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IMPACT OF NON-JUSTICIABLE SOCIO-ECONOMIC AND CULTURAL RIGHTS ON HUMAN RIGHTS IN ZAMBIA

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1.0. Background to the Study

In most countries of Sub- Saharan Africa such as Zambia, the majority of the people live in deplorable socio-economic conditions. Most of them are jobless, homeless, hungry and illiterate. They have no access to proper medical care. They also live without safe water and sanitation. In a report, the Jesuit Centre for Theological Reflection, raised a number of questions as to why these conditions exist in Zambia[1].

Scholars such as Acheampong,[2] observe that Zambia is in this situation because the Government has completely washed its hands on socio-economic issues. As an example, the Bill of Rights of the Constitution of the Republic of Zambia does not have socio-economic and cultural rights. The Constitution only recognizes some of these rights as Directive Principles of State Policy in Part IX. By Article 112 of the Constitution, Directive Principles of State Policy are non-justiciable.

An attempt to include socio-economic and cultural rights in the Bill of Rights of the Constitution and have them enforceable was made during a referendum held on the 11th August, 2016. This referendum was held alongside Presidential and General Elections. The referendum could not go through because the "YES" votes could not reach the threshold required by law[3]. From the total number of 7, 528,091 of persons entitled to vote, only 1, 852,559 voted yes[4]. 753,549 were no votes[5]. 739,363 were spoiled votes[6].

The present study therefore, attempts to examine the impact that a Constitution with non-justiciable socio-economic and cultural rights, like that of the Republic of Zambia, has on the citizens' enjoyment of these rights.

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[1] Zambia's Economic, Social and Cultural Rights: Why should they not be in the New Constitution? Research Report by Simon Mwale, Consultant to the Jesuit Centre for Theological Reflection. Done under the Social Conditions Research Project, December 2004. www.jctr.org.zm.

[2] Kenneth Asamoa Acheampong, "Reforming the Substance of the African Charter on Human and Peoples' Rights: Civil and Political Rights and Socio-economic Rights," *African Human Rights Law Journal* 1, no.2 (2001):202.

[3] Kelvin Chongo, Chomba Musuka, "Referendum Flops: Stakeholders Regret Lost Opportunity to Improve Rights", *Zambia Daily Mail*, August 20, 2016, 1.

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

2.0. METHODOLODY

2.1 Research Design

This study followed a social-legal approach. It involved an examination of the impact that the current provisions in the Constitution of the Republic of Zambia had on the social and political conditions of the people of Zambia.

2.2 Data Collection Procedure and Time Limit

Data collection was dependent on qualitative desk research. The researcher interviewed notable politicians, lawyers and academics. With a lot of website stored materials on human rights, the internet was one of the sources of the materials for the study. Therefore both primary and secondary sources of data were accessed, but applied qualitatively.

The period that was needed to collect this data was two months.

3.0. Enforncing Socio-economic and Cultural Rights by the Constitutional Court of South Africa

Some countries' constitutions around the world only provide for justiciable civil and political rights. If such constitutions are to have socio-economic and cultural rights, they would not be enforceable and might only appear as Directive Principles of State Policy. Zambia has such a Constitution.

Several reasons are advanced for having non-justiciable socio-economic and cultural rights or leaving them out completely from the Constitution.

Firstly, it is argued that there is imprecision in the way socio-economic and cultural rights are defined[7]. This, therefore, goes to say that they should not be recognized and enforced.

Secondly, it is argued that socio-economic and cultural rights cannot be made justiciable as they are positive rights[8]. By positive rights, it means that socio-economic and cultural rights require government intervention for their realization.

Thirdly, it is argued that socio-economic and cultural rights cannot be the subject of judicial intervention because socio-economic policy is best determined by policy makers[9]. The said policy- makers are themselves democratically accountable and possess specialized knowledge of how to prioritize the distribution of resources which cannot be said of Judges. This is because the

[7] Mumba Malila, "The Sleep of the Just: Misunderstanding Economic, Social and Cultural Rights in Zambia, *Zambia Law Journal* 41 (2010): 135.
[8] *Ibid*, 138.
[9] *Ibid*, I41.

