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LONG WALK TO JUSTICIABILITY: ARTICLE 8A AND UGANDA'S NATIONAL OBJECTIVES AND DIRECTIVE PRINCIPLES OF STATE POLICY

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Abstract

The 1995 Constitution of the Republic of Uganda was lauded by many commentators as one of the best in the region. Much of these sentiments of admiration gained traction because of the comprehensive nature of the Bill of Rights in Chapter 4 of the Constitution. However, the main body of Chapter 4 did not include a number of economic, social and cultural rights and they were instead included as part of the manifesto of aspirations code named, the "National Objectives and Directive Principles of State Policy." Judicial enforcement of ESCRs became difficult because of the fact that these National Objectives were not considered justiciable. In 2005, the Constitution was amended, introducing a new Article 8A in its main body that seemed to suggest that NODSPs were not merely aspirations. Notwithstanding some victories, the experience that the courts have had with Article 8A has left a lot to be desired.

1.0 Introduction.

Uganda's 1995 Constitution[1] was once lauded by commentators as one of the best in the region.[2]Most of the admiration sprang from the comprehensive nature of its Bill of Rights (Chapter four).[3]

Chapter four, however, did not include a number of economic, social and cultural rights (ESCRs), which were instead included within the manifesto of national aspirations that is the 'National Objectives and Directive Principles of State Policy'.[4] These National Objectives

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1 Promulgated on October 8, 1995 and replacing the 1967 Constitution.

2 Proceedings from the Judicial Colloquium on the Application of International Human Rights Law at the Domestic Level, held on 9-11 September 2003 in Arusha, alluded to by Justice Mpagi-Bahigeine in Constitutional Petition No.2 of 2003, Uganda Association of Women Lawyers and Others v Attorney General, Constitutional Petition No.2 of 2003.
September 2003 in Arusha-Tanzania.

3 Mostly Articles 20-45.

4 Hereinafter referred to simply as 'the National Objectives'.

include aspects of both civil and political rights (CPR's) and ESCRs. In this article, ESCRs will be the focus of our discussion.

Given their outright inclusion within Chapter four, CPR's have been considerably dealt as far as their legal/judicial enforcement is concerned. In contrast, only a few ESCRs made it to Chapter four and they include; the right to education,[5] the right to join or form trade unions and partake in industrial action,[6] protection of children from economic exploitation[7] and the right to equal treatment for men and women in employment, remuneration, economic opportunities and social development.[8]

In the report of Uganda's Constitutional Commission, Justice Benjamin Odoki notes that these objectives were intended to make the state more responsive to social needs, link the state and the society, define the role of the society in development, identify the duties of the state, and clarify the purposes for which power is to be exercised.[9]

However, judicial enforcement of ESCRs appearing within the National Objectives and not within Chapter four became difficult because Courts considered the National Objectives to be non-justiciable. In other words, that they were not enforceable as substantive rights.

In 2005, as part of the *Kisanja amendments*,[10] the Constitution was altered to introduce a new Article 8A into its main text. Article 8A provided that National Objectives were more than just aspirational ideals; that they were in fact justiciable. This meant that an action in court could be founded and sustained based on this Article. However, the experience that the courts have had with Article 8A has albeit with some victories left a lot to be desired.

Uganda has ratified a number of instruments that contain Economic Social and Cultural Rights (ESCRs); these include the African Charter on Human and Peoples Rights,[11]the African Charter on the Rights and Welfare of the Child,[12]the Convention on the Rights of the Child,[13]the

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5 Article 30, Constitution of the Republic of Uganda, 1995.
6 Article 40.
7 Article 34, Constitution of Uganda, 1995.
8 Article 33, Constitution of Uganda, 1995.
9 Report of Uganda's Constitutional Commission, Paras. 0.54, 5.73, 5.77.
10 Oloka Onyango, Decentralization without Human Rights? Local Government and Access to Justice in Post-Movement Uganda, HURIPEC Working Paper 12, p.15.
11 Ratified on 10 May 1986.
12 Ratified on 17 August 1994.

Convention on the Elimination of All Forms of Discrimination Against Women,[14]and the International Covenant on Economic Social and Cultural Rights,[15] which is the main international instrument protecting these rights.

By virtue of these ratifications, Uganda is bound by the provisions of these instruments[16] and it has a duty to guarantee the rights therein as part of its municipal law.[17] However, Uganda's attitude towards discharging this obligation has been a controversial one. In this paper, we will discuss the enforcement of ESCRs before the inclusion of Article 8A in the Constitution, probe the history behind the inclusion of Article 8A, analyse what the courts have done with Article 8A and what its existence means for the enforcement of Economic, Social and Cultural Rights in Uganda. The question we interest ourselves in is whether in view of Article 8A and subsequent judicial pronouncements, National Objectives and Directive Principles of State Policy have now attained the status of justiciability.

