

RIGHTS INFERENCE: UNDERSTANDING THE MEANING OF SECTION 46 OF THE CONSTITUTION OF ZIMBABWE BEYOND GUBBAY CJ'S DICTUM

BY JUSTICE ALFRED MAVEDZENGE¹

(in loving memory of the late Blasio Zivengwa Mavedzenge)

ABSTRACT

The Constitution of Zimbabwe guarantees a wide range of fundamental rights. These are set out in Chapter four-the Declaration of Rights. However, the Constitution is silent on a number of fundamental rights which include the right to access adequate housing, the right to development and the right to the protection of family. Thus, the Constitution does not expressly provide for these rights, yet in the preamble it, captures and expresses a vision of a prosperous and just society that is based on human dignity. There is a real risk that this vision will remain a pipe dream if individuals do not enjoy these rights. In this paper, I examine how and the extent to which the interpretive guidelines set out in section 46 of the Constitution, can be applied as a tool to infer or read in rights that are not expressly provided for in the Constitution's Declaration of Rights. Inevitably I also examine the theoretical underpinnings of the rules provided for in section 46 and argue that, the courts need to engage with those theories in a critical and nuanced fashion in order to develop a meaningful jurisprudence on how fundamental rights should be interpreted in Zimbabwe.

Key words: constitution-constitutional court-section 46-constitutional values-rights-human dignity-constitution of Zimbabwe.

INTRODUCTION

Amongst the progressive attributes of the 2013 Constitution of Zimbabwe is that it guarantees an expansive Declaration of Rights, especially when one compares it to the previous Lancaster House

¹ Justice Alfred Mavedzenge holds a PhD in Constitutional Law from the University of Cape Town. He is a Researcher at the University of Cape Town Law Faculty's Democratic Governance and Rights Unit, and is an associate at Maja and Associates Commercial Law Chambers.

Constitution of 1979 and to Constitutions of other jurisdictions.² Yet, it is also true that the Constitution of Zimbabwe does not expressly guarantee certain rights that are very important, especially for the socio-economic well-being of individuals and groups. Such rights include the right of every person to access adequate housing³, the right to development⁴ and the right to the protection of family.⁵

Some may argue that if the Constitution does not expressly guarantee these rights, then there is no need for courts to bother about their enforcement.⁶ This is a misplaced argument. There is more to constitutional interpretation than just the words that are written in the Constitution. Usually constitutions are meant to capture and express a broad vision of a society. They rarely provide adequate details on how that vision should be achieved.⁷ The courts, government agencies and everyone seized with constitutional interpretation, must then interpret the Constitution in a manner that promotes the realisation of the stated goal or vision.

There can never be any reasonable doubt that, through the 2013 Constitution the people of Zimbabwe aspire to establish for themselves a "*just and prosperous nation*"⁸ that is founded on "*recognition of inherent dignity and worth of each human being*"⁹ as well as "*the equality of all human beings*."¹⁰ That aspiration cannot be achieved if individuals and communities cannot enjoy such rights as the right to development, the right to access adequate housing and the right

2. Such as the Constitution of Zambia and the Constitution of Botswana

3. The Constitution expressly provides for the right to shelter for children in section 81 (1) (f).

4. See art 1 and article 2 of the United Nations General Assembly, *Declaration on the Right to Development: Resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128. Also see Arjun Sengupta "Right to Development as a Human Right" in 2001 Vol. 36, No. 27 *Economic and Political Weekly*

5. See art 18 of the African Charter on Human and Peoples' Rights and for a discussion of what this right entails see United Nations Human Rights Committee "Report on protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development (A/HRC/31/37)"

6. This may be the view of those who argue in favour of a strict literal interpretation

7. Iain Currie and Johan De Waal make similar observation in *The Bill of Rights Handbook* 6th ed, *Juta and Company* 2013 at p. 135 and 136

8. See preamble of the Constitution of Zimbabwe, 2013

9. See section 3 (1) (e) of the Constitution of Zimbabwe, 2013

10. See section 3 (1) (f) of the Constitution of Zimbabwe, 2013

to the protection of family. The Committee on Economic, Social and Cultural Rights (CESCR) has interpreted the right to adequate housing as the “*right to live somewhere in peace, security and dignity*”¹¹, thereby underscoring the inseparability of this right from the vision of establishing a society based on respect for human dignity.¹² The same can be said with respect to the right to the protection of family¹³ and the right to development.¹⁴

Clearly these rights are so important that they cannot be ignored, if Zimbabwean courts are to interpret the Declaration of Rights in a manner which realises the vision captured in this Constitution. In this paper, I do not address how these particular rights can be read into the Zimbabwean Declaration of Rights. I have done so elsewhere.¹⁵ The question that I grapple with is whether and to what extent does section 46 of the Constitution of Zimbabwe require courts to infer rights that are not expressly provided for in the Declaration of Rights?

