The public policy deficit with regards effective response to carnages on the roads can be traced back to the single digit figures of people who daily lose their lives and sustain injuries because, sadly, it takes major road accidents where people perish in large numbers to make the relevant authorities sit up and take notice.

Statistics released by the Traffic Safety Council of Zimbabwe (TSCZ) for the year 2012 painted a grim picture. 2011 was the country’s bloodiest year as it recorded 2,000 road deaths in which approximately 1,992 people died and 16,944 were injured in road accidents. The report indicated that each year since 2006, road accident fatalities have increased from a total of 1,037 deaths with media reports indicating that about five people die on Zimbabwe’s roads daily.

By any standards, these statistics are extremely disturbing, especially as the rates are increasing at an alarming rate. It can therefore be argued that the existing measures for making our roads safer at either policy or operational level are insufficient at best or failing at worst.

While it cannot be contested that accidents are, by their very nature, unavoidable in life the case for Zimbabwe is that the rate of fatalities is unacceptably high and more importantly, with a reorganisation of relevant existing policy as well as further new measures, a drastic reduction is very possible. In our specific context, it is sad to say the deaths and injuries to persons and property are largely avoidable but for a glaringly inadequate policy regime further exacerbated by implementation challenges. As innocent people continue to be affected by these accidents - which serve as a reminder that none of us is safe- the situation grows more desperate and urgent remedies are required.

For a long time now, there have been concerns as regards the driving licencing system in our country. These questions refuse to go away and it can therefore be asserted that as long as opacity continues with regards issuance of driving licences, the carnage on the road may be with us for a long time.

Corruption is a social ill and the attendant costs of corruption include a decline in the levels of safety on the roads. Added to this fact is the laxity and inefficiency that finds accommodation when law enforcement and the Vehicle Inspection Department (VID) are riddled with the scourge of corruption while bribery is rampant at the so-called roadblocks and patrols. The net effect is that this terrible vice undermines all efforts being targeted towards minimising the carnage on our roads. In as much as society and the law would not condone gun possession by bad guys, similarly they ought to condemn the issuance of to untrained people.

Zimbabwe has witnessed a surge in the number of its motorist population in the past decade. Among other factors, this has been occasioned by the improved accessibility of vehicles from foreign markets, Japan in particular. The ‘ex-Japs’ used vehicles are popular as they are not only easy to procure offshore, but generally affordable to Zimbabwe’s average citizen. From this, however, problems emerge.

As the vehicle population balloons, the road network and its capacity to cope is not corresponding likewise. At the same time, because the majority of these vehicles are used already, it goes without saying that they have well passed their best lives. Many other issues can be traced to this fact as discussed below, including increased pressure on law enforcement, maintenance issues, congestion, pollution, and corruption on the roads.
It should concern all policy makers and stakeholders that one does not need to be a bad driver to be a possible victim of our roads; rather, a very good and responsible motorist only needs an irresponsible, drunk, over-speeding driver or a motorist using a defective vehicle which might encroach his/her lane, for example.

That kind of situation can be arrested if we enforce the principle that driving is never an absolute right but a privilege. There is no other way to right the situation than for a big political statement to be made through pursuing actions that endeavours chiefly to ensure that law enforcement adheres to minimum standards of integrity. The integrity of the driving licence needs to be urgently restored.

Corruption has taken deep root and is worsened by the fact that most people have adopted it as a culture as well: the new “normal”. Without an overhaul of the system from the top, it is impossible to stem the tide of bribery and corruption in the transport sector. Culprits, especially repeat offenders who wantonly break road rules, ought to have their licences suspended and/or cancelled totally for their own sake and indeed for the sake of other road users. This is only possible if the law is followed to the book by a responsible and transparent system.

Indeed, most of the fatalities occur on our busy highways that link cities to towns and to rural centres. By far the greatest problem has to do with the width of these major routes. Virtually all of them are single lanes, posing obvious risks to the motoring public and passengers.

Sideswiping, head on collisions as well as smashes with stationary vehicles are some of the factors normally fingered as major causes of accidents on the highways. Invariably, this is a result of – or is worsened by - the narrowness of single lane roads, which maximise the potential for impact of vehicles in motion should any slightly veer off the lane.

