisdictions, the courts⁶⁰ have developed a criteria which must be met if such measures are to be deemed reasonable. This criteria has been discussed elaborately in Chapter 2

⁵⁸ Supra note 25, p. 342-343

⁵⁹ As is required by section 68 of the Constitution of Zimbabwe, 2013

⁶⁰ See for example the decision of the Constitutional Court of South Africa in *Government of the Republic of South Africa v Irene Grootboom* 2000 (11) BCLR 1169 (CC)

and therefore, there is no need to repeat it here save to say that it includes the requirements that: the measures must be coherent⁶¹; they must be backed up by sufficient resources to finance their implementation⁶² and they must address the short term and long term housing needs of the affected people.⁶³ This criteria can also be applied in Zimbabwe given that the Constitution requires measures adopted to be reasonable and it allows courts to borrow the interpretation of ‘reasonable measures’ from foreign jurisdictions where a similar concept is entrenched.⁶⁴ An important component of the criteria for reasonable measures is therefore that the measures must address the immediate housing needs of the previously marginalised groups. This gives people who are homeless (as a result of past unfair discrimination) an immediate right to restitutionary measures in the form of suitable temporary housing, in order to address their immediate and urgent housing needs. It cannot be denied that the ability of the state to provide temporary housing is also dependent upon the resources available. However, the state cannot evade this responsibility by simply claiming that it does not have enough resources.⁶⁵ Where the state claims that it does not have sufficient resources to provide temporary housing as a restitutionary measure, it will have to prove that to the court and it must satisfy the court that it has done everything reasonably possible within its power and has failed to find the resources. The court can also compel the state to meaningfully engage with the affected groups in order to find a solution to their situation of homelessness.

As part of the immediate restitutionary measures, the state may also be compelled to provide security of tenure to people who are living in informal settlements as a result of past unfair discrimination. For instance, as a result of the mass forced eviction campaign described above, a number of people who lost their homes ended up settling in informal settlements that are dotted around the country.⁶⁶ They do not have security of tenure and are constantly harassed with threats of forced evictions.⁶⁷ These people can rely on their right to substantive equality to claim, as a

⁶¹ Ibid, para 41

⁶² Ibid, para 39

⁶³ Ibid, para 43

⁶⁴ See section 46 (1) (e) of the Constitution of Zimbabwe, 2013 which states that courts may consider relevant foreign law, when interpreting provisions of the Declaration of Rights.

⁶⁵ See section 324 of the Constitution of Zimbabwe, 2013 which state states that ‘All constitutional obligations must be performed diligently and without delay’

⁶⁶ These include Hopley Farm, Caledonia and Epworth.

⁶⁷ See Newsday ‘Squatters misery worsening’. Available on <https://www.newsday.co.zw/2013/01/16/squatters-misery-worsening/> (Accessed on 8 September 2017)

restitutionary measure, that they immediately be given security of tenure while the state is seeking to progressively make adequate housing accessible to them.

Thus the right to substantive equality in s 56 (6) of the Constitution can be interpreted to infer the duty of the state to implement restitutionary measures that make adequate housing accessible to social groups that are being deprived of adequate housing, as a result of past unfair discrimination. As acknowledged earlier, the government enjoys discretion to select the specific policies on how to empower these people to obtain access to adequate housing. However, if the government fails to develop measures that are reasonable, it can be compelled to do so. Thus the government's international legal obligation to develop and implement appropriate measures and policies to empower vulnerable persons to access adequate housing⁶⁸ can be enforced in domestic courts by reading it into the duty of the state to achieve substantive equality as provided for in s 56 of the Constitution.

6.7. Conclusion

By virtue of having ratified the ICESCR, the Government of Zimbabwe is internationally bound to ensure the progressive realisation of the right of access to adequate housing by everyone in the country. As discussed in the previous chapter, this obligation can be enforced in Zimbabwean courts by relying on the right to live in human dignity. However, social groups who live under inadequate housing conditions as a result of past unfair discrimination have a choice to invoke their right to substantive equality in order to compel the state to implement restitutionary measures that ameliorate their disadvantage and enable them to access adequate housing. In practice, the following are some of the measures which the state can be compelled to implement: developing reasonable policies which indicate how the state intends to make adequate housing accessible to the previously marginalised groups, providing suitable temporary housing to those who are homeless and providing security of tenure to those who live in informal settlements as a result of past unfair discrimination.

It must be remembered that the purpose of this thesis is to identify alternative constitutional rights as means to compel the government to make adequate housing accessible to every person in

⁶⁸ Provided under art 11 (1) of the ICESCR as interpreted in UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991 at para 8 (e)

Zimbabwe. Thus far, I have suggested that the right to life can be invoked by anyone who is economically vulnerable to claim access to adequate housing, while the right to substantive equality can be applied to achieve the same objective but only for disadvantaged previously marginalised groups. In addition to these two rights, I now turn to argue that parents or guardians who are adults and who may not qualify for restitutionary measures under substantive equality can rely on their children's right to shelter, to claim access to adequate housing for themselves.

CHAPTER SEVEN: THE CHILDREN'S RIGHT TO SHELTER AS AN ALTERNATIVE AVENUE FOR THE ENFORCEMENT OF THE RIGHT TO HAVE ACCESS TO ADEQUATE HOUSING

Every child has the right to a standard of living which is adequate to cater for the child's physical, mental, spiritual, moral and social development. Although primary responsibility lies with the parents, it is the state's duty to assist parents in this regard, and in case of need, the state must provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing—Anne Skelton on the interpretation of the UNCRC¹

7.1 Introduction

The Constitution of Zimbabwe guarantees every child the right to parental care² and the right to shelter.³ When these two constitutional rights are interpreted together, they create the duty of every parent and guardian to provide adequate housing to their children. However, I argue that the state has a duty to create the necessary conditions to enable every parent and guardian to provide adequate housing to their children. As part of creating these conditions, the state has to enact the necessary legislation. Subject to the resources available to the state, the government has to provide reasonable material assistance to make the necessary resources, services and materials accessible to the parents and guardians so that they can secure and provide adequate housing for their children. It also has an immediate duty to provide security of tenure not just for the children but also for the parents who live with those children. By performing these duties under the right to adequate housing for children, the state is made to indirectly fulfil most of its international law duties under art 11 (1) of the ICESCR that are due to the parents.

To illustrate the above argument, I begin this chapter by demonstrating that parents have the primary duty to provide their children with adequate housing. After that, I discuss the obligations of the state to empower parents and guardians to provide adequate housing to their children by creating the enabling legal framework, providing security of tenure and providing material assistance.

7.2 The right to parental care

¹ (2010) 'Girls' Socio-economic Rights in South Africa' *South African Journal on Human Rights*. p. 143

² See section 81 (1) (d) of the Constitution of Zimbabwe, 2013

³ See section 81 (1) (f) of the Constitution of Zimbabwe, 2013

The Constitution of Zimbabwe provides every child with the right to parental care. This right is enshrined in s 81 (1) (d) of the Constitution as follows; ‘Every child, that is to say, every boy and girl under the age of eighteen years, has the right- to family or parental care...’ The right to parental care is derived from the common law doctrine of ‘parental power’.⁴ It gives children the right to live with their parents or their guardians and, it places an obligation on parents or guardians to provide for the children’s socio-economic needs.⁵

This right is guaranteed alongside the right to shelter for children, which is entrenched in section 81 (1) (f) as follows: ‘Every child, that is to say every boy and girl under the age of eighteen years, has the right-to education, health care services, nutrition and shelter.’ When the right to parental care is interpreted together with the children’s right to shelter, it creates the obligation for parents and guardians to provide their children with adequate housing. However, it must be noted that the Constitution says children have a right to ‘shelter’.⁶ Therefore, a question arises as to whether children are to be provided with rudimentary shelter or with adequate housing.⁷ I argue that children are entitled to be provided with housing that is adequate.

7.3 Why the children’s right to shelter should be interpreted to mean the right to adequate housing for children?

The principle of the best interests of the child dictates that the right to shelter in s 81 (1) (f) of the Constitution should be interpreted to mean the right to adequate housing for children. This principle is entrenched in s 81 (2) of the Constitution as follows: ‘A child’s best interests are paramount in every matter concerning the child.’⁸ The courts in Zimbabwe⁹ have interpreted this

⁴ See Pieterse, M. (2003). ‘Reconstructing the Private/Public Dichotomy? The Enforcement of Children's Constitutional Social Rights and Care Entitlements.’ *South African Journal on Human Rights*. p. 6

⁵ Ibid, p. 7. Also see Currie, I. and De Waal, J. (2013). *The Bill of Rights Handbook*. 6th ed. p. 604

⁶ Supra note 3 provides as follows: ‘Every child, that is to say every boy and girl under the age of eighteen years has the right to education, health care services, nutrition and shelter.’