Judges neither have the capacity to evaluate budgets nor are they qualified to evaluate how much it is necessary to spend. Further, the Judges cannot evaluate how much society can afford or what its priorities are.

Despite these criticisms, the 1996 Constitution of the Republic of South Africa has provided for the enforceability of both civil and political rights and socio-economic and cultural rights. Most importantly, the country's Constitutional Court has come to the party by being objective in the way it interprets and enforces socio-economic and cultural rights. Therefore, this has provided a platform from which countries like Zambia can learn from.

This section discusses how the Constitutional Court of South Africa enforces socio-economic and cultural rights in practice.

3.1. Development of Jurisprudence on Socio-economic and Cultural Rights

One of the factors which made the Constitutional Court of South Africa be admired around the world by human rights lawyers, scholars and others alike, is the jurisprudence which it has developed. This is particularly on the issue of enforceability of socio-economic and cultural rights.

The jurisprudence so developed, helps in interpreting socio-economic and cultural rights without necessarily causing friction with the other arms of the government. This is because, there is an inherent danger that when courts are called upon to enforce this category of human rights, they will come into conflict with the executive or legislature by seemingly performing their roles.

3.2. Recognition of the Inter-relationship of Civil and Political Rights and Socio-economic and Cultural Rights

The Constitutional Court is of the view that civil and political rights on the hand, and socio-economic and cultural rights, on the other hand, are inter-dependent and indivisible. This is because one cannot enjoy his or her civil and political rights if he or she is unable to enjoy socio-economic rights.

Without doubt, the Court was influenced by this principle in *Government of South Africa v Grootboom and Others*[10]. In this case, the Court made it plain that the right of access to housing could not be separated from the right to dignity[11].As a matter of fact, the right to housing is a socio-economic right where as the right to human dignity is a civil and political right.

[10] 2000 (1) SA 46 (CC); 2000 (11) BCLR 1169.
[11] *Ibid*, at 191.

3.3. Whether the State has taken Reasonable Measures

The Court appreciates the fact that it is actually possible to have socio-economic rights to be enforceable by the courts without necessarily interfering with the roles of the executive and the legislature. This is because the Court merely addresses the question of whether or not the state has taken reasonable measures within its available resources progressively to realize the right concerned.

Thus in *Government of the Republic of South Africa v Grootboom and Others*[12], Mrs. Grootboom decided she had had enough. She and her two children, and her sister with three children, lived in a shack in an area not far from Cape Town. The winter rains were approaching and she felt she could not bear another season in a waterlogged area. Altogether, about 5000 people lived in similar circumstances in the settlement, without clean water, or sewage or refuse removal services, and with virtually no electricity. Many had applied to the municipality for subsidized low-cost housing and had been on waiting lists for as long as seven years, with no relief in sight. Faced with the prospect of remaining indefinitely in intolerable conditions, Mrs. Grootboom and nearly a thousand adults and children moved to a nearby vacant hill-side. The land had in fact been set aside for low-cost housing. Negotiations with the owner and the local council followed, but without success. Eventually a court order was issued declaring them to be in unlawful occupation of the land and requiring them to be evicted. They were then forcibly removed, prematurely and inhumanely, at the expense of the municipality. Their makeshift homes were bulldozed and burnt and their possessions destroyed. Many of the residents were not even present to salvage their meager belongings.

Desperate and homeless, they moved onto a local dusty sports ground. Bitter Cape winter rains were arriving and they had little more than plastic sheeting for protection. They approached an attorney who wrote to the council describing the intolerable conditions under which they were living and demanded that the council meets its constitutional obligations and provides them with temporary accommodation. Dissatisfied with the municipality's response, the group launched an urgent application in the High Court.

