

Assessment of the Progress on **Socio-Economic Rights** in Zimbabwe during the COVID-19 Period

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RD-GRAPHIX



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This document is divided into 3 parts

Part A: Gender Analysis Of the Progress of Socio-Economic Rights in Zimbabwe During the Covid 19 Period

Part B: Legal framework, Rights provisions and policies and laws for securing women's access to rights, services and justice under Covid 19

Part C: Zimbabwean Courts' approach to the adjudication of Economic Socio and Cultural Rights: A brief Survey of cases

Research carried out by Prof. **Sunungurai D. Chingarande** and **Brian Penduka**
(February-March 2021)

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INTRODUCTION TO THE RESEARCH

Emerging evidence on the impact of COVID-19 shows that the pandemic is not gender blind, it has deepened the structural, economic, social and gendered inequalities further marginalising women and girls facing intersecting forms of discrimination such as women living with HIV, women and girls with disabilities and elderly women among others. Against this background, in December 2020, three civil society partners i.e. Zimbabwe Women's Resource Centre and Network (ZWRCN), Diakonia and Women in Law in Southern Africa (WLSA), with funding from the Transparency, Responsiveness and Citizen Engagement (TRACE) programme under the project entitled "Inclusive and Gender Responsive Local Government Policy, Planning and Budgeting Processes for Equitable Public Service Delivery" commissioned an independent in-depth desk gender and legal analysis on the progress of socio-economic rights in Zimbabwe during the COVID 19 period. The analyses specifically focused on the rights to water and health and proffered recommendations for the advancement of such rights. Three research reports were produced and they focused on 1) Gender analysis of the progress of socio-economic rights in Zimbabwe during the COVID-19 period, and 2) Legal framework, Rights provisions and policies and laws for securing women's access to rights, services and justice under Covid 19 and 3. Case Law analysis on Zimbabwean Courts' approach to the adjudication of Economic Socio and Cultural Rights.

Based on these reports, the partners intend to develop advocacy tools for engagement with citizens, other likeminded civil society organisations and policy makers, including local and central government authorities and Members of Parliament.

PART A

GENDER ANALYSIS OF THE PROGRESS OF SOCIO-ECONOMIC RIGHTS IN ZIMBABWE DURING THE COVID 19 PERIOD

Report By **Sunungurai D. Chingarande (PhD)**

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LIST OF ACRONYMS

ABR	Adolescent Birth Rate
CSO	Civil Society Organisation
FP	Family Planning
GBV	Gender Based Violence
GoZ	Government of Zimbabwe
GRB	Gender Responsive Budgeting
mCPR	Modern Contraceptive Prevalence Rate
MICS	Multiple Indicator Cluster Survey
MMR	Maternal Mortality Ratio
MOHCC	Ministry of Health and Child Care
NDS	National Development Strategy
NGO	Non-governmental Organisation
OSC	One Stop Centre
PFMA	Public Finance Management Act
PPE	Personal Protective Equipment
PR	Proportional Representation
SARA	Service Readiness and Availability Assessment
SDG	Sustainable Development Goal
SOP	Standard Operating Procedure
TFR	Total Fertility Ratio
TRACE	Transparency, Responsiveness and Citizen Engagement programme
TSP	Transitional Stabilisation Programme
VFU	Victim Friendly Unit
VIAC	Visual Inspection with Acetic Acid Camera
WHO	World Health Organisation
WILD	Women in Leadership Development
WLSA	Women in Law in Southern Africa
ZDHS	Zimbabwe Demographic and Health Survey
ZINWA	Zimbabwe National Water Authority
ZWLA	Zimbabwe Women Lawyers Association
ZWPC	Zimbabwe Women's Parliamentary Caucus
ZWRCN	Zimbabwe Women's Resource Centre and Network

1. BACKGROUND

Zimbabwe has not been spared by the Coronavirus disease 2019 (COVID-19), a global pandemic which was first identified in Wuhan City in China in December 2019. The first positive case in Zimbabwe was recorded in March 2020. In August, Zimbabwe recorded a surge in cases from 3659 on 1 August to 5378 on 18 August (Ministry of Health and Child Care, 2020). The government of Zimbabwe (GoZ) responded to the spread of the virus by putting in place various mitigation measures including a three week Phase 4 lockdown from end of March to mid April 2020. Following the Phase 4 lockdown, the country entered a Phase 2 lockdown with relaxed restrictions which resulted in accelerated transmission as prevention behaviour slackened. In response, on 23 July, the government increased lockdown restrictions by introducing among other things a dusk to dawn curfew¹ Emerging evidence on the impact of COVID-19 shows that the pandemic is not gender blind, it has deepened the structural, economic, social and gendered inequalities further marginalising women and girls facing intersecting forms of discrimination such as women living with HIV, women and girls with disabilities and elderly women among others. Against this background, the Zimbabwe Women's Resource Centre and Network (ZWRCN), Diakonia and Women in Law in Southern Africa (WLSA) with funding from the Transparency, Responsiveness and Citizen Engagement (TRACE) programme under the *"Inclusive and Gender Responsive Local Government Policy, Planning and Budgeting Processes for Equitable Public Service Delivery"* commissioned an in-depth desk gender analysis of the progress of socio-economic rights in Zimbabwe during the COVID 19 period with specific focus on rights to water and health, and proffer recommendations for advancement of such rights. This report focuses on the progress and achievements made, the challenges and impacts on women through case studies or stories.

1.1 Purpose and objectives of the assignment

The purpose of this assignment is to influence advocacy on securing the rights of women to water and health in the context of the COVID 19 pandemic while its objective is to conduct a gender analysis on the progress of socio-economic rights in Zimbabwe during the COVID 19 period focusing on:

- The status of socio-economic rights for women during COVID 19
- The rights to water and access for women during COVID 19
- The rights to health care and access for women during COVID 19

2. GENDER AND STATUS OF SOCIO-ECONOMIC RIGHTS

2.1 Gender and Access to Water

The Constitution of Zimbabwe's Section 77 states that every person has a right to safe, clean and portable water. Water accessibility, availability, affordability and quality affect women and men differently. Women's lives are closely tied to water owing to both social and biological factors. The former relates to the gender division of labor that relegates reproductive roles of cooking, washing, and cleaning to them while the latter relates to how women's biological make up demands that they bath regularly to keep themselves from natural odours emitted by their bodies due to natural processes of menstruation, sex, pregnancy, child birth, and breast feeding, which therefore forces them to require more water than men in performing their reproductive roles. Women face competition for water with commercial consumers, who are mostly male, creating stressful and sometimes dangerous conditions.

¹Ministry of Health and Child Care May to July 2020 Government of Zimbabwe COVID-19 Operational Plan

A study by the German Agro Action (2013) revealed that local authorities, Zimbabwe National Water Authority (ZINWA) and the District Development Fund who are supposed to supply piped water to the localities, were failing to do so consistently, and in some cases the water taps have been dry for several months, thereby violating the citizens' rights to water. Owing to the inter-dependability of rights, violation of the right to water ultimately leads to violation of other socio-economic rights that include the right to health and widens the inequality gaps between men and women. In a bid to alleviate the water shortage, boreholes have been drilled but these have not been enough to meet the water needs of big population concentrations. Women still travel long distances, in rough conditions, and often carry heavy containers, putting considerable stress on their physical well-being. The time they spend fetching clean water can be significant and stressful. Women and girls wake up earlier than men to fetch water and spend much of their time in water queues resulting in time poverty for productive tasks and for leisure. Thus, inaccessibility of water means women spend more time than men performing reproductive and unpaid work related to fetching water and seeking health for diseases like cholera and typhoid emanating from water challenges leaving them with little time for leisure (Diakonia, 2018). The water challenges have also resulted in gender based violence in the form of sexual harassment and teenage pregnancies (Diakonia, 2018).

In Zimbabwe, women and girls bear the heaviest burden of managing water issues at household level and yet they participate minimally in making investment decisions that affect them. Women and girls have limited space in decision making processes at both community and household level and hence decisions made concerning water do not adequately address their needs. The Zimbabwe National Water Policy adopted by the government in March 2013 which aims at recovering and normalizing the water and sanitation services in rural and urban Zimbabwe "recognizes and promotes gender equity in allocation, access and utilization of water as well as implementation of WASH activities. It stipulates that at least 30% of the Catchment and Sub Catchment Council positions will be reserved for women and the youth and that at least 3 board members in the ZINWA board will be women, youth or worker representatives." However, the challenges have always been the limited numbers of female experts in the WASH sector. The policy further acknowledges the disproportionate burden placed on women and the girl child when fetching water and taking care of the sick and recommends targeted programming and implementation of WASH activities that is gender sensitive including gender responsive budgeting.

2.2 Gender and Access to Health Care Services

The Constitution of Zimbabwe provides for the right to health care in Section 76, Subsections 1 to 4 which stipulate that:

1. Every citizen and permanent resident of Zimbabwe has the right to have access to basic health care services including reproductive health;
2. Every person living with a chronic illness has the right to have access to basic health care services for the illness;
3. No person may be refused emergency medical treatment in any health care institution;
4. The State must take reasonable legislative and other measures within the limits of the resources available to it to achieve the progressive realization of the rights set out in this section.

Access to health care services is still a challenge for Zimbabwe's population, especially for women owing to a number of gaps in health care provision. In Zimbabwe, the health care system reached near collapse in 2008.² Although there have been efforts to resuscitate the system, there are serious gaps affecting access to health care especially for women. The following key indicators clearly portray the situation:

- Health facility density, an indicator of outpatient service access was 1.1 facilities per 10,000 population, below the Service Readiness and Availability Assessment (SARA) benchmark of 2 facilities per 10,000 population. Across all provinces, facility densities ranged from less than 1 health facility per 10,000 population to 1.7 per 10,000 population;
- Zimbabwe's national in-patient bed density is 18 in-patient beds per 10,000 against SARA target of 25 in-patient beds per 10,000 population;
- National maternity bed density is 8 per 1000 pregnant women against the SARA target of 10 maternity beds per 1000 pregnant women;
- The overall health infrastructure index score (average of health facility density, in-patient bed density and maternity bed density) is 69% of the respective target values.
- Zimbabwe's overall density of core health care workers per 10,000 population is 8, about a third of the recommended target of 23 per 10,000 population by the World Health Organisation (WHO).
- The national general service availability score is 42%³

WILD (2020) summarises the challenges that women face in relation to access to health as absence of waiting mothers' shelters, poor road infrastructure, long distances to get to the nearest medical services, lack of medication and qualified health personnel. Owing to the fact that the burden of caring for the sick falls heavily on women, it is important to highlight that where health services are not available, accessible, affordable and of good quality, women bear the brunt of providing the necessary care and support. The challenges in access to health care are manifested in the following gender equality indicators:

- The total fertility rate (TFR) of 4.0 children per woman;
- The use of modern methods of Family Planning (i.e. modern Contraceptive Prevalence Rate, mCPR) of 66%;
- Unmet need for Family Planning of 8.6%;

² Zimbabwe National Health Strategy 2016-2020

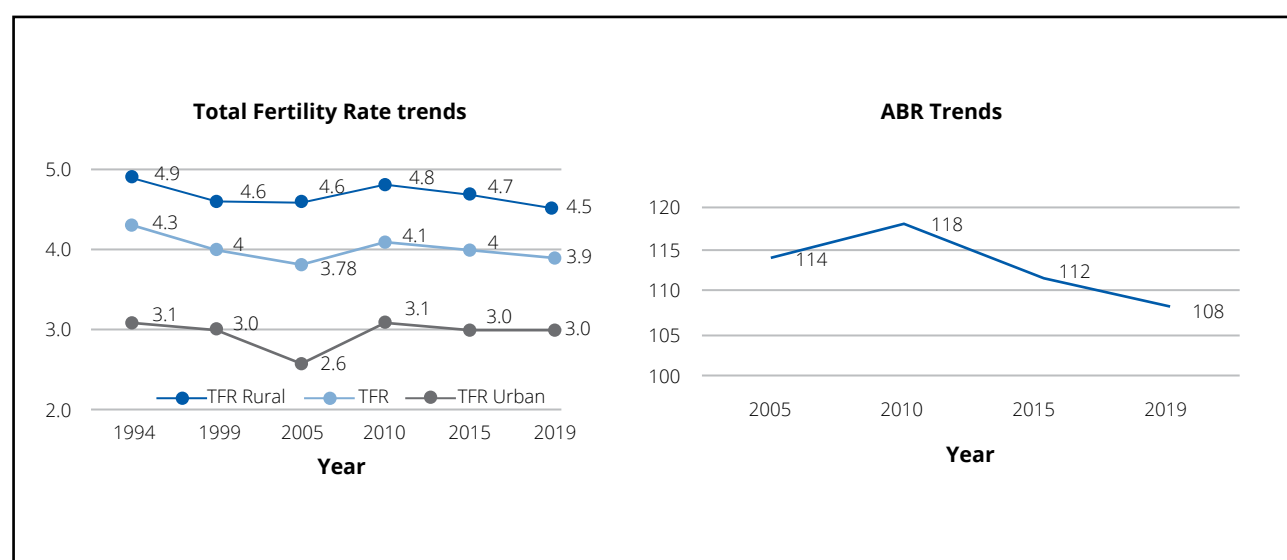
³ Ministry of Health 2015 Zimbabwe Service Availability and Readiness Assessment Survey

- Adolescent Birth Rate (ABR) of 108 live births per 1000 women against a global average of 44.⁴
- Maternal Mortality Ratio (MMR) per 100,000 live births of 462 in 2019 ⁵

Table 1: Adolescent birth rate, TFR, mCPR and unmet FP needs by Residence and Province

	*ABR 15-19	*TFR 15-49	** mCPR 15-49	Unmet FP need
Total	108	3.9	66%	8.6%
***National Target (2020)	99		68%	6.5%
Urban	62	3.0	70.7%	6.7%
Rural	136	4.5	63.2%	8.7%
Mash. Central	150	4.3	65.2%	6.9%
Mash East	89	4.1	69.1%	6.9%
Mash West	136	4.4	71.0%	5.8%
Mat. North	161	4.2	66.3%	9.8%
Mat. South	138	3.7	59.7%	13.3%
Manicaland	97	4.3	56.7%	8.3%
Masvingo	126	4.3	60.5%	10.3%
Midlands	115	3.9	67.2%	8.5%
Harare	56	3.0	70.4%	6.7%
Bulawayo	57	2.6	70.8%	6.7%

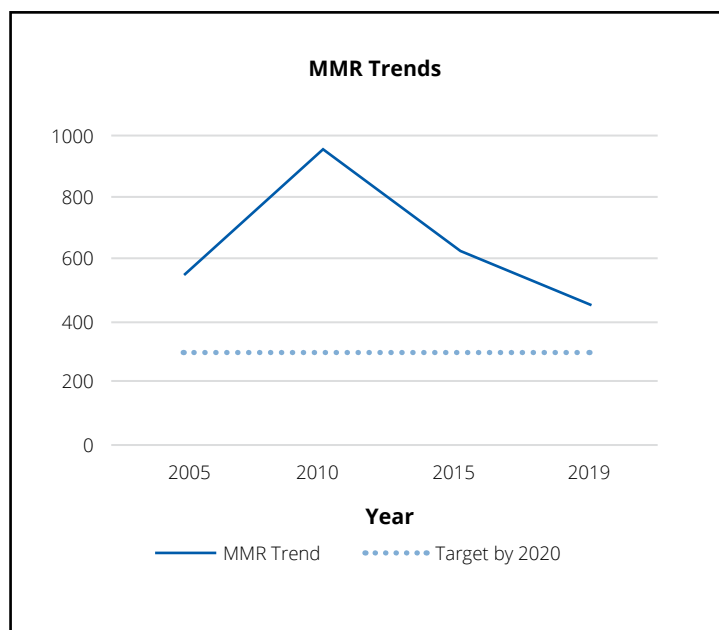
Figure 1: Trends in Total Fertility (graph above) and trends in Adolescent Birth Rate (Graph)



⁴ Zimbabwe National Statistics Agency (ZIMSTAT) and UNICEF (2019). Zimbabwe Multiple Indicator Cluster Survey 2019, Survey Findings Report. Harare, Zimbabwe: ZIMSTAT and UNICEF.

⁵ Ministry of Health and Child Care Zimbabwe (2020). 2019 Annual Family Health Programme Report

Figure 2: Trends in maternal mortality rate 2005-2019



Zimbabwe has a high burden of cervical cancer. Its incidence rate of 36.7/100,000 women, is more than double the global average of 15.1/100,000 women, with a mortality rate around 64%. Despite successes in the Cervical Cancer screening (80,624 screened in 2019 against a target of 75,000), the linkage to treatment has been poor. The treatment rate for Visual Inspection with Acetic Acid Camera (VIAC) positive women was 66% in 2019 against a target of 80%.⁶ Unavailability of treatment options and a dearth of human resources have hindered linkage to treatment.

Table 2: Cervical cancer screening and treatment rates 2010 to 2019

Year	2010	2015	2019	National Target
CA cervix screening	41 778	103920**	380058**	75 000
VIAC treatment rates	65%	49%	66%	80%

Regarding HIV, an estimated 730,000 women were living with HIV in Zimbabwe in 2018. In the same year, 19,000 women became HIV positive, compared to 14,000 men. In 2018, it was estimated that 93% of all adult women living with HIV were on treatment compared to 83% of men. In 2016, 67% of all women living with HIV were virally suppressed compared to 67% of HIV positive men. However, budgetary issues, weak infrastructure and capacity challenges means viral load testing is far from routine and existing facilities are mostly located in cities. In 2017, around 431 300 people received a viral load test, equivalent to around 40% of people on treatment that year.⁷ There are also gaps in Prevention of Mother to Child Transmission of HIV especially among adolescent and young women who seroconvert during pregnancy and breastfeeding, and low coverage of syphilis testing and treatment among pregnant women.