⁷ The nature of housing which children are entitled to determines the nature of obligations which the state is required to perform in order to enable parents to secure the housing.

⁸ A similar principle is enshrined, with some further explanation in art 3 of the United Nations Convention on the Rights of the Child as follows: ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’

⁹ See *Mukundu v Chigumadzi* (2015) ZWHHC 818 at p. 5 and *Kempen v Kempen* (2016) ZWSC 14 at para 5. Also see *Mudzuru v Minister of Justice and Parliamentary Affairs* (2015) ZWCC 12 where the Court was seized with a matter in which it had to determine the appropriate interpretation of a fundamental right that had an impact on the legality of marriages concluded by persons who are below the age of eighteen (child marriages). The provision at issue was section 78 (1) of the Constitution of Zimbabwe that states that: ‘Every person who has attained the age of eighteen years has the right to found a family.’[My emphasis]. The Court had to determine if this provision outlawed child

principle to mean that, when interpreting the meaning of a law or a constitutional right, the courts must prefer an interpretation which best protects the welfare interests of the child.

There are two possible interpretations of the children's right to shelter. This right may be interpreted broadly or minimally. A minimalist interpretation would suggest that the right to shelter implies that every child has a right to rudimentary housing services, which means it would be sufficient to provide a mere roof over the child's head. The broad interpretation suggests a right to adequate housing that meets all the minimum standards described in Chapter 3 of this thesis.¹⁰

The broad interpretation must be preferred because it is the one which best protects the welfare and dignity of the child.¹¹ The purpose of entrenching the right to shelter is to protect and promote the welfare and dignity of the child.¹² It is to ensure that the child enjoys an adequate standard of living.¹³ Therefore, it is in the best interests of the welfare and dignity of every child in Zimbabwe that the right to shelter be interpreted broadly and purposively, to imply the right to adequate housing.¹⁴ As part of this right, children are therefore entitled to be provided with housing that is habitable and where they enjoy adequate security of tenure.

marriages. There were two possible interpretations that were presented to the Court. The first interpretation, as contended by the Respondents, was that the provision in question should be given its literal interpretation, that is that it does not give anyone any right to marry but a right to 'found a family'. Thus, the Respondent argued that the impugned legislation that authorised child marriages did not violate the right to marry because there is no such a right in the Constitution. The second interpretation, as contended by the Applicants, was that the provision gave every person, upon attaining the age of 18, the right to marry and therefore child marriages are ultra vires the Constitution. The Court preferred this interpretation primarily because it is the one that best protects and promotes the interests of children in Zimbabwe. Thus the Court applied the principle of the best interests of the child (in conjunction with other factors prescribed under the Bill of Rights interpretation guidelines) to determine the appropriate interpretation of a fundamental right in the Constitution.

¹⁰ See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991 at para 8

¹¹ The child has a right to human dignity under section 51 of the Constitution of Zimbabwe, 2013

¹² See the preamble to the United Nations Convention on the Rights of the Child. Also, see preamble to the African Charter on the Rights and Welfare of the Child. Also see section 46 (1) (b) that requires the rights enshrined in the Constitution of Zimbabwe to be interpreted in a manner which secures and promote human dignity.

¹³ See article 27 (1) and (3) of the United Nations Convention on the Rights of the Child (UNCRC)

¹⁴ This interpretation is also supported by section 46 (1) (b) of the Constitution which requires all fundamental rights to be interpreted in a manner that upholds the constitutional value of human dignity. It also accords well with the rule in section 46 (1) (c) which stipulates that when interpreting constitutional rights, courts must incorporate relevant international law norms and standards. Under article 27 of the UNCRC and article 11 (1) of the ICESCR, the right to housing is required to be interpreted broadly. This interpretation was also supported in comparative law in *Government of the Republic of South Africa v Irene Grootboom* 2000 (11) BCLR 1169 (CC), para 73

The duty to provide such housing primarily rests with the parents and guardians.¹⁵ However, the state has obligations in terms of s 44 of the Constitution of Zimbabwe¹⁶, to protect, promote and fulfil the rights of the child. In the paragraphs below, I explain how these obligations imply the duty of the state to implement reasonable measures to make adequate housing accessible to parents so that they can secure and provide it to their children, and by so doing, the state will be indirectly fulfilling most of its duties under art 11 (1) of the ICESCR that are due to the parents.

7.4 Duty to protect and promote the children's right to adequate housing

As indicated earlier in Chapter 1 of this thesis, most of the fundamental rights enshrined in the Zimbabwean Declaration of Rights are still new and the domestic courts are yet to develop any useful jurisprudence on their meaning. In order to suggest an interpretation and advance my thesis, I have to refer to international law ratified by Zimbabwe.¹⁷ Zimbabwe ratified the UNCRC¹⁸ and the ACRWC.¹⁹ The UNCRC recognises the right to adequate housing for children²⁰, while the ACRWC places some obligations on the state regarding access to housing by children.²¹ Therefore, the duties created by the children's right to adequate housing, enshrined in the Constitution of Zimbabwe, must be interpreted in a manner that upholds and fulfils Zimbabwe's international legal obligations under the same right, as recognised in the UNCRC.²² This rule, as I show in the paragraphs below, leads to the interpretation that the state has a duty to implement measures to make adequate housing accessible to every parent so that the parent or guardian can build and provide housing to their children.

¹⁵ See art 7 of the UNCRC, art 19 of the African Charter on the Rights and Welfare of the Child. Also see *Government of the Republic of South Africa v Irene Grootboom* 2000 (11) BCLR 1169 (CC) at para 77 and Liebenberg, S. (2003). 'The Interpretation of Socio-economic rights'. In Chaskalson, M etal. (ed). *Constitutional Law of South Africa, 2nd ed.* p. 50

¹⁶ Section 44 of the Constitution of Zimbabwe, 2013 states that 'The State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter [The Declaration of Rights]'

¹⁷ As required by section 46 (1) (c) of the Constitution of Zimbabwe of 2013

¹⁸ Zimbabwe ratified the UNCRC on the 11th of September 1990. See the Treaty Ratification Table on https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (Accessed on 9 August 2017)

¹⁹ Zimbabwe ratified the African Charter on the Rights and Welfare of the Child (the ACRWC) on 19 January 1995. See Ratification Table on <http://www.achpr.org/instruments/child/ratification/> (Accessed on 9 August 2017)

²⁰ See article 27 (3) of the ACRWC

²¹ See article 20 (2) (a) of the ACRWC which requires government 'to assist parents and other persons responsible for the child and in case of need, provide material assistance and support programmes particularly regarding nutrition, health, education, clothing and housing'

²² As well as in conformity with the duties of the state under article 20 (2) of the ACRWC.

i) Duty to enact legislation and administrative policies to guarantee access to adequate housing.

While parents and guardians have a duty to secure, build and provide adequate housing for their children, the state has an obligation to protect and promote the realisation of this right by the children.²³ The duty to protect includes the obligation to monitor compliance and enforce the rights of the children.²⁴ Thus the state has a duty to enforce the obligation of parents to provide adequate housing to their children. However, the state also has a duty to promote these rights²⁵ and therefore, its role goes beyond monitoring and enforcing compliance by parents.

As discussed in Chapter 2, the duty of the state to promote constitutional rights entails the obligation to create the necessary conditions for the right to be realised. Therefore, the state must implement measures which make it possible for parents to access adequate housing for their children. There are exceptional instances where the state may be called in to directly provide adequate housing to the child.²⁶ However, the general principle is that where the child lives with its family, the duty of the state is to implement measures to enable the parents to provide adequate housing to their children.²⁷ Such measures should include enacting the necessary laws and administrative policies to guarantee the parents and guardians with access to the resources, materials and services which they need in order for them to establish adequate housing for their children. In practice, the state must enact legislation and administrative policies which guarantee every parent and guardian with access to land and other building materials so that they can construct and deliver adequate housing to their children. By so doing, the state will be guaranteeing parents (and not just the child) access to what is needed for one to secure adequate housing. The legislation must also guarantee adequate security of tenure not just for the children but for their parents and guardians who care for those children.

