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Justiciability and Constitutional Interpretation Value of Chapter 2 on National Objectives of the Constitution of Zimbabwe Amendment No 20 Act of 2013

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Justiciability and Constitutional Interpretation

The adoption of the Constitution of Zimbabwe Amendment No. 20 Act of 2013 has largely been viewed as a monumental and progressive development in Zimbabwe's history. The Constitution is lauded for its substantive content that introduces salient foundational democratic elements that are consistent with international human rights best practice and standards. These rights are well packaged under an elaborate Declaration of Rights[1] that seeks to promote all generations of rights.

Furthermore, elaborate and more expansive National Objectives[2], present a lofty and aspirational framework of guidance to *'…the State and all institutions of government at every level*[3]*…*' in formulation and implementation of law and policy decisions. While the much touted 'Declaration of Rights' is noble, it only provides for three clear cut second generation rights of education[4], health care[5] and food and water[6] ,albeit in a very limited and highly qualified fashion. Most second generation rights are laid out under Chapter 2 with unequivocal elaboration, contrary to the manner in which they are provided for under Chapter 4, which has a clear enforcement regime as compared to the former as shall be discussed in this essay.

The status of National Objectives, (*herein referred to as* NOs) under Chapter 2 of the Constitution is not easily ascertainable [1]. Section 8 (1) provides thus:

The objectives set out in this Chapter guide the State and all institutions and agencies of government at every level in formulating and implementing laws and policy decisions that will lead to the establishment, enhancement and promotion of a sustainable, just, free and democratic society in which people enjoy prosperous, happy and fulfilling lives.

Section 8[7] continues to provide that '*Regard must be had to the objectives…when interpreting the State's obligations under this Constitution and any other law.*' Matyszak[8] illustrates the uncertain status of the NOs in the following words:

Once again this wording, under Chapter 2[9], is unhelpful. It is not known whether 'the State and all institutions and agencies of government' includes the courts. That 'regard must be had' to the national objectives when interpreting the State's obligations does not advance the matter as to who is to have such regard as alluded by the use of the passive tense…the provision could be improved by making it clearer.

It is common cause that the draft Constitution upon which Matyszak (2013:4) was commenting upon was retained *verbatim* pertaining to Section 8 (1) and (2), and therefore, the uncertainty of the application and enforcement of National Objectives loom large, especially in the jurisprudence of litigating economic, social and cultural rights, the majority which are provided for in terms of Chapter 2 and omitted under Chapter 4, which has a clear enforcement mechanism. While the legitimacy of the powers of judges and the courts to interpret the Constitution has occupied the minds of many legal critics[10], it is the manner in which judges and courts in Zimbabwe will interpret Chapter 2 that will generate more prolific debate as envisaged by the discussion in this essay. This is especially crucial, given that the socio-economic rights jurisprudence has not developed enough within the Zimbabwean jurisdiction, hence the task of interpreting and applying the economic, social and cultural rights under Chapter 2, is yet to confront the Zimbabwean judiciary, as has been the case with the Indian, Nigerian and Ghanaian socio-economic and cultural rights jurisprudence which also have been confronted with a similar '*National Objectives versus Bill of Rights scenario'*.

The debate of the status of NOs under Chapter 2 is deservedly located in the core of the two salient concepts of *justiciability* and *constitutional interpretation*. This poses the question whether the NOs in Zimbabwe's constitutional interpretation framework and context are justiciable, and if so, to what extent is the threshold of such justiciability applicable. Defining justiciability and constitutional interpretation at this point, becomes imperative.

The ICJ Publication [2], proffers a clear definition of the concept of justiciability as follows:

Justiciable means people who claim to be victims of violations of the rights conferred by the Constitution are able to file a complaint before an independent and impartial tribunal or body, to request adequate remedies if violation has been found to have occurred or to be likely to occur, and to have any remedy enforced.

[1]Chapter 4 of the Constitution of Zimbabwe

[2]Chapter 2 of the Constitution

[3]Section 8 (1)

[4]Section 75

[5]Section 76

[6]Section 77

[7]Section 8 (2) of the Constitution of Zimbabwe

[8]Matyszak op cit

[9]The emphasis is mine

[10]Olowu, D (2011). Constitutional Interpretation and the Notion of Unenumerated Rights: Circumventing the Exclusion of Socio-economic Rights in Africa, Conference Working Paper, Rabat, Morocco. p.9

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This means that the extent of justiciability of NOs under Chapter 2 should be measured by the level with which they are capable of availing remedies to victims of violations of the provisions under the same. This is especially, when such violations are brought before independent and impartial bodies or tribunals, which in this case are usually the courts which are assigned with the mandate of interpreting the Constitution. Constitutional interpretation on the other hand, as Roland [3] posits is: "*…the process by which meanings are assigned to words in a constitution, to enable legal decisions to be made that are justified by it.*' Further, Roland[11] submits that:

…some scholars distinguish between *"interpretation"* — assigning meanings based on the meanings in other usages of the terms by those constitutional writers and their readers, and *"construction"* — inferring the meaning from a broader set of evidence, such as the structure of the complete constitutional document from which one can discern the function of various constitutional parts, discussion by the constitutional drafters or ratifiers during debate leading to adoption ("legislative history").