⁶ Global Cancer Registry, Zimbabwe

⁷ UNAIDS 2020 HIV and AIDS in Zimbabwe

3. GENDER ANALYSIS OF THE RIGHTS TO WATER AND TO HEALTH CARE ACCESS FOR WOMEN DURING COVID 19

This gender analysis follows the Care International Core Areas of Inquiry for gender analysis, picking on those directly linked to socio-economic rights, particularly rights to water and health namely:

Area of Inquiry # 1: Gender Roles, Responsibilities and Time Used: Gender roles and responsibilities at household and community level are influenced by gender norms. Specific household duties may present opportunities, constraints and status for individuals. The gender analysis examines the effects of unequal responsibility for care, productive and reproductive work among women and men during COVID 19.

Area of Inquiry# 2: Access to and Control over Assets and Resources: Access to and control of productive assets has implications on how individuals can pursue their aspirations and protect themselves from emergencies. It helps to understand how gender relations influence the control over and the benefits derived from productive assets as well as access to services. Under this core area of inquiry, some of the issues considered include costs associated with ill-health and the ways these are distributed among men and women, as well as issues of gender responsive budgeting.

Area of Inquiry# 3: Meaningful Participation in Public Decision-Making: As equal members within a community it is important that groups and individuals have the space to meaningfully participate in public decision-making. The ability to participate goes beyond token representation for underrepresented groups. Meaningful participation involves environments where individuals may actively contribute to decisions and where they can take part in leadership. The gender analysis examines the critical COVID 19 decision making structures and women's representation in these.

Area of Inquiry #4: Gender Based Violence (GBV): Violence is an expression of relationships under strain, worsened by COVID 19 lockdown. The gender analysis considers GBV as an effect of violation of rights to water and health. This core area of inquiry also considers GBV emanating from the absence of safe spaces for women at waterpoints.

Underlying these core areas of inquiry are Laws, Policies, Regulations, and Institutional Practices as well as Cultural Norms and Beliefs which are discussed and explained through this gender analysis.

3.1 The Rights to Water and Access for Women During COVID 19

Traditionally, women are responsible for unpaid care work that include caring for the elderly, children and the sick, cooking, fetching water, washing clothes and dishes which all require water and which reportedly intensified during lockdown as families were forced to be home all the time. The 2014 Zimbabwe Labour Force Survey revealed that women spent an average of 17 hours per week in unpaid care work caring for children under 5 in their own households compared to about 7 hours among men. Women also spent an average of 14 hours per week caring for the sick, disabled and the elderly and in terms of housekeeping and other home duties, women spent about 18 hours and men an average of 8 hours. Before the outbreak of COVID-19, 75% of women would spend less than 5 hours doing care work in their homes. During the lockdown period, more women (84%) were seen to be taking more time in care work up to 10 hours per day⁸. Lockdown therefore led to an increase in unpaid care work.

⁸WCOZ 2020 Zimbabwe COVID 19 Gender Monitoring Survey Report

In relation to fetching water for example, generally more women (65%) than men (35 %) are involved in fetching water. Women spend almost twice the time than men fetching water (MICS, 2019). The 2019 MICS shows that slightly more than a third of households in Zimbabwe had sources of water on their premises, with 40% of the households requiring about 30 minutes per round trip to fetch water. About 20% of the households required more than 30 minutes per round trip to fetch water for the household. In urban setups due to perennial water challenges, women spent much of the time in water queues as the demand for water at household level increased, resulting in time poverty for productive activities and other domestic chores. This resulted in conflicts that in some cases ended in physical violence, denial of conjugal rights and ultimately sexual violence. The conflicts between women and men were compounded by the fact that despite the fact that men were at home, they would rarely assist women take care of household chores, for fear of stigmatisation and social sanctions. In a study conducted by Trocaire (2020⁹) in Insiza, women reported,

The demand for water during the lockdown increased, the demand for meals increased and yet there was no money to buy food. The demand for sex also increased. Under normal circumstances we would rarely have sex because men would come home exhausted but due to idleness during the lockdown, the frequency of having sex increased and this caused GBV..



Source: www.newzimbabwe.com/bulawayo-residents-sleep-in-queues-waiting-for-water-from-council-bowsers

The African Development Bank Joint Needs Assessment Report for 2020 acknowledges the high infrastructural deficit in water and sanitation among others which requires US\$34 billion to rehabilitate and expand¹⁰ implying that the right to water provided for by the 2013 Constitution remains a myth. Physical and psychological violence were also reported to be common at water points as a result of lack of order as people stampede to get water.

⁹ Trocaire, 2020 Documenting the Experiences of GBV Survivors with Access to Justice During COVID 19 in Zimbabwe

¹⁰ African Development Bank, 2020 Joint Needs Assessment Report

3.2 The rights to health care and access for women during COVID 19

Women's gender roles have seen them dominating the nursing profession and provision of home based care and ultimately being exposed to COVID 19. Access to the full scope of health services was disrupted, as health facilities concentrated on emergence cases, with most of the cases being referred to provincial hospitals due to limited or no capacity to handle COVID-19 related cases. Mobility restrictions affected access to health care services. For example, in rural locations, for sexual violence cases which require doctors' examinations, the services are even farther. Under the Termination of Pregnancy Act, 1977, a survivor of sexual violence who requires termination of pregnancy should obtain a thorough medical examination report from a superintendent at a designated health facility. The superintendent can only do this if the woman has been examined by two doctors who independently recommend termination of pregnancy. The recommendations should come from either a doctor at a designated facility and one other facility, or two doctors who are not in the same partnership or practice. These doctors are usually found at provincial hospitals, which are far away from a majority of the rural communities. Distance to health care facilities were major challenges for remote locations and communities inhibiting access to health care services¹¹. The current health facilities profile in Zimbabwe indicate that there are 214 hospitals and 1634 primary health facilities countrywide.

Table 2: Health Facilities Profile in Zimbabwe

Hospital	Number	Primary Health Facilities	Number
Central hospitals	6	Clinics	1122
Provincial hospitals	8	Polyclinics	15
District hospitals	44	Mission clinics	25
Mission hospitals	62	City council/municipal clinics	96
Rural hospitals	62	Rural health centres	307
-	-	Private clinics	69
Total	214		1634

Source: Ministry of Health and Child Care 2016-2020 National Health Strategy for Zimbabwe

During COVID 19 lockdown, due to mobility restrictions, access health services was limited by a number of factors, namely, the unavailability of transport services, the closure of some health facilities to other cases except COVID related cases as well as the fear by health care workers to contract COVID-19 from people that were walking in from communities. In some cases clinics and hospitals were demanding COVID results for one to access health services, and PCR tests were being charged US\$65, which was beyond the reach of many women. The other challenges were staff shortages as a result of a strike by health personnel and unavailability of essential drugs from clinics and hospitals which meant that women were supposed to procure these from pharmacies which had stipulated opening hours (8am-3pm). Pharmacies ended up charging exorbitant prices for drugs.

The impact of COVID 19 on women's access to primary health care has also been noticeable because of mobility restrictions as well as scaling down of routine services as facilities focussed more on COVID response. Low turn out for routine services such as immunisations, antenatal care, family planning services and HIV treatment and care services was reported. OCHA reports that

¹¹ Ray, S and Masuka, N (2017) Factors and Barriers to Effective Primary Health Care in Zimbabwe

as of 3 December 2020, access and utilisation of essential services including preventive, curative and rehabilitation services declined in the period April to October 2020, compared to the same period in 2019. Outpatient consultation declined by 49% and attendance of pregnant women at the fourth antenatal care visit declined by 55% and this resulted in an increase in unsafe home deliveries in a country that had witnessed progress in reduction of mortality ratios from 651 in 2015 (2015 ZDHS) to 462 in 2019 (2019 MICS). The number of live births in health facilities fell by 21% while new clients on combined birth control dropped by 90%. Women reported being turned away from health institutions as priority shifted to the fight against COVID-19. Patients (female and male) on anti-retroviral therapy (ART) for HIV were also severely compromised by the travel restrictions. Inability to access quality health services directly increases the burden for women's unpaid care work due to gender norms. Furthermore, there were reports of limited access to family planning services and to modern contraceptives, potentially leading to a rise in unwanted pregnancies and the socio-economic impact that they have on individuals, households and communities. Currently, the unmet need for contraceptives in Zimbabwe is 8.6%¹²

Women had limited access to accurate, official information and public service announcements, due to limited access to public spaces, and group gatherings (e.g. through safe spaces) and outreach activities. The situation for women and girls with disability was worse because of lack of disability friendly ways of communication. This contributed to increased risk of infection, as well as increased stress and protection risks.¹³

Time spent caring for the sick also increased as a result of COVID 19, increasing the risk of infection. COVID 19 also increased girl child labour, as girls work to help out their mothers with domestic chores. School closures, social distancing and containment strategies impacted girls and boys differently, especially adolescent girls who due to gender roles were expected to take on care duties, limiting their access to remote learning programmes. Closure of schools also heightened their protection risks with no supervision during the day which can lead to sexual abuse and exploitation, GBV, including early marriage, and risk of engaging in high risk sexual activity potentially leading to Sexually Transmitted Infections (STIs) and pregnancy. Teenage pregnancies and child marriages have negative development outcomes. For example, owing to the age of the mother, there are risks of perinatal mortality for the child and prolonged labour for the young mother. Teenage pregnancies and early child bearing are usually characterised by limited educational attainment, increased risk of maternal and infant mortality, increased vulnerability to HIV and other STIs, and lack of skills to be viable to the labour market, factors that hinder women empowerment and promote further vulnerability to gender based violence.

Despite the value of unpaid care work, it is commonly left out of policy agendas due to a common misperception that unlike standard market work measures, it is difficult to measure and less relevant for policies.¹⁴ Neglecting unpaid care work leads to incorrect inferences about its effects on the wellbeing of women as well as the value of time invested by women into it which in turn limits gender equality and women empowerment policy effectiveness. Estimates made of the value of unpaid care work as a percentage of the Gross Domestic Product were as high as 39% in India in 1998/9 and 35% in 2006 in Tanzania. Under the current circumstances when the burden of unpaid care work is increasing, necessary investments and special attention to it is urgent and critical.

¹² Zimbabwe National Statistics Agency (ZIMSTAT) and UNICEF (2019). Zimbabwe Multiple Indicator Cluster Survey 2019, Survey Findings Report. Harare, Zimbabwe: ZIMSTAT and UNICEF.

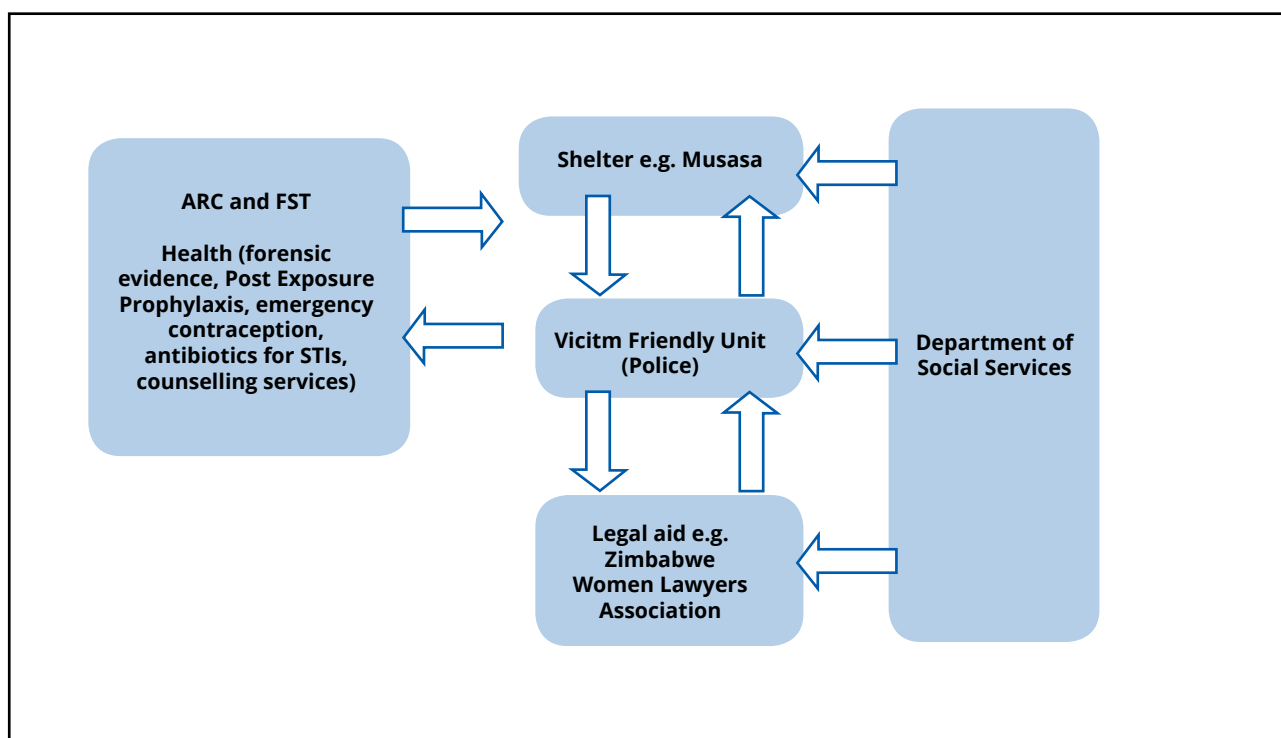
¹³ WCOZ 2020 Zimbabwe COVID 19 Gender Monitoring Survey Report

¹⁴ UNDP 2020 Immediate Socio-Economic Response to COVID-19 in Zimbabwe: A Framework for Integrated Policy Analysis and Support

3.3 COVID-19 and the Disruption of the Referral Pathway for GBV Survivors

One Stop Centres (OSCs) provide multi-sectoral case management for GBV survivors including health, psycho-social support, gathering of evidence by the police and issuance of form 234 (request for medical examination) to GBV survivors, and legal assistance under one roof and free of charge. Where the services could not be provided under one roof, identified partners providing services were coordinated to support the survivors. For OSCs located at government hospitals, the Ministry of Health and Child Care (MOHCC) provides staff to manage the health section, Zimbabwe Women Lawyers Association provides legal personnel, Family Support Trust provides counselling services while the Zimbabwe Republic Police handles investigations and arrests of perpetrators. At the OSCs which are not located at government hospitals, only legal advice and psychosocial support services are offered. Referrals are then made for medical and police services. The strengthened referral pathway has contributed to improved service utilisation by GBV survivors. However, during lockdown, this referral pathway was disrupted owing to the unavailability of service providers, hence it became costly for survivors to access services during the lockdown.

Figure 3: SGBV Referral Pathway



ARC: Adult Rape Clinic;

FST: Family Support Trust;

Psycho-social support is a crucial type of support required particularly by GBV survivors to ensure that survivors are empowered to regain proper functionality. Formal psycho-social support structures that include Department of Social Services, Ministry of Women Affairs, and CSOs that work on GBV issues were reported as unavailable and inaccessible due to their closure as well as mobility restrictions. The informal support structures that include friends and family as well as faith leaders remained available for face to face support where they stay in the same area with the survivor or for over the phone support where they stay far away. Although some CSOs remained accessible for psycho-social support services through hotline services, this service was not well known by some women. The hotlines include all local networks to enable everyone including those in remote areas to call. The hotlines are managed by specialised counsellors who provide remote

psycho-social support through voice, text and/or whatsapp to GBV survivors. Lack of psycho-social support services potentially leads to mental health challenges among women and girls.

The Domestic Violence Act provides for 'the promotion of the establishment of safe houses for purposes of sheltering survivors of domestic violence, including their children and dependants. A safe home in the context of GBV is an alternative home to house GBV survivors away from any further potential harm from the perpetrator. According to Standard Operating Procedures (SOP) for Safe Homes in Zimbabwe, shelters ideally provide GBV survivors whose life is at risk with case management services which include psycho-social and legal as well as follow-up care and in the end ensure access to justice. In addition, the SOPs stipulate that a safe shelter should provide economic or vocational empowerment to equip survivors with the necessary skills to lead independent and dignified lives in future. The services should be easily accessible, approachable, empowering and sustainable. There are no government run shelters despite the fact that the Domestic Violence Act provides for them. GBV survivors who were already admitted at shelters continued to receive services that did not require other service providers outside the shelter. Because at every shelter there is a shelter administrator based at the shelter who is a trained counsellor, GBV survivors continued to receive psycho-social support during lockdown. The challenge they faced was accessing externally provided services, such as health care, the police, and courts especially during the first phase of the lockdown due to mobility restrictions.

New admissions were not allowed at the shelters during the initial phase of the lockdown as there were no Standard Operating Procedures for Shelters during COVID-19, hence all GBV survivors that required refuge faced challenges in accessing CSO operated shelters and had to continue in abusive environments.