I take the position that, as a general rule, section 46 of the Constitution requires courts to adopt a broad approach to interpretation of fundamental rights. I acknowledge that this has already been pointed out by the Constitutional Court of Zimbabwe-albeit in passing.¹⁶ Thus, apart from just mentioning it and regurgitating Gubbay CJ’s *dictum* in a 1994 case of *Rattigan v Chief Immigration Officer*¹⁷, the Constitutional Court has not engaged on this subject in a deeper and nuanced fashion. For instance in *Madzimbamuto v Registrar General*, Ziyambi JA simply said:

The approach to interpretation of a constitutional right has been laid down in many decisions of the predecessor of this Court. Thus in *Rattigan & Ors v Chief Immigration Officer & Ors* 1994

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11. 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
 12. See Justice Alfred Mavedzenge PhD thesis “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” *University of Cape Town*, 2018
 13. Supra note 4
 14. Supra note 3
 15. Supra note 11
 16. See *Mawere v Registrar General* (2015) ZWCC 04 at para 20 and *Madzimbamuto v Registrar General* [2014] ZWCC 5 at 5-6
 17. 1994 (2) ZLR 54 (S) at 57 F-H

(2) ZLR 54 (S) at 57 F-H the Court held: "This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. 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 or strictly construed."¹⁸

After citing the above *dictum*, the learned Ziyambi JA went straight to conclude and give an order without providing any meaningful analysis of what this *dictum* entails, as if the *dictum* is self-explanatory. The rest of the bench concurred with this judgment. The Court took a similar approach in *Mawere v Registrar General*¹⁹, where Garwe JA (with concurrence of the entire bench) cited Gubbay's *dictum* and a couple of other remarks by judges from other jurisdictions, but did not engage with this *dictum* to provide any nuanced interpretation of section 46 of the Constitution.

Therefore, beyond Gubbay CJ's *dictum*, there is not yet any meaningful jurisprudence that has been developed on the practical implications of section 46, especially when interpreting constitutional rights. There is therefore a gap in the Zimbabwean jurisprudence on this subject. Through this paper, I hope to make a contribution towards addressing this gap.

The centre piece of my argument is that section 46 of the Constitution is an expression of the following doctrinal theories of constitutional interpretation: rights interdependence and indivisibility; the doctrine of the 'living' constitution, the value based and purposive theory of interpretation-and these presuppose a broad and or value laden approach to rights interpretation, which in turn allows the courts to infer some of these rights that are not expressly provided for in the Declaration of Rights. First, I consider what section 46 says.

SECTION 46 OF THE CONSTITUTION OF ZIMBABWE

Section 46 sets out rules governing the interpretation of constitutional rights. It is framed as follows:

^{18.} Supra note 16 *Madzimbamuto v Registrar General* at p.5-6

^{19.} Supra note 16, para 20

When interpreting this Chapter, 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;
 - c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;
 - d) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and
 - e) 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.

Thus, in addition to other relevant factors (such as views expressed in literature by eminent scholars) which courts have discretion to consider, section 46 identifies certain factors as mandatory. These are: the need to ensure that rights are given their intended full effect: the need to protect and promote constitutional values: the need to promote compliance with international legal duties, norms and standards: and the need to ensure that the interpretation is anchored on textual context. Each of these factors or considerations is an expression of the doctrinal theories that I identified above, and their common purpose is to ensure that rights are interpreted in a manner that guarantee their effective realization. I begin by discussing how the rights interdependence and indivisibility theory underpins the rules in section 46²⁰ and why that should result in courts inferring certain rights upon the Declaration of Rights.

RIGHTS INTERDEPENDENCE AND INDIVISIBILITY

Section 46 (1) (a) obliges courts to interpret the Declaration of Rights in a manner that gives '*full effect*' to the fundamental rights and freedoms enshrined therein. The Constitutional Court often regurgitates this provision, without explaining its practical implications.²¹ In order to identify the practical implications of section

^{20.} Of the Constitution

^{21.} Supra note 17 and supra note 18

46 (1) (a), regard must be had to the theoretical underpinnings of the rule prescribed therein.

The rule of constitutional interpretation, encapsulated in section 46 (1) (a) is a constitutional instruction for the court to observe and apply the rights indivisibility and interdependence principle, when interpreting the Declaration of Rights. Essentially, this principle entails that fundamental rights cannot be interpreted and enforced separately or in isolation because the effective realisation of certain rights depends on the simultaneous enforcement of other relevant fundamental rights.²² Put differently, in order to 'give full effect' to a right as is required by section 46 (1) (a), the court must recognize that some rights must be enforced simultaneously because there is a conceptual relationship of interdependence between or amongst them.