The High Court ordered the municipality to provide temporary shelter pending the outcome of the application, so that it would not be compelled to determine the difficult and important questions under pressure of approaching rains. At the hearing, the state acknowledged the dire circumstances in which the applicants found themselves. It contended, however, that these were the inherited consequences of past injustice, and not indications of a failure to meet current constitutional obligations. On the contrary, it argued, it was meeting these obligations by means of implementing a massive housing programme which enabled millions of poor people to move

[12] *Ibid.*

from leaking and makeshift shacks without secure tenure, to weatherproof homes to which they had a full title. Three quarters of a million families had already been able to move into completely subsidized homes, serviced with electricity and water, and millions more would benefit in future as the housing programme unrolled.

The High Court accepted that the state in fact was meeting its obligations progressively to realize the right of access to adequate housing. The Court went on to hold, however, that the state had failed to meet a further and special obligation, namely, that which flowed from the rights of the child spelt out in the Constitution. The Court pointed out that a child's rights to shelter was not qualified by reference to progressive realization within available resources. The shelter envisaged by the section in the Constitution on children's rights might be less than adequate housing, but at the very least the state had an obligation to provide some protection from the elements. Furthermore, since the children could not be separated from their parents, the Court ordered that all the people concerned should be given at least elementary protection.

Dissatisfied with the High Court's decision, the state appealed to the Constitutional Court.

The Court held that the key concept in the provision on access to adequate housing was the obligation on the state to take reasonable legislation and other measures progressively to realize the right. In the Court's view, the concept of reasonable measures was one that was capable of being adjudicated upon by the Court. If the measures failed to reach the standard of reasonableness then the state would be in breach of the Constitutional obligations. In deciding whether the measure met this standard, the Court would acknowledge the specialty of the government in this area and accept the fact that a wide range of policy choices would be consistent with reasonableness.

In this case, the Court found that notwithstanding the fact that the state housing programme was impressive, it had failed to make provision for persons such as Mrs. Grootboom who had found themselves in situations of such crisis and desperation that their dignity had been seriously assailed. In other words, although the programme was reasonable in its broad reach, it had one serious gap which prevented it from satisfying constitutional requirements. This is because it contained no comprehensive plan of how to deal with homeless people in situations of extreme desperation, such as victims of disaster, or persons in Mrs. Grootboom's situation. The Court, accordingly, declared the housing programme of the state to be unreasonable and in conflict with the Constitution to the extent that it failed to make reasonable provision within its available resources for people with no access to land, no roof on their heads, and who were living in intolerable conditions or crisis situations.

3.4. Dignitarian Approach to Socio-economic and Cultural Rights

The Constitutional Court in Government *of the Republic of South Africa v Grootboom and Others,*[13] applied the dignitarian principle when arriving at its decision. In other words, it took the view that respect for human dignity united the right to be autonomous with the need to recognize that people live in communities. Therefore, the Court in this case considered the fact that it was the fundamental right of all human beings to have their basic human dignity respected.

3.5. Application of Principles of Proportionality, Fairness and Reasonableness

The principles of proportionality, fairness and reasonableness are applied by the Constitutional Court before arriving at its decisions. This is according to Sachs, who notes as follows:

> **These were not questions that could be decided purely by grammatical textual analysis and logical inference. In just about every case that came before us, the Constitution obliged us to make value judgments on issues of major moral and social importance. The problem then was not *whether* to make value judgments, but *how* to do so in a principled way that was true to the letter and spirit of the Constitution[14].**

Thus inevitably, the Court considers the principles of proportionality, fairness and reasonableness along with that of respect for human dignity when interpreting provisions on socio-economic and cultural rights of the Constitution.

It is important to consider these principles especially for a country such as South Africa which is diverse and plagued with inequalities. The Constitution itself, through the Bill of Rights, seeks to create conditions which ensure that the 'haves' continue to have, and also that the basic dignity of the 'have nots' is secured[15].