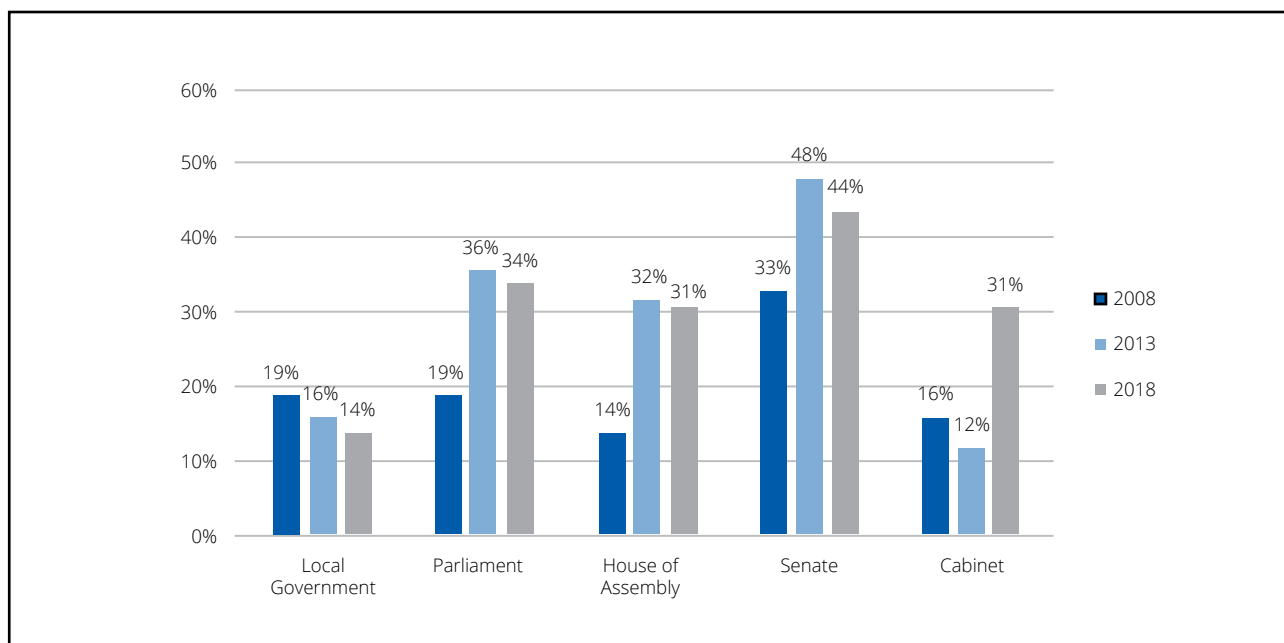
Major contributing factors to the challenges that women and girls faced regarding enjoyment of socio-economic rights during COVID 19 include the lack of proactiveness of the Ministry of Women Affairs, Community, Small and Medium Enterprise Development, the Zimbabwe Gender Commission and the fact that the response to COVID 19 in Zimbabwe was not guided by any gender analysis. Gender analysis examines the relationships between females and males. It examines their roles, their access and control of resources and the constraints they face relative to each other. It is the first and most critical step for gender mainstreaming. It precedes any gender mainstreaming action to help determine areas and methods of intervention, by ensuring that interventions are not based on incorrect assumptions. Absence of a gender analysis results in gender blind interventions, that are designed from the perspective of men and ultimately do not meaningfully address the conditions of women, which is a glaring gap in the COVID 19 response plan in Zimbabwe.

3.4 Challenges with the COVID 19 Response Measures

3.4.1 *Limited involvement of women in COVID 19 Taskforce Teams*

Full equality between men and women in all aspects of life cannot be achieved if equality between men and women is not achieved in governance and political representation. Women's voices are indispensable for democracy to embrace the plurality of needs and interests of the whole society. Because of the fact that most COVID 19 committees drew their membership from existing decision making structures such as Parliament and Cabinet, it is important to show the representation of women in these structures.

Figure 4: Women in politics in Zimbabwe, 2008-2018



Source: Zimbabwe Electoral Commission and Gender Links

The proportion of women in local government has receded with each election – from 18% in 2008; to 16% in 2013 to 14% in 2018. The highest political representation of women in Zimbabwe is in the Senate, where a “zebra” quota operates together with a Proportional Representation (PR) system for 75% of the seats. However, the proportion of women in the senate dropped from 48% in 2013 to 44% in 2018. The second highest political representation for women in Zimbabwe is in the National Assembly where 30% seats are reserved for women on a proportional representation (PR) basis. Following the adoption of the new Constitution in 2013, the proportion of women in the national assembly increased from 14% to 32%, but dropped to 31% in 2018. Overall women’s representation in parliament dropped from 36% to 34% in 2018. The only area in which there has been a significant increase in women’s political participation is in cabinet – from 12% in 2013 to 31% in 2018.

In relation to Parliamentary Portfolio committees, in the 9th Parliament (from 2018 to 2023), women lead 6 of the 21 (29%) portfolio committees namely Environment and Tourism, Local Government, Public Works and National Housing, Public Service, Labour and Social Welfare, Health and Child Care, Women Affairs, Community, Small and Medium Enterprise Development, Primary and Secondary Education. This figure does not correspond with the numbers of women in Parliament. These committees are very strategic in their oversight of the COVID 19 response hence the limited involvement of women has repercussions on the gender responsiveness of the COVID 19 strategies and actions.

The impacts of COVID 19 on women and girls that are discussed in this paper are partly a result of the exclusion of women’s voices from the COVID-19 response taskforce teams. The Beijing Declaration and Platform of Action (1995) points out that women’s equal participation in decision-making is not only a demand for simple justice or democracy, but can also be seen as a necessary condition for women’s interests to be taken into account. Achieving the goal of equal participation of women and men in decision-making will provide a balance that more accurately reflects the composition of

society and is needed in order to strengthen democracy and promote its proper functioning. The national COVID 19 Taskforce, an 11-member inter-ministerial team, the most powerful decision making body, appointed by the President has only two women (18%). This team is responsible for leading the management of the pandemic, identify gaps for corrective action, raise public awareness of the disease as well as mobilise domestic and international financial support required. The same situation obtains at provincial and district levels¹⁵ Provincial and district level COVID 19 response task forces are constituted by representatives of various government departments and local authorities. A study by Care International in selected districts on the representation of women in these taskforce committees revealed that women are excluded from such structures.

Table 3: Gender Composition of Selected Provincial and District Level Taskforce Committees

Location	Number of Females	Number of Males	% Female
Masvingo Provincial level	3	14	18
Chiredzi	2	15	12
Gutu	4	14	22
Bikita	1	9	10
Zaka	2	10	17
Mwenezi	4	15	21
Masvingo	2	11	15
Chivi	3	11	21
Mberengwa	0	12	0
Zvishavane	3	13	19

The district with the highest number of women has a total representation of 22%. A study by the Women’s Coalition of Zimbabwe in Manicaland province revealed that the provincial taskforce committee had 11 members, one of whom is a woman.¹⁶ The limited representation of women in the COVID 19 response teams resulted in limited consideration of the needs of women in the COVID-19 National Response Strategy.

A standing Cabinet Committee under the stewardship of the Minister of Local Government, Public Works and National Housing is tasked with overseeing the government’s response efforts and coordinates with the humanitarian partners through the office of the UN Resident Coordinator. Coordination and planning is led by the Permanent Secretary for the Ministry of Health and Child Care working with Permanent Secretaries of other Ministries in support of the Inter-ministerial COVID 19 Task force. Currently Zimbabwe has only 5 female permanent secretaries, with the one for the Ministry of Women Affairs, Community, Small and Medium Enterprise Development being male.

A 12 member COVID 19 Experts Advisory Committee was established to provide evidence based advice on the national COVID 19 Preparedness and Response. Only three women are part of this committee and there is no gender expert among the various experts in this committee.

A key structure that was not activated in the COVID 19 response is the Zimbabwe Women’s Parliamentary Caucus (ZWPC), formed out of a regional consensus, in October 2001, after the 2000

¹⁵ Care (April 2020) Rapid Gender Analysis for COVID-19

¹⁶ WCOZ 2020 WCOZ Situation Report

elections. It is national machinery that is responsible for lobbying and advocating for women's rights and empowerment. This structure transcends party politics. The female parliamentarians work together to advance women's empowerment, gender equality and equity. The caucus successfully pushed for the passing of the Sexual Offences Act in Parliament in 2002 and the Domestic Violence Act of 2006. The caucus works closely with the Zimbabwe Women's Coalition. The ZWPC has previously ensured more consultation and collaboration among various women's organizations and civil society on women's issues for lobbying in parliament.¹⁷

3.4.2 Gaps in the Legal, Policy and Institutional Framework Governing Emergencies in Zimbabwe

The Civil Protection Act, 1989 is the main legal instrument for disaster management in Zimbabwe. This Act principally establishes a civil protection entity that provides for the operation of civil protection services in times of disasters. It also provides for the establishment of a fund to finance civil protection as well as the declaration of a state of disaster. The Act is silent on matters of gender equality during disasters or emergencies despite the differential impacts of disasters on men and women, and ultimately on gender equality. The Act indicates that implementation of disaster risk management is a mandate of the Department of Civil Protection, a department housed in the Ministry of Local Government, Public Works and National Housing. The department was established to carry out the overall coordination of all relevant disaster management stakeholders, hence the position during COVID 19 that the standing Cabinet Committee be under the stewardship of the Minister of Local Government, Public Works and National Housing.

The Civil Protection Act [Section 4(2)] provides for the establishment of the National Civil Protection Committee comprising of the director, the Secretary for Health, Commissioner of Police, commanders of the various branches of the Defence forces; Secretary General of the Zimbabwe Red Cross Society; Director of Prisons, Director of Civil Aviation, a representative of the Fire Brigade and three other members appointed by the Minister for their experience in matters of civil protection. All these positions are held by men. It is important to point out that the National Civil Protection Committee was not activated to lead the COVID 19 response. There are a number of gaps in the Civil Protection Act with respect to this committee that are pertinent for the COVID 19 response:

- The glaring absence of the Ministry of Women Affairs, Community, Small and Medium Enterprise Development as well as the Zimbabwe Gender Commission from the National Civil Protection Committee;
- Lack of decentralisation of the National Civil Protection Committee;

The glaring gender gaps in the Civil Protection Act are despite the commitment by the government of Zimbabwe to promoting gender equality and women empowerment through various national laws and policies on gender equality and women empowerment as well as international and regional legal frameworks on the same. The country's commitment to gender equality is also evident in its strategic documents such as the Transitional Stabilisation Programme (TSP) and its successor the National Development Strategy 1 (NDS 1) which both recognise gender mainstreaming in all sectors of the economy as fundamental to achieving equitable, sustainable and inclusive socio-economic

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development. NDS 1 identified a number of key initiatives for promoting gender equality targeting legislation and policies, budgets, economic empowerment and women's participation in decision making as Table 4 shows.

Table 4: National Development Strategy Key Interventions and Strategies for Gender Equality

Key Interventions	Strategies to achieve Gender Equality
<ul style="list-style-type: none"> i. Further mainstreaming of gender sensitive policies and legislation, ii. Integrating gender issues into national and sectoral economic policies, national budget policies, iii. Gender Responsive Budgeting - programming and budgeting, which involves identification of gender issues, interventions, budget costings, and setting of performance benchmarks, iv. Prioritisation of resource allocation, disbursement and implementation of national and sectoral gender plans and programmes, v. Implementation of gender sensitive programmes and projects, targeting women; and vi. Monitoring and evaluation, which involves tracking performance, and feedback for policy review. 	<ul style="list-style-type: none"> i. Youth and women affirmative action, ii. Equal Opportunity for all programs, iii. Promoting Women into positions of influence, iv. Promoting equality at all levels of society, v. Advancing women political representation, vi. Youth and women advocacy initiatives; and vii. Enhancing access to financing for women in business.
Outcomes for Women and Gender Equality	
<ul style="list-style-type: none"> - Growing women participation in the economy across all sectors, - More women in decision making positions, - Growing women incomes; and - Equal opportunities for women. 	

3.4.3 Lack of Gender Responsive Budgeting in the COVID Response

In Zimbabwe, the national budget process is enshrined in the Constitution of Zimbabwe Amendment (No. 20) Act, 2013. Section 298 of the Constitution provides principles that guide all aspects of public finance processes and management in Zimbabwe. These include among others transparency and accountability in public financial matters, clear financial management and fiscal reporting and that public funds must be expended transparently, prudently, economically and effectively. The Public Finance Management Act (PFMA) further specifies principles to be followed

in processes involving the management of public funds. Section 7 (1)(a) of the PFMA identifies the duty of the Minister of Finance and Economic Development as that of developing and implementing macroeconomic policies as well as to supervise, monitor and coordinate the finances of Zimbabwe. Further, section 13 (1) and (2) of the PFMA unequivocally spells out the functions of the Minister as that of management and disbursement of public resources, taking into consideration the monthly reports submitted to him or her. The whole budget process, including dates and key activities of a budget process are set in section 10(1) of the Public Finance Management (General) Regulations, 2019. Within the COVID-19 context, in Zimbabwe arbitrary decisions were made on public finance management by the Minister of Finance and Economic Development without the involvement of Parliament as required by the law. For example, the Ministry of Finance introduced a number of COVID-19 allowances without Parliament approval. In addition, resources sourced through donations from non-governmental organisations (NGOs) were disbursed to ministries and departments such as Ministry of Health and Child Care (MOHCC) without proper declaration of those resources to Parliament. This led to a spate of corrupt activities and allegations of abuse with the most prominent being the infamous 'Draxgate scandal'. This involved allegations of corruption in the procurement of COVID-19 supplies leading to the sacking of the Minister of Health and Child Care. This can culminate into serious budget overruns whereby policy pronouncement champions a budget surplus yet the socio-economic realities of the people are dire and urban and rural poverty with a women's face is the order of the day.

The role of Parliament in budget formulation and implementation

In compliance with Section 28 (5) of the PFMA, the Minister of Finance and Economic Development solicits parliamentary discretion in the preparation and formulation of the national annual budget through the appropriate Portfolio Committee of Parliament as it is provided in section 28 (5) of the Public Finance Management Act. The appropriate Portfolio Committee is mandated to conduct public hearings to solicit the views and opinions of stakeholders to allow for inclusivity and equitable representation. Nonetheless, the consultations should ensure substantive incorporation of the stakeholder concerns.

Parliament of Zimbabwe carries out budget consultations in all the provincial capitals and other selected areas based on resource availability. Thus, at least 20 venues are visited of which ten are provincial capitals whilst the other ten are districts (one in each province) that are selected under the criteria that the venues chosen would not have been visited in the last 2-3 years. On the monitoring and implementation stage, through the relevant Portfolio Committees, Parliament monitors government spending on a periodic basis by requesting for periodic performance update reports from Ministries as enshrined in the PFMA. The reports are prepared using the guidelines, which provide indicators that Portfolio Committees can use to assess public expenditures and the achievements of specific public policy objectives. The Portfolio Committees can also embark on field visits to ascertain progress on the ground. The primary function of the legislature in the budget process is therefore to pass the PFMA, allowing members of parliament (MPs) to examine and decide on the proposed budget. It is also the responsibility of MPs to help ensure the government's international/national commitments are upheld in the budget. The legislature also plays an important part in monitoring the budget and ensuring accountability. Parliament should conduct regular audits of and produce reports on how ministries spend money. This was not done regarding budget for COVID 19 since parliament sittings as well as most its business activities were suspended for some time.

Due to the fact that COVID 19 presented serious operational challenges for the legislature, these established budget practices were set aside in order to expedite emergency responses. In the process, gender issues were overlooked. The Constitution of Zimbabwe Section 113 provides for the emergency suspension of business as usual checks and balances to empower the government to respond to a crisis quickly. However, for COVID 19, Zimbabwe did not declare the pandemic an emergency but rather a national disaster in terms of the Civil Protection Act by the gazetting of the Civil Protection (Declaration of State of Disaster, Rural and Urban Areas in Zimbabwe (COVID 19) Notice. The Civil Protection Act does not provide for adequate parliamentary oversight because the only extent to which the President is obliged to involve Parliament is through informing it of the declaration. Emergency acts concentrate power in the executive branch allowing government to enact policy with fast tracked or reduced parliamentary procedures, spend without parliamentary authorisation.

Gender commitments should be translated into fiscal commitments by applying a gender perspective to the administrative processes and fiscal mechanisms through gender responsive budgeting (GRB), if gender equality outcomes are to be realised. GRB success stories usually focus on three dimensions of the budgeting process namely, decision making, expenditure and revenue. In the context of COVID 19 response in Zimbabwe, gendered perspectives in budgetary planning and decision making, sieving of public expenditure for gender differential impacts and gender sensitive revenue raising, which are pivotal for any pandemic response, were glaringly missing in the COVID 19 pandemic funding and stimulus packages. COVID 19 spending in Zimbabwe did not include any component of gender sensitive spending geared towards addressing women and girls' specific needs emanating from the pandemic such as loss of jobs, women's sexual and reproductive health, unpaid care work, and gender based violence (GBV) among others. Without GRB in COVID 19 funding, women's needs will remain largely unmet and Zimbabwe is unlikely going to attain Sustainable Development Goals.

As a result of the gaps in the legal instrument governing disasters and emergencies in Zimbabwe, the COVID 19 relief measures were gender blind. The most visible of the Government of Zimbabwe's COVID19 relief measures is the ZWD18.2 billion Economic Recovery and Stimulus Package announced on May 4th 2020¹⁸. Given that most of the relief provided to individuals, families, small and large businesses in terms of social protection, expansion of basic services, liquidity support and job protection was drawn from this Fund it is generally regarded as a COVID19 Relief Fund. A gender analysis of the fund revealed that gender blindness and 'emergency-thinking' affected gender responsiveness of the fund.¹⁹

By the 30th June various line Ministries, Agencies and Departments had received ZWD1.8 billion or 10% of the Package in support from the Government of Zimbabwe towards COVID19 responses. These were the resources raised and made available to different sectors by the time of the Mid-Term Budget Review of July 2020. Importantly, the allocations were principally for COVID19-aligned responses.

¹⁸ UN-OCHA September 2020 Zimbabwe Situation Report

¹⁹ ZWRCN 2020 Zimbabwe's COVID-19 Relief Fund 2020: A Preliminary Gender Analysis

Table 5: Allocations and Uses as of July 2020 by sector

Agency	Amount (Million ZWD)	Purpose
Ministry of Health and Child Care	738.5	<ul style="list-style-type: none"> • COVID 19 risk allowance • Additional employment costs from recruitment • Capacity building of Health staff- training • Procurement of health and laboratory equipment and consumables • Procurement of PPE • Rehabilitation and construction of isolation units.
Ministry of Lands	18.14	Borehole drilling
Institutions of higher learning	33	Seed capital for local production of face masks and sanitisers
Security sector	197	Operational support; [PPEs, enhancing, surveillance capabilities in enforcing lockdown restrictions]
Social Welfare	50	Mitigation against the effects of COVID 19 lockdown on poor households
	35.5	Housing homeless people
	50	Quarantine centres
Ministry of Local Government	76	WASH services in local authorities
	179.7	Construction of identified isolation centres and PPE for public works personnel involved in construction
Ministry of Primary and Secondary Education	100	Re-opening of Schools starting with examination classes
Ministry of Women Affairs, Community, Small and Medium Enterprises	0	Re-opening of Schools starting with examination classes

Source: Government of Zimbabwe, 2020

An analysis of the funding provided to the MOHCC reveals that no funding was dedicated towards women’s access to health services including sexual and reproductive health services despite the impact of the pandemic on women’s access to primary health care. No funding had been disbursed to the Ministry of Women Affairs, Community, Small and Medium Enterprises Development and the Anti-Domestic Violence Council and the Zimbabwe Gender Commission despite the spike in GBV cases as well as the impact of the pandemic on small and medium enterprises. Under the 2021 budget, the Ministry of Women Affairs remains the least funded ministries with an allocation of \$2,2 billion (ZWD), slightly above 1% of the total budget.