It goes without saying therefore that the expansion of our highways into dual highways or dual carriageways divided down the middle by a barrier that separates traffic going in different directions is a high priority. This is not a new suggestion at all as the Government seems aware and has thus been making efforts towards the end. What this paper does though is to emphasize this critical intervention because the slow pace with which, for example the Harare-Bulawayo highway has been dualised basically means that if it continues at this rate, then the country is placing travellers and motorist at grave risk by not extending similar development on other major highways.

Notwithstanding the economic challenges that have hit Zimbabwe in recent years, it is not enough to explain the slow progress in dualising our roads. What can be gleaned from the frustratingly slow progress is that a failure of policy is apparent (excessive government involvement), prioritisation problems, bureaucracies all capped with a lackadaisical approach from the often less accountable public sector. It is suggested that the Government carefully measures its involvement in the economy and leave private players to expedite some of these infrastructural projects.

Undoubtedly, the government has not been successful in those areas that it has sought to do such vast projects on its own and this is not a surprise. From a public policy point of view, it is advisable that the government considers able private players for Build Own Operate and Transfer (BOOT) arrangements.

According to Hanis B. Nizar et al, in a BOOT project, a project company, normally a special project vehicle (SPV) is given a concession to build and operate a facility that would otherwise be built by the public sector.

The facility may be a power station, toll road, airport, bridge, tunnel, water supply and sewerage system, railway, communication or manufacturing plant. This can be used as an opportunity to empower local companies, through ensuring that the concession owner co-opts local players for example in the supply of materials.

When done, the Concession owners would operate the roads (i.e maintenance and collecting tolls) for a certain agreed period of time until they are handed back to the government/public sector. This has worked in various developing countries and Zimbabwe can take advantage of its current relationship with the rising powers such as Brazil, India, China, Russia to expand and modernise the road network.

To conclude, it is not only these few factors highlighted that will help arrest the carnage on our roads. Rather, there are various other basic measures that need to be taken to complement these decisive steps. Just to exemplify; that stray animals - both domestic and wild - can encroach on highways posing serious risks to motorists also points to a deficiency in local government because security/parameter fencing has been vandalised at will. In short, what is required is a multi-sectoral approach from government, local authorities, law enforcement, motorists, and other stakeholders to imagine bold considerations that confront the very causes and factors that lead to daily loss of life and limb.

We should move beyond the customary token of assisting with funeral costs to victims’ families as well as hollow statements like “…we appeal to motorists to exercise caution on the roads…” to action-oriented, proactive approaches that achieve tangible results.

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http://www.slideshare.net/wanrempit/buildoperateowntransfer-boo
THE PARADOX OF SUBJECTING THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

An analysis of the provisions of the new Constitution of Zimbabwe
[Amendment (No. 20) ACT 2013]

What is ‘justiciability’?

The term ‘justiciability’ refers to the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur. Justiciability implies access to mechanisms that guarantee recognized rights. Justiciable rights grant right-holders a legal course of action to enforce them, whenever the duty-bearer does not comply with his or her duties. The justiciability of rights is critical, because a right without a remedy is as good as non-existent.

Historical Background

The government of Zimbabwe acceded to the International Covenant on Economic Social and Cultural Rights (ICESCR) in August 1991. However this accession did not reflect a correlative paradigm shift in the perception of economic, social and cultural rights from the flawed notion that, they are “second generation” rights which are largely aspiration ‘soft law’ to an acceptance that all human rights are universal, indivisible, interdependent and interrelated. Consequently, the Lancaster House Constitution (as the old Zimbabwean constitution was popularly called) notwithstanding its nineteen amendments did not include economic, social and cultural rights as part of the bill of rights.

In this regard, one of the major points for constitutional reform during the Zimbabwe Constitution Select Committee (COPAC) led constitution making process was the need to include economic, social and cultural rights as justiciable rights in the constitution of Zimbabwe. This process culminated in the enactment of the new constitution of Zimbabwe (Amendment [No. 20] ACT 2013 (the new constitution), which as will be discussed below, included certain economic, social and cultural rights as justiciable rights in Zimbabwe.