Why is Justiciability an Issue?

John Murphy J defines 'justiciability'[18] as a set of man-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life that is to say, what is subject to judicial review and enforcement. It is the notion that a set of rights are enforceable by a court of law. Justiciability is concerned with whether rights are enforceable by legal means.[19]The ideological parameters within which this concept was developed lend credence to the fact that traditionally, courts were not avenues for the poor. It was developed to lock out those who posed a danger to the capitalist interests of profit maximization.[20]Justiciability of ESCRs is for the marginalized and the vulnerable in society and it is an urgent concern. If the poor and marginalized cannot run to a court to have the rights that affect their existence, their dignity and quality of life, why in the first place would the courts exist? This is why Article 8A

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13 Ratified on 10 September 1990.
14 Ratified on 21 August 1985.
15 Ratified on 21 April 2008.
16 Article 14 of the Vienna Convention on the Law of Treaties.
17 Christopher Mbazira, Public Interest Litigation and The Struggle over Judicial Activism in Uganda: Improving the Enforcement of Economic, Social and Cultural Rights, HURIPEC Working Paper No.24, 2008, p.17.
18 Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General,) 2008 NSSC 111 (CanLII); 267 NSR (2d) 21.
19 Report of the Uganda Constitutional Commission, Para.23.29.
20 Oloka Onyango, When Courts Do Politics: Public Interest Litigation in East Africa, 2017, pp.162-163.

and what it means for National Objectives and Directive Principles of State Policy is a crucial issue for discussion.

2.0 Enforcement of ESCRS in the Pre-Article 8A Dispensation

As earlier shown, the National Objectives and Directive Principles of State Policy were the home of economic, social and cultural rights in the 1995 Constitution. The framers of the 1995 Constitution deemed it wise that these types of rights should not be part of the enforceable aspects of the main body of the Constitution.[21]Oloka-Onyango has decried this state of affairs and has pointed out that the choice that the Constitutional Commission made left a lot to be desired in terms of offering serious protection for ESCRs.[22]What is shocking is that the Constitutional Commission had rightly observed that human rights are indivisible and inter-related[23]only to turn around and subject ESCRs to a different categorization.[24]What precipitated this decision was summed up by the Commission in these words;

> "*There is consensus that the economic and social rights should be spelt out in the Constitution. At the same time, we are mindful of the fact that the economic situation of the country would make it impossible for the people to enjoy these rights immediately on the coming into effect of the new Constitution or indeed in the foreseeable future. Even countries which are economically more advanced than Uganda find it prudent not to make them enforceable rights. Nevertheless, provision of such rights in a non-enforceable form will set vitally important directions for future policy and programmes of government*"

The Commission was mindful of the economic conditions of the country at the time and therefore decided that some 'less serious' rights like the right to food, shelter, among others should wait in the queue. Oloka- Onyango (2017) has noted that such excuses thatallude to the economic status of a country are escapist.[25] Their aim is to simply insulate the State from responsibility and

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21 Report of the Uganda Constitutional Commission, Paras.23.85-23.87.

22 J. Oloka-Onyango Interrogating NGO struggles for economic, social and cultural rights in contemporary UTAKE: A perspective from Uganda. Human Rights & Peace Centre Working Paper Series, No. 4, 2006.

23 Report of the Uganda Constitutional Commission, Para.23.4.

24 Ibid, Para.23 .85-23.86.

25 Oloka Onyango, When Courts Do Politics: Public Interest Litigation in East Africa, 2017, pp.162-163.

accountability.[26] The Commission's excuse that even more developed countries did not have ESCRs as enforceable rights also begs the question of whose interests the Commission represented. Why did they deny the people of Uganda an opportunity to ask their courts to enforce theireconomic, social and cultural rights? After-all, what would it cost to enforce a policy that ensures social parity?[27]