The amount of \$50 million allocated towards mitigation against the effects of COVID 19 lockdown on poor households against \$197 million allocated to the Security sector towards PPEs and enhancing, surveillance capabilities in enforcing lockdown restrictions shows that the government's attention was more on enforcing lockdown restrictions than on addressing the negative effects of COVID 19 on poor households which are dominated by women. Owing to poverty, triggered by COVID 19, there were reports of adolescent girls and young women being forced into negative coping strategies that include transactional sex and early marriage²⁰. This is a result of the fact that women have lost jobs, with limited or no savings at all and no social security or safety nets, exposing them to poverty. Despite the National Development Strategy's (NDS 1) recognition of the role of decent work in the COVID-19 recovery period and in the informal economy, the continued thrust of penalisation of the informal economy through taxation, will have its toll on women as this fails to take into consideration the negative effects that COVID-19 and lockdown measures have had on the sector. Cost recovery trajectory which fails to take cognisance of socio-economic services that are mostly consumed by women and girls can eventually lead to deepened poverty especially if incomes remain low.

3.5 Access to justice in case of violation of Socio-economic rights

This section presents the challenges of access to justice by women during COVID 19 and gives stories and case studies of successes and challenges.

Lack of access to Judicial Services

Police

Distance to police posts and limited working hotlines in the wake of mobility restrictions affected access to police services during the lockdown. This was compounded by the shortage of trained police in the Victim Friendly Unit (VFU). Generally, VFU officers are few nationwide, hence not all police stations have these and not all police officers are trained in GBV issues. The VFU is an additional structure of policing that was established in 1996 with the aim of ensuring that survivors of sexual violence have access to justice, by trying to overcome some of the immediate barriers to making complaints. This police department is concerned about cases of violence against women and children, sexual and domestic violence offences. The challenges related to accessing the police that are cited in literature include:

- a) Mobility restrictions.

During lockdown, police did not want to see anyone outside their homes. There were countless roadblocks. All the police were concerned with was wearing of masks and letters/passes. The first thing you would be asked if you managed to get to a roadblock without being turned back was a letter or pass indicating where you were going, without which you would be turned back. They did not consider GBV as essential so you would be told 'we will arrest you for loitering, go back home and resolve your issues.'²¹

- b) Unavailability of police at police stations including Victim Friendly Unit

There were few officers at police stations as most officers were deployed to enforce COVID-19 mobility restrictions. For GBV survivors absence of VFU officers presented further challenges related

²⁰ Torcaire 2020 Documenting the Experiences of GBV Survivors with Access to Justice During COVID 19

²¹ Trocaire 2020 Documentation of the Experiences of GBV Survivors with Access to Justice During COVID 19

to negative attitudes of the few police officers that were at police stations towards GBV cases which could be a result of lack of training in handling GBV cases. The Judicial Service Commission's Protocol on the Multi-Sectoral Response to Sexual Abuse and Violence in Zimbabwe outlines several standard guidelines on how VFU service delivery should be conducted. Some of the guidelines include, maintaining privacy, confidentiality and safety of the victim at all times, and treating each case of domestic violence or sexual abuse as a priority. Among other duties, it is the responsibility of the VFU officer to escort the victim for medical examination, but even before the lockdown police cited transport challenges hence CSOs such as Musasa have been supporting both the survivor and the VFU officer with transport money. During the initial phase of the lockdown, survivors could neither access VFU officers nor funds from Musasa. In accordance with the protocol, the police VFU investigators are responsible for investigation, arrest of offenders, and docket compilation. All these services were not available during lockdown, particularly the first phase of the lockdown. In a study conducted by Trocaire, a woman in Insiza narrated the experience she had with her 9 year old daughter who had experienced sexual violence,

I discovered around 9pm that my husband had just raped our daughter. That very moment I decided to take my daughter to Filabusi, about 85km away, that is where the nearest health facilities as well as police camp are located. I walked that distance the whole night with my daughter. I arrived at the police station around 8am. From that time until around 4pm, there was no one to serve us. I was attended to at around 4pm then I proceeded to the hospital where my daughter was examined. I was advised that there were no drugs at the hospital so a prescription was written so that I would procure drugs from the pharmacy. We left the hospital around 6pm going to look for a pharmacy to buy the drugs from. We found all pharmacies closed because government had reduced business hours. The pharmacies had closed at 3pm. We had to sleep in the open that night because it did not make sense for me to go back home and come again the following day. I then bought the drugs the following day.

c) Reduced public transport availability

Lack of availability of public transport to access police stations was another challenge. Where women managed to get private transport it was very expensive, and charged in United States Dollars (US\$) hence it was difficult for them to access police stations.

Legal aid

The Legal Aid Directorate is the state department that deals with the indigent in need of justice that was set up in terms of the Legal Aid Act [Chapter 7:16]. The services provided by the Legal Aid Directorate include legal advice/consultations, drafting of court documents (pleadings), legal representation and dispute resolution (arbitration). The Legal Aid Directorate is located at provincial centres hence it was not accessible to the majority of the rural women who cannot afford to hire private lawyers. Legal aid services were generally not accessible before and during COVID-19. Owing to these challenges, women before the lockdown resorted to accessing legal aid from civil society organisations such as Women in Law in Southern Africa (WLSA), Musasa, Zimbabwe Lawyers for Human Rights (ZLHR) and Zimbabwe Women Lawyers Association (ZWLA). During the first phase of the lockdown, all these organisations were not operating since there was a directive from the government to work from home.

Magistrates and Regional Courts

In Zimbabwe there are 52 Magistrates courts and 30 Regional courts. Magistrates courts are divided into regional courts and provincial courts. Regional courts are more senior than provincial courts and hence have a higher jurisdiction which include the right to handle sexual violence cases.

Access to courts, particularly regional courts was a challenge for most women during lockdown due to distance and travel related barriers. Both magistrates and regional courts were closed during the first lockdown except for criminal cases. Practice Direction 1 of 2020 Guiding Court Operations during the first 21 days of the lockdown, stipulates that with effect from 30 March, 2020, “the filing of new cases, all process and pleadings shall be suspended for the duration of the national lockdown...only initial remands, urgent applications and bail applications may be entertained. All pending civil matters shall be deemed to have been postponed. For the magistrates court, matters shall be deemed to have been postponed to the first business day following the last day of the lockdown period.”

A further challenge associated with courts was that courts were said not prioritise GBV cases, including those of sexual violence. After government relaxed COVID 19 restrictions, courts have opened but they restrict the numbers of people to attend to daily and witnesses are not accommodated. Courts are only accommodating the plaintiff and the litigant. Cases are therefore moving at a very slow pace.

Local courts

Local courts have jurisdiction in certain civil cases in which customary law is applicable. They cannot preside over cases of inheritance, divorce and maintenance and also do not have criminal jurisdiction.²² Traditional leaders were available and accessible since they are resident in their areas. However, no local courts were sitting during the first phase of COVID 19 lockdown. The local courts started to operate after the relaxation of the restrictions to gatherings of a maximum 50 people. However, traditional leaders lacked Personal Protective Equipment (PPE) which exposed them to the risk of contracting COVID 19. Furthermore, they had mobility challenges because no special consideration was made by the government for them to have passes as an institution that provides essential services.

Access to justice was therefore a serious challenge during the lockdown and this denied women of their constitutionally provided right.

Combined Harare Residents Association Versus City of Harare

The Combined Harare Residents Association (CHRA) took Harare City Council to court in April 2020 in an urgent application compelling the authorities to avail water to residents under a national lockdown. The case also cited Minister of Finance and Economic Development, Minister of Health and Child Care and Minister of Local Government, Public Works and National Housing as respondents for instigating a lockdown without making provisions for water for residents. The court ordered government and city of Harare to take concrete steps to improve water supplies to residents in the face of COVID 19 outbreak and the subsequent lockdown to prevent its further spread. This resulted in deployment of water bowsers to communities and to the fixing of all broken boreholes within the city and provision of marshalls to monitor compliance to social distancing recommended as a measure to stop the spread of COVID 19.

²² Ibid.

4. KEY CONCLUSIONS AND RECOMMENDATIONS

Zimbabwe has committed itself to promoting its citizens' socio-economic rights through ratifying international human rights protocols and through its own national constitution. Although some steps had been taken to ensure enjoyment of these rights, a number of gaps in infrastructure and costs among others have led to the exclusion of certain groups of people from the enjoyment of these rights. Owing to gender roles and division of labour these gaps impact negatively on women and girls more than on men and boys. Measures put in place to curb against the spread of COVID 19 worsened the experiences of women regarding access to water and health care mostly because of gender and social norms related to gender roles, responsibilities and time use; differential access to and control over resources and assets; limited involvement in public decision making among others. The unintended gender related effects of lack of access to water and health during the COVID 19 lockdown on women and girls have been spikes in GBV at home and at water points, resulting in early child marriages and teenage pregnancies, unwanted pregnancies and the burden of unpaid care work among others. These effects are as a result of the limited involvement of women in the COVID 19 taskforce teams as well as the absence of gender responsive legal instruments guiding response strategies. Without addressing the gender gap created by COVID 19, Zimbabwe is unlikely going to meet SDG 5 targets. The following recommendations are proffered for the advancement of the rights to water and health during COVID 19:

1. Review the Civil Protection Act

There is need to lobby and advocate for a review of the Civil Protection Act to ensure inclusion of the Ministry of Women Affairs, Community, Small and Medium Enterprise Development, the Women's Coalition of Zimbabwe, the Zimbabwe Gender Commission, the Zimbabwe National Peace and Reconciliation Commission and the Zimbabwe Human Rights Commission in the National Civil Protection Committee. The commissions should each have a seat in the committee. Furthermore, the National Taskforce Committee on COVID 19 should have decentralised structures at provincial, district and ward levels to ensure effective responses that consider women's experiences relating to rights to water and health.

2. Integrate gender into Covid-19 Response Plans and include women and girls in decision making

The participation and leadership of women and girls in responding to any emergency, including COVID 19 is crucial to ensuring the most effective humanitarian response. There is need for ensuring women's leadership and decision making in response strategies. Furthermore, because COVID 19 is not gender blind, the response to it should not be, either, hence gender should be a key consideration at all stages of policy design to ensure that COVID 19 recovery leaves no one behind. The National Taskforce on COVID 19 and its structures at provincial and district levels should provide inclusive platforms where women's experiences are shared by ensuring the inclusion of women as well as a permanent agenda item on gender for all meetings.

3. Recognise, reduce and redistribute unpaid care work

Promote policy measures that recognize, reduce and redistribute the overload of unpaid work taking place at home for healthcare, care of children, the elderly, and people with disabilities, that is taken on mostly by women. In addition, there is need to scale up social mobilisation and advocacy on social norms and sharing the burden of unpaid care work at the same time strengthening

community and household based support services to reduce the burden. It is also important to emphasise that for men to effectively participate in unpaid care work, workplace cultures that respect care giving responsibilities for both men and women be created, through policy.

4. Gender evidence of time use and value to unpaid care work

For an effective policy response to unpaid care work, gender evidence of time use is very important. This will then be followed by policy responses that support measures to value unpaid care work and cushion women's vulnerabilities in the care economy.

5. Intensify mobile services during emergencies

To ensure wider access to services including during emergencies, there is need to roll out of mobile clinics in communities for basic health services that remained a concern in communities. There is further need for community engagement to improve health information and access to essential services.

In addition, there is need for mobile water services, mobile legal clinics, police stations and courts, toll free and hotline services. The mobile legal aid clinics can be in partnership with local Law schools to raise awareness about the various services available to communities. The hotlines should use all local mobile networks to enable everyone including those in remote areas to call for services.

6. Engender emergency response and recovery legislation

There is need to ensure that emergency response and recovery legislation, relief packages and budgets are developed on the basis of sex disaggregated data, gender analysis and consultations with gender experts and that they include a gender impact assessment. There is need for ensuring women's leadership and decision making in budgeting processes.

PART B

Legal Framework, Rights Provisions and Policies and Laws for Securing Women's Access to Rights, Services and Justice Under Covid 19

Report By **Brian Penduka**

January 2021

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LIST OF ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
CAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment
CCPR	United Nations Covenant on Civil and Political Rights
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination Against Women
CERD	United Nations Convention on the Elimination of All Forms of Racial Discrimination
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CRC	United Nations Convention on the Rights of the Child
CRPD	United Nations Convention on the Rights of Persons with Disabilities
ESCR	Economic, Social and Cultural rights
HRC	United Nations Human Rights Committee
ICESCR	United Nations Convention on Economic, Social and Cultural Rights
ILO	International Labour Organization
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights
SADC	Southern Africa Development Community
WLSA	Women in Law in Southern Africa
ZDHS	Zimbabwe Demographic and Health Survey
ZINWA	Zimbabwe National Water Authority
ZWLA	Zimbabwe Women Lawyers Association
ZWPC	Zimbabwe Women's Parliamentary Caucus
ZWRCN	Zimbabwe Women's Resource Centre and Network

GLOSSARY OF TERMS¹

Affirmative Action:	Action taken by a government or private institution to make up for past discrimination in education, work, or promotion on the basis of gender, race, ethnic origin, religion, or disability.
Civil & Political Rights:	The rights of citizens to liberty and equality; sometimes referred to as first generation rights. Civil rights include freedom to worship, to think and express oneself, to vote, to take part in political life, and to have access to information
Convention:	Binding agreement between states; used synonymously with Treaty and Covenant. Conventions are stronger than Declarations because they are legally binding for governments that have signed them. When the UN General Assembly adopts a convention, it creates international norms and standards. Once a convention is adopted by the UN General Assembly, Member States can then Ratify the convention, promising to uphold it. Governments that violate the standards set forth in a convention can then be censured by the UN.
Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)	(adopted 1979; entered into force 1981): The first legally binding international document prohibiting discrimination against women and obligating governments to take affirmative steps to advance the equality of women.
Convention on the Rights of the Child (CRC)	(adopted 1989; entered into force 1990): Convention setting forth a full spectrum of civil, cultural, economic, social, and political rights for children.
Covenant:	Binding agreement between states; used synonymously with Convention and Treaty. The major international human rights covenants, both passed in 1966, are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).
Customary	Law that becomes binding on states although it is not written, but

¹ Sources: Adapted from Julie Mertus et al., *Local Action/Global Change*, Ed O'Brien et al, *HumanRights for All*, and Frank Newman and David Weissbrodt, *International Human Rights: Law, Policy, and Process*.

International Law:	rather adhered to out of custom; when enough states have begun to behave as though something is law, it becomes law “by use”; this is one of the main sources of international law.
Declaration:	Document stating agreed upon standards but which is not legally binding. UN conferences, like the 1993 UN Conference on Human Rights in Vienna and the 1995 World Conference for Women in Beijing, usually produce two sets of declarations: one written by government representatives and one by Nongovernmental Organizations (NGOs). The UN General Assembly often issues influential but legally Nonbinding declarations.
Economic and Social Council (ECOSOC):	A UN council of 54 members primarily concerned with population, economic development, human rights, and criminal justice. This high-ranking body receives and issues human rights reports in a variety of circumstances.
Economic, Social, Cultural Rights:	Rights that concern the production, development, and management of material for the necessities of life. The right to preserve and develop one’s cultural identity. Rights that give people social and economic security, sometimes referred to as security-oriented or second generation rights. Examples are the right to food, shelter, and health care.
Human Rights:	The rights people are entitled to simply because they are human beings, irrespective of their citizenship, nationality, race, ethnicity, language, gender, sexuality, or abilities; human rights become enforceable when they are Codified as Conventions, Covenants, or Treaties, or as they become recognized as Customary International Law.
Inalienable:	Refers to rights that belong to every person and cannot be taken from a person under any circumstances.
Indivisible:	Refers to the equal importance of each human rights law. A person cannot be denied a right because someone decides it is “less important” or “nonessential.”

Interdependent;	Refers to the complementary framework of human rights law. For example, your ability to participate in your government is directly affected by your right to express yourself, to get an education, and even to obtain the necessities of life
International Covenant on Economic, Social, and Cultural Rights (ICESCR):	Adopted 1966, and entered into force 1976. The ICESCR declares that all people have a broad range of economic, social, and cultural rights. One of the components of the International Bill of Human Rights.
Justiciable	Capable of being decided by legal principles or by a court of justice.
Ratification, Ratify:	Process by which the legislative body of a state confirms a government's action in signing a treaty; formal procedure by which a state becomes bound to a treaty after acceptance.
Treaty	Formal agreement between states that defines and modifies their mutual duties and obligations; used synonymously with Convention and Covenant. When conventions are adopted by the UN General Assembly, they create legally binding international obligations for the Member States who have signed the treaty. When a national government Ratifies a treaty, the articles of that treaty become part of its domestic legal obligations.
Universal Declaration of Human Rights (UDHR):	Adopted by the general assembly on December 10, 1948. Primary UN document establishing human rights standards and norms. All member states have agreed to uphold the UDHR. Although the declaration was intended to be Nonbinding, through time its various provisions have become so respected by States that it can now be said to be Customary International Law.

INTRODUCTION

This report provides the reader with a broad assessment of the progress made towards the realisation of Economic Social and Cultural Rights in Zimbabwe during the novel Coronavirus Disease 2019 (COVID-19). The report will consider the progress and achievements made, highlight the challenges and impacts on women through case law, provide recommendations and opportunities for the advancement of such rights.