Cress [4] proffers a direct insight on constitutional interpretation as a '*…debate over how much discretion should be afforded to judges who assign meaning to the Constitution.*' Cress[12] further posits that this debate oscillates around the question whether the constitutional text should be the sole sources of law for the purposes of judicial review or whether judges should supplement the text with either an unwritten constitution or external constitutional source that is implicit in precedent, practice and conventional morality. He further contends that these conceptions are located in two basic categories of constitutional interpretation; which are interpretivism or originalism and non-interpretivism or non-originalism. Interpretivists or originalists accord binding authority to the text of the Constitution or the intentions of its adopters, while non-interpretivists or non-originalists believe that, along with the constitutional text, and intentions of the framers and ratifiers, other sources are also relevant on constitutional interpretation[13].

The National Objectives are contained in Chapter 2 of the Constitution and many provisions therein correspond to the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. For instance, national development[14], empowerment and employment creation[15], food security[16], culture[17], work and labour relations[18], education[19], shelter[20], health services[21], social welfare[22], legal aid[23], sporting and recreational facilities[24]. While the justiciability of these objectives ordinarily remains uncertain as illustrated by Matyszak[25], the objectives have been enjoined as an important interpretative tool in terms of Section 46 (d) which provides thus:

When interpreting this Chapter, a court, tribunal, forum or body- must pay due regard to all provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and…in addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.

This interpretational guidance deals premium to the importance of the NOs in assigning meaning to the provisions that fall under Chapter 4 on Declaration of rights. In any event, some of the NOs, mostly which are of an economic, social and cultural nature correspond with the entrenched economic, social and cultural rights under Chapter 4. A good example is of the Chapter 2 NOs on food security, labour, education and health services which correspond with the Chapter 4 rights to food and water[26], labour[27], education[28] and health[29]. It can be argued that the Section 46 interpretation clause scoffs at the general theory of the non-justiciability of the NOs.

The uncertainty of the justiciability of NOs is also dealt a big blow by the fact that there is nowhere in the Constitution where it is expressly mentioned that the NOs are not justiciable, hence putting Zimbabwe's constitutional jurisprudence on a better position than other jurisdictions such as the Indian, Ghanaian and Nigerian jurisdictions. This is so because in the constitutional jurisprudence of these comparators, they have allowed express provisions that oust the justiciability of the NOs equivalent, commonly referred to as the Directive Principles of State Policy (DPSP). These DPSPs are provided for in terms of Article 5 of the Irish Constitution, Part 4 of the Indian Constitution, Chapter 2 (Sections 13-22) of the Nigerian Constitution and Chapter 6 (Articles 34-41) of the Ghanaian Constitution. This is discussed below.

Under Part IV of the Indian Constitution, there is a cluster of "Directive Principles of State Policy" dealing with such issues as adequate means of livelihood; fair distribution of material resources; equal pay for equal work; health and strength of all citizens; child development;[30] equal justice and free legal aid;[31] functional village arrangement;[32] right to work, to education and to public assistance in certain cases;[33] provision of just and humane conditions of work and maternity relief;[34] living wage and fair conditions of work for workers;[35] participation of workers in industrial management;[36] uniform civil code for citizens;[37] provision of free and compulsory education for children;[38] promotion of educational and economic interests of weaker sections of society;[39] duty of the State to raise the level of nutrition and the standard of living;[40] organization of agriculture and

[11] ibid
[12] ibid
[13] ibid
[14] Section 13
[15] Section 14
[16] Section 15
[17] Section 16
[18] Section 24
[19] Section 27
[20] Section 28
[21] Section 29
[22] Section 30
[23] Section 31
[24] Section 32
[25] Matyszak Op. cit

[26] Section 77
[27] Section 65
[28] Section 75
[29] Section 76
[30] Art. 39.
[31] Art. 39A.
[32] Art. 40.
[33] Art. 41.
[34] Art. 42.
[35] Art. 43.
[36] Art. 43A.
[37] Art. 44.
[38] Art. 45.
[39] Art. 46.
[40] Art. 47.

animal husbandry;[41] environmental protection and improvement;[42] to mention just but a few.