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*".²³ 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 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..²⁴

Thus, the concept of organic interdependence requires us to perceive certain rights as constituent elements of other rights. Craig Scott uses the example of the right to life and the right to adequate housing.²⁵ 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.²⁶

^{22.} Craig Scott "Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" in 1989 *Osgoode Hall Law Journal*. p. 781. Also see Sandra Liebenberg. *Socio-economic Rights: Adjudication under a Transformative Constitution* 2010 p. 51

^{23.} *Supra* note 22, Craig Scott at p. 779

^{24.} *Ibid*

^{25.} *Supra* note 22, Craig Scott at p. 780

^{26.} Also see E Wicks. "The Meaning of Life: Dignity and the Right to Life in International Human Rights Treaties." in 2012 *Human Rights Law Review* at p. 206: Also see UN General Assembly "*Promotion and Protection of Human Rights:*

Yacoob J in *Government of the Republic of South Africa v Irene Grootboom*²⁷ makes a similar assertion.

According to Scott, the organic interdependence of fundamental rights can be explained on the basis of two conceptions. First is what he describes as the “*logical or semantic entailment*.”²⁸ 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).²⁹ Thus the ‘derivative right’ is a logical consequence of the ‘core right’. For example, it can be argued that the right to life is a ‘general core right’ which logically implies a range of other rights including the right to have access to basic social services that are necessary for human life.³⁰ In this connection, the right to access adequate housing is therefore, a ‘derivative 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 access 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 that the fundamental right to [substantive] equality is a ‘general core right’ which logically takes within its scope, other ‘derivative rights’ such as the right to development for a previously marginalized community.

Critics may argue that the above approach allows judges to replace the law with their own logic and this may undermine the rule of law and separation of powers between the judiciary and law or policy makers. In defence of Scott’s logical entailment approach, I argue that this approach is not a licence to constitutional flights of fancy as it does not mean that there are no limitations regarding the extent to

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

27. 2000 (11) BCLR 1169 (CC), para 23

28. *Supra* note 22, Craig Scott at p. 781

29. *Ibid*

30. Also see the decisions of the Supreme Court of India 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

which judges should apply their logic. As will be made clearer in the following sections of this paper, the judge's logic must be rational in the sense that it must be guided by the textual context- which comprises of the prescribed constitutional values, principles, international law and the words used in framing the right. Yacoob J in *Government of South Africa v Grootboom*³¹ demonstrates how this approach to constitutional construction can be applied within the above highlighted limits, for purposes of giving effect to the constitutional vision.

Scott identifies the second form of organic interdependence as the 'effectivist or foundational conception' which 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*".³² Thus, the 'effectivist conception' entails that the enforcement of one right cannot be effective without simultaneously enforcing the other right.

Both the logical entailment and the effectivist approach (as Craig Scott's conception of the rights indivisibility and interdependence theory) require courts to refrain from interpreting rights as if they are isolated from the other. As I mentioned earlier, the Constitutional Court, by citing with approval Gubbay CJ's *dictum*, has expressed this view.³³ However, it has not demonstrated in its jurisprudence, the implications of that rule. In practice, the implications of this rule (as encapsulated in section 46 (1) (a) of the Constitution) is therefore that even if a right is not expressly guaranteed in the Declaration of Rights, the court must infer that right (the derivative) upon another expressly guaranteed right (the core right) as long as the 'core right' is grammatically framed broadly, and as long as it can be proven that the expressly guaranteed right cannot be implemented effectively without simultaneously enforcing the implied (derivative right) right. Thus, section 46 (1) (a) of the Constitution is an expression of the rights indivisibility and interdependence doctrine, which requires courts to interpret the expressly guaranteed rights as widely as the language allows in order to infer other rights which the Constitution is silent on. In a sense therefore, section 46 (1) (a) requires courts to refrain from perceiving the Declaration of Rights as an exhaustive list of constitutional rights. It ought to be perceived as an outline of the

^{31.} Supra 26, at para 19-25 and 35-40

^{32.} Supra note 22, Craig Scott at p. 781

^{33.} Supra note 17 and Supra note 18

'core rights' upon which numerous other derivative rights can be inferred.³⁴

Section 46 as an Expression of the Doctrine of a 'Living Constitution'

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)³⁵ obliges courts to interpret fundamental rights in a manner that upholds and promotes the entrenched constitutional values. In order to give constitutional rights their full effect and to protect the underlying constitutional values, courts have to refrain from rigidly holding on to the traditional and age old interpretations of fundamental rights.³⁶ Instead, the courts must develop and embrace new, nuanced and updated meanings of fundamental rights in order to address contemporary challenges which threaten to render rights illusory or which threaten the values that underlie the Constitution.

Thus, the rules of constitutional interpretation, provided for in section 46 (1) (a) and (b) have their theoretical roots in the doctrine of a living constitution. Regard must therefore be had to this doctrine if we are to fully grasp the practical implications of section 46 (1) (a) and (b) on rights interpretation.