The global advent and spread of the COVID-19 virus fundamentally altered the way the world functions. It redefined the entire world order and adversely affected the socio-economic and cultural wellbeing of citizens everywhere. Globally the virus has infected 93,536,554 people in 210 countries and territories around the world.² As a response to the pandemic, the World Health Organisation issued a set of guidelines for countries to follow. The guidelines include measures such as quarantine, self-isolation, repatriations of citizens and preparedness at workplaces for essential services. The Zimbabwean Government has responded to the pandemic by adopting the Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Consolidation and Amendment) Order, 2020. Whereas these restrictions were necessary and contributed to the effective management of the spread of the virus, they had a definite negative effect on the enjoyment by citizens of their rights. The COVID 19 measures meant that non-essential businesses and industries had to be closed to mitigate infection risk for employees and customers alike. This saw the closure of important sectors like mining, tourism, transportation, retail, and restaurants; critical contributors to the local economy. Thokozile Ruzvidzo the Director of Gender, Poverty and Social Policy Division ECA writing on the “The impact of COVID-19 on African cities”³ made the following remarks at the initial stages of the pandemic:

COVID-19 employment effects in are likely to be severe in urban areas. With urban-based sectors of the economy (manufacturing and services) which currently account for 64% of GDP in Africa are expected to be hit hard by COVID-19 related effects, leading to substantial losses in productive jobs. In particular, the approximately 250 million Africans in informal urban employment (excluding North Africa) will be at risk. Firms and businesses in African cities are highly vulnerable to COVID-19 related effects, especially SMEs which account for 80% of employment in Africa. These risks are compounded by a likely hike in the cost of living is expected as shown for example by some initial reports of up to 100% increase in the price of some food items in some African cities.

It was anticipated that the pandemic would have an enormous effect on the ability of citizens to provide for their livelihoods, and the impact of this productivity deficit is not yet nearly understood. Perhaps a more detrimental consequence of the measures was the effect it had on the provision of essential services. This report, looking specifically on economic social and cultural rights seeks to explore the extent to which these rights were affected. The report is anchored on the finding of the Situational Daily Reports (Sitreps) issued by the Women’s Coalition of Zimbabwe since March 2020 focusing on Gender and the national COVID-19 response. This report focuses on two main issues that emerged from the Sitreps namely the Right to Water and Health Care.

² Worldometer, Reported Cases and Deaths by Country, Territory, or Conveyance, <https://www.worldometers.info/coronavirus/> (retrieved 15 January 2021)

³ <https://www.africanews.com/2020/04/15/coronavirus-africa-the-economic-impact-of-covid-19-on-african-cities-likely-to-be-acute-through-a-sharp-decline-in-productivity-jobs-and-revenues-says-eca/> (retrieved 19 April 2020)

Objectives

The purpose of the report is to conduct an assessment of the progress on socio-economic rights in Zimbabwe during the Covid-19 period and produce a comprehensive report focusing on 4 key areas:

- the status of socio-economic rights in domestic law and policy
- the rights to water as enshrined in the Constitution
- the rights to health care as in the Constitution
- access to justice in case of violation of socio-economic rights (water and health).

Constitutional Framework

The 2013 Constitution of Zimbabwe⁴ envisions a society within which every Zimbabwean should be able to enjoy their basic needs in conditions of dignity. From the Preamble, the Constitution acknowledges the need to overcome historical inequities and seeks to re-imagine a Zimbabwe united in its common desire for freedom, justice and equality. The Preamble goes further to mention the country's recognition of the need to entrench democracy, transparent and accountable governance and the rule of law. The preamble also reaffirms Zimbabweans collective commitment to upholding and defending fundamental human rights and freedoms. The Constitution in the Preamble makes reference to equality as a principal in three different provisions. In its final stanza dealing with equality, it introduces the idea of the right to development. The mention of the dignity of hard work initiates a discourse on economic rights into Zimbabwe's constitutional framework. The provision reads as follows:

Resolve by the tenets of this Constitution to commit ourselves to build a united, just and prosperous nation, founded on values of transparency, equality, freedom, fairness, honesty and the dignity of hard work

The Preamble to the Constitution introduces four themes which are paradigm setting, that are instructive or important to the issues discussed in this report, these are:

- a) A commitment to transformation. The Zimbabwean Constitution like the South African⁵ one that preceded it, is transformative in nature. The Preamble sets the tone for this transformative agenda, which as will become evident below is carried forth throughout the Constitution.
- b) The Constitution of Zimbabwe is aware of the socio-political context within which it was developed. The Constitution commits itself to transforming this country to a more just and equitable society. The Zimbabwean Constitution: in the Preamble, declares the resolve of the people of Zimbabwe

⁴ The Constitution of Zimbabwe Amendment (Number 20) Act 2013

⁵ Several scholars have written on the transformative nature of the South African Constitution. Some of the more prominent examples are cited by Theunis Roux in a paper title *Transformative Constitutionalism and the Best Interpretation Of The South African Constitution: Distinction without a difference?* These are, De Vos *Substantive Equality after Grootboom: the Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence* 2001 AJ 52 58 n 23; Moseneke Fourth Bram Fischer Memorial Lecture: *Transformative Adjudication* 2002 SAJHR 309 317; Botha *Metaphoric Reasoning and Transformative Constitutionalism* (Part 1) 2002 TSAR 612 613 n 9; Froneman *Legal Reasoning and Legal Culture: our 'Vision' of Law* 2005 Stell LR 3 4 n 10; Pieterse *What do we mean when we talk about Transformative Constitutionalism?* 2005 SAPL 155; Van der Walt *Transformative Constitutionalism and the Development of South African Property Law* (Part 2) 2006 TSAR 1 22 n 236; Wesson & du Plessis *Hart, Dworkin and the Nature of (South African) Legal Theory* 2006 SALJ 700 722 n 75; Liebenberg *Needs, Rights and Transformation: adjudicating Social Rights* 2006 Stell LR 5 6 n 2; Albertyn *Substantive Equality and Transformation in South Africa* 2007 SAJHR 253 257 n 18; Dyzenhaus *The Pasts and Future of the Rule of Law in South Africa* 2007 SALJ 734 740 n 18.

to build a united, just and prosperous nation, founded on values of transparency, equality, freedom, fairness, honesty and the dignity of hard work. This reconstructive process is premised on the tenets of the Constitution. The Constitution also introduces a number of reforms to bodies constituted therein, introducing more accountable appointment procedures⁶, setting principles for their operations⁷ and dissolution. More importantly, it includes an expanded Declaration of Rights that has justiciable socio-economic rights. Section 2 of the Constitution declares that it (the Constitution) “is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.”

b) Related to the transformative agenda is the commitment to development.

The idea of a prosperous nation finds expression in a number of provisions in the Constitution. Section 13 in particular calls upon all state institutions and agencies to endeavour to facilitate rapid and equitable development. The section proceeds to emphasise that the people must be involved in the formulation of programmes that affect them.⁸ Furthermore that measures taken must protect and enhance the right of the people, particularly women, to equal opportunities in development⁹. Section 13 in essence highlight the importance of the right to development to Zimbabwe’s Constitutional discourse. The right to development is indispensable to any discussion on ESC rights.

The Right to development was proclaimed in the Declaration on the Right to Development, adopted in 1986 by the United Nations General Assembly in its resolution 41/128. This right is also recognized in the African Charter on Human and Peoples’ Rights and re-affirmed in several instruments.¹⁰ The right to development is quintessentially African. It was first articulated by African scholars and the only hard law provision guaranteeing the right is set out in The African Charter on Human and Peoples’ Rights (hereinafter the Charter). In it’s preamble the Charter draws a link between the right to development and Economic Social and Cultural Rights. The Charter makes the point that:

Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

A point it (the Charter) reiterates in Article 22 in the following terms:

⁶ e.g. Section 180 of the Constitution, provides for a more transparent and a more competitive appointment process than under the old Constitution. The process includes the public nomination and interview of candidates for judicial appointment.

⁷ Section 8(1) for example requires the State and all institutions and agencies of government at every level must be guided by the constitutional objectives in the formulating and implementing laws and policy decisions. The policies and laws thus formulated should then lead to the establishment, enhancement and promotion of a sustainable, just, free and democratic society in which people enjoy prosperous, happy and fulfilling lives.

⁸ Section 13(2) of the Constitution

⁹ Section 13(3) of the Constitution

¹⁰ These including the 1992 Rio Declaration on Environment and Development, the 1993 Vienna Declaration and Programme of Action, the Millennium Declaration, the 2002 Monterrey Consensus, the 2005 World Summit Outcome Document and the 2007 Declaration on the Rights of Indigenous Peoples

ARTICLE 22

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Article 22 makes it clear that the right to development applies to all spheres of human existence, that is economic, social and cultural. Furthermore that the duty to ensure the right rested on individual states and also collectively on the other states parties to the Charter. Obiora Chinedu Okafor¹¹ in an attempt to tease out and build on the nature of the concept of the right articulated in Article 22, makes the point that development should not only be seen as economic growth but that it should foster parity between states, that gender interest must be taken into account and the practice of the development must be participatory and not follow a top-down approach. The UNDP which is quoted with approval by Obiora Chinedu Okafor conceives the term human development to denote the creation of “an environment in which people can develop their full potential and lead productive creative lives in accordance with the needs and interests.” Another important element in Article 22’s articulation of the right to development is the notion of equality in the enjoyment of the common heritage of mankind. This echoes a sentiment, in one of the early articulations of the right to development shared by Kéba M’Baye, Chief Justice of the Supreme Court of Senegal, lecturing at the International Institute of Human Rights in Strasbourg, France, in 1972. The Chief Justice postulated that “in the name of justice and peace, it is necessary to double efforts to re-encounter the true foundations and sources of the inalienable right that every human being has and that all human beings collectively have to live and to live better, that is, to equally benefit from the goods and services produced by the international or national community they belong to”.¹²

Paragraph 10, in Part I, of the Vienna Declaration and Programme of Action¹³ declared quite clearly that the right to development is a universal and inalienable right and an integral part of the corpus of fundamental human rights. This position had been more articulately outlined in article 1 (1) of the Declaration on the Right to Development, which stated that:

Article 1

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

The Declaration in its Preamble describes in clear terms the link between development and the Economic, social, cultural and political rights by stating “development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being

¹¹ Obiora Chinedu Okafor, A regional perspective: article 22 of the African Charter on Human and Peoples’ Rights <https://www.ohchr.org/Documents/Issues/Development/RTDBook/PartIVChapter27.pdf> (retrieved 7 December 2020)

¹² Kéba M’Baye, “Le droit au développement en droit international”, in *Études de droit international en l’honneur du juge Manfred Lachs*, Jerzy Makarczyk, ed. (Martinus Nijhoff, 1983), p. 165,

¹⁴ Reference

of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.”

c) The discourse on equality

The Constitution sets out equality as both a paradigm defining value and a right in itself. The preamble in three different places makes mention of the importance of the notion of equality in the formulation of our democracy. The Constitution carries forth this commitment throughout its provisions. The founding principles as set out in section 3 affirm the equality of all human beings¹⁴ and makes particular reference to gender equality.¹⁵ Of particular importance to this report is section 3(2) j of the constitution the equitable sharing of natural resources, including land as a good governance principle which binds the State and all institutions and agencies of government at every level. Section 17, of the Constitution, is dedicated to ensuring gender balance in all spheres of society and promote the full participation of women in society.

d) Commitment towards the enjoyment of human rights.

One of the most celebrated aspects of the Constitution is the extension of the bill of rights. The 2013 Constitution builds on its predecessor and includes an extended bill of rights in Chapter 4 titled “Declaration of Rights.” In addition to the civil and political rights that were outlined in the Lancaster house constitution the current constitution contains economic social and cultural rights in addition to rights of special interest groups like women the elderly and children. The Declaration of Rights contained in the 2013 Constitution also differs from the Lancaster House Constitution in a number of ways. The Declaration of Rights in the Lancaster House Constitution began with a preambular provision that was followed up by the individual rights and concluded with an enforcement procedure or mechanism. However, the Declaration of Rights in the current Constitution has been divided into five distinct parts:

- a) Part One: the “application and interpretations” of the Declaration of rights,
- b) Part Two: defines the rights and freedoms protected under the constitution;
- c) Part Three: elaborates on certain rights. It essentially sets out the group rights;
- d) Part Four: is the enforcement provision, and
- e) Part Five: defines the limitations to the exercise of the rights set out in the chapter

The Courts are required when interpreting the Declaration of Rights to “take into account international law and all treaties and conventions to which Zimbabwe is a party.”¹⁶ The Constitution demands that:-

When interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter.¹⁷

¹⁴ Section 3(1)f of the Constitution

¹⁵ Section 3(1)g of the Constitution

¹⁶ Section 46(1)(c) of the Constitution of Zimbabwe

¹⁷ Section 46(2) of the Constitution of Zimbabwe

Reading a similar provision in the South African Constitution¹⁸ the Constitutional Court was of the view that the provision created an imperative normative setting that obliges courts to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. The Court was of the view that the Courts did not have any discretion on the matter. Where the common law is deficient, the courts are under an obligation to develop it appropriately. This developing the common law involves a creative and declaratory function in which the court puts the final touch on the process of incremental legal development that the Constitution has already ordained.¹⁹

Perhaps the most meaningful addition to the Declaration of Rights that distinguished the 2013 Constitution from its predecessor is the inclusion of a justiciable set of Economic Social and Cultural Rights. The Lancaster House Constitution was primarily made-up of Political Rights and did not contain any provisions relating to Economic Social and Cultural Rights.

The position adopted in the Lancaster House Constitution reflected a misconception, at the time, for which the political west was a proponent that Economic Social and Cultural Rights were not justiciable. That is, that they could not be enforced through adjudication as they were seen to be aspirational and abstract at best. Through the inclusion of a justiciable corpus of Economic Social and Cultural Rights the Constitution of Zimbabwe seeks to guarantee that no one should have to live in conditions that fall below a minimum core content. The minimum core is a concept introduced by the Committee on Economic, Social and Cultural Rights ("the Committee") with the aim of ensuring "the satisfaction of, at the very least, minimum essential levels of each of the rights." The Committee expressed this view in General Comment 3 which elaborated on the provisions of Article 2 of the ICESCR. Although the Constitution does not make specific mention or reference to the doctrine of "minimum core content" it is now generally accepted that this is the correct interpretation of Economic Social and Cultural Rights. The Constitution makes reference to a "a basic state-funded education,"²⁰ "access to basic health care services,"²¹ and section 77 guarantees the rights of every person to safe water and sufficient food. The Government is enjoined, despite the resources available at its disposal, to make sure that people enjoy at least essential levels of protection of each of their economic, social, and cultural rights. That is protection from starvation, primary education, and provision of basic and emergency healthcare, as basic standards to live a dignified life. It is the duty of the government to ensure these at all times. This obligation maintains even in cases of economic downturn or situations of emergency like the COVID pandemic, these minimum core requirements must be guaranteed to everyone.

The Constitution's commitment Economic Social and Cultural Rights extends beyond the Declaration of Rights and finds expression in a number of provisions. These include sections 15, 16, 24, 27, 28, 29, 30, 32, 33 under the heading "National Objectives." In addition to which, Section 289 defines what is required in the formulation of the policy related to agriculture. It notes that the use of agricultural land should promote food security, good health and

¹⁸Section 39 (2) of the South African Constitution Reads

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

¹⁹Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amicus Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others 2006 (1) SA 524 (CC) paragraphs 14 & 15

²⁰See section 75 (1)a of the Constitution.

²¹See section 76 (1) of the Constitution

nutrition and generate employment while protecting and conserving the environment for future generations. Section 301 which deals with the allocation of revenue between provincial and local tiers of government requires that Acts that are to provide for local authority must take into account the need to provide basic services including educational health facilities water roads social amenities ended electricity to marginalised areas.

Justiciability of socio-economic rights (water and health).

The Declaration of Rights places a duty on every person (including juristic persons) and every agency of government at every level, to respect, protect, promote and fulfill the rights and freedoms set out in the Constitution.²² In this way the Constitution departs from the traditional function of constitutional provisions which guarantee the rights of citizens against branches of the government. The provisions of section 45 of the Constitution allow for horizontal application of the Bill of Rights which means that one can invoke constitutional norms directly indirectly against private parties to a legal dispute. In other words, the constitution binds in addition to the government, legal and natural persons for violations of the right set out in the declaration of rights. This, at conceptual level, means that there is now more robust protection for the rights enshrined in the Constitution as they can now be enforced against both persons and the state. Part 4 of the Declaration of Rights is entitled "Enforcement of fundamental human rights and freedoms." Section 85, therein, allows persons acting in their own interests, acting on behalf of other people, who cannot act for themselves; acting as members or in the interests of a group or class of persons; acting in the public interest or any association acting in the interest of its members to approach a court alleging that a fundamental right or freedom enshrined in the Bill of Rights has been, is being, or is likely to be infringed. The court presented with such an application is empowered to grant appropriate relief including a declaration of rights and award for compensation. This means therefore that by their inclusion in the Declaration of Rights social economic rights can now be enforced by way of a court order. A process that is referred to as the justiciability of social economic and cultural rights. The term "justiciability" means that people who claim to be victims of violations of these rights are able to file a complaint before an independent and impartial body, to request adequate remedies if a violation has been found to have occurred or to be likely to occur, and to have any remedy enforced.²³

Zimbabwe joins a growing list of countries which have recognized the full justice ability of social economic and cultural rights. This list includes Argentina, Bangladesh, Colombia, Finland, Hungary, India, Ireland, Kenya, Latvia, South Africa, Switzerland, the Philippines, the USA and Venezuela. However, the traditional distinction between the economic social and cultural rights and civil and political rights on the extent to which the former is justiciable is ongoing. It remains to be seen how the court in Zimbabwe are going to respond to this debate in the nature of the awards that they are willing to grant for cases brought about that require the courts to look into the policy announcements and determine the appropriateness of resource allocation by the government. The longstanding debate has been that the vague nature of economic social and cultural rights and the inappropriateness of having court officials interfering with government decisions on social economy policy renders it difficult to fully adjudicate on economic social and cultural rights. The question therefore becomes about whether the court system can play a role in the adjudication and enforcement of social and economic rights.