In determining these matters, the judges of the Court define in a principled way the limited and functionally manageable circumstances in which judicial responsibility for being the ultimate protector of human dignity compels them to enter what might be politically contested terrain. This is in cases where political leaders may have difficulty in withstanding constitutionally undue political pressure or human dignity is most at risk.

[13] *Ibid*.
[14] Albie Sachs, *The Strange Alchemy of Law and Life*, (Oxford: Oxford University Press,2009) 206.
[15] *Ibid* .

By so doing, the Court is able to express itself in its pure form. The Constitution enables to achieve this by guaranteeing them judicial independence. In the end, the Court ensures that justice is done to all, without fear, favour or prejudice.

Furthermore, the Constitutional Court always gauges the measure concerned with the Constitution as the measuring-rod. This enables the Court to ascertain what would be permissible in an open and democratic society based on humanity, equality and freedom. By so doing, the Court is able to range far and wide, deriving as much benefit as it can from reasoning and practice in other parts of the world.

3.6. Recognition of Scarcity of Resources

The Constitutional Court does not give a blind eye to the fact that resources at the government treasury are scarce. This principle is applied even in very serious and compassionate cases. The Court takes into account the practicability of the enforcement of their decisions. Sachs, therefore, notes:

> **…the basic problem of the human rights court was to find a principled way of balancing out the various public and private interests that came into conflict with each other, not to determine the frontiers between justice and injustice[16].**

In so doing, the Court takes into account the diverse interests that exist in an open and democratic society. This is because the Court does not give an abstract legal reasoning of a dogmatic kind in their decisions but interpret the law in such a way that purpose, context, impact and values take centre stage.

Thus the Court departs from formal reasoning and embraces the concept of balancing the varying interests. This is because it recognizes the fact that the problem with enforcing socio-economic rights is precisely that resources are always minimal. In the Court's view, socio-economic rights by their very nature involved rationing. Such rationing is considered a restriction to socio-economic rights, but the pre-condition for its exercise.

This is the main reason for the Court's recognition that socio-economic rights were in this respect different in their mode of enjoyment from civil and political rights. As an example, the right to life is not rationed. Everybody has a right to life. The right to life, and other civil and political rights are fully fledged right from the start. They are not subject to progressive realization. The progressive realization of socio-economic rights within available resources, on the other hand, indicates that a system of apportionment was fundamental to their very being.

The case of *Soobramoney v Minister of Health, Kwa Zulu Natal*[17], illustrates this point.

[16] *Ibid*, 202.

Mr. Soobramoney, who was close to death, commenced an action in the Constitutional Court of South Africa. He was suffering from chronic renal failure and other heart and sugar-related problems. He was asking the Court to order the state hospital's dialysis service to keep death away as long as its machines could keep him alive. He had previously received a session of life-serving dialysis treatment at a state hospital, but had been told that he did not qualify for further treatment because resources permitted only thirty percent of persons suffering from chronic renal failure to be treated. Priority was given to those who could benefit from renal transplants, and since he was a poor candidate for such transplants, he had to stay at the back of the queue. Mr. Soobramoney had managed to survive for some time on dialysis in the private medical sector, but when his family's funds had run out, he had once more sought free treatment from a state hospital. On being turned away he went to Court, claiming that his constitutional right to access health care services was being denied.

Firstly, the Court held that his claim based on the right to emergency medical treatment could stand. This is because the right to emergency care could be claimed on behalf of someone who collapsed or who was a victim of sudden trauma. It did not apply to chronic medical conditions, even if they had reached life-threatening proportions. The Court was of the view that if all chronic illnesses were to be regarded as emergency cases entitled to treatment at state expense, there would be no funds left in the public health budget for other pressing services such as mother and child care, health education, immunization, the prevention and treatment of diseases such as TB, cancer and malaria, and the amelioration of HI/AIDS.

Secondly, the Court held that as far as the right of access to health was concerned, the access granted by the state health services to Mr. Soobramoney had not been shown to be unreasonable. This is because the evidence from the hospital indicated that their plan was eminently rational and non-discriminatory. Therefore, his claim on this ground failed as well[18].