However notwithstanding the inclusion of economic, social and cultural rights in the new constitution of Zimbabwe, the paradoxical inclusion of ‘claw-back’ clauses which limit the state’s obligations in the implementation, promotion and protection of economic, social and cultural rights to the availability of resources, seems to water down the potency of the rights and weakens the justiciability of economic, social and cultural rights in Zimbabwe.

The discussions which follow seek to analyze the new constitution of Zimbabwe, in order to assess the extent to which the “subject to the availability of resources” clause affects the justiciability of economic, social and cultural rights in Zimbabwe. The discourse will also take into account experience from other jurisdiction pertaining to the same issue, as well as internationally accepted best practice in an effort to map out a positive trajectory for the development of economic, social and cultural rights jurisprudence in Zimbabwe.

The new Constitution

The ‘spirit’ of the constitution can be deduced from its preamble and introductory provisions which usually set-out the guiding principles and objectives of the constitution. This ‘spirit’ of the constitution is important as it guides how the more substantive provisions of the constitution ought to be interpreted and applied. The national objectives are also critical as they delineate what the government’s aims are and guide all state institutions in the formulation and implementation of laws and policies. It is therefore commendable that, there are several clauses in the new constitution’s national objectives which speak to economic, social and cultural rights. For instance, such key economic, social and cultural issues as national development, empowerment and employment creation, food security, culture, education and health services are set out as part of the national objectives.

These founding clauses in the new constitution set the tone which resonates throughout the rest of the constitution including the bill of rights. The bill of rights is preceded with a clause which underscores the obligations of the state, every person, natural or legal to protect, promote and fulfill the rights and freedoms delineated in the bill of rights, which also includes economic, social and cultural rights. This clause lays a strong foundation to bolster the justiciability of economic, social and cultural rights as legal rights with the same binding effect and enforceability as civil and political rights.

In addition to the civil and political rights listed as part of the bill of rights, the new constitution includes economic, social and cultural rights, such as language and cultural rights; freedom of profession, trade or occupation, labour rights; property rights; rights to agricultural land; environmental rights; right to education, health care; and right to food and water. The bill of rights also includes a clause which states that the bill of rights is not a closed list and allows for the recognition of other rights which may be conferred by for instance international law, as long as the rights so created are consistent with the constitution.
However, notwithstanding these positive provisions of the new constitution particularly in relation to economic, social and cultural rights, the rights are punctuated with provisos which subject the rights to the limitation of available resources. The national objectives as already stated above set-out economic, social and cultural objectives for the state to work towards the progressive realization of all economic and social rights. However the same national objectives are subjected to the limitation of the availability of resources. For instance, in relation to the provision of shelter and basic nutrition, health care and social services to children the state is only obligated to work “within the limits of the resources available to it.” Likewise, the provision of work opportunities, shelter, health services and social welfare as national objectives are all subject to the limits of the resources available to the government.

Furthermore, the economic social and cultural rights in the bill of rights, such as rights to education, health care as well as food and water are all subjected to the limits of the resources available to the state.

Should this be a cause for concern?

The subjection of economic, social and cultural rights to the availability of resources is not a novel phenomenon, neither is it unique to the new constitution of Zimbabwe. This is because the wording of the ICESR itself acknowledges that states have to work to respect, protect, promote and fulfil the economic, social and cultural rights according to the maximum of their available resources, with a view to achieving progressively the full realization of the economic, social and cultural rights. The same clause can also be found in the constitution of South Africa, however in the constitution of Kenya even though the availability of resources is recognized as an essential element for the fulfillment of economic social and cultural rights, the onus is on the state to prove resources are not available; and even though the courts are not empowered to ordinarily usurp the administrative decision making role of the state, the state is still mandated to prioritize in the allocation of resources the widest possible enjoyment of economic, social and cultural rights.

It is also noteworthy that, instead of counteracting the justiciability of economic social and cultural rights, the provision relating to the use of available resources is meant to provide some degree of flexibility attributable to the inherent progressive nature of economic, social and cultural rights. As aptly stated by the UN Committee on Economic, Social and Cultural Rights (CESCR) “...this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.”