²² Section 44 of the Constitution of Zimbabwe

²³ International Commission of Jurists publication "Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability", p. 1.

The rights to Health Care

76. Right to health care

1. Every citizen and permanent resident of Zimbabwe has the right to have access to basic health-care services, including reproductive health-care services.
2. Every person living with a chronic illness has the right to have access to basic healthcare services for the illness.
3. No person may be refused emergency medical treatment in any health-care institution.
4. The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of the rights set out in this section.

The Constitution of Zimbabwe shows a very high commitment to the protection of the health of its citizens (and permanent residence) however at a basic level. Section 29 provides that the state must take practical measures to ensure the provision of basic accessible and adequate healthcare throughout Zimbabwe. This National Objective goes further to enjoin the state to ensure that no person is refused emergency medical treatment in any health care facility. Furthermore, and perhaps of particular interest to this report, the state is required to take all preventative measures within the limits of its resources against the spread of disease.

The Constitution does not provide for the Right to Health per se but instead provides for the Right to Healthcare. This is provided for in section 76 of the Constitution which provides that every citizen and permanent resident of Zimbabwe has the right to have access to basic health care including reproductive health care services. It should be noted that the right to healthcare extends to both citizens and permanent residence. This places a duty upon the state to ensure that every citizen and every permanent resident is afforded an opportunity to receive basic health care. However, no person may be refused emergency medical treatment in any healthcare facility. That means that (of emergency services) this guarantee extends beyond just permanent residents and citizens. It can be interpreted to mean the provision of emergency health care even to persons in the country illegally. Similarly, every person living with a chronic illness has the right to have access to basic healthcare services for the illness. Therefore, the right to healthcare at its basic level may apply only to citizens and permanent residence nonetheless emergency treatment and provision of medication or treatment for chronic illness extends to everyone living in Zimbabwe.

Section 76 enjoins the state to take reasonable legislative in other measures within the limits of the available resources to achieve the progressive realisation of the rights set out in the section. The reference to the progressive realisation in the provision does not in itself take away the need for a minimum core content of the right. Article 2 of the International covenant on economic social and cultural rights recognises the principle of progressive realisation of ESC rights. This does not mean that states are free to postpone undertaking their duties to provide rights until a later date. The Committee on Economic Socio and Cultural Rights has interpreted the term "progressive realization" to constitute 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. The Committee elaborated further that "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 realization of economic, social

and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the purpose, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights..." It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. "Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."

The Committee noted, based on its extensive experience that there was an obligation to ensure a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights. It concluded that 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 intentions. By the same token, reference to progressive realisation under Section 76 should be read and understood in a similar way. The government must make every effort within the bounds of the resources available to meet this core obligation and ensure that the right to basic health care is attained by all citizens and permanent residence.

It is therefore self-evident that the committed to health as expressed in the constitution is pitched at a very low level. The Constitution guarantees access to basic health care. The standard set out by global norms is somewhat different. The right is framed as the right to health in most of the global treaties. The Universal Declaration of Human Rights does not provide for the right to health per se but instead in Article 25.1 affirms that: "Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services". The ICESCR provides the most comprehensive article on the right to health in international human rights law. In accordance with article 12.1 of the Covenant, States parties recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The African Charter in article 16 (1) guarantees every individual's right to enjoy "the best attainable state of physical and mental health." The South African Constitution in Section 27 States that everyone has the right to have access to healthcare services including reproductive health care. The provision in the South African constitution does not qualify the healthcare services either is the highest or best attainable or basic rate it simply guarantees a right to healthcare services. The Kenyan Constitution goes even further, and provides in section 43 (1), that every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.

CEDAW also provides for the right to health which focuses specifically on the need to ensure equal provision of health goods and services and that effort be made to ensure that the peculiar needs of women are provided for by the state. It states in Article 12, that States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. It goes on to state in paragraph 2 of article 12 that States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation. The Maputo Protocol provides a more elaborate description of the right to health as it pertains to women. Article 14 of the Protocol reads as follows:

Article 14

Health and Reproductive Rights

1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:

- a) the right to control their fertility;
- b) the right to decide whether to have children, the number of children and the spacing of children;
- c) the right to choose any method of contraception;
- d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
- e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices;
- g) the right to have family planning education.

2. States Parties shall take all appropriate measures to:

- a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;
- b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding;
- c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.

Impact of the COVID measure on the Health Care

The Committee on Economic Social and Cultural Rights in General Comment number 14 pointed out that the right to health in all its forms and at all levels contained for interrelated and essential elements. The precise application of which depended on the conditions prevailing in that particular country. These were availability, accessibility, acceptability and quality. The general comment in paragraph 12 explains each and every one of these interrelated in the essential elements and it is upon this criterion that the Right to health during the COVID period shall be assessed, taking into consideration Zimbabwe's peculiar context.

Availability

The Committee noted that functioning public health and health care facilities, goods and services should be available in sufficient quantities in any particular country. It went on to note that the precise nature of the facilities goods and services will vary depending on a number of factors including the countries level of development. The Sitreps note a number of issues that affected availability of health care. It recites the following in its report:

- a) With respect to access to health care services, much of the early responses to the outbreak of COVID-19 was led by the efforts of private non-state based actors who donated ventilators and Personal Protective Equipment (PPE) for use by frontline health workers. There were long delays in availing of PPE to healthcare workers by the Government, primarily because of challenges in

appreciating the gravity of the COVID-19 pandemic and this was reflected in the bureaucratic proceduralism and red tape in the procurement of the supplies needed in the national response.

- b) An overwhelming number of reports pointed women in multiple locations failing to access services for maternal health, chronic illnesses, antiretroviral therapy, family planning, as well as sexual and reproductive health products and services. The reports also indicate the very substantial rise in costs of medication for chronic illnesses such as diabetes and hypertension under the lockdown. Women have been turned away from clinics, hospitals, and mothers' shelters citing fear of COVID-19 and service provider's unpreparedness to deal with COVID-19 and to serve the mothers at the same time.

It is apparent from the reports that the Right to Health Care was not "available" to citizens even at the basic level anticipated by the Constitution. Even within the bounds of the resources available to the treasury in Zimbabwe, these basic conditions should and could have been met but for the slow response by government to the pandemic. Furthermore, as it would later emerge corruption and abuse of office by the then Minister of Health further exacerbated the situation.

Accessibility

Under the rubric of accessibility, the committee noted that healthcare facilities goods and services have to be accessible to everyone without discrimination and included physical, economic and information accessibility. As already observed above medical facilities and protective gear was not accessible during the early stages of the pandemic. The cost of accessing the protective clothing was also well beyond the ordinary Zimbabwean to access. However, and perhaps detrimental to the containment of the spread of the pandemic, the Sitreps observed that Procurement and disbursement of funds to COVID-19 responding institutions provincial and district was not done timeously. This impacted on COVID-19 taskforce teams' preparedness and abilities to implement the response plans. The district and provincial level response team were hampered by the late disbursement of funds and delivery of supplies. Expedited disbursements to frontline institutions and expedited procurement of the equipment and products required for testing, tracing, and treating COVID-19 is of utmost importance.

Furthermore, there were serious gaps in the accessibility of testing. The Sitreps observed that the release of prisoners following the Presidential Amnesty posed a challenge in terms of the spread of COVID-19. This was because the released prisoners were not tested and the communities receiving them were not capacitated to receive them, to monitor their health and that of the families they come into contact with. Adequate steps should have been taken to prepare the receiving communities and for the task force teams in each area to properly track the released inmates.

Acceptability

Acceptability is primarily in respect to medical ethics cultural appropriateness and gender sensitivity. The committee noted that healthcare facilities goods and services and programs needed to be people centred and to cater for the specific needs of diverse population groups in accordance with international standards of medical ethics on Confidentiality and informed consent.

The names and identities of suspected and confirmed covered patients where freely released in the newspapers and on other media platforms. This was done without regard to the privacy needs of the individuals and their families concerned.

Quality

To the Committee the Health Care, in addition to being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, inter alia, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation. According to the Sitreps reports, the quarantine centres were very shabby and actually stimulated and catalysed the spread of COVID-19 rather than curtail its spread. Returnees are supposed to be tested on the 1st, 8th and 21st days but due to lack of both test kits and reagents, the first test was frequently administered several days after arrival and quarantining of the returnee. Also, there were lengthy delays in the release of returnees' COVID-19 test results with some returnees having to stay for more than 21 days in quarantine centres and some exceeding a month. Meanwhile, the returnees were made to share bedrooms and washrooms with other returnees whose test results were unknown. Reports also indicate that social distancing is not being observed.

The Rights to Water

77. Right to food and water

Every person has the right to--

- a. safe, clean and potable water; and
- b. sufficient food;

and the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right.

The right to water is set out together with the right to food under section 77 of the Constitution. The right to water stipulated in the constitution of Zimbabwe simply provides that every person has the right to safe clean and portable water. It enjoins the state to take reasonable legislative and other measures within the limits available to it to achieve the progressive realization of this right. As a general rule all rights are indivisible, inalienable and equal. However, the right to water is inextricably related to the right to the highest attainable standard of health and the rights to adequate housing and adequate food.²⁴ This is consistent with the way the right is formulated in the Maputo Protocol which also provides for the link between food security and the right to water. Article 15 of the Protocol "States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food."²⁵ The Committee on ESC Rights has said that the Right to Water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.²⁶ The International Covenant on Economic, Social and Cultural Rights does not expressly provide for the "Right to Water." The Committee in providing interpretative guidance

²⁴ Paragraph 3 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, E/C.12/2002/11, available at: <https://www.unhcr.org/publications/operations/49d095742/committee-economic-social-cultural-rights-general-comment-15-2002-right.html>

²⁵ Article 15 (a) Maputo Protocol

²⁶ Paragraph 2 General Comment 15.

in General Comments Number 15 was looking at articles 11 (adequate standards of living) and 12 (health) of the Covenant and reading into these the Right to Water. The Committee recommended that the interpretation of the word “adequate” should be broad and not limited to volumetric quantities.²⁷ The committee went further to define factors which should apply to the right in all circumstances. These are availability, quality, and accessibility. The right is explicitly provided for in the Convention on the Rights of the Child,²⁸ the Convention on the Elimination of All Forms of Discrimination against Women²⁹ and the Convention on the Rights of Persons with Disabilities.³⁰

In the Zimbabwean Constitution the right to water is set out in section 77 together with the rights to sufficient food. Section 77 provides that every person has the right to safe clean and potable water and that the state must take reasonable measures within its available resources to achieve the progressive realisation of the right. The right as defined in the Constitution requires that the access be of safe, clean and portable water. These are the same attributes that The Committee identified as being applicable in any context for the enjoyment of the right.

The report noted that:

Women and communities across the ten provinces of Zimbabwe continue to fail to access clean and safe water. The ability of communities to cooperate with the lockdown and to maintain the standards of hygiene and personal care required by the lockdown call for conscious and purposive interventions by the central government to support the provision of bulk, clean, safe water to communities facing lack of water and sanitation services. Many Sitreps indicate challenges faced by women at water sites and communal boreholes including violence from rival suitors of the scarce water and law enforcement officers. This is especially pronounced in the high-density residential areas in urban areas which are grossly under-serviced. Several reports also indicated that isolation centres had no water as far as 13 days into the lockdown. Reports indicate that adequate practical steps to provide bulk water supplies to communities have not been taken, are erratically implemented and have not been clearly communicated to the communities. Women in high density residential areas bear the brunt of the water crisis. They are the ones who, along with minor children, queue at communal boreholes and are reportedly attacked by law enforcement officers when found at the communal boreholes past curfew time.

There are number of things from the report quoted above which shows how the provisions of water fell below the standard expected by the Constitution. The constitution and a section 77 require that the water should be portable. The idea of portable water conveys 2 idea described by the Committee; that is availability and accessibility. In terms of the former, the supply of water for each person must be sufficient and continuous or personal and domestic use. And by accessibility water and water facilities and services have to be accessible without discrimination within the country. It is clear from the above quoted section of the report that water was not readily available to the communities. Where it was available it was not adequate to meet their domestic needs. But for the majority of women water has not been accessible as they has been violence at the collection points by either other citizens or by law enforcement agents.

²⁷ Paragraph 11 of General Comment 15

²⁸ See Article 24(2)(c)

²⁹ See article 14(2)(h)

³⁰ See Article 28(2)(a)

RECOMMENDATIONS

Recommendation One: Monitoring and Documentation of Violations

The restrictive measures that have been necessitated by the COVID pandemic have limited the number of interventions that are possible at the moment. Litigation which has been the traditional method of obtaining redress where violations have occurred, whether this is at a domestic or at an international level, is not an option at the moment. The Courts are inundated with cases and have backlogs. Therefore, the institution of legal proceedings would not bring about immediate relief. Cases involving economic social and cultural rights may not be admitted onto the roll as urgent cases. This then places a big burden for civil society actors to consider alternative advocacy measures. In the interim it is imperative to collect and collate accurate/reliable information. This can be used for evidence-based advocacy initiatives in the future or for litigation when court operations are restored.

It is therefore recommended that during the COVID 19 pandemic the monitoring and documentation of cases should therefore be prioritized. The standards for documentation should go beyond anecdotal stories and evidence should be collected that can either sustain a legal case or be persuasive for policy makers.

Recommendation Two: Complaints with the Chapter 12 Institutions

An important innovation that came about as a result of the adoption of the 2013 Constitution was the strengthening and in some cases creation of independent Commissions. Section 233 of the Constitution notes that the independent commissions have as their objectives the following,

- a) to support and entrench human rights and democracy.
- b) to promote constitutionalism to promote transparency and accountability in public institutions and
- c) to secure the observance of values and principles by the state.

It should be noted therefore that these institutions have a very large part to play to support our democracy. The Gender Commission and the Human Rights Commission both have complaint mechanisms that can be utilized to ensure redress for victims of violations if these are not burdened by procedures they are low-cost options which have the potential to bring about immediate relief.

It is therefore recommended that a plan be developed and cases be compiled for submission with the complaint mechanisms of the independent Commissions.

Recommendation Three: Engagement with Local Authorities

The adversarial nature of litigation in this country means that the courts should be an arena of last resorts. Litigation neither can nor considered as the only means to ensure governments compliance with its duties relating to ESC rights. The courts alone cannot supervise the implementation of laws and policies in areas such as health, work, food, housing or education. The provision of clean portable water is primarily the responsibility of local authorities. In addition, local authorities around the country manage council clinics which are for most people the most available or primary institute

of health care. As such it is important to engage council and come up with means of ensuring that marginalized or vulnerable communities have access to health care facilities. Local government authorities are generally more accessible than central government and are not burdened by the bureaucratic hurdles.

It is therefore recommended that a concerted lobbying advocacy strategy be developed targeting local authorities with the objective of engaging them on issues of economic social and cultural rights.

Recommendation Four: Litigation

The courts are generally reluctant to interfere with the way that resources are allocated towards economic social and cultural rights. However, when all else has failed the courts are the only ones that are able to then move the hand of government to act. As such information should therefore be collected as per Recommendation One for the possibility of litigation in the future and where an agent situation arises for immediate action.

It is therefore recommended that litigation be used as a last resort when engagement with local government authorities and recourse to the independent institutions has failed.

Recommendation Five: Development of a comprehensive Development Charter

Although the provisions of section 13 of the Constitution are not necessarily articulated as the Right to Development. The essential elements, of the right, as defined by international law find expression with the provisions of section 13. This is important as we begin to look at the realisation of socio-economic rights within the context of Zimbabwe. As the Right to Development in its very nature integrates aspects of ESC rights to development theory and practice. The attainment of development and enjoyment of ESC rights are synonymous. They also require the meaningful participation of citizens in the defining of the development agenda. Therefore, in line with the transformative nature of the Constitution the essence of the Right to Development demands a comprehensive human-centred development policy that is participatory in its formulation and just and equitable in its application/implementation. Fostering pro-poor growth paying particular attention to groups that sit on the margins of society.

It is therefore recommended that the partners to this project compile a comprehensive development plan which looks at interventions that can be adopted to reduce the impact of the restrictive measures on the rights holders.