Article 37 however, expresses the non-justiciable status of those provisions as follows: *"The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."* This provision is met with mixed feelings from various scholars. A notable scholar of the Indian Constitution, Seervai explains the essence of the Directive Principles as follows:

The principal object in enacting the directive principles was to set standards of achievement before the legislature and the executive, the local and other authorities, by which their success or failure could be judged. It was also hoped that those failing to implement the directives might receive a rude awakening at the polls.[43]

However, today Indian courts have established a veritable juridical pedestal in the Directive Principles to address the plight of India's underprivileged masses, to challenge poverty and deprivation, and to question governmental acts that are capable of fettering the very life, capabilities and aspirations of ordinary Indians. It is particularly striking to note that the pivot of the Indian judicial approach to the expansive and proactive interpretation of fundamental rights have been the Directive Principles, which, technically speaking, are non-justiciable. The Supreme Court has resoundingly reaffirmed the status of the Directive Principles as being the non-negotiable corollary of fundamental human rights. This reconceptualization has meant a sustained commitment to the integrative approach to all human rights in Indian courts. A long line of cases demonstrates this assertion.

In the ground breaking case of *Maneka Ghandi v. Union of India*,[44] the applicant's passport had been seized by the authorities pursuant to the Emergency Orders of that period, and thus, she had been denied the opportunity to travel abroad. Observing that any procedure affecting any human rights must not be "arbitrary, fanciful or oppressive",[45] the Indian Supreme Court seized the opportunity of *Ghandi* to affirm that the right to life entrenched in Article 21 of the Indian Constitution also covers the right to travel abroad and other rights listed under the DPSPs. While *Ghandi* had arisen as an action in defense of the right to personal liberty, its broader effects have been felt in the areas of criminal justice, judicial review, contracts, ecology, fundamental rights as well as other "implied fundamental rights" including education, legal aid, pollution-free environment, livelihood and human dignity.

Thus, the status of the Direct Principles of Part 4 of the Indian Constitution puts in good light the justiciability of the NOs of the Constitution of Zimbabwe. The NOs can be aids to interpret the Constitution, and more specifically to provide the basis, scope and extent of the content of a fundamental right. Thus, the Zimbabwean judiciary can use the Indian experience by converting what seemed non-justiciable NOs into justiciable ones by invoking the wide sweep of the enforceable Section 46 (d).

The Nigerian experience also proffers a glimmer of hope to the justiciability of NOs of the Constitution of Zimbabwe. The Nigerian Constitution provides a litany of principles that guides the administration of the Nigerian polity towards the general good.[46] The objectives and principles are essentially a set of guidelines designed to secure the 'national' targets of social well-being, social justice, political stability, and economic growth in accordance with the espoused vision of the Preamble to the Constitution. However, an overriding provision of the same Constitution nullifies their legal value as follows:

6(1) The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation.

…

(6) The judicial powers vested in accordance with the foregoing provisions of this section

…

(c) shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution….[47]

It naturally follows, from the above ouster clause, that all the promises of the Objectives and Principles in Chapter II of Nigerian Constitution serve no better purpose than being mere declarations of intent. The decisions of Nigerian courts, as far as the status of those provisions is concerned, were unequivocal in confining those provisions to the realm of principles that may only appeal to the morality of any government in power.

The non-justiciability of these provisions has received judicial pronouncement in a series of cases, chief among which was *Okogie v. Att'y Gen., Lagos State*.[48] Here, the plaintiff had sued as the trustee of Roman Catholic Schools challenging the abolition of private primary schools on the ground that it was contrary, *inter alia*, to freedom of expression guaranteed in the Nigerian Constitution of 1979. The government had argued that the operation of private schools was inconsistent with the obligation of the State to give "equal and adequate educational opportunities" under Section 18(1). The court also held that while the phrase "equal and adequate educational opportunities" did not necessarily restrict the right of private institutions or other persons to provide similar or different educational facilities at their own expense, taste and preferences, the Directive Principles must have to conform to and run subsidiary to the fundamental human rights provisions.[49] The reasoning in that decision found wholesale affirmation in *Adewole v. Jakande, Governor of Lagos State*.[50] It had become evident that the ESCR elements in the Directive Principles were to remain cosmetic constitutional provisions in Nigeria.

However, the first time those provisions were ever referred to as "rights" was in the 1991 decision of the Nigerian Court of Appeal in *Uzuokwu v. Ezeonu II*[51] where the court held, *inter alia*, that "[t]here are other *rights* which may pertain to a person which are neither

[41]Art. 48.

[42]Art. 48A.

[43]Seervai, H.M, Constitutional Law of India, 759 (1967).

[44]*Ghandi*, A.I.R. 1978 S.C. 597.

[45]*Ibid.*, at p.674.

[46]Sections 13-22 of the Nigerian Constitution.

[47]Nigeria Constitution, 1979, § 6(6) (c). This same section was re-enacted *verbatim* as § 6(6) (c) in the in the Constitution of Nigeria, 1999.

[48](1981) 1 N.C.L.R. 218.