Arguably, the doctrine of a living constitution was originally developed in the American jurisprudence,³⁷ but it must be noted that the Supreme Court of Zimbabwe³⁸ confirmed the application of this doctrine in Zimbabwe when it held that:

A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid the austerity of tabulated legalism and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of

^{34.} To the extent permitted by the words used to frame the core rights

^{35.} Of the Constitution of Zimbabwe, 2013

^{36.} Supra note 16, *Mawere v Registrar General*, para 20

^{37.} For a discussion on this see See Aileen Kavanagh "The Idea of a Living Constitution." in 2003 *Canadian Journal of Law and Jurisprudence*

^{38.} Though prior to the enactment of the 2013 Constitution

the values bonding its people and in disciplining its Government.³⁹

Unfortunately, in the above case, the Supreme Court simply reproduced the *dictum* of Mahomed J.⁴⁰ The Court did not engage sufficiently with the doctrine itself, to examine its practical implications beyond the rhetoric contained in the *dictum* cited above. However, one of the scholars on this subject, Aileen Kavanagh provides a clearer description of this theoretical approach to constitutional interpretation. She describes it 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.⁴¹

Thus, as a general rule the constitution must 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 of society.⁴² The practical implications of this rule [as encapsulated in section 46 (1) (a) and (b)⁴³] is therefore that, when interpreting constitutional rights the courts should not restrict themselves to the traditionally accepted meaning of certain constitutional rights. Where necessary, they should adapt the scope and meaning of these rights in order to address contemporary challenges which threaten to render those rights illusory or which threaten the values upon which the constitutional order is based. Thus, in a sense, the courts should infer certain rights upon those that are expressly guaranteed in the Constitution, as a means of addressing contemporary challenges which threaten the realisation

^{39.} *Supra* note 16, *Mawere v Registrar General* at para. Also see *Capital Radio Pvt Ltd v Broadcasting Authority of Zimbabwe* 2003 (2) ZLR 236 (5), p 247 b-d

^{40.} In *S v Mhlungu* 1995 (3) SA 867; 1995 (7) BCLR 793 (CC) at para 8, which he later applied in *Government of the Republic of Namibia v Cultura* 2000 1994(1) S.A. 407 (Nm S) at 418 F-H when he was sitting as Chief Justice of the Supreme Court of Namibia

^{41.} See *supra* note 37, Kavanagh, at p. 56

^{42.} 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.

^{43.} Of the Constitution of Zimbabwe, 2013

of the expressly guaranteed right or the constitutional values which the right is meant to protect.

For instance, in Zimbabwe, the right to life may have originally been conceptualised to protect individuals from unlawfully being deprived of their life,⁴⁴ 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 cancer, 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 given a nuanced meaning-which is the right to receive reasonable assistance by the state in order to access basic necessities of life in order to prevent loss of human life and to protect human dignity.

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.*”⁴⁵ 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. Kentridge AJ⁴⁶ also emphasised this point by stating that:

[w]hen interpreting constitutional rights] it cannot be too strongly stressed that the Constitution does not mean whatever

⁴⁴. See section 12 (1) of the previous Constitution: The Lancaster House Constitution of Zimbabwe, 1979

⁴⁵. See supra note 37, 7 at p. 57

⁴⁶. In *S V Zuma* 1995 (2) SA 642 (CC) at 17

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.

As I indicated earlier, the Constitution requires courts to respect the text used in framing the constitutional right, when interpreting the Declaration of Rights.⁴⁷ This is implicitly prescribed in section 46 (1) (d) which requires courts to take into account the relevant provisions, when interpreting constitutional rights. Therefore, the scope and content 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 Wilkinson⁴⁸ 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.⁴⁹

Similarly, in Zimbabwe certain constitutional provisions are framed narrowly. For example, the right to shelter in section 81 (1) (f) is for children, who are defined as "*every boy or girl under the age of eighteen*".⁵⁰ It is therefore clear that adults cannot rely on this right to claim access to shelter as a right.⁵¹ However, some rights are framed broadly. For instance, 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 in accordance with certain constitutional values, to address contemporary threats to human life and reach the conclusion that this right implies the

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

48. In "Interpreting a Living Constitution" 2015 *North East Law Review* at p.7-13

49. *Ibid*, p. 7

50. See section 81 (1) of the Constitution of Zimbabwe, 2013

51. *Supra* note 11

duty of the state to make adequate housing accessible, in order to protect and promote the attainment of life in human dignity.

Similarly, under the right to equality, the duty of the state to achieve substantive equality is framed in broad terms in s 56 (6)⁵² 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 through an interpretation process which seeks to protect constitutional values and give expression to the constitutional vision of a society based on human dignity and equality. In that regard, it can be argued for instance that the measures contemplated in section 56 (6) include making adequate housing accessible to disadvantaged groups, or the right to development for such groups, in order to achieve substantive equal protection of human dignity between or amongst different communities in the country. Given that most fundamental rights are framed broadly,⁵³ it is possible to apply the rules prescribed in section 46 (1) (a) and (b) to infer certain rights upon those that are expressly guaranteed in the Declaration of Rights.