As a result, notwithstanding the limitation clause relating to the availability of resources in most of the jurisdictions identified above, the justiciability of economic social and cultural rights is galvanized by progressive jurisprudence from the courts which reinforce the states’ obligations arising from economic social and cultural rights as real and enforceable. The courts in most jurisdictions have refused to be limited by the ‘subject to the availability of resources’ clause opting rather to demand that the state achieve a minimum core of its obligations or prove that it has taken reasonable steps aimed at the realization of economic, social and cultural rights. In essence therefore, the limitation clause relating to the availability of resources ought to be construed narrowly allowing the judiciary to review the work and policies of the state in relation to the progressive realization of social economic and cultural rights.

Taking into account the fact that, economic, social and cultural rights jurisprudence in Zimbabwe is still at its nascent, one can only hope that our judiciary does not adopt a rigid and conservative approach in interpreting the provisions of the new constitution, in particular, the limitation clause relating to the availability of resources for the state to fulfill its obligations arising from economic, social and cultural rights. This is because a conservative approach would result in the weakening of the justiciability of economic social and cultural rights by not holding the state as the primary duty bearer accountable to the citizens as the rights holders. In this regard, in the absence of a vibrant and vigilant judiciary, the ‘availability of resources’ clauses can therefore be abused by the state in order to dodge its obligations by simply pleading poverty as justification for its failure to deliver upon the dictates of economic social and cultural rights.

Furthermore, the enforcement of economic, social and cultural rights requires that states “must at all times act in good faith to fulfill the obligations”, without which the limitation clause would act as an iron curtain blocking the judiciary from supervising the policies and programs of the state. This is especially so in Zimbabwe, where there is very little if any transparency or disclosure relating to state revenue generation. As such, when the state pleads bankruptcy there is no way of countering its assertions as the state keeps a tight grip of the national purse strings, allowing no other independent oversight over the state coffers and government expenditure.

Conclusion

In order for the economic, social and cultural rights to be justiciable and fully realized in Zimbabwe, there is need for more work to be done beyond just the commitments listed on paper in the new constitution. This is because the justiciability of economic, social and cultural rights hinges on many aspects beyond the letter of the constitution. Transparency in national fiscal matters, government policies and programs, as well as the good faith of the state are critical components without which the economic, social and cultural rights listed in the new constitution will only be a wish list. The judiciary is also crucial in ensuring that the provisions in the new constitution are interpreted in a manner that gives life to economic, social and cultural rights, in order to hold the state accountable to its citizens for the obligations to respect, protect and fulfil economic, social and cultural rights.

Prepared by Blessing Gorejena - Chinawa and Tafadzwa Christmas from the Zimbabwe Human Rights NGO Forum. They write in their personal capacity.
READING LIST


See ZIMBABWE’S STATUS OF COMPLIANCE WITH HUMAN RIGHTS INSTRUMENTS, Vol 1, Zimbabwe Lawyers for Human Rights (2011) at page 6


The Constitution of Zimbabwe was published as a Schedule to the Zimbabwe Constitution Order 1979 (S.I. 1979/1600 of the United Kingdom).


Chapter 2, Section 8 (2) Constitution of Zimbabwe (Amendment [No. 20] Act 2013)

Section 8 (1) supra
Section 13 supra
Section 14 supra
Section 15 supra
Section 16 supra
Section 27 supra
Section 29 supra
Chapter 4 supra
Section 44 supra
Section 63 supra
Section 64 supra
Section 65 supra
Section 71 supra
Section 72 supra
Section 73 supra
Section 74 supra
Section 76 supra
Section 77 supra
Section 47 supra
Section 19 supra
Section 19 (2)

See Sections: 24;28;29 & 30 of the new constitution respectively
See Sections: 24 (1); 28; 29(3) & 30 of the new constitution respectively
See Sections:75; 76 and 77 of the new constitution respectively
See Article 2 (1) ICESCR

See for instance Sections 26 (2) & 27 (2) Constitution of the Republic of South Africa No. 108 of 1996
See Section 20 (5) (a) Constitution of Kenya 2010
See Section 20 (5) (b) supra


See the famous South African cases such as : Treatment Action Campaign and Others v Minister of Health and Others 2002 (4) BCLR 356 (T); Government of the Republic of South Africa and Others v Groooboom and Others 2000 (11) BCLR 1169 (CC)


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ON Thursday, November 7, 2013 government started demolishing illegal settlements, beginning in the Ruwa District on the eastern outskirts of Harare, after government officials had already indicated that the demolition exercises would be carried out countrywide.