[49]§ 18(1) the Nigerian Constitution 1979 provided that: "Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels." §18(1) of Nigerian Constitution 1999 retains the provision in its exact wording.

[50](1981) 1 N.C.L.R. 152.

[51](1991) 6 N.W.L.R. (pt. 200) 708.

fundamental nor justiciable in the court. These may include *rights* given by the Constitution as under the Fundamental Objectives and Directive Principles of State Policy under Chapter II of the Constitution." [52] In what may be considered a new judicial perception about the status of the Fundamental Objectives in Nigeria, the Supreme Court added that:

As to the non-justiciability of the Fundamental Objectives and Directive Principles of State Policy, section 6(6)(c)…says so. While they remain mere declarations, they cannot be enforced by legal process but would be seen as a failure of duty and responsibility of State organs if they acted in clear disregard of them…the Directive Principles can be made justiciable by legislation.[53]

Once this proposition gains acceptation in the higher courts of Nigeria, then the Zimbabwean jurisdiction in its development, should give due regard to this persuasive approach. This so because it embraces wider and purposive constitutional interpretations that consider NOs rather than sticking to hard and fast originalists rules which do not look beyond the text in assigning Constitutional meaning.

Ghana presents a brilliant comparative, as the DPSPs in Ghana do not expressly, just like the case with the Zimbabwean Constitution, declare the non-justiciability under the Ghana 1992 Constitution. Notwithstanding that, the DPSPS had always been treated as non-justiciable by the Ghanaian courts as noted in the case of *The New Patriotic Party v AG*[54]. However, this position has shifted in Ghana because in the Supreme Court decision of *Ghana Lotto Operators Association case*[55], it was held that all the provisions in the Constitution are justiciable because it contained the most important rule on political governance save for such provisions that are expressly excluded in the Constitution. Therefore, it was held that although the original intention was to make them non-justiciable, the Ghanaian DPSPs were justiciable.

This position is somewhat more akin to the Zimbabwean scenario. This is so in view of the fact that the National Objectives of the Zimbabwean are supported as justiciable by Section 46 (d) of the Zimbabwean Constitution. Moreover, there is no express provision in the same Constitution that ousts the NOs' justiciability conferred by Section 46 (d). It is also to be acknowledged that the dictates of Section 46 (d) resonate well with a new Constitutional interpretation approach that appears to permeate the whole constitutional structure of the 2013 Constitution embracing liberal interpretations such as the *historical*[56] and *functional/structural*[57] approaches that are not encumbered by textual restrictions. The decision in the recent Constitutional Court case of M*udzuru and Tsopodzi v Minister of Justice* the court embraced a liberal interpretation of the Constitution and complied with Section 46 that prescribes that the court should pay due regard to international human rights instruments in arriving at decisions pertaining to the Bill of Rights.

It can be concluded that, although Zimbabwe's jurisprudence on the justiciability of Chapter 2 Objectives have not developed yet, due considerations should be taken by the judiciary in order to embrace the same in its constitutional interpretational framework. The contemporary state of ESCR jurisprudence in Africa should make it an imperative to identify trajectories for constitutional interpretative thrust that will promote ESCR jurisprudence and invariably, a rights-based approach to democratization, development and good governance in Africa. From the decisions examined in this instalment, an inevitable inference emerges: that African juridical entities can no longer afford to be complacent in the delivery of social justice whatever their ideological leanings might be, solely on the technicality that, in the case of Zimbabwe, National Objectives are not mentioned under Chapter 4 on Bill of rights.

The path to that lofty jurisprudential picking lies in the integrative approach to constitutional interpretation of human rights. The consciousness would need to be strengthened among jurists and other stakeholders in the administration of justice in Zimbabwe that in the whirlpool of the dynamic social, economic, legal and policy complexities of contemporary Zimbabwe, their role as interpreters and arbiters must be underpinned by a constant watch on the products of democratization and governance. One of such products is to look at the NOs as not alien to the whole construction of the economic, social and cultural rights jurisprudence that the framers of the Constitution envisaged, especially by creating an umbilical cord between the NOs and the Bill of Rights through Section 46 (d) in as far as the interpretation of the Constitution is concerned, thus also enjoining the NOs as justiciable.

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[52] *Id.*, at 761-762 (emphasis added).

[53] *Id.*, at 96-97.

[54] (1996-7) CHR Chana LR 728 P. 745

[55] (2007-8) 2 SCGLR

[56] Interpretation based less on the actual words than on the understanding revealed by analysis of the history of the drafting and ratification of the law, for constitutions and statutes, sometimes called its legislative history, and for judicial edicts, the case history. It arises out of such Latin maxims as *Animus hominis est anima scripti*.

[57] Mudzuru and Tsopodzi v Minisiter of Justice, Legal and Parliamentary Affairs, Minister of Women's Affairs, Gender and Community Development and Attorney-General of Zimbabwe CCZ 12/2015

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