VALUE-BASED INTERPRETATION OF FUNDAMENTAL RIGHTS

In addition to observing the principle of rights indivisibility and applying the doctrine of a living constitution, courts are also required to adopt a value-based approach to rights interpretation. This is encapsulated in section 46 (1) (b) as follows:

vWhen interpreting this Chapter [the Declaration of Rights], a court, tribunal, forum or body- (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 a number of cases which include *Mawere v Registrar General*⁵⁴ and *Madzimbamuto v Registrar General*,⁵⁵ the Constitutional Court interpreted the above provisions to mean that they require courts to interpret fundamental rights broadly, purposively and with flexibility,

^{52.} Of the Constitution of Zimbabwe, 2013

^{53.} See for example the following sections of the Constitution of Zimbabwe: 48 (1); 51; 57; 56 (6) and 74

^{54.} Supra note 15, *Mawere v Registrar General*

^{55.} Supra note 15, *Madzimbamuto v Registrar General*

in order to protect the values underpinning Zimbabwe's constitutional democracy. For instance, the Constitutional Court said:

[W]hen 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.⁵⁶ [My emphasis.]

As I mentioned above, this is Gubbay CJ's *dictum* in *Rattigan v Chief Immigration Officer*. By reproducing this *dictum* several times, the Court has underscored the idea that a value-based approach requires courts to interpret fundamental rights broadly. Whilst it is true that a broad construction is usually necessary, it is not always the case that rights should be interpreted broadly in order to protect constitutional values. In certain circumstances, the court may have to attach a narrow interpretation in order to protect certain constitutional values.⁵⁷

The above incorrect assumption may have been made because the Court seems to have adopted Gubbay CJ's *dictum* without further engaging (in its jurisprudence) on what these values actually mean and how (in practice) they should be applied when interpreting constitutional rights. There are numerous constitutional values that are enshrined in section 3⁵⁸ and it is impossible for the Court to examine what all these values mean every time when the Court interprets fundamental rights. However, what would be expected of the Court is to engage on the relevant values and incrementally create a nuanced jurisprudence on what those values mean and how in practice they influence the interpretation of a right. The failure by the Constitutional Court to do this has resulted in a dearth of local jurisprudence on the meaning of constitutional values and how they should be applied when one is interpreting fundamental rights. Thus, beyond Gubbay CJ's *dictum* (which as I showed above, makes some incorrect assumptions) there is yet to be a nuanced interpretation and application of section 46 (1) (b) of the Constitution of Zimbabwe.

^{56.} Supra note 15, *Mawere case* at para 20

^{57.} For example see *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) where the right to free use of private property was interpreted narrowly in order to protect the dignity of the evictees which would be violated if they were to be evicted without being given alternative housing.

^{58.} Of the Constitution of Zimbabwe, 2013

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.*”⁵⁹ In practice, the first step is therefore to identify the constitutional value(s) which would be affected by the court’s interpretation of the right(s) in question. After that the court has to discuss what those values entail or require of society and individuals, the norms and standards implied by those values. The last step is to then incorporate the norms and standards implied by those values or to adopt an interpretation which best protects or promotes those norms and standards. Whether a court should adopt a broad or narrow approach in order to protect the constitutional values is a question whose answer depends on what scope of the right would be best suitable to accommodate and protect the norms and standards implied in the constitutional values.

Comparative jurisdictions provide examples of how the above approach can be applied. Similar to section 46 (1) (b) of the Constitution of Zimbabwe, the 1993 interim Constitution of South Africa required courts to interpret rights in a manner that protects and promotes the entrenched constitutional values. This rule of interpretation was retained in the final Constitution of South Africa, 1996. One of the enshrined values is human dignity. In *S v Makwanyane*⁶⁰ the Court grappled with the question whether capital punishment is constitutionally valid or not. It was contended that capital punishment is unconstitutional because it amounted to cruel, inhuman and degrading punishment and therefore, it was an impermissible limitation of the freedom from cruel, inhuman and degrading punishment.⁶¹ In a way, the Court had to interpret what the constitutionally guaranteed freedom from cruel, inhuman and degrading punishment entails.⁶² This had to be done in a manner that protects the constitutional value of human dignity. The Court thoroughly engaged with the concept of human dignity in order to deduce what it entails as a constitutional value.⁶³ Although most judges who sat on this case wrote separate judgments, they all seem to agree⁶⁴ that by entrenching the value of

^{59.} See *Statutory Interpretation: An Introduction for Students* 4th ed 2005 p. 193

^{60.} 1995 (3) SA 391 (CC), 1995 (6) BCLR 665

^{61.} *Ibid* at para 27 for the summary of the arguments by parties

^{62.} *Ibid*, see for example paras 131 to 134

^{63.} And a fundamental right as well

^{64.} See the judgments of Langa J, Madala J, Mahomed J and Mokgoro J in *supra* note 59 at paras 223 - 227; 237 - 243; 263; and 307 - 313 respectively.