This interpretation is supported in both the UNCRC and the ACRWC which place upon the Government of Zimbabwe, the international law obligation to establish the legal framework

²³ See supra note 16

²⁴ See article 3 of the UNCRC and article 16 (1) of the ACRWC. Also see the decision of the Constitutional Court of South Africa in *Government of the Republic of South Africa v Irene Grootboom* 2000 (11) BCLR 1169 (CC), para 75. This decision has persuasive force in Zimbabwe by virtue of s 46 (1) (e) of the Constitution of Zimbabwe, 2013 which allows Zimbabwean courts to adopt interpretations that are similar to those made by courts in comparative jurisdictions.

²⁵ See supra note 16

²⁶ For example, where the child is living on its own and has been abandoned by its parents or guardians.

²⁷ This is because the child has a right to live with its parents. See supra note 2 of the Constitution. This interpretation is also reinforced by the UNCRC and ACRWC as will be discussed shortly.

necessary to protect and give effect to the fundamental rights recognised in these Conventions. This obligation is provided for in art 4 of the UNCRC which states that:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights [such as the right to housing], States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.’

A similar obligation is recognised in art 1 (1) of the ACRWC as follows:

Member States of the Organization of African Unity, Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

Thus in both Conventions, there is an explicit recognition that the government must establish the necessary legislative and administrative framework to protect as well as to facilitate the realisation of children’s rights. This international legal obligation must be incorporated into the scope of the constitutional duties of the Government of Zimbabwe to protect and promote the right to adequate housing for children.²⁸ As a result, this creates a constitutional obligation to enact laws and policies to guarantee the realisation of adequate housing by children, as argued above. The Zimbabwean legal system already provides for the right of children to adequate housing.²⁹ However, the state must enact the necessary legislation and administrative policies to implement this constitutional right, as required by both the UNCRC³⁰ and s 44 of the Constitution of Zimbabwe.³¹ The legislation and policies enacted by government must take into account that children have a constitutional right to live with their parents³² and parents have a constitutional duty to provide for the welfare needs of their children.³³ Therefore, the legislation and the administrative policies must guarantee access to housing by every parent so that the parents or guardians can provide adequate housing to their children.

²⁸ See the rule in supra note 17 that requires constitutional rights to be interpreted in conformity with international law standards and norms.

²⁹ See supra note 3

³⁰ See article 4 of the UNCRC

³¹ As well as section 45 of the Constitution of Zimbabwe, 2013

³² See section 81 (1) (d) of the Constitution of Zimbabwe. Also see article 9 (1) of the UNCRC which states that ‘States Parties shall ensure that a child shall not be separated from his or her parents against their will and such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents.’

³³ See article 27 (1) and (2) of the UNCRC and article 20 of the ACRWC

ii) Duty to provide reasonable material assistance to parents

As Jane Fortin³⁴ rightly observes, the role of the state is not limited to law and policy making but the Government is expected by both the UNCRC and the ACRWC to provide services and resources to assist disadvantaged parents to provide for the welfare needs of their children. This obligation is set out in art 27 (3) of the UNCRC as follows:

States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right [the right to adequate housing] and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.³⁵

A similar obligation is also set out in art 20 (2) of the ACRWC as follows:

State Parties to the present Charter shall in accordance with their means and national conditions take all appropriate measures: (a) to assist parents and other persons responsible for the child and in case of need, provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing.³⁶

Therefore, both the UNCRC and the ACRWC recognise that parents have the primary responsibility to provide adequate housing to their children.³⁷ However, they both recognise³⁸ also that some parents are materially disadvantaged and therefore are unable to access on their own the means to provide for the welfare of their children. The government has the duty to provide material assistance to such parents and guardians so that they can access and provide adequate housing to their children.³⁹ This obligation must be incorporated into the scope of the constitutional duty of the Government to promote the children's right to adequate housing. This, therefore, creates a duty on the state to make certain resources and services available to the disadvantaged parents, so that they can access and provide adequate housing to their children. For instance, due to the high levels of poverty, some parents cannot afford the costs of buying land and other materials that are needed

³⁴ See (1998). *Children's Rights and the Developing Law*. p. 287. Also see Sloth-Nielsen, J. (2016). 'Children's Economic, Social and Cultural Rights in Africa' In Chirwa, D and Chenwi, L. (eds). *The Protection of Economic, Social and Cultural Rights in Africa*. p. 156

³⁵ Also, see article 18 (2) of the UNCRC which states that: 'For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.'

³⁶ It is also implied as part of legislative and 'other' measures which the state is required to undertake in terms of article 1 (1) of the ACRWC.

³⁷ Article 27 (2) of the UNCRC

³⁸ See article 27 (3) of the UNCRC and article 20 (2) of ACRWC

³⁹ Also see Taylor, C. (2003). 'Children's Right to an Adequate Standard of Living.' *Children's Legal Rights Journal*. p. 18 and Skelton, A. (2010). 'Girls' Socio-economic Rights in South Africa.' *South African Journal on Human Rights*. p. 144

for them to establish adequate housing for their children. By virtue of its duty to promote the children's right to adequate housing, the state has an obligation to implement reasonable measures to enable such parents to access the necessary resources so that they can obtain and provide adequate housing to their children. The state enjoys discretion to choose the specific measures to empower such parents.⁴⁰ It must also be acknowledged that the duty to adopt these measures is subject to the resources available to the state.⁴¹ However, it must be noted that there is a duty to adopt such measures. If the government unreasonably fails to adopt the measures, the parents (acting on behalf of their children) can invoke their children's right to adequate housing to compel the government to provide them with the necessary assistance to access adequate housing, although for the benefit of their children.

The duty to provide material assistance also includes the obligation to provide services that are needed to make existing housing meet the standards of habitability for both the parents and the children, who are living together. As noted earlier, the right to adequate housing for children means the housing must be habitable.⁴² There are circumstances where the children are living with their parents or guardians in housing that is located in conditions which do not comply with the standards of habitability. For instance, the housing could be located in polluted environments that are harmful to the children's health or the housing is located in places where there is no access to clean water, energy and other infrastructure such as health care and educational institutions. As part of the duty of the state to protect and promote the child's right to live in adequate housing conditions, the government may be compelled to provide the services that are needed in order to make the housing habitable. When providing these services, it is not feasible for the government do so only for children but it has to provide for the parents and guardians who live with those children as well. Therefore, the parents and guardians are able to access habitable housing, through their children's right to such housing. As highlighted above, the fulfilment of this obligation is dependent on the resources available to the state.

⁴⁰ This is by virtue of the doctrine of separation of powers, provided in section 3 (2) (e) of the Constitution of Zimbabwe, 2013

⁴¹ See article 4 of the UNCRC and article 20 (2) of the ACRWC

⁴² As in housing which meets the conditions set out in supra note 10.

iii) Duty to provide security of tenure

As noted above, the children's right to adequate housing implies that the children must be provided with housing where they live with adequate security of tenure. This means they should live in housing where they enjoy sufficient protection from forced evictions and other forms of harassment.⁴³ There are children who live with their parents in informal settlements and do not enjoy security of tenure. Such housing is inadequate as both the children and the parents are vulnerable to evictions and other forms of harassment. The duty of the state to protect the children's right to adequate housing requires the government to immediately provide security of tenure to all the inhabitants of such housing. Alternatively, the government is required to relocate the inhabitants to another place where they can settle with adequate security of tenure.⁴⁴ This means the security of tenure is not provided to children only but to parents as well. Thus parents are able to access, secure and enjoy adequate security of tenure through the children's right to adequate housing.

7.5 Comparative law in support of the duty of the state to provide material assistance

Some of the arguments advanced above have also been confirmed in comparative foreign jurisdictions such as South Africa. Similar to Zimbabwe, South Africa has ratified the UNCRC⁴⁵ and its Constitution guarantees children with the right to adequate housing.⁴⁶ The duties to protect and promote this right have been interpreted in light of the UNCRC.⁴⁷ Zimbabwean courts should, therefore, be persuaded by how the South African courts have interpreted the role of the state in protecting and promoting the realisation of the children's right to adequate housing.