PART C

Zimbabwean Courts' Approach to the Adjudication of Economic Socio and Cultural Rights: A Brief Survey of Cases

Report By **Brian Penduka**

March 2021

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- c) **FARAI MUSHORIWA V CITY OF HARARE** (HC 4266/13) [2014] ZWHHC 195
- d) **FORBES & THOMPSON (BULAWAYO) (PVT) LIMITED V ZINWA & ANOTHER** HB 147-18, HC 1148-16 [2017] ZWBHC 147 (08 June 2017)
- e) **HIPPO VALLEY ESTATES LIMITED & ANOTHER V MINISTER OF ENVIRONMENT, WATER & CLIMATE** (HH 235-18, HC 7770/16) [2018] ZWHHC 235 (03 May 2018)
- f) **HOPCIK INVESTMENT (PTY LTD) V MINISTER OF ENVIRONMENT WATER AND CLIMATE AND CITY OF HARARE** (HH 137-16) & (HC 1796/14)
- g) **HOVE V HARARE CITY** (HH 205/16 HC 1728/15) [2016] ZWHHC 205 (23 March 2016)
- h) **JONPENN (PVT) LTD. V CITY OF HARARE & ANOTHER** (HH 332-16 HC 4447/15) [2016] ZWHHC 332
- i) **MUTAMBA & 2 ORS V CITY OF MASVINGO & 3 ORS** (HMA 19-20, HC 84/20) [2020] ZWMSVHC 19 (21 May 2020)

THE RIGHT TO HEALTH

- a) *COMBINED HARARE RESIDENTS ASSOCIATION & ANOR V THE MINISTER OF HEALTH & CHILD CARE N.O & 3 ORS*(HH 642-20, HC 4070/20) [2020] ZWHHC 642 (14 October 2020)
- b) *MAKOKA V MINISTER OF HEALTH AND CHILD CARE & 4 ORS* (HH 414-20, HC 3003/20) [2020] ZWHHC 414 (19 June 2020)
- c) *MARKHAM & ANOR V MINISTER OF HEALTH AND CHILD CARE & 3 ORS* (HH 263-20, HC 2168/20) [2020] ZWHHC 263 (15 April 2020)
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LIST OF ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
AU	African Union
CAT	United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment
CCPR	United Nations Covenant on Civil and Political Rights
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination Against Women
CERD	United Nations Convention on the Elimination of All Forms of Racial Discrimination
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CRC	United Nations Convention on the Rights of the Child
CRPD	United Nations Convention on the Rights of Persons with Disabilities
ESCR	Economic, Social and Cultural rights
HRC	United Nations Human Rights Committee
ICESCR	United Nations Convention on Economic, Social and Cultural Rights
ILO	International Labour Organization
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights
SADC	Southern Africa Development Community
ZINWA	Zimbabwe National Water Authority

GLOSSARY OF TERMS¹

Affirmative Action:	Action taken by a government or private institution to make up for past discrimination in education, work, or promotion on the basis of gender, race, ethnic origin, religion, or disability.
Civil & Political Rights:	The rights of citizens to liberty and equality; sometimes referred to as first generation rights. Civil rights include freedom to worship, to think and express oneself, to vote, to take part in political life, and to have access to information
Convention:	Binding agreement between states; used synonymously with Treaty and Covenant. Conventions are stronger than Declarations because they are legally binding for governments that have signed them. When the UN General Assembly adopts a convention, it creates international norms and standards. Once a convention is adopted by the UN General Assembly, Member States can then Ratify the convention, promising to uphold it. Governments that violate the standards set forth in a convention can then be censured by the UN.
Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)	(adopted 1979; entered into force 1981): The first legally binding international document prohibiting discrimination against women and obligating governments to take affirmative steps to advance the equality of women.
Convention on the Rights of the Child (CRC)	(adopted 1989; entered into force 1990): Convention setting forth a full spectrum of civil, cultural, economic, social, and political rights for children.
Covenant:	Binding agreement between states; used synonymously with Convention and Treaty. The major international human rights covenants, both passed in 1966, are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).
Customary International Law:	Law that becomes binding on states although it is not written, but rather adhered to out of custom; when enough states have begun

¹ Sources: Adapted from Julie Mertus et al., *Local Action/Global Change*, Ed O'Brien et al, *HumanRights for All*, and Frank Newman and David Weissbrodt, *International Human Rights: Law, Policy, and Process*.

to behave as though something is law, it becomes law “by use”; this is one of the main sources of international law.

Declaration:

Document stating agreed upon standards but which is not legally binding. UN conferences, like the 1993 UN Conference on Human Rights in Vienna and the 1995 World Conference for Women in Beijing, usually produce two sets of declarations: one written by government representatives and one by Nongovernmental Organizations (NGOs). The UN General Assembly often issues influential but legally Nonbinding declarations.

Economic and Social Council (ECOSOC):

A UN council of 54 members primarily concerned with population, economic development, human rights, and criminal justice. This high-ranking body receives and issues human rights reports in a variety of circumstances.

Economic, Social, Cultural Rights:

Rights that concern the production, development, and management of material for the necessities of life. The right to preserve and develop one’s cultural identity. Rights that give people social and economic security, sometimes referred to as security-oriented or second generation rights. Examples are the right to food, shelter, and health care.

Human Rights:

The rights people are entitled to simply because they are human beings, irrespective of their citizenship, nationality, race, ethnicity, language, gender, sexuality, or abilities; human rights become enforceable when they are Codified as Conventions, Covenants, or Treaties, or as they become recognized as Customary International Law.

Inalienable:

Refers to rights that belong to every person and cannot be taken from a person under any circumstances.

Indivisible:

Refers to the equal importance of each human rights law. A person cannot be denied a right because someone decides it is “less important” or “nonessential.”

Interdependent;

Refers to the complementary framework of human rights law. For example, your ability to participate in your government is directly affected by your right to express yourself, to get an education, and even to obtain the necessities of life

- International Covenant on Economic, Social, and Cultural Rights (ICESCR):** Adopted 1966, and entered into force 1976. The ICESCR declares that all people have a broad range of economic, social, and cultural rights. One of the components of the International Bill of Human Rights.
- Justiciable** Capable of being decided by legal principles or by a court of justice.
- Ratification, Ratify:** Process by which the legislative body of a state confirms a government's action in signing a treaty; formal procedure by which a state becomes bound to a treaty after acceptance.
- Treaty** Formal agreement between states that defines and modifies their mutual duties and obligations; used synonymously with Convention and Covenant. When conventions are adopted by the UN General Assembly, they create legally binding international obligations for the Member States who have signed the treaty. When a national government Ratifies a treaty, the articles of that treaty become part of its domestic legal obligations.
- Universal Declaration of Human Rights (UDHR):** Adopted by the general assembly on December 10, 1948. Primary UN document establishing human rights standards and norms. All member states have agreed to uphold the UDHR. Although the declaration was intended to be Nonbinding, through time its various provisions have become so respected by States that it can now be said to be Customary International Law.

INTRODUCTION

Zimbabwe Women's Resource Centre and Network (ZWRCN), Diakonia and Women in Law in Southern Africa (WLSA) commissioned research to explore the progress towards the full attainment of Economic Social and Cultural Rights in Zimbabwe during the COVID-19 period. The research which was funded through the Transparency, Responsiveness and Citizen Engagement (TRACE) programme under the project entitled "Inclusive and Gender Responsive Local Government Policy, Planning and Budgeting Processes for Equitable Public Service Delivery" found that there were significant violations of the right to water and the right to healthcare in particular. Significantly one of the recommendations that emerged from this research was the need to explore the jurisprudence emerging from the courts and how best to seek and ensure redress for the millions of Zimbabweans whose basic enjoyment of economic social and cultural rights had been adversely affected by the virus.

BACKGROUND

The emergence of the COVID-19 pandemic, also known as the coronavirus pandemic, has significantly shifted focus of most Zimbabweans from civil and political rights to economic social cultural rights. The pandemic being primarily a healthcare crisis amplified the need to ensure robust and effective health care provision. In addition, the restrictive measures put in place by most governments to contain the spread of the virus have exposed preexisting fault lines in most African states and reinforced the need to put social safeguards to ensure that populations in Africa enjoy a minimum core content of this group of rights. The restrictive measures have affected the ability of most citizens to seek or offer employment, to access education and health care facilities, and to adequately water and nourish their families. The challenges that have occurred as a result of the virus have reinforced the need to look at the redress mechanisms that are available for the protection of economic social and cultural rights.

This report which follows up on the initial research focuses on the decisions that have been taken by the courts since the adoption of the 2013 Constitution² on ESC Rights with a particular focus on the rights to water and the right to health. It does not provide an exhaustive survey of the jurisprudence but seeks to provide the reader with an understanding of the major themes and trends that can be discerned from the case law that is emerged from the courts. It acknowledges in this process that the jurisprudence is still developing. It's only been seven years since the adoption of the Constitution, and there have not been that many cases that have come to test the courts' philosophy on ESC Rights. This report therefore provides the preliminary view of the emerging law and concludes by making recommendations on the direction the law should be going in order to ensure adequate redress for all rights holders.

METHODOLOGY

The Research utilised a social science qualitative research method called Grounded Theory. This approach involves the construction of hypotheses and theories through the collecting and analysis of data. Central to this method is the inductive approach, involving a bottom-up mindset where the theory emerges from the data, instead of starting from a hypothesis or a central argument and

² Constitution of Zimbabwe Amendment 20 of 2013

then deductively turning to the data in search of illustrations or confirmations of this hypothesis. This requires an open-minded approach towards the data to let the data 'speak'. The research therefore developed conclusions or outlined a pattern following the completion of the research/ case reviews.

STRUCTURE

The report itself begins by introducing the reader to the general discourse around ESC rights looking at their historical development internationally and then their inclusion into the Zimbabwean Constitution. Thereafter it looks at the case law that is emerging from the Courts. The report concludes with an assessment of the jurisprudence and proposes some guidance on the direction the case law should go in order to ensure the full realization of ESC rights in Zimbabwe. The report is structured in a way that allows for both legally and none legally trained readers to understand and comprehend its content. This was done deliberately to allow for it to be widely disseminated and read.

Adjudication of ESC Rights

The inclusion of justiciable economic social and cultural rights in emerging or newly crafted constitutions has led to a rise in the adjudication off economic social and cultural rights. This rise in cases of ESC rights has been fueled by pressure groups and rights advocacy organizations working in the area of child rights HIV and AIDS and through deliberate and strategic litigation have seen a growth in the corpus of cases that have been precedent setting and have changed how these rights have been understood and seen.

Conceptual Challenges in the litigation of ESC cases

The developments in the adjudication of economic social and cultural rights have not been without obstacles. There have been a number of conceptual or ideological challenges that have been raised concerning the ability of the courts to resolve dispute involving ESC rights. Listed below are the three most common objections that are raised:

a) ESC rights were not legal rights

It yes you can make some it has long been considered that ESC rights where not necessarily rights but a list of societal aspirations. Furthermore, that the achievement of these societal goals was subject to availability of resource and government priorities. However, with the growing inclusion of ESC rights in constitutional bills of rights and international law and the growing body of jurisprudence has changed perception on their adjudication.

b) ESC rights were not justiciable since they involved issues of policy not law.

The view was that implementation of ESC rights was a policy matter, not a matter of law. In order to resolve disputes of ESC rights the courts question and resolve the efficacy of government decisions to prioritisation resources. Courts in south Africa have resolved this law and policy divide by developing or adopting orders that respond positively to this challenge. The structural

interdict for example that was adopted in the *Government of the Republic of South Africa and Others vs. Grootboom and Others*³ a classic common law gradualist approach which monitored the duty bearers compliance.⁴

c) The Courts are not equipped to resolve such policy issues or lack the legitimacy.

The other reason that is provided or given as the basis upon which the Courts should not deal with ESC rights is that they (the courts) either lack the legitimacy or the necessary skills to be involved in such resource allocation. The primary issue being that the courts are made up of lawyers and very often lawyers are not equipped with the requisite skills to be able to look into budgetary issues and assess whether or not the duty bearer has acted in a manner that is prudent. The fact that judicial officers are appointed and not elected raises also a legitimacy issue. Can the courts make decisions that go against the will of the people as expressed through their elected representatives in parliament or the executive? However, if this argument was to hold then the whole function of the courts would be lost. Judicial officers are often called to make pronouncements on issues that they may not be fully acquainted with; judges are not trained in medicine but can authoritatively deal with a malpractice suit involving a medical professional. The Courts' ability to work or adjudicate in any matter is dependent on the pleadings that are presented before them. As such the issues that are raised can therefore be resolved by the litigants bringing forth sufficient information for the court to exercise their discretion.

The Right to Water

Perhaps the most prominent case which deals with the Right to Water In Zimbabwe is the dispute between the City of Harare and Farai Mushoriwa,⁵ which was first heard is an urgent chamber application in the High Court before Judge Bhunu in 2013.⁶ The case would eventually be taken up on appeal by the City of Harare. The facts of the matter amply summarize by Justice Patel in the appellant court judgment as follows:

The High Court found that the relevant legislation governing water supplies divested the appellant of any unfettered discretion to disconnect water supplies. In any case, where the appellant sought to do so for any alleged failure to pay, it could only disconnect upon proof that the consumer in question had failed to pay the charges due. Moreover, the appellant could not arrogate to itself the right to determine when payment is due without the requisite proof secured by due process or recourse to a court of law. The court opined that the right to potable water is enshrined in the Constitution and that the appellant, being a public body, cannot deny water to any citizen without just cause. Furthermore, the relevant by-law relied upon by the appellant was not only unconstitutional but also ultra vires its parent legislation

³(CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)

⁴DM DAVIS Adjudicating The Socio- Economic Rights In The South African Constitution: Towards 'Deference lite? Citation: 22 S. Afr. J. on Hum. Rts. 301 2006

⁵Mushoriwa v City of Harare (HC 4266/13) [2014] ZWHHC 195 (29 April 2014) City of Harare v Mushoriwa (SC 54/18, Case No. SC 228/14) [2018] ZWSC 54 (20 September 2018)

⁶ see also judgement in Bothwell Property (Pvt) Ltd. v City of Harare & Another (HH 360-16 HC 4446/15) [2016] ZWHHC 360 (15 June 2016); 2. Jonpenn (Pvt) Ltd. v City of Harare & Another (HH 332-16 HC 4447/15) [2016] ZWHHC 332 (01 June 2016) and also the judgement in Hove v Harare City (HH 205/16 HC 1728/15) [2016] ZWHHC 205 (23 March 2016) in which the court dismissed the applicants case.

*because it conferred sole jurisdiction upon the appellant to determine any disputed bill without recourse to the courts.*⁷

The City of Harare appealed the decision of the court a quo on grounds, according to the appellant court judgement, could be categorised under two broad headings “that firstly, to the relief granted by the court a quo and, secondly, to the legality of the appellant’s actions generally.” The appellant court did not deal as extensively with the issue of the right to water in the discharge of this case as was done in the court a quo. Judge Patel, writing for the court, devoted a large part of the judgment to dealing with issues of statutory interpretation and how this affected the legal rights of the two parties to the dispute. The learned Judge of appeal dealt with the issue all the right to water not as part of the *ratio decidendi*⁸ but instead as *obiter dictum*.⁹ The court did not utilize the numerous standards on economic Social and Cultural Rights that have been developed but instead drew inspiration from the South African experience. Before looking at the judgement in detail, it should be noted that the 2013 Constitution instructs the court in section 46 to take into account international law and all treaties and conventions to which Zimbabwe is a party when interpreting the Declaration of rights. The courts in South Africa have understood this section to mean that:

*“all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.”*¹⁰

Judge Patel (AJA) drew heavily in his judgement from South African sources. He neglected however to note an important distinction in the way the right to water is framed in the South African Constitution and the Zimbabwean Constitution. The judge, erroneously, noted that “Section 77 of the Constitution of Zimbabwe is framed in words that are almost identical to those used in its South African counterpart.” However, as will become apparent in the table below, the right in South Africa is to “access to sufficient food and water” and under section 77 of the Zimbabwean Constitution the law provides for the “right to safe, clean and portable water.”

⁷ City of Harare v Mushoriwa (SC 54/18, Case No. SC 228/14) [2018] ZWSC 54 (20 September 2018) <https://zimlil.org/zw/judgment/supreme-court-zimbabwe/2018/54> @page 1

⁸ “the reason” or “the rationale for the decision”

⁹ “Obiter dicta (often simply dicta, or obiter) are remarks or observations made by a judge that, although included in the body of the court’s opinion, do not form a necessary part of the court’s decision” Wikipedia Obiter dictum https://en.wikipedia.org/wiki/Obiter_dictum [retrieved 22 March 2021]

¹⁰ Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others (CCT1/00) [2000] ZACC 12; 2000 (10) BCLR 1079 ; 2001 (1) SA 545 (CC) (25 August 2000)

Right to water South African Constitution	Right to water Zimbabwean Constitution
<p>27. Health care, food, water and social security</p> <ol style="list-style-type: none"> 1. Everyone has the right to have access to- <ul style="list-style-type: none"> - health care services, including reproductive health care; - sufficient food and water; and 3. social security, including, if they are unable to support themselves and their dependents, appropriate social assistance. 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. 3. No one may be refused emergency medical treatment. 	<p>77. Right to food and water Every person has the right to--</p> <ol style="list-style-type: none"> a. safe, clean and potable water; and b. sufficient food; <p>and the State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realisation of this right.</p>

The South African Constitution guarantees an individual's access to sufficient water. The duty of the state in this regard is to make sufficient amounts of water available to rights holders. The obligation in terms of section 77 of the Zimbabwean constitution demands more from the state. The state is not merely asked to make available or facilitate access to water but instead a positive duty is placed upon government to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to fully realize the right to water.¹² The duty on the state in Zimbabwe extends beyond access but calls upon the duty bearer to ensure the full realisation of the right.

Although the court's decision did not hang on its understanding of section 77, the court quoted extensively from South African authorities. Making no distinction in its analysis of the framing of the right in the two constitutions. As stated above the South African Constitution provides for the right to have access to sufficient water and the equivalent provision in Zimbabwe is to safe, clean and potable water. This distinction in my view renders or limits the usefulness of South African authorities in the understanding of the right in Zimbabwe. Gabru quoted by the court explains that the reference in the South African provision "to "access" rather than the "right" to water means that the State's duty is limited to only those sections of the population without the means to ensure access to health care, food, water and social security." The court would have been better served by looking to the Committee on Economic Social and Cultural Rights for guidance. The Committee on Economic Social and Cultural Rights has in General Comment 15 defined the normative content of the right to water as containing both freedoms and entitlements. It states in paragraph 10 that:

10. The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system

¹¹ see paragraphs 25 to 29 of General comment 15

of water supply and management that provides equality of opportunity for people to enjoy the right to water.

The objective of this assessment, however, is not to provide a critique of the jurisprudence but simply to outline what has emerged from the courts over the past seven years. To this end, Judge Patel's contribution to the jurisprudence is set out in two consecutive paragraphs. This, it should be noted, was obiter; the judge noted that:

What the State is enjoined to do is to take reasonable legislative and other measures to achieve the progressive realisation of the rights to sufficient food and potable water. Moreover, its obligations in this regard are confined to measures within the limits of the resources available to it. In light of the relatively inchoate and somewhat nebulous scope of the rights conferred and the concomitant obligations imposed, I am inclined to regard s 77 as being essentially policy-oriented and hortatory in nature. This is not to render the provision entirely nugatory but rather to recognise that the extent of its practical enforceability is not necessarily self-evident in every circumstance.

My reading of s 77 of the Constitution is that the possible violation of its provisions is only implicated where the State or a local authority fails to provide any or adequate water supply to any given community or locality. It might also arise where, as appears to have been recently admitted by the appellant itself, having afforded an adequate water supply to most inhabitants, it is then discovered that such supply is in fact contaminated and therefore only potable at great risk. In contrast, it is difficult to envisage how the broad import of s 77 might be invoked in the case of a consumer, who has full or adequate access to water supply, but is deprived thereof by being disconnected for having failed to pay for water consumed and after having received due notice and warning to settle his account.