human dignity, the Constitution recognizes that human beings have inherent worthiness which must be protected at all times. O'Regan J put this more directly and vividly as follows:

The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.⁶⁵

The above interpretation of human dignity was considered in order to define what the freedom from cruel, inhuman and degrading punishment entails as a right. The Court concluded that, punishment is inhuman and degrading if its impact depraves, undermines or destroys the inherent worthiness of the human being.⁶⁶ Thus, the meaning of the freedom from cruel, inhuman and degrading punishment was interpreted by incorporating the value of human dignity. In the same case, a similar approach was applied to interpret the meaning of the right to life.⁶⁷ In subsequent cases, the Court applied a similar approach to interpret the meaning of the right to equality,⁶⁸ the right to adequate housing⁶⁹ and the right to privacy.⁷⁰

Elsewhere, the Supreme Court of Canada⁷¹ and the Federal Constitutional Court of Germany⁷² applied a similar approach to interpret the meaning of the freedom from cruel, inhuman and degrading punishment. In India, the Supreme Court has similarly incorporated the value of human dignity into the right to life in order to reach the conclusion that the right to life implies the right to live in human dignity.⁷³

65. Supra note 59 at para 328

66. Ibid. See for example para 95, and paras 144-145

67. Supra note 59 at para 327

68. See *Prinsloo v Van der Linde* 1997 (6) BCLR 759; 1997 (3) SA 1012 (CC) at 31-33; *President of the Republic of South Africa v Hugo* (6) BCLR 708; 1997 (4) SA 1 at para 41 and *Harksen v Lane* NO 1997 (11) BCLR 1489; 1998 (1) SA 300 (CC) at para 93

69. Supra note 26

70. *National Coalition for Gays and Lesbians Equality v Minister of Justice* 1998 (12) BCLR 1517; 1999 (SA) 6 (CC)

71. *Kindler v Canada* (1992) 6 CRR (2d) 193 SC at 241

72. [1977] 45 BVerfGE 187, 228 (Life Imprisonment case)

73. Supra note 29

In citing the above as examples, I am aware that human dignity as a conceptual value means much more than respect for the inherent worthiness of the human being.⁷⁴ I am also aware that the meaning of human dignity and many other values such as equality, is a highly contested subject which has seen courts and scholars in different jurisdictions interpreting them differently.⁷⁵ Therefore I am not (at this juncture) advocating that the Constitutional Court of Zimbabwe should adopt similar interpretations as those developed by other courts in the jurisdictions that I cited above. Rather, the point that I am making is that the Constitutional Court has a role to give meaning to the constitutionally entrenched values. This cannot be achieved by merely restating section 46 (1) (b)⁷⁶ or Gubbay CJ's *dictum* when interpreting fundamental rights. The Court must develop a nuanced Zimbabwean jurisprudence on the interpretation of these values, and it must demonstrate clearly how these values are informing the interpretation of rights. As Laurie Ackermann⁷⁷ rightly argues, this means that the court must engage with the relevant philosophical theories that led to the development of these values. Such analysis must also be anchored on Zimbabwe's historical and contemporary contextual realities. In South Africa for instance, Ackermann J of the Constitutional Court in *Prinsloo v Van der Linde* 1997⁷⁸ took into account South Africa's historical background of apartheid, contemporary realities of racial inequalities, and juxtaposed these against Ronald Dworkin's theory of equality, to develop an interpretation of what the value of equality in South Africa entails. He concluded that the entrenchment of equality as a constitutional value represents South Africa's aspiration to break from its apartheid past and achieve a society where the inherent worthiness of each person is equally respected and protected (which is Dworkin's interpretation of equality⁷⁹). Jurisprudence has thus been developed to the effect that the right to equality in South Africa does not always

74. Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* 2013 at p. 23-24 and 28-29

75. And sometimes putting different emphasis on different aspects of these values. For this discussion see Oscar Schachter "Human Dignity as a Normative Concept" in 1983 Vol 77, no 4 *The American Journal of International Law* pp 848-854

76. Of the Constitution

77. *Supra* note 73 at p.28-29

78. 1997 (6) BCLR 759; 1997 (3) SA 1012 (CC) at para 31-42 where Ackermann J engages with Ronald Dworkin's theory on equality and juxtaposes that theory against South Africa's apartheid history

79. Ronald Dworkin. *Sovereign Virtue: The Theory and Practice of Equality* 2000 p.

mean the right to receive equal treatment, but it also mean that previously marginalised groups should receive preferential treatment so as to achieve the constitutional goal of a substantively equal society.⁸⁰ Yacoob J in *Government of South Africa v Grootboom*⁸¹ takes a similar approach to interpret what the value of human dignity entails in the interpretation of the right of access to adequate housing.