I acknowledge that the Constitutional Court of South Africa in *Government of the Republic of South Africa v Grootboom*⁴⁸ rejected the claim that the children's right to adequate housing can be applied to compel the state to immediately provide adequate housing or basic shelter to parents

⁴³ Ibid

⁴⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997 at para 16

⁴⁵ On 16 June 1995. See the Ratification table on https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (Accessed on 9 August 2017)

⁴⁶ See section 26 (1) (c) of the Constitution of South Africa, 1996 as interpreted in *Government of the Republic of South Africa v Irene Grootboom* 2000 (11) BCLR 1169 (CC), para 73

⁴⁷ *Government of the Republic of South Africa v Irene Grootboom* 2000 (11) BCLR 1169 (CC), para 73

⁴⁸ Ibid, para 70-71

who cannot provide adequate housing to their children. This is not the argument I am making in this thesis and in this chapter. The argument that I am advancing is that, subject to the resources available, the state can be compelled to implement reasonable measures to enable disadvantaged parents to access resources and materials necessary for the parents to secure and provide adequate housing to their children. Therefore, the argument I am advancing in this chapter and the argument that was rejected by the Constitutional Court of South Africa are different. In the *Grootboom* case, the Court did not examine the duty of the state to provide material assistance in the manner that I am suggesting in this chapter.

The argument that I am advancing in this thesis was, however, dealt with by the same Court in *Minister of Health v Treatment Action Campaign*.⁴⁹ In this case, the issue for determination was whether the State had a direct obligation to fulfil the children's right to basic healthcare. The Court provided its interpretation as follows:

While the primary obligation to provide basic health care services no doubt rests on those parents who can afford to pay for such services, it was made clear in *Grootboom* that this does not mean that the State incurs no obligation in relation to children who are being cared for by their parents or families....The state is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking.⁵⁰

In the above case, the Court confirmed the argument that the state has an obligation to provide material support where the child is under inadequate parental care. Although the Court said this concerning the right to health care for children, the same principle should apply when interpreting the scope of the duty of the state to protect the children's right to adequate housing because both rights concern the welfare of the child. Therefore, subject to the resources available; the state has a duty to protect and promote the realisation of adequate housing by children through making certain resources, services and materials available to disadvantaged parents so that such parents can secure and establish adequate housing for their children. The courts in Zimbabwe should be able to uphold this argument because of the fact that the state has a constitutional duty to protect and promote the children's right to adequate housing without removing the child from its parents.⁵¹

⁴⁹ *Minister of Health v Treatment Action Campaign* [2002] ZACC 15; 2002 (5) SA 721.

⁵⁰ *Ibid*, para 77 and 79

⁵¹ Children are only removed from their parents as a measure of last resort and only if it is in the best interests of the child to take the child away from its parents.

7.6 Conclusion

The Constitution of Zimbabwe does not expressly provide for a fundamental right of access to adequate housing for everyone, but it does provide for the right to shelter for children. This constitutional right must be interpreted in a manner that protects the best interests of the child, as required under s 81 (2) of the Constitution. This leads to the interpretation that the children's right to shelter, enshrined in s 81 (1) (f) of the Constitution implies that children have a right to 'adequate' housing. The duty to fulfil this right must be interpreted by taking into account the children's right to parental care, guaranteed in s 81 (d) of the Constitution, to mean that parents have the primary duty to provide their children with adequate housing.

However, the state has obligations that are set out in s 44 of the Constitution, to protect and promote the right of children to adequate parental care as well as adequate housing. This obligation entails that, apart from monitoring and enforcing the duty of parents to provide adequate housing to their children, the state has an obligation to create the necessary conditions to enable parents to successfully provide adequate housing to their children. The duty to create these conditions includes the obligation to undertake legislative and administrative measures to guarantee parents and guardians with access to resources and services needed for them to secure and provide adequate housing to their children. Subject to the resources available, the state is also required to provide reasonable material assistance to disadvantaged parents in order to empower them to access adequate housing, for the benefit of their children. The state is also required to provide adequate security of tenure for both the children and parents who are living with the children. Thus, the duty of the state to create enabling conditions and to provide reasonable material assistance, under the children's right to adequate housing, enables parents to also access resources and services necessary for them to obtain adequate housing, even though they do not have a right of access to adequate housing that is explicitly guaranteed for them under the Constitution.

CHAPTER EIGHT: SUMMARY OF THE MAIN FINDINGS

8.1 Introduction

The idea for this thesis was triggered by the realisation that the recently adopted Constitution of Zimbabwe does not explicitly guarantee for every individual, a fundamental right of access to adequate housing, yet such a right is necessary in order to enforce (in domestic courts) the government's international legal obligation to make adequate housing accessible to every person. Through this research, I therefore sought to identify and explain how certain fundamental rights that are enshrined in the Zimbabwean Declaration of Rights¹, can be interpreted to imply the duty of government to progressively achieve the realisation of the right to have access to adequate housing by all. Thus I sought to identify and examine fundamental rights which can be applied as alternative constitutional rights to compel the Government of Zimbabwe to fulfil its duties under art 11 (1) of the ICESCR, relating to the right to have access to adequate housing. This chapter seeks to provide the main findings of this research and suggest possible thrusts for future research.

8.2 The specific international legal duties under the right of access to adequate housing

One of the research questions considered under this thesis is: what is the legal source for Zimbabwe's international legal obligation to make adequate housing accessible for all, and what does this obligation entail? Zimbabwe is a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR)² as well as the African Charter on Human and Peoples' Rights (the African Charter).³ These international treaties place upon the government an obligation to ensure that every person enjoys access to adequate housing as a justiciable right. In order to interpret what this obligation entails, I referred to art 11 (1) of the ICESCR because the ICESCR is the most comprehensive international treaty on the right to have access to adequate housing.⁴

¹ The Bill of Rights

² Zimbabwe ratified the International Covenant on Economic, Social and Cultural Rights on 13 May 1991. See the treaty ratification table available on https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-3&chapter=4&lang=en [Accessed on 07 August 2017]

³ Zimbabwe ratified on 30 May 1986. See the Ratification Table: African Charter on Human and Peoples' Rights available on <http://www.achpr.org/instruments/achpr/ratification/> [Accessed on 20 June 2017]

⁴ Unlike other conventions, the right to adequate housing in the ICESCR is given substantive content through the authoritative interpretation given by the Committee on Economic, Social and Cultural Rights (CESCR), which describe duties imposed upon States Parties by the right to adequate housing. In Zimbabwe, these General Comments have been accepted as authoritative sources of interpretation of the rights recognised in these conventions. See *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe* [2003] ZWSC 65. See also *Mudzuru v Minister of Justice, Legal & Parliamentary Affairs* [2015] ZWCC 12

In terms of art 11 (1) of the ICESCR, the right to housing implies the right to have access to housing that is ‘adequate’ in the sense that; the housing must be habitable⁵, the inhabitants must enjoy adequate security of tenure and protection from forced evictions.⁶ Adequate housing must be made accessible to all without discrimination.⁷ This obligation is to be achieved progressively.⁸

However, although access to adequate housing for all is to be achieved progressively, the Government of Zimbabwe is bound by the ICESCR to fulfil certain immediate obligations. They are called ‘immediate obligations’ because the government is required to perform them within a reasonably short period of time after ratifying the ICESCR, in order to move as expeditiously and effectively as is possible towards the goal of achieving the full realisation of access to adequate housing.⁹ These obligations can be analysed into negative and positive duties.¹⁰

Under the negative duties, the Government of Zimbabwe is required to refrain from undertaking retrogressive measures.¹¹ These are measures or actions that reverse or undermine the objective to ensure that every person in Zimbabwe enjoys access to adequate housing.¹² Thus, as an example, the government must immediately¹³ refrain from conducting forced evictions.¹⁴ This includes abstaining from condoning, facilitating or advocating the forcible removal of individuals or groups of people from their homes, without following due process and offering them suitable alternative

⁵ This means the housing must provide adequate space; they must be constructed in such a way that the building structure does not endanger the physical security of the inhabitants and the buildings must be capable of protecting the inhabitants from weather hazards; they must be located in areas where the inhabitants have access to certain essential services, facilities and infrastructure; and they must be located in places where the physical environment is not harmful to the inhabitants’ health and wellbeing. See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991 at para 8 (b), (d) and (f)

⁶ Ibid CESCR *General Comment 4* at para 8 (a)

⁷ Ibid at para 6 and 8 (e)

⁸ See art 2 (1) of the ICESCR as interpreted by the CESCR in UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990 at 9

⁹ Ibid CESCR *General Comment 3*

¹⁰ See Akintayo, A. (2014). ‘Planning Law Versus the Right of the Poor to Adequate Housing: A Progressive Assessment of the Lagos State of Nigeria’s Urban and Regional Planning and Development Law of 2010’. *African Human Rights Law Journal*. p. 561-562. Also see Alston, P and Quinn, G. (1987). ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights. *Human Rights Quarterly*. p. 184 and See Currie, I. and De Waal, J. (2013). *The Bill of Rights Handbook*. 6th ed. p. 568-570

¹¹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997 at para 8

¹² See Currie, I. and De Waal, J. (2013). *The Bill of Rights Handbook*. 6th ed. p. 568

¹³ Upon ratifying the International Covenant on Economic, Social and Cultural Rights.