It was pointed out in the judgment that that the problem associated with all cases concerned with enforcing socio-economic rights was that the resources were always minimal. In this context, the Court re-affirmed the principal that socio-economic rights by their nature involved rationing and that rationing should be considered a restriction of the right of access to health care , but the pre-condition for its proper exercise.

The Court further held that unlike civil and political rights that are fully-fledged right from the start, socio-economic rights require progressive realization. This progressive realization of socio-

[17] 1998(1)SA 765 (CC); 1997 (12) BCLR 1696.
[18] *Ibid*, 185.

economic rights within available resources, indicates that a system of apportionment was fundamental to their very being[19].

Lastly, the Court held that the state was obliged to take measures progressively to realize the right of access to health care. Therefore, the state could fulfill its duty in respect of providing such access as much by measures to provide water, clean air, and basic nutrition for the whole community, as by providing a place in a hospital and expensive curative treatment for an individual. The Court, therefore, noted that the reach of health programmes had become progressively larger in South Africa and that every individual had a right to be considered fairly and without discrimination for treatment within each programme.

The Court thus observed as follows:

> ***One cannot but have sympathy for the appellant and his family, who face the cruel dilemma of having to impoverish themselves in order to prolong his life. The hard and unpalatable fact is that if the applicant were a wealth man he would be able to procure such treatment from private resources; he is not and has to look to the state to provide him with the treatment. But the state's resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme[20].***

3.7. Taking into Account the Practicabilities of the Enforcement of their Decisions

Indeed, the Court considers the question of whether it is practicable or not for their decisions to be enforced. This is because it would not make any sense to come up with a decision which is practically impossible to enforce. Thus in *Government of Republic of South Africa* v Grootboom *and Others*[21], the Court left it open to the state to decide how best in practice it could remedy its failure. It was free to decide whether the programme for emergency shelter could operate nationally, provincially or locally. It was also to decide how the programme was to best be developed; whether it would involve only providing land on which people could erect shelters, or whether it would provide both land and houses, or whether it would be more efficacious for the state to provide sufficient financial assistance for the affected persons to make their own housing arrangements.

In addition, the Court left it to the state to decide where it was going to get the money for the emergency programme. It could get money from defense, it could raise taxes, or it could take it from anywhere.

[19] *Ibid*, 188.
[20] *Ibid*.
[21] *Ibid*, note 10s.

3.8. Taking into Account the Doctrine of Separation of Powers

The Constitutional Court of South Africa does also take into account the doctrine of separation of powers when deciding matters relating to socio-economic rights. It is important to do so because this doctrine of separation of powers is fundamental in any democratic society. Thus in *Minister of Health v Treatment Action Group (TAC),*[22] the main issue before the Court was whether the government was unreasonable and in default of its constitutional obligations when it only restricted the supply of Nevirapine to two sites only in each province. It was further contended by the state that such a question belonged to the sphere of government policy, and accordingly fell outside the domain of the judiciary. The state in fact put it bluntly: it was not for the judges to prescribe drugs.

Firstly, the Court held that it was the Constitution itself which gave it the task of enforcing socio-economic and cultural rights. By enforcing these rights therefore, the Court was in fact fulfilling its obligation in terms of the doctrine of separation of powers when it uses its judicial authority to ensure that the Constitution is respected.

Secondly, the Court held that in this case it could decide a matter of government policy. It stated that since the drug was available without cost and was deemed safe enough for use in the private sector and in the test sites, limiting its supply on the ground that the government wanted to do further research on operational problems was not reasonable.

3.10. Putting to Debate Issues Before the Court

The Court also puts to debate most of the issues before it. The issues are debated until there is enough common ground for a unanimous judgment to be produced.