The judge starts off by correctly pointing out or identifying the state as the primary duty bearer in the gradual pursuit to achieve or attain ESC Rights. The judge however described the right to water as "inchoate and somewhat nebulous" without taking the opportunity this created to give it meaningful expression. The court in this case adopted the view that the right was not entirely justiciable. The court also limited the liability of state by making the right to water an access issue. The Court took the view that as long as the water was made available (adequate supply) and safe the state had discharged its duty. This approach renders attainment of the right to water, subject not only to the resources of the state, but also those of the individual. The approach adopted by the court is potentially discriminatory.¹² It creates an apartheid of rights holders that distinguishes between those with the means and those without. Although international law acknowledges that the right to water does not create a right to free access, it calls upon the state to make sure that water is affordable.¹³ The court in this case therefore, oh be it in obiter, contributed two things to the jurisprudence on the right to water:

¹² Committee on Economic, Social and Cultural Rights General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant) Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11) see paragraph 17 (hereinafter general comment 15)

¹³ See paragraph 27 of General Comment 15.

1. The duty of the state or local authority was to make available adequate clean and safe portable water. But this was subject to the individual's ability to pay for the service, and
2. The right to water was essentially policy oriented and this rendered it difficult to enforce.

The court in **Hopcik Investment (Pty Ltd) v Minister of Environment Water and Climate and City of Harare**¹⁴ was confronted with an application where the local authority had failed to make water available on the applicant's property. The applicant in this matter had not received water on to their property in three years and averred that the local authority had not done all that was necessary to "to provide an equitable distribution of water to all the inhabitants of the city."¹⁵ The court in the **Hopcik Investment (Pty Ltd)** matter, unlike the appellant court in the Farai Mushoriwa case, drew inspiration from international law in coming up with its conclusions. It is worth quoting extensively from the judgement:

The right to water was recognised by the United Nations General Assembly through Resolution 64/292 on 28 July 2010 as a human right. The resolution calls upon state parties to make available financial resources to help capacity building and technology transfer and places obligations on state governments to ensure that its citizens can enjoy, "sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses." See UN CESCR General Comment 15. A number of international treaties, which include the Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child and the International Covenant on the Economic Social and Cultural Rights, recognise this right. It is an economic, and social right. This right is recognised as a self-standing human right. The right to water contains an entitlement to access to a minimum amount of safe drinking water to sustain life and health. The supply must be sufficient and continuous to cover personal and domestic uses and meet basic needs. According to the World Health Organisation, WHO between 50 and 100 litres of water per person per day are needed to ensure that basic needs are met.¹⁶

The court in this case likened the right to water as set out in the Zimbabwean Constitution to the UN Resolution of 28 July 2010. It reaffirmed the state as the primary duty bearer in the supply of safe water. The court noted that the state "is expected to fulfil its obligations by taking meaningful steps to address the shortage of water within the resources available to it. It must ensure that local authorities have adequate powers and resources to perform their duties. It must adopt appropriate legislative and administrative and financial measures to fully realize the right to water."¹⁷ The court also articulated in more instructive terms what it saw as the role of the court in the enforcement process. The court defined, without necessarily calling it as such, a three-part inquiry:

- a) Where a complaint against a failure to supply water has been filed, the relevant authorities are required to account for their actions;
- b) The court is required to enquire into the reasons for the failure to comply, and
- c) The State and local authority involved may only be absolved where good and sufficient reasons for failing to provide and maintain a safe, clean and potable supply of water have been given.

¹⁴ (HH 137-16) & (HC 1796/14)

¹⁵ Hopcik Investment (Pty Ltd) v Minister of Environment Water and Climate and City of Harare page 2

¹⁶ Hopcik Investment (Pty Ltd) v Minister of Environment Water and Climate and City of Harare page 3

¹⁷ Hopcik Investment (Pty Ltd) v Minister of Environment Water and Climate and City of Harare page 4

The court, which would eventually decide in favor of the applicant, acknowledged that there may be difficulties occasioned by resource constraints that may hinder the ability of the state to provide safe, adequate and portable drinking water. However, it was incumbent upon the state, faced with a complaint of this nature to provide the court with evidence that it had “taken meaningful and reasonable steps to address the issue at hand.”¹⁸

Forbes & Thompson (Bulawayo) (Pvt) Limited v ZINWA & Another¹⁹ followed in the tradition of the cases against the City of Harare. The case which involved the disconnection of water by Zimbabwe National Water Authority (ZINWA) concluded with the court ordering that, inter alia, the disconnection by first and 2nd respondents of the applicant’s water supply from Blanket Dam, Gwanda, without a court order amounted to self-help and was unlawful. Like the City of Harare cases the court in its judgement did not focus on the right to water but based its judgement on the parties contractual obligations.

In the case Mutamba & 2 Ors v City of Masvingo & 3 Ors²⁰ the High Court was called upon to make a decision on the applicants’ right to water during the lock down period in 2020. Applicants’ case hinged on the fact that historically the City of Masvingo had been rationing water supplies to the residence. Moreover, the circumstances occasioned by the COVID 19 pandemic created greater urgency for constant water supply. The Applicants pointed out that the World Health Organisation had been specifically encouraging individuals to wash their hands using running water as a prevention and containment measure. The court in this matter, however, like the majority of cases that preceded it, failed to take the opportunity to deal with section 77 in detail. Instead, the court opted to make its ruling based on the requirements for an urgent application. The court concerned itself with the interest that was expressed by the 1st and the 2nd applicants and concluded they were not able to show irreparable harm. The court went out of its way to avoid dealing with any of the conceptual issues that pertained to the right. The interim order, which was sought, required that adequate consistent clean and portable water be provided to the applicants. It was the courts view that the applicants’ draft order was too vaguely worded. The court was not prepared to grant the application on the basis of an order thus framed. The court actively avoided making a pronouncement of what constituted adequate supply. The Court on page 11 of the judgement made the following points:

The nature of interim relief sought namely “adequate consistent, clean and potable water and water on wheels” is on its own vague. Particularly where applicant seeks supply of adequate water. What is adequate is not defined in the application. In oral submissions, counsel for applicants was asked to define adequate water and was not very helpful in that regard.

I am averse to granting as vague an order as one reflecting “adequate” supply of water.

It is this type of order that will result in parties reverting time and again back to court for a definition of what is adequate.

¹⁸ Hopcik Investment (Pty Ltd) v Minister of Environment Water and Climate and City of Harare page 6

¹⁹ (HB 147-18, HC 1148-16) [2017] ZWBHC 147 (08 June 2017)

²⁰ (HMA 19-20, HC 84/20) [2020] ZWMSVHC 19 (21 May 2020)

CONCLUSION

There's very little to discern from the jurisprudence that is emerged from the courts, on how the courts are looking to develop the jurisprudence on ESC rights. What is however apparent is the courts reluctance to deal with matters on their merits. The decision in the Farai Mushoriwa appeal case by Justice Patel seems to support the view that the court still perceive ESC rights as being non-justiciable. It would also appear from the numerous cases that the courts have been seized with that judges would prefer to deal with other issues that pertain to the matter than conclude or frame its findings based on an understanding of the right to water. The majority of the cases have been decided either on an interpretation of a statute or contractual relationship between the parties. The court has not actively sought to deal with issues around the right to water. In fact, in the Matumba case the court went out of its way to avoid dealing or defining what is referred to as adequate. It should be noted however that the majority of the cases presented to the court were reactionary. In that all of them were brought on an urgent basis responding to a supply issue. The court has not yet been presented, from the cases surveyed, with an appropriate case within which to deal extensively with the issues presented by section 77.

The Right to Health

Since December 2019 the entire globe has suffered under the effects of the Corona virus; it has, as of 22 March 2021 caused 2,728,644 globally.²¹ It's difficult to draw any positive conclusions from the COVID-19 pandemic. However, an area that is certainly or potentially could benefit is the courts' jurisprudence on the right to health. The virus is likely to have exposed pre-existing fault lines in the country's health care system. This has the potential of unearthing a number of human rights issues that pertain to the right to health which will require the courts to interpret and to provide appropriate redress. However, for this to happen in a manner that furthers the interests of rights holders, litigants would need to seriously consider their cases and outline them in a manner that is accessible to the courts.

The sentiments expressed by the judge in *Makoka v Minister of Health and Child Care & 4 Ors* have characterised litigation in this area of the law. The court in that case viewed the issues raised by the applicant in the matter as exploratory. The litigation of human rights in Zimbabwe, as is evident from the cases assessed, has ceased to be about seeking redress for victims. It has assumed a more political lens and has become more about exposing the states shortcomings rather than holding them to account. So much so that the courts have, as was the case in the *Zimbabwe Chamber for Informal Workers & 2 Others v Minister of Health and Child Care & 6 Others*²³ resorted to making calls for unity.²⁴

²¹ Worldometer, COVID-19 CORONAVIRUS PANDEMIC, https://www.worldometers.info/coronavirus/?utm_campaign=homeAdvegas1? [retrieved 22 March 2021]

²² (HH 414-20, HC 3003/20) [2020] ZWHHC 414 (19 June 2020)

²³ (HH 334-20, HC 2221/20) [2020] ZWHHC 334 (26 May 2020)

²⁴ The court in that case made the point that:

We must all be part of the solution. Sentiments of Abhijit Nasker an international bestselling author of a number of books, are pertinent. He has said ;

"The holy trinity of tackling a crisis is unity, faith and sacrifice. We must stay united as humans above all else, we must have faith in ourselves and in each other and we must sacrifice our self-obsession"

The *Makoka v Minister of Health and Child Care & 4 Ors*²² case was an application that was brought by Hon. Tendai Biti on behalf of Gumai Makoka a resident of Crowhill who had approached the courts seeking to compel the state to, inter alia, publish regulations in terms of section 13 of the Social Welfare Assistance Act within seven days from the granting of the order that define the eligibility of beneficiaries of the provision of social safety nets during the period in which a declaration of COVID-19 as a formidable epidemic disease has effect and the methodology to be used in identifying qualifying citizens and any other ancillary matter deemed appropriate to realise the same for such period. It was the applicants' case that they had been what Mr Biti termed "endemic poverty" that had been exacerbated by unemployment. The applicants mentioned further that people were food vulnerable and that urban populations were living in poverty. In response the state had indicated that there was no need to have such regulations enacted as there was a sufficiently robust legislative framework to deal with the issues that had been raised in the application. It was further submitted for the state that the assistance had already started to be rolled out and that the applicant was also eligible for their support. In so doing, the court held that the state had accepted an obligation to assist its citizens in respect of shelter, health and social welfare as specified in the constitution. However, the application did not succeed because the court felt that the applicant did not have a strong enough cause of action. The court's notice that they had neither been denied social warfare assistant nor access to healthcare facilities. But perhaps more significantly from the case the courts lamented or castigated the applicants for this sort of application with the court felt resembled another case involving Alan Norman Markham vs the Ministry of Health and Childcare. The court also felt that large parts of the affidavits in the case had been copied and pasted from the Markham case without any attempt or little attempt to change the content.

The *Alan Norman Markham and Anor vs Ministry of Health Care and two Ors* was a case that had been brought in April 2020 on an urgent basis by Honorable Tendai Biti on behalf of his fellow Member of Parliament Mr Alan Markham. The interim relief that the parties sought was for the respondents to pass regulations and enforce such regulations that provide for emergency relief in the form of door-to-door food hand-outs, cash hand-outs, water deliveries and related provisions that sustain the livelihoods of affected communities during the lockdown period, within forty-eight hours of the order. The final order sought was for a declarator to the effect that failure by the respondents to enact such law was in violation of the right to life, the right to health and the right to a clean environment as protected by the Constitution of Zimbabwe. The judgement does not deal with any of these rights in any detail. Instead looked at who the appropriate respondent was in the matter. The case turned on the applicants' failure to cite the Ministry of Public Service, Labour and Social Welfare. The court in the case felt that the applicants were not taking the pandemic seriously and that no just cause had been shown to warrant the relief sought.

CONCLUSIONS

Even with cases on the right to health there is little that can be discerned on the courts jurisprudence except for their (the courts) very apparent reluctance to deal with ESC rights directly or rather to interfere with the prerogative of the executive. In the case of Combined Harare Residents Association & Anor v The Minister of Health & Child Care N.O & 3 Ors Chitape²⁵ (J) made the point twice that:

I do not intend to debate the question regarding the powers of the court to order the legislature and executive to exercise their functions in relation to a particular law in a particular manner. This is so because the application can be and will be determined without the need to interrogate that issue of law.

He later reinforced the point by remarking that:

In relation to suspending s 4 (2) of S.I 83/20, there are no reasonable grounds established to warrant the granting of such a drastic measure which amounts to a blatant interference with executive function.

The attitude of the court was more apparent in The Zimbabwe Chamber for informal Workers & 2 Others v Minister of Health and Child Care & 6 Others²⁶ where it was held by Dude J that:

Government has the responsibility to put in place measures to contain the Covid -19 pandemic which goal is legitimate. The appearance is that Zimbabwe may be entering a second wave of the pandemic as the infections are on the increase. The respondents have an obligation to plan for the epidemic and should be afforded the opportunity to do so without interference. It is not the business of the court to interfere with government policy. The Government has the right to govern. It must be afforded an opportunity to govern and plan for the epidemic and put in place adequate measures for the containment of the disease.

The courts have shown in a number of these cases that they are reluctant to make pronouncements that interfere with government policy. The very essence of redress in economic social and cultural rights cases requires that the courts determine on the efficacy of government policy and resource allocation. The courts are not in a position to effectively discharge their duties if the approach of the court is that they are not willing or feel that they are not capable of interfering with the policy to this extent.

²⁶ (HH 334-20, HC 2221/20) [2020] ZWHHC 334 (26 May 2020)

CONCLUSIONS

The body of law that has been developed on ESC right shows a number of very interesting trends that require mention:

- a) There have not been a lot of cases that have been brought before the courts that have challenged the courts to make pronouncements on ESC rights. Majority of the cases that the courts have had to entertain have been cases where the right has been incidental to the dispute and the courts have been able to avoid dealing with the issue of the rights involved by discharging the case either on a technicality or on another point of law;
- b) The majority of the cases also have been brought before the courts on an urgent basis. This may be an over generalization but urgent cases in their very nature are reactionary and they are often put together on very short notice. This often means that the arguments presented before the courts are not always the most robust and tend to focus on the urgency of the matter or rather whether or not the case urgent, and
- c) Moreover, it is very apparent that the courts are reluctant to interfere or pass judgment on the ability of government to formulate policy and to allocate resources. The courts have in a number of cases expressly mentioned that it is not the role of the courts to interfere with government policy and practice. This reluctance by the current bench to deal effectively with disputes on ESC rights may be detrimental to the full enjoyment and realization ESC rights in Zimbabwe.

On the demand side of the equation, there are patterns and trends which are also very apparent and require express mention:

- a) It would appear that a lot of the cases have a political angle or motivation to them. Generally speaking, rights discourse in Zimbabwe has assumed a particular trajectory since 2000. Makau Mutua describes this as *savage-victim-savior paradigm*.²⁷ The learned author points out that the grand narrative of human rights contains a subtext that depicts an epochal contest pitting Savage on the one hand against the victims and saviors on the other hand. As long as rights litigation in this country conforms to this matrix it will be difficult to bring the government on board and make them partners in the human rights enterprise. Rights litigation must be depoliticized and focused on the rights holder not on secondary political motives.
- b) Furthermore, the majority of cases that are brought before the courts are on an urgent basis. It could just be that where a violation of a right is ongoing that there is need to bring a halt to that violation on an urgent basis. However, there are instances in which more thought and effort must be put into formulation and development of arguments in order to develop the law in the area of rights. As such it may be beneficial for some cases to be developed and follow the normal application procedure route to ensure that more work and consideration is given into providing the courts with very persuasive arguments about why they need to deal with the rights involved.

²⁷ Makau Mutua, *Savage, Victims and Saviors: The Metaphor of human Rights*, Volume 42, Number 1, Winter 2001

c) The courts have not yet been presented with a case which isolates a particular ESC right and demand resolution exclusively on that right without bundling it together with other legal issues or a long list of other rights violated by the conduct for which redresses sort. The quality of jurisprudence that is or can be produced by the courts is a direct result of the pleadings that are brought before the courts.

RECOMMENDATIONS

Recommendation One: Training

In order to ensure that there is quality jurisprudence that is emerging from the courts it is imperative that both legal practitioners and judicial officers be trained on the different aspects of ESC rights and their adjudication. Globally there has been a lot of effort that has been put and a lot of material that has been developed which looks specifically at how ESC rights can be successfully litigated. It is important to draw on these sources in order to enrich the quality of pleadings and eventually the jurisprudence that emerges from the courts.

Recommendation Two: Research

It is also very important for more work to be put into understanding the trajectory of ESC rights in Zimbabwe. There is need, therefore, to look very carefully at the nature violations that emerging from the Situational Daily Reports (Sitreps). Thereafter to explore the law and understand the nature of judgments that can be made by the courts and also look at how other jurisdictions have dealt with issues of a similar nature. The quality of jurisprudence that will emerge from the courts will be dependent on the quality of the pleadings that are presented. As long as matters are rushed and are presented to the courts on a cursory understanding of the right regiment, we are unlikely to see the courts dealing effectively with cases and we will continue to see judgments that are not directly dealing with the rights involved.

Recommendation Three: Targeted litigation

Once there has been effective training of lawyers and judges it would be important to then consider which cases can then be brought before the court. From the evidence that has been gathered in the Situational Daily Reports (Sitreps) issued by the Women's Coalition of Zimbabwe a soft target maybe litigation around the right water and the right to health. Based on these reports, with the exception of urgent emerging issues, more care and consideration must be put into the selection of matters to be brought before the courts. Furthermore, the pleadings brought before the courts must ensure the courts are presented with as much information as possible around the right, such that the judge is not at pains to find reasons to pronounce on the basis of the right in question and develop the law in the process.