¹⁴ Supra note 11

housing.¹⁵ The government must also stop implementing any policies or engaging in practices which unfairly discriminate against certain people or groups of people from accessing adequate housing.¹⁶

The positive immediate obligations also include that the government must undertake appropriate legislative and administrative measures. Such measures include enacting legislation to guarantee and give effect to the right of every person to have access to adequate housing.¹⁷ The legislation must as clearly as is possible set out enforceable duties that will be implemented by the state in order to make adequate housing accessible to every person within its jurisdiction.¹⁸ Thus, the legislation must provide the domestic courts with sufficient mandate to enforce the right and duties of the state, and grant appropriate relief when the right and those duties are violated.¹⁹ The legislation must also establish the necessary administrative institutions which will implement the government's duties under this right. The legislation must adequately guarantee security of tenure and protection against forced evictions. This means that it must set out procedural requirements which evictions must comply with.²⁰

Under the positive obligations, the state is also required to conduct comprehensive assessments of the national housing situation.²¹ The assessments must be conducted regularly and they must at least provide information on; the the full extent of homelessness and inadequate housing within Zimbabwe, details regarding persons living in 'illegal' settlements and persons affected by evictions.²² The state must also adopt and implement a national strategy on housing. Whilst the state enjoys discretion to choose the specific measures to include in the national strategy, those

¹⁵ Supra note 11, para 15-16

¹⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009 at para 8

¹⁷ UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment no 9: *The domestic application of the Covenant*, 3 December 1998 para 2

¹⁸ Ibid

¹⁹ Ibid. Also Supra note 5 *CESCR General Comment 4*, para 17

²⁰ These include the following: evictions should only be conducted as a last resort after considering all other possible solutions or options; there must be adequate consultation of the affected families prior to the evictions; all affected families must be given adequate and reasonable notice prior to the evictions; the evictions must not be conducted at night or during bad weather unless the affected persons consent otherwise; evictions must not be conducted in a manner that violates any human rights; and the evictions should not be conducted before providing the affected families with suitable alternative housing. See Supra note 11, para 15-16

²¹ Supra note 5 *CESCR General Comment 4*, para 13

²² Ibid

measures must meet the standard of appropriateness²³ and the national strategy must provide certain minimum information.²⁴ The national housing strategy must also indicate how the government will ensure that the costs of accessing adequate housing are proportional to the average income levels of the general population, in order to ensure that the poor are not discriminated from accessing adequate housing.²⁵

8.3 Domestic application of the international legal duty to achieve the realisation of the right to have access to adequate housing

The duties described above are not directly enforceable in domestic courts as municipal law in Zimbabwe. As shown above, they arise from art 11 (1) of the ICESCR and therefore, they are international treaty based obligations. The Constitution of Zimbabwe stipulates that international treaties are only enforceable as part of the municipal law if they are domesticated through a constitutional or statutory provision or through a resolution of Parliament.²⁶ The Parliament of Zimbabwe has not passed any resolution to domesticate art 11 (1) of the ICESCR. Furthermore, the Constitution (or any of the statutes) does not explicitly guarantee every person in Zimbabwe with the right to have access to adequate housing. However, through this thesis, I examined how certain fundamental rights that are already provided for under the Declaration of Rights can be interpreted to enforce (in domestic courts) the international legal obligations under the right of access to adequate housing. The rights examined are the fundamental freedom from arbitrary evictions,²⁷ the right to life,²⁸ the right to equality,²⁹ and the children's right to shelter.³⁰

²³ This means the measures must be deliberate, concrete and be directed as clearly as possible towards achieving the goal of making adequate housing accessible to everyone. See Supra note 8 *CESCR General Comment 3*, para 2

²⁴ It must set out clear objectives and measures that will be undertaken; it must identify the stakeholders involved and set out how coordination between different government departments will be achieved; and it must show how resources will be allocated and timeframes for the delivery of the relevant services. Supra note 5 *CESCR General Comment 4*, para 12

²⁵ Ibid

²⁶ See s 327 of the Constitution of Zimbabwe of 2013

²⁷ Ibid, section 74

²⁸ Ibid, section 48 (1)

²⁹ Ibid, section 56

³⁰ Ibid, section 81 (1) (f)

8.4 Rules of constitutional interpretation

It is possible to generously or broadly interpret the rights identified above³¹ to imply the right to enjoy access to adequate housing because, the rules of constitutional interpretation require courts to adopt the widest possible meaning of these rights, subject to the words used to frame the right.³² The courts are also required to adopt a purposive approach to constitutional interpretation.³³ Therefore, when interpreting these rights³⁴ the courts must adopt an interpretation or meaning which best fulfils the purpose or objective for entrenching the right under the Constitution.³⁵ Furthermore, the Constitution requires fundamental rights to be interpreted in a manner that protects and promotes the underlying values of human dignity, equality and justice.³⁶ Therefore, when interpreting the right to life, the right to equality and the children's right to shelter; the courts must prefer a meaning which best secures, protects and promotes the values of human dignity, justice and equality.³⁷ This necessitates a generous approach to the interpretation of these constitutional rights and therefore, allows for the incorporation of the duty of the state to protect and promote access to adequate housing.

The Constitution further requires courts to uphold the relevant international law norms and standards when interpreting all fundamental rights that are enshrined in the Constitution.³⁸ By relevant international law norms, the Constitution refers to international customary law and treaties that have been ratified by Zimbabwe.³⁹ International treaties ratified by Zimbabwe require a generous and value based meaning to be attached to the right to life⁴⁰, the right to equality⁴¹ and

³¹ Namely the fundamental freedom from arbitrary evictions, the right to life, the right to equality and the children's right to shelter.

³² As required by s 46 (1) (a) of the Constitution. See *Mawere v Registrar General* [2015] ZWCC 04 at para 20; *Madzimbamuto v Registrar General* [2014] ZWCC 5 at p. 5–6 and *Rattigan v Chief Immigration Officer* 1994 (2) ZLR 54 (S) at para 57 f–h

³³ *Ibid Mawere v Registrar General*

³⁴ Namely the fundamental freedom from arbitrary evictions, the right to life, the right to equality and the children's right to shelter.

³⁵ *Supra* note 32, *Mawere v Registrar General*

³⁶ See section 46 (1) (b) of the Constitution.

³⁷ *Supra* note 32, *Madzimbamuto v Registrar General*

³⁸ As required by section 46 (1) (c) of the Constitution. Also see *Mudzuru v Minister of Justice, Legal & Parliamentary Affairs* [2015] ZWCC 12 at 25-25

³⁹ *Ibid Mudzuru case v Minister of Justice, Legal & Parliamentary Affairs*

⁴⁰ See UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982 at para 5

⁴¹ *Supra* note 16, para 8

the children's right to shelter.⁴² The Constitution also requires fundamental rights to be interpreted in a manner that embraces the interdependence and interrelatedness of these rights and therefore, it is possible to argue that certain constitutional rights⁴³ should be applied and enforced simultaneously in order to imply the right of access to adequate housing. It also requires the Declaration of Rights to be interpreted as a living instrument,⁴⁴ which necessitates the courts to depart from the traditionally accepted interpretation of certain rights⁴⁵, and accept new and broader meanings that respond to contemporary challenges. The broader interpretation must however be to the extent permitted by the words used to frame the right.⁴⁶ The fundamental freedom from arbitrary evictions, the right to life, the right to equality and the children's right to shelter are framed in broad terms and this allows the courts to generate a wide and generous interpretation that is in line with the theory of a living constitution. Applying these rules of constitutional interpretation, below are the key findings on how the fundamental rights identified above can be interpreted to imply the duty of the state to progressively achieve the realisation of the right of access to adequate housing by everyone in Zimbabwe.