When the Constitutional Court of Zimbabwe adopts this approach, it will be clear (as it is in comparative jurisdictions) that by requiring courts to adopt a value laden approach to rights interpretation, the Constitution obliges courts (where necessary) to infer other rights upon those that are expressly guaranteed in the Declaration of Rights. The inference of rights is a consequence of incorporating certain constitutional values into the expressly guaranteed rights. However, as Lord Wilberforce said: "*a Constitution is a legal instrument, the language of which must be respected.....a Constitution embodying fundamental principles should as far as its language permits be given a broad construction.*"⁸² As I pointed earlier, this rule is encapsulated in section 46 (1) (d). Therefore, the inference of other rights, which is done by means of incorporating certain values into the expressly guaranteed rights, can only be done to the extent permitted by the words used to frame the fundamental right.

PURPOSIVE INTERPRETATION OF FUNDAMENTAL RIGHTS

By virtue of binding courts to attach an interpretation which gives full effect to the right, section 46 (1) (a) of the Constitution⁸³ is in a sense a constitutional injunction for courts to apply a purposive approach to constitutional rights construction. Scholars on this subject⁸⁴ 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:

^{80.} Supra note 77

^{81.} Supra note 26

^{82.} This was cited by Kentridge AJ in *State v Zuma* 1995 (2) SA 642 (CC)

^{83.} Which requires the court to attach an interpretation that gives full effect to the right.

^{84.} G Devenish. *Interpretation of Statutes* 1992) p. 36. Also see L Du Plessis. *Re-Interpretation of Statutes* 2002 p. 96 and Iain Currie supra note 6 at p 136-137.

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.⁸⁵

Thus, purposive interpretation 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. This approach has been cited with approval by the Constitutional Court of Zimbabwe,⁸⁶ which means that there can never be any doubt that section 46 (1) (a) embodies a purposive approach to constitutional construction. The Constitutional Court of Zimbabwe has even provided guidelines relating to the steps which must be taken when applying this approach. It has thus suggested that the purposive approach should be considered only if limiting the interpretation to the literal meaning of the right would produce an absurd meaning⁸⁷ an unreasonable interpretation which (for instance) undermines the object of the Constitution.

However, what remains unclear is how the court should ascertain the purpose of the right in the event that a literal meaning would produce an absurd interpretation. If this is not clarified, then the purposive approach remains vulnerable to abuse. It becomes a license for judges to replace the law with their own opinions clothed as 'the purpose of the Constitution'. As I argue elsewhere⁸⁸, the Constitutional Court's ruling in *Justice Mavedzenge v Minister of Justice*⁸⁹ is a practical example of how the purposive approach can be misused if there is no clarity about how the judge should ascertain the purpose of the right.

Some scholars⁹⁰ have observed that the purpose of a legal provision can be ascertained from documents which describe the background

85. R v Big M Drug Mart Ltd 1985 18 DLR (4th) 321 para 395-396

86. See *Zimbabwe Electoral Commission v Commissioner General*, ZRP (2014) ZWCC 3, para 8. Also see *Justice Alfred Mavedzenge v Minister of Justice*, legal and parliamentary affairs CCZ 05-18 at page 9

87. *Ibid*, *Zimbabwe Electoral Commission v Commissioner General*, ZRP at para 8

88. *Supra* note 11

89. *Supra* note 85

90. *Supra* note 7, Iain Currie at p. 141

leading to the drafting of the provision. Reliance on '*travaux preparatoires*' is allowed in international law.⁹¹ This may be a useful strategy only if those documents and their authenticity can be ascertained, which is rarely the case.⁹²

Reference can also be made to the historical context in order to identify the purpose of the right.⁹³ Here the assumption is that the constitutional right seeks to prevent certain things that happened in the past from happening again in the future,⁹⁴ or that the constitutional right is guaranteed in order to consolidate certain gains that were made in the past. Unfortunately, historical facts and events are usually a highly contested and disputed terrain to the extent that it is usually impossible to ascertain the truth or veracity of certain historical claims.

Textual context can also be useful when ascertaining the purpose of the right.⁹⁵ This is the idea that the purpose of the right should be ascertained by taking into account relevant provisions in the Constitution and their historical origins. For instance, Iain Currie and Johan De Wall⁹⁶ suggest that "*purposive interpretation is aimed at teasing out the core values that underpin*" the right. This view seems to be based on the assumption that every right is guaranteed in order to protect a certain value, and therefore, the best way of identifying the purpose is to ask the question: what value does the right seek to protect or advance? To a great extent, this assumption is true and can be the most useful way of identifying the purpose of the right because, a Constitution should be read holistically.⁹⁷

The Constitution of Zimbabwe provides for a list of values and principles under section 3. It declares that Zimbabwe is founded on respect for those values and principles. It further provides for a Declaration of Rights which, in terms of section 46 (1) (b) must be interpreted in a manner that upholds and promotes the values enshrined in section 3. Therefore, section 46 (1) (b) of the Constitution makes it abundantly

^{91.} See Article 32 of the Vienna Convention on the Law of Treaties (1969)

^{92.} *Supra* note 59 at para 17-18

^{93.} See *Brink v Kitshoff* 1996 (4) SA 197 (CC) at para 40 for an example of how historical context was taken into account to ascertain the purpose of equality as both a constitutional value and a right.