For anyone with an objective mind, it is undisputable that the proliferation of illegal settlements in the urban centres of Zimbabwe if left unchecked will slowly turn whole cities into unplanned settlements. One would agree with the government that there is need to stop the spread of illegal structures in urban areas, albeit with reservations in the manner and timing at which demolitions are being carried out to wipe out illegal settlements. The demolitions are happening during the rainy season.

Like everything that is done without looking at the context and adjusting to it, there is a danger of overlooking socio-economic realities in pursuing the ideal of beautifying cities, leading to collateral damage in the form of poor people’s livelihoods.

Memorably, the last time that the government carried out demolitions of illegal settlements was under the auspices of Operation Murambatsvina in 2005; where there was huge collateral damage in the form of disruption of the already difficult livelihoods of the urban poor.

Tellingly, this led to condemnation of the exercise, on human rights grounds, by the United Nations (UN) when it sent Human Settlements Special Rapporteur Anna Kajumulo Tibaijuka to assess the situation.

No doubt, that there has been a link in the proliferation of illegal structures to the unique and clear recent socio-economic circumstances of the ordinary Zimbabweans.

Following over a decade of economic challenges beginning with the 1990’s impoverishing Economic Structural Adjustment Programme (ESAP) and accelerated economic problems after 2000, poverty is endemic despite the economy having slightly improved from 2008.

More particularly, poverty among many people in the urban areas makes them unable to construct proper houses, or pay rentals. The lack of housing land has also exposed these prospective house owners to phony cooperatives in some cases created by politicians.

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Remains of some of the tuck shops which were demolished in Ruwa on 7 November 2013

The lack of housing land has also exposed these prospective house owners to phony cooperatives in some cases created by politicians.

The above scenario means that the government’s preoccupation with repeated demolition of illegal settlements may be missing the point that there is need to address the shortage of housing land, or lack of affordable accommodation, than concentration on symptoms in the form of illegal settlements.

Though ideally there is no excuse for breaking the law, there is clear socio-economic justification and mitigating circumstances for some of the illegal structures. More precisely, there is a clear trend of economic desperation among the people whose structures are being targeted by the government.

For instance, most of the illegal structures destroyed in Ruwa on Thursday, November 7 were makeshift business structures such as tuck shops, workshops, barbershops and hair salons.

People have resorted to erecting the informal businesses structures due to lack of opportunities in the formal economy, to escape the prevalent poverty and high unemployment levels through illegal, but honest means – honest as opposed to theft and burglary.

This is more so given industry reports that 711 companies recently shut down and more continue to do so; that instead of employment creation in the economy, there are mounting retrenchments.
The trend is also affecting parastatals with the National Railways Association (NRZ) having recently proposed to retrench 6000 employees, and the job losses in the economy have been going on for years.

The result could be that more people than in previous years cannot afford proper urban housing and resort to illegal settlements, or have no alternative means of income and resort to building illegal small business structures to survive. Under the circumstances, one would conclude that the demolition effort and its timing without proffering clear and timely alternatives for illegal structure owners will destroy livelihoods.

The dilemma is similar to the government’s fight against street vendors and touts. The desire to clean and beautify the streets has clear merits, but it is clashing with delicate socio-economic circumstances and fragile livelihoods; what is required is a more creative and thoughtful approach than peremptory application of the law.

One would think that it is the timing which is wrong, because the affected people have not had the opportunity to find alternative livelihoods as the economy is still trying to recover, especially looking at the informal business structures like makeshift tuck-shops, barbershops, workshops and hair salons.

One would also urge the government to investigate and deal decisively with politicians accused of promoting the spread of illegal structures, especially illegal housing units for political mileage.

Vivid Gwede is a social commentator

More pictures from the Ruwa demolitions