As an example, in *Prince v President of the Law Society of the Cape of Good Hope*,[23]the appellant, a Rastafari, claimed for an exemption to enable him to engage in his religious practice of smoking marijuana (dagga). The applicant was a candidate attorney. He was regarded by his professional order as fit and proper to join the profession, save for one fact: he had twice been convicted for possession of marijuana. Pursuant to his religion he would not give an undertaking to desist from smoking it. It was argued by the state, on the other hand, that the law enforcement agencies would not be able to effectively police a limited exemption in favour of the Rastari.

The Court was split by votes of 6 to 5 after an intense debate. The majority decided that in view of the fact that granting a limited exemption would make effective law enforcement impossible, the applicant's application be refused. The Court further stated that in any event, a limited exemption would not satisfy the claims by the Rastafari.

[22] (2002) 5 SA 721 (CC).
[23] (CCT 36/00) (2000) ZACC 1; 2002 (3) BCLR 231.

4.0. Impact of Non-justiciable Socio-economic and Cultural Rights in Zambia

Zambia is very far from achieving socio-economic rights for many people. Part of the reason for this state of affairs is that socio-economic and cultural rights are not enforceable under the Constitution. Therefore, people who would otherwise have sought judicial redress for not realizing socio-economic rights have no such opportunity.

In addition, this makes the enjoyment of civil and political rights a nightmare for the majority of the citizens. As a few examples discussed in this section will show, some people in Zambia are unable to enjoy their right to life simply because their socio-economic rights have been denied.

Poverty, for instance, is widespread in Zambia. It affects both urban and rural areas. Just recently, eight people died at the Olympic Youth Development Centre (OYDC) in Lusaka in a stamped. This stampede, happened after 35 000 people rushed to a church meeting where it was promised that they would be given food hampers[24].

Unemployment levels in the country have reached alarming levels. Retrenchments and closure of companies arising from the implementation of the Structural Adjustment Programme since the early 1990s have worsened the situation[25].

The story in the education sector is not any better. This is because accessibility, quality and availability of education remains a night mere to many Zambians. The major cause of the problems in this sector is inadequate funding by government[26].

As this is not enough, many people in Zambia face housing problem. Since the 1970s when the government, through the National Housing Authority and the councils built houses for ordinary citizens at a large scale to try and address this problem, nothing of that sort has been done of late. This has created a crisis that has resulted in many people living in unplanned settlements where houses have no piped water and sanitation is very bad. This lack of water and poor sanitation sometimes lead to the breaking out of water borne diseases like cholera, dysentery and typhoid. Many people have actually lost their lives from these diseases.

The health has also not been spared from these problems. In fact, the situation has even been made worse by the HIV/AIDS pandemic. In 2015, the HIV prevalent rate in Zambia was estimated at 12.9 percent[27].

[24] Priscilla Chipulu, Steven Mvula, "Deadly Church Banned: Eight Die in Stampede as 35 000 Rush for Freebies," *Zambia Daily Mail*, March 10, 2017, 1.
[25] Alastair Fraser, John Lungu, *For Whom the Wind Falls: Winners and Losers in the Privatisation of Zambia's Copper Mines* (Lusaka: Catholic Centre for Justice, Development and Peace, 2010), 9.
[26] https//www.unicef.org./Zambia/5109 8460.html.
[27] https://www.avert.org/profession/hiv-around-world/sub-saharan/zambia.

5.0 Conclusion

This research has confirmed an important doctrine of international human rights law which is that civil and political rights on the one hand, and socio-economic and cultural rights on the other hand, are indivisible and inter-dependent. It has been shown, for instance, that Zambia is very far from realizing socio-economic rights for many people because these rights are not justiciable under the Constitution. As a result, there is widespread poverty in the country created by unemployment, illiteracy and the prevalence of HIV/AIDS. Consequently, some people have died simply because they could not access their socio-economic rights in turn denying them their civil and political rights. The research, using South Africa as an example, has also illustrated how a Country can have justicable socio-economic and cultural rights without serious conflicts arising between the judiciary and the other two arms of government.

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