^{94.} *Supra* note 39, *S v Mhlungu* at para 8

^{95.} *Supra* note 7, Iain Currie at p. 143

^{96.} *Ibid* at p.136-137

^{97.} *Ibid* at 143-144, for a detailed discussion on this

apparent that there is a correlation between section 3 of the Constitution and the Declaration of Rights apparent. The correlation is that the rights and freedoms guaranteed in the Declaration of Rights are primarily⁹⁸ meant to serve and protect the values that are enshrined in section 3 of the Constitution. Therefore, section 3 forms the textual context which should be considered by the court in order to ascertain the purpose of the right. By this I am not arguing that the court should not consider context outside of section 3. Rather, the argument is that constitutional values in section 3 should be the primary reference point when the court is ascertaining the purpose of the right. The courts can proceed to consider context outside of section 3⁹⁹ if an inquiry focused on section 3 has failed to produce a clear answer regarding the value or principle which the right seeks to protect. Such an approach creates certainty regarding how courts should identify the purpose for which a right has been guaranteed. It shields the constitution from being replaced by the judges' own personal or collective opinion-sometimes based on their own preferred version of history-which is then presented as the true purpose of the right.

Thus, the purposive approach is a necessity and must be anchored on the constitutional provisions (especially the values). By instructing courts to adopt a purposive approach to rights interpretation, section 46 (1) (a) of the Constitution requires that, where it is necessary to protect the purpose of the right, certain rights should be inferred upon those that are expressly guaranteed in the Declaration of Rights. For instance, if the right to life is interpreted by taking section 3 (1) (e) of the Constitution into account as the primary textual context, then the purpose for guaranteeing the right to life is to ensure that the "*inherent dignity and worth of each human being*"¹⁰⁰ is respected at all times. This would then mean that the right to life implies other rights such as the right to access adequate housing because human dignity cannot be protected without ensuring that individuals and their families have access to adequate housing. In that sense, the purpose for guaranteeing the right to human dignity would not be

^{98.} There are numerous interests to be served, including the constitutional objectives in Chapter two of the Constitution, but the primary here I suggest that the primary interests are the constitutional values

^{99.} For example, reference should also be made to the objectives set out in Chapter Two of the Constitution as required by section 46 (1)(d)

^{100.} See section 3 of the Constitution

achieved if the right to access adequate housing is not inferred upon the right to life. Put differently, the right to life cannot be enforced effectively, as required by section 46 (1) (a) if it is interpreted without inferring upon it certain other rights which guarantee people access to basic amenities that are necessary for the protection of human dignity.

The above approach may be criticized by some as a conflation of section 46 (1) (a), which requires rights to be given full effect, and subsection (b) which requires courts to uphold constitutional values when interpreting these rights. There is no conflation because the two subsections (a) and (b) have a common purpose-which is to ensure that constitutional rights are interpreted in a manner which does not render them to be illusory and mere paper tigers. Whereas subsection (a) requires rights to be given full effect, subsection (b) provides the means through which how rights can be given full effect. The means is to interpret them in a manner that protects the values which underpin those values. In that sense, the protection of the constitutional values is either the purpose for which the right was guaranteed or the constitutional values function as signposts for identifying the purpose served by the right. Thus, section 46 (1) (b) is a means to achieve that which is required by subsection (a). In that sense, the purposive approach to interpretation is itself a value laded approach to rights construction and therefore section 46 (a) and (b) must be interpreted together and holistically. Thus, the two are like a bow and arrow which must be applied together in order to give rights teeth and meaning.

CONCLUSION

The rules of constitutional interpretation that are provided for in section 46 (1) (a) and (b) of the Constitution have their conceptual roots in certain theories of constitutional construction, namely: the rights indivisibility and interdependence theory, the doctrine of a living constitution, the value based and purposive approach. These theories are underpinned by a common objective-which is to facilitate the interpretation of rights in a manner that promotes their effective realization. When applied properly they will inevitably result in certain rights being inferred upon the Declaration of Rights. Thus, section 46 (1) (a) and (b) is can be an effective pathway for reading in rights which the Constitution is silent on, yet the enjoyment of those rights is a precondition for the realization of the rights and the vision that is expressly guaranteed or expressed in the Constitution. However, for

this to happen, the courts must adopt a more robust approach to the application of the interpretive rules. This demands courts to go beyond regurgitating what has been said by other courts or judges. The courts must provide a comprehensive, deeper and nuanced engagement with the conceptual underpinnings of these rules of constitutional interpretation.