⁴² See art 27 (1) of the United Nations Convention on the Rights of the Child. Also see Supra note 5 *CESCR General Comment 4*, para 7

⁴³ For example the right to life and the right to equality can be applied together to claim that adequate housing be made accessible to all without discrimination and special measures be implemented to enable the disadvantaged to access adequate housing. The right to adequate housing for children and their right to parental care can be applied together to imply the duty of the state to provide material assistance to enable parents to access adequate housing so that they can provide it to their children. For views on the interdependence of rights see Scott, C. (1989). 'Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' *Osgoode Hall Law Journal*. p. 781; Liebenberg, S. (2001) *Socio-economic Rights: Adjudication under a Transformative Constitution*. p. 51; and De Vos, P. (2001) 'Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness' *South Africa Journal on Human Rights*. p. 264

⁴⁴ This principle implies that the constitution must always be interpreted in a manner which adapts the meaning of its provisions to the present day realities and the interpretation generated must be one which is in sync with the contemporary needs and circumstances. This therefore, allows courts to depart from the traditionally accepted meaning of certain constitutional rights, and without disregarding the words used to formulate the fundamental right, this theory therefore encourages courts to expand and adapt the scope of these rights in order to address contemporary challenges. See s 46 (1) (a) of the Constitution as interpreted in Supra note 32, *Mawere v Registrar General*. Also see Kavanagh, A. (2003). 'The Idea of a Living Constitution.' *Canadian Journal of Law and Jurisprudence*. p. 56

⁴⁵ For example the meaning of the right to life should no longer be limited to protection of mere existence but should now be interpreted as the right to a dignified human existence. See *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 at para 326-27 and *Chameli Singh v State of U.P* (1995) Supp 6 SCR 827 at p. 8

⁴⁶ See s 46 (1) (d) of the Constitution as interpreted in *Zimbabwe Electoral Commission v Commissioner General, ZRP* (2014) ZWCC 3 at para 8

8.5 The fundamental freedom from arbitrary evictions

The Constitution guarantees for every person the fundamental freedom from arbitrary evictions.⁴⁷ In international law,⁴⁸ this fundamental freedom is regarded as an element of the right to have access to adequate housing. It therefore can be argued that the drafters of the Constitution derived this right from international law, particularly from art 11 (1) of the ICESCR. Given the rule⁴⁹ that fundamental rights and freedoms should be interpreted in line with the relevant international law, the freedom from arbitrary evictions must therefore be interpreted in a manner that incorporates duties of the state under art 11 (1) of the ICESCR.

This constitutional freedom creates the obligation of the state to refrain from conducting arbitrary evictions.⁵⁰ It also requires the state to undertake the necessary legislative measures in order to guarantee for everyone, adequate security of tenure against arbitrary evictions.⁵¹ However, the Constitution does not provide a definition of arbitrary evictions. The courts must interpret ‘arbitrary evictions’ in line with art 11 (1) of the ICESCR. This therefore implies that the state must refrain from conducting and, it must guarantee protection against evictions that are conducted without following certain minimum procedural and substantive requirements recognised both in international law⁵² and those implied under the Constitution.⁵³ Crucially, these requirements include that evictions must be conducted only when they are unavoidable, and families targeted for the evictions must be given suitable alternative housing.⁵⁴ In order to qualify as suitable, the alternative housing does not necessarily have to meet all the standards of adequate housing, but it must provide the inhabitants with the basic necessities that are consistent with their constitutional right to human dignity.⁵⁵ In addition to the above, the state must immediately confer adequate legal

⁴⁷ Supra note 27

⁴⁸ See Supra note 5, *ICESCR General Comment 4*, para 8 (a)

⁴⁹ See section 46 (1) (c) of the Constitution of Zimbabwe, 2013

⁵⁰ See section 44 of the Constitution of Zimbabwe, 2013

⁵¹ Supra note 11, para 9

⁵² Ibid, para 15-16

⁵³ Although the Constitution does not define arbitrary evictions, it requires fundamental rights to be interpreted in conformity with the values of fairness, equality and human dignity. Therefore, it can be argued that evictions should be carried out in a manner that does not undermine these values. See Supra note 26, s 46 (1) (b). Also see the following decisions of the Constitutional Court of South Africa, which have persuasive force in Zimbabwean courts: *Port Elizabeth Municipality v various occupiers* [2004] (12) BCLR 1268 (CC), 2005 (1) SA 217 (CC) at para 11 and *Residents of Joe Slovo Community; Western Cape v Thubelisha Homes* [2009] ZACC 16; 2010 (3) SA 454 (CC) at para 231

⁵⁴ Supra note 52

⁵⁵ Ibid

security of tenure to persons who are living without such security and, this must be done after genuinely consulting with all the affected persons and groups.⁵⁶ Thus the fundamental freedom from arbitrary evictions goes a long way in domesticating some of the international legal obligations of the state under the right of access to adequate housing. However, its scope is limited to guaranteeing security of tenure against forced evictions, for people who already enjoy some form of shelter.

The international legal obligation of the state to progressively achieve the realisation of the right of access to adequate housing, also requires that the state must implement positive measures to create conditions that enable those who currently live under inadequate housing, to gain access to adequate housing.⁵⁷ To enforce this aspect of the right of access to adequate housing, individuals should rely on the constitutional right to life and equality, while parents who live with their children can also rely on their children's constitutional right to shelter.

8.6 The right to life

The Constitution of Zimbabwe guarantees every person the right to life.⁵⁸ This right must be interpreted in a manner that upholds and promotes the dignity of the human person, as required by s 46 (1) (b) of the Constitution. Therefore, the value of human dignity must be incorporated into the scope of the fundamental right to life and this creates the constitutional right to live a dignified human life.⁵⁹

As a consequence of the right to live in human dignity, every human being in Zimbabwe is entitled to live a life which meets certain minimum standards of quality derived from human dignity. The concept of human dignity entails that every human person is born with inherent worthiness because he or she has inherent capabilities which include the capability to organise their personal lives, to develop intellectually and to actively participate in public life.⁶⁰ This inherent worthiness must be

⁵⁶ Supra note 5, *CESCR General Comment 4*, para 8 (a)

⁵⁷ Ibid, para 8 (e) and Liebenberg, S. (2003). 'The Interpretation of Socio-Economic Rights.' In Chaskalson, M et al, (eds). *Constitutional law of South Africa* 2nd ed. p. 6

⁵⁸ See section 48 (1)

⁵⁹ A similar conclusion can also be reached by invoking the right to human dignity in section 51 of the Constitution which; recognises that every human being is born with dignity and guarantees that every person has the right to have their human dignity protected at all times.

⁶⁰ See Gregor, M. (1996). ed. *Immanuel Kant: Practical Philosophy*. p. 557; Ackermann, L. (2013). *Human Dignity: Lodestar for Equality in South Africa*. p. 56 and Ackermann, L. (2000). 'Equality and the South African Constitution: The Role of Dignity' *Heidelberg Journal of International Law*. p. 537, 540–542

protected and these inherent capabilities must be promoted to develop to their optimum.⁶¹ When human dignity is incorporated into the fundamental right to life, it therefore implies the right to access basic living conditions in which an individual's inherent worthiness is respected, protected and promoted; and in which an individual's inherent capabilities are promoted to flourish up to their best optimum.

The state has a constitutional duty to protect, promote and fulfil the right to live in human dignity.⁶² This implies the duty to undertake positive measures in order to ensure that every human being enjoys access to the basic livelihoods and services that are required for the human being to live in human dignity. One of these basic livelihoods is access to adequate housing. When individuals have access to adequate housing, they live in decent homes where they enjoy access to essential services such as clean water, healthcare, education and energy.⁶³ They also live in homes that are built in a way that gives them adequate living space, which protects them from weather hazards and they are guaranteed security of tenure and protection from forced evictions.⁶⁴ Without access to these living conditions, which come as part of 'adequate' housing, the individual cannot have a dignified human life. Therefore, access to adequate housing is indispensable for the protection of human dignity. The duty to undertake positive action in order to protect, promote or fulfil the constitutional right to live in human dignity must therefore be interpreted to imply the obligation of the state to make adequate housing accessible to every person in Zimbabwe.

It is therefore possible to invoke the right to live in human dignity in order to compel the Government of Zimbabwe to implement positive measures to enable individuals and their families to access adequate housing, even though the Constitution does not explicitly guarantee for every person, the right of access to adequate housing. For instance, on the basis of the duty of the state to protect the right to live in human dignity, the government may be compelled to undertake legislative measures to guarantee every person with access to adequate housing.⁶⁵ The government may also be compelled to develop and adopt a coherent national housing policy strategy.⁶⁶ Subject

⁶¹ Nussbaum, M. (2007). *Frontiers of Justice*. p. 179

⁶² See section 44 of the Constitution of Zimbabwe, 2013

⁶³ Supra note 5 *CESCR General Comment 4*, para 8 (b) and (d)

⁶⁴ *Ibid*, para 8 (a)

⁶⁵ As is required under art 11 (1) of the ICESCR.

⁶⁶ As is required under art 11 (1) of the ICESCR. See Supra note 5 *CESCR General Comment 4*, para 12

to the resources available, the state may also be compelled to provide services that are lacking in order to make the existing housing to be habitable.⁶⁷

8.7 The right to substantive equality for previously marginalised groups

In addition to relying on the right to life, as summarised above, I also made an argument that persons who live under inadequate housing conditions as a result of past unfair discrimination can rely on their right to substantive equality to compel the state to implement reasonable restitutionary measures to enable them to access adequate housing. The Constitution of Zimbabwe provides for the right to substantive equality as part of the broader right to equality. The right to substantive equality is provided for as follows:

The State must take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination. (a) Such measures must be taken to redress circumstances of genuine need; (b) No such measure is to be regarded as unfair for the purposes of subsection (3). [My emphasis].

Critics of this thesis may counter-argue that the duty of the state to achieve substantive equality does not necessarily imply a justiciable right of previously marginalised groups to compel the state to implement affirmative action or restitutionary measures to benefit them.⁶⁸ However, it must be noted that this obligation is provided for as part of the right to equality and it is formulated as a peremptory duty which the state ‘must’ perform.⁶⁹ Thus the state has no discretion to initiate restitutionary measures. It must do so and the measures must be reasonable. Therefore, persons who are still disadvantaged by past unfair discrimination have a right to claim restitutionary measures to be undertaken by the government as part of the duty of the state to protect and promote equality for such people. What sort of restitutionary measures does the Constitution envisage?

It has been argued in comparative jurisdictions that these must be reasonable measures that are aimed at eradicating existing material disadvantage that is suffered by certain groups of people as a result of past unfair discrimination.⁷⁰ This argument should hold in Zimbabwe as well given that the Constitution requires fundamental rights to be interpreted in a manner that upholds the constitutional goal of establishing a society that is based on the values of human dignity and

⁶⁷ As is required under art 11 (1) of the ICECSR. Ibid, para 8 (d)

⁶⁸ This counter-argument is likely to emerge from jurisdictions where the duty to achieve substantive equality is couched as a discretion which the state enjoys.

⁶⁹ See section 56 (6) of the Constitution of Zimbabwe, 2013

⁷⁰ See Albertyn, C and Goldblatt, B. (1998). 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' *South African Journal on Human Rights*. p. 249

equality.⁷¹ Thus the right to substantive equality must be interpreted in a manner that upholds the values of equality and human dignity.

The entrenchment of equality as a value signifies a constitutional commitment to establish a Zimbabwean society that is based on equality.⁷² The value of equality has multiple dimensions to it. From Ronald Dworkin's view point, it means that the state must show equal concern for the welfare of every citizen⁷³ and therefore, when the value of equality is applied as an aid to interpret the nature of measures contemplated under the duty to achieve substantive equality, it can be argued that such measures must seek to eradicate material disadvantage as a way of showing equal concern for the welfare of those who are disadvantaged by past unfair discrimination. It has also been argued by Nancy Fraser that to achieve equality, the state must seek to establish parity of participation in decision making processes by all citizens.⁷⁴ Material disadvantage constrains certain people from participating equally in decision making processes and therefore, in order to promote the value of equality, the measures envisaged under the duty to achieve substantive equality must seek to eradicate material disadvantage suffered as a result of past unfair discrimination. From Amartya Sen's view point of equality as 'equality of capabilities'⁷⁵, it can also be argued that the measures to be implemented by the state as part of its duty to achieve substantive equality must seek to eradicate material disadvantage suffered by previously and unfairly marginalised groups, in order to enable members of such groups to gain the capability to make personal life choices. A similar argument can also be made when equality is viewed from John Rawls's social minimum theory which entails that for a society to be based on equality, people must have access to certain basic social necessities.⁷⁶ Thus, when the duty to achieve substantive equality is interpreted in a manner that upholds the value of equality, the courts in Zimbabwe should be able to reach the conclusion that the measures contemplated under s 56 (6)

⁷¹ See section 46 (1) (b) of the Constitution

⁷² See preamble to the Constitution of Zimbabwe, 2013

⁷³ Dworkin, R. (2000). *Sovereign Virtue: The Theory and Practice of Equality*. p.1

⁷⁴ Fraser, N. (1992). 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' In Calhoun, C. (ed). *Habermas and the Public Sphere* p. 121-126

⁷⁵ According to this view, it is important for every citizen to enjoy the capability to make personal choices regarding how they want to live their lives. See Sen, A. (1999). *Development as Freedom*. p. 74-75. Also see Sen, A. (2010) *The Idea of Justice*. p. 231-235

⁷⁶ Rawls, J. (2001). *Justice as Fairness: A Restatement*. p.162

of the Constitution are measures that seek to eradicate conditions of material disadvantage suffered by previously marginalised groups as a result of past unfair discrimination.

A similar conclusion should also be reached when the courts apply the value of human dignity as an aid to interpret the nature of measures contemplated by the Constitution under the duty of the state to achieve substantive equality. Human dignity is also a multi-dimensional concept but, it is widely viewed as the idea that human beings have inherent worthiness and capabilities which include the capability: to exercise their own judgement; to have a sense of self-worth; to exercise self-determination; to develop their own personalities and to strive for self-fulfilment in their lives.⁷⁷ Therefore, when human dignity is constitutionalised as a value, it signifies a commitment to establish a society where every person's inherent worthiness is equally protected and every person has the chance to develop and realise the full potential of their inherent capabilities. Conditions of material disadvantage violate the inherent worthiness of the human being and they impair the growth of the human being's inherent capabilities. Thus material disadvantage is an impediment to the establishment of a society based on equal protection of human dignity for all. In order to promote the establishment of a society that is based on the equal protection of human dignity, the duty to achieve substantive equality for previously marginalised groups should include the obligation to implement measures that seek to eradicate material disadvantage suffered by these groups as a result of past unfair discrimination.

Thus whether one applies the value of equality or the value of human dignity as an aid to interpret the nature of measures contemplated under the duty of the state to achieve substantive equality, one inevitably comes to the conclusion that these measures must include legislative and other measures that are aimed at eradicating material disadvantage which is currently preventing members of previously marginalised groups from accessing opportunities and living life as equals with the rest of the society. Such conditions of material disadvantage include lack of access to adequate housing as a result of past unfair discrimination. When persons live without access to adequate housing, they are constrained from accessing certain opportunities in life and they cannot actively participate in public life as equals with others.⁷⁸ Thus lack of access to adequate housing

⁷⁷ See Nussbaum, M. (2000). *Women and Development: The Capabilities Approach*. p. 72 and Ackermann, L. (2013). *Human Dignity: Lodestar for Equality in South Africa*. p. 86

⁷⁸ For example, when a person is homeless in Zimbabwe, they may not qualify to vote in elections or to be voted for because they cannot show proof of residence.

is a material disadvantage that deprive people of their capability to function to their optimum as human beings and live as equals with others.

There are groups of people in Zimbabwe who live under inadequate housing conditions as a result of past unfair discrimination.⁷⁹ Such people have a right to substantive equality and can compel the state to initiate and implement reasonable legislative and other measures to enable them to access adequate housing. However, it has to be conceded that the duty to achieve substantive equality for such people is to be fulfilled progressively and subject to resources available to the state. Nonetheless, there are certain measures which the state can immediately initiate which do not require substantial amounts of resources. For instance, the state can be compelled to immediately develop a reasonable plan of action which indicates how it intends to make adequate housing accessible to previously marginalised groups who live under inadequate housing conditions as a result of past unfair discrimination. The state can also be compelled to provide security of tenure to those who live in informal settlements as a result of past unfair discrimination. Subject to resources available, the state can also be compelled to provide suitable temporary housing to those who are homeless as a result of past unfair discrimination.

8.8 Children's right to shelter

In addition to the opportunities created by the right to life and the right to equality, as described above; persons who are parents or guardians can also apply their children's right to shelter in order to compel the state to make adequate housing accessible to them and their children. The right to shelter for children is guaranteed in s 81 (1) (f) of the Constitution. Although the Constitution uses the word 'shelter' to describe this right, the scope and meaning of this right should be viewed as extending beyond the right to a rudimentary or basic shelter. This is because constitutional rights must be interpreted in a manner that upholds the values, norms and standards recognised by international law that has been signed and ratified by Zimbabwe. Zimbabwe has ratified the United Nations Convention on the Rights of the Child (UNCRC),⁸⁰ which recognises the right to shelter

⁷⁹ These include persons who were unfairly targeted for mass forced evictions in 2005 under the Government's program code named 'Operation Murambatsvina'. See Tibaijuka, A. (2005). *Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe.* Available at: <http://ww2.unhabitat.org/documents/ZimbabweReport.pdf> [Accessed 10 Apr. 2015]

⁸⁰ Zimbabwe ratified the UNCRC on the 11th of September 1990. See the Treaty Ratification Table on https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en [Accessed on 9 August 2017]

for children as the right to adequate housing for children.⁸¹ When the children's constitutional right to shelter in Zimbabwe is interpreted in accordance with the standards created or recognised in the UNCRC, the court will reach the conclusion that this right implies the children's right to adequate housing.

Furthermore, when interpreting the scope and meaning of children's rights, the courts must apply and be guided by the principle of the best interests of the child. Therefore, as has already been demonstrated by the Constitutional Court of Zimbabwe,⁸² when faced with multiple possible interpretations of a right that belongs to or which affects the welfare of a child, the court must prefer the interpretation that furthers or best protects the interests or welfare of the child. Regarding the right to shelter for children, there are two possible interpretations. These are that the right could be given a narrow meaning that implies the right to basic shelter or it could be given a wider meaning to imply the right to adequate housing for children. Recalling that the right to adequate housing for children is derived from the desire to protect human dignity,⁸³ the principle of the best interests of the child dictates that the court must prefer the wider interpretation because it is the one which best protects and promotes the human dignity and welfare of the child. Therefore, the right to shelter for children in Zimbabwe implies the right to adequate housing for children.

The right to adequate housing for children must be read together with the right to parental care, which is enshrined in s 81 (1) (d) of the Constitution.⁸⁴ When these two rights are interpreted together, the court should reach the conclusion that the parents have the primary responsibility to provide adequate housing to their children.⁸⁵ However, the state has a duty to protect the children's constitutional right to adequate housing.⁸⁶ In part, this entails that the state must enact and enforce laws to ensure that parents and guardians comply with their parental duty to provide adequate housing to their children.⁸⁷ It also entails the obligation to establish the necessary legal framework to enable the parents to secure and provide adequate housing to their children.⁸⁸ Therefore, the

⁸¹ Supra note 42, art 27 (3)

⁸² Supra note 38, *Mudzuru v Minister of Justice, Legal and Parliamentary Affairs*

⁸³ See preamble to the UNCRC. Also see preamble to the ACRWC

⁸⁴ It is provided as follows: 'Every child, that is to say every boy and girl under the age of eighteen years, has the right to family or parental care, or to appropriate care when removed from the family environment'

⁸⁵ See art 20 (1) of the ACRWC and also see *Government of the Republic of South Africa v Irene Grootboom* 2000 (11) BCLR 1169 (CC) at para 77-78

⁸⁶ See section 44 of the Constitution of Zimbabwe, 2013

⁸⁷ See art 3 of the UNCRC and art 16 (1) of the ACRWC. Also see Supra note 85 *Grootboom case*, para 75

⁸⁸ See art 4 of the UNCRC and 1 (1) of the ACRWC

state has an obligation to undertake the legislative measures to guarantee every parent and guardian with access to services and resources that are needed for them to be able to secure and establish adequate housing for their children. Although these legislative measures are undertaken ultimately for the benefit of the children, in practice such measures make adequate housing accessible to the parents and guardians. Thus adult persons who are parents or guardians can, on behalf of their children, invoke this right to compel the state to establish laws which guarantee them with access to adequate housing so that they can provide housing to their children.

In addition to enacting laws to guarantee every parent or guardian access to adequate housing, the state has a duty to promote and fulfil the children's constitutional right to adequate housing. This obligation entails that the state must go beyond enacting laws. Where necessary,⁸⁹ the state is required to provide reasonable material assistance to enable parents to access adequate housing for the benefit of their children.⁹⁰ The state enjoys discretion to choose the specific measures but the measures must be reasonable and they may include making land available to economically disadvantaged parents so that they can establish decent homes for their children. Although such measures are undertaken ultimately for the benefit of the children, the parents are beneficiaries as well because the material assistance is given to them so that they can access adequate housing for the benefit of their children. Thus adult persons who are parents or guardians can apply their children's right to adequate housing to compel the state to provide them with reasonable material assistance in order for them to access resources and services which they need in order to establish adequate housing for the benefit of their children.

8.9 Conclusion and possible further research

I have sought to investigate and establish how the international legal duty of the state to progressively achieve the realisation of the right to have access to adequate can be enforced in Zimbabwe, even though the Constitution does not expressly guarantee every person with such a right. The absence of an explicit constitutional right of access to adequate housing should not mean that the government's international legal obligations under that right cannot be enforced as a constitutional responsibility. The entrenchment of the fundamental freedom from arbitrary evictions, the right to life, the right to substantive equality and the children's right to shelter

⁸⁹ For instance in cases where the parents have no means to provide adequate care on their own.

⁹⁰ See 27 (3) of the UNCRC and 20 (2) of the ACRWC

provides incredible alternative avenues for the enforcement of these obligations in domestic courts. Thus, it can be argued (as Julie Stewart, Rosalie Katsande and Olga Chisango⁹¹ do) that this Constitution brings a fresh perspective and an enforceable right to have access to adequate housing and therefore, that citizens can legitimately demand that this right be respected, protected, promoted and fulfilled by the national government and local municipalities.

However, future research needs to investigate and establish if in practice, the Zimbabwean judiciary will be willing to embrace the arguments that have been advanced in this thesis regarding how the right to life, the fundamental freedom from arbitrary evictions, the right to equality and the children's right to shelter can be invoked and interpreted to compel the government to take specific steps aimed at facilitating access to adequate housing by individuals in Zimbabwe. Thus the arguments generated in this research need to be tested through public interest litigation in Zimbabwean courts.

In addition to that, future research might also need to examine the extent to which the arguments and ideas advanced in this thesis can be applied in other jurisdictions that are comparable to Zimbabwe. There are certain jurisdictions, particularly in Africa,⁹² where socio-economic rights have not been expressly entrenched in the Constitutions but the right to life and the right to equality are provided for. The arguments and ideas generated in this thesis could also be developed further through similar research in those jurisdictions, as academics and courts seek to foster access to social justice for the vulnerable groups.

The arguments and ideas developed in this thesis may also be useful for regional and continental human rights bodies, particularly the African Commission⁹³ as it seeks to promote the realisation of socio-economic rights in Member States of the African Union. In 2010, the African Commission took a progressive step to develop guidelines on the interpretation of the social, economic and cultural rights under the African Charter on Human and Peoples' Rights and it noted that:

Without prejudice to the foregoing, where economic, social and cultural rights are not expressly included in the constitution of a State party, the courts and administrative tribunals should strive to protect the interests and values underlying these rights through an expansive interpretation of other

⁹¹ (2017). 'Shelter, a Home, a House or Housing?' *International Development Research Centre*. p. 15

⁹² For example Namibia, Botswana, Lesotho and Swaziland. See Dinokopila, B. (2013). 'The Justiciability of Socio-Economic Rights in Botswana' *Journal of African Law*. p. 108-125

⁹³ The African Commission on Human and Peoples' Rights

rights, for example, the rights to life, human dignity, security of the person, equality and just administrative action.

This thesis sought to advance this line of thinking, using Zimbabwe as a case study. The African Commission may therefore adopt the ideas propagated in this thesis and popularise them amongst its Member States, in order to demonstrate how the civil and political rights can be interpreted to imply the duty of Member States to respect, protect and promote access to socio-economic rights. International development agencies such as the International Commission of Jurists (ICJ) who have taken a keen interest on promoting socio-economic rights around the world, through the development of best practice guidelines,⁹⁴ may also consider the arguments advanced in this thesis and adapt them to suit the respective jurisdictions in which they are working.

⁹⁴ See Ratjen, S. (2014). *Adjudicating Economic, Social and Cultural Rights at National Level: A Practitioner's Guide* and Ratjen, S and Mavedzenge, J. (2014). *A Guide for the Litigation of Economic, Social and Cultural Rights in Zimbabwe*.

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Peter Makani v Epworth Local Board HH 550–14

Rattigan v Chief Immigration Officer [1994] (2) ZLR 54 (S)

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9.4 Cases from South Africa

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9.5 Cases by the African Commission and the African Court

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9.6 Cases by the Inter-American Court of Human Rights

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9.7 Cases from India

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9.8 Cases from Canada

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