The judiciary quickly became an avenue for many cases especially on questions of Constitutional interpretation but it was mainly concerned with civil and political rights. In fact, the cases on ESCRs have been somewhat accidental[28] and sporadic.[29]The earlier decisions concerned civil-political rights but they always begged for the view of trial or appellate courts on the status of National Objectives. In the first case before the Constitutional Court which concerned a high ranking officer of the Ugandan army and his denied request for retirement from the UPDF, that is, *Tinyefuza v Attorney-General,* [30]Egonda Ntende JCC observed that the National Objectives and Directive Principles of State Policy should guide all organs of the state including the judiciary in the interpretation of the Constitution. The learned Justice however fell short of saying that these objectives and directives are by themselves legally binding.[31]In Zac*hary Olum & Another v Attorney-General,* the court observed that although the National Objectives and Directive Principles of State Policy form an important part of the Constitution and are crucial canons in the interpretation of the Constitution, they are not justiciable.[32]The two decisions increased the uncertainty over the future of rights that were encased in the National Objectives and Directive Principles of State Policy. They restricted National Objectives to mere tools of Constitutional interpretation but with no real efficacy in Constitutional enforcement. While the statements made by both justices in the *Tinyefuza* and *Olum* cases appear attractive on the surface, they simply gave National Objectives no biting legal status, they left them impotent for the purposes of enforcement.

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26 Ibid.

27 Ibid, p.163.

28 Ibid, p.173. ;Cases have been somewhat accidental because some of the earlier views that shaped jurisprudence as we understand it now came from the liberal interpretation of traditional civil and political rights to include some ESCR's. ESCR's were never the intention of the parties as is seen in the *Abuki case*.

29 Ibid.

30 Constitutional Petition No.1 of 1996.

31 Ben Twinomugisha, Fundamentals of Health Law in Uganda, p.28.

32 Constitutional Petition No. 6 of 1999.

The decision of the Constitutional Court in *Salvatori Abuki and Anor v Attorney General*, however demonstrated the creativity with which activist judges can enforce socio-economic rights without necessarily reading from the script of the main body of the Constitution but from its spirit. Justice Egonda-Ntende in that case interpreted the right to life to encompass the right to livelihood. He observed that once a person is banished from his community, he is subjected to homelessness which violates his right to shelter and the right to food, consequently his right to life and livelihood.[33]The *Abuki* decision seemed to have settled the qualms, but we were to learn that in the absence of a clear statement from the judiciary, justiciability of National Objectives and consequently of ESCRs would remain in abeyance. Indeed as Oloka-Onyango notes, the *Abuki* decision dealt with ESCRs obliquely.[34]This approach is similar to that proposed by some that rights that are not expressly provided for in the main body of the Constitution can be read into the same using the open door policy of interpretation that Article 45 proposes.

Article 45 states that, the rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned. However Article 45 has been interpreted to mean that the rights being referred to are those which appear in international instruments which Uganda is a party to.[35]This approach does not resolve the question that surrounds the justiciability of National Objectives. The reason for this is that Article 45 is not new in the Constitution, if the framers intended it to have an effect on National Objectives, they would have stated so. Article 45 indeed exists to bring Uganda into conformity with its international obligations but it does not in our opinion aim at such rights as those which were safely tucked away in the National Objectives in a bid to avoid their enforcement.[36]They aim at such rights which the Commission considered justiciable from the beginning not those which it sought to shield from justiciability. Article 45 does not assist the case for the justiciability of National Objectives in a greater degree.

3.0 History of Article 8A: How Did It Get into The Constitution?

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33 Constitutional Case No.2 of 1997.

34 Oloka, FN 20, p.173.

35 Uganda Law Sciety and Anor v The Attorney General, Constitutional Petitions No.2 and 9 of 2009, Judgment of Twinomujuni JA, p.20.

36 See FN 9 and FN 19.

As earlier pointed out, National Objectives in the 1995 Constitution were meant to be non-justiciable.[37]These principles were to "guide all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society."[38] This was the legal status of the National Objectives,[39] all they could do was to guide in the implementation of government programs. However, the reasoning of the court in *Zachary Olum,* dispelled all ideas of inferring that the term 'guidance' meant justiciability.[40]This situation left the enforcement of ESCRs in doubt.[41]

In 2005, there were amendments to the Constitution. These amendments have been christened as the '*Kisanja Amendments'*[42] since their main objective was to remove Presidential term limits from the Constitution. However,neither the Constitutional Review Commission chaired by Professor Fredrick Ssempebwa nor the Government White Paper had mentioned or discussed any amendments with respect to National Objectives.[43] The origins of Article 8A are traced from theparliamentary debates (Hansard) that were spear-headed by Margaret Zziwa the then Kampala Woman Member of Parliament.[44]It can be argued that Article 8A was an after-thought, serving no particular purpose. It was a camouflage to legitimize amendments that were already unpopular in the court of public opinion. Perhaps this explains why Article 8A has not been taken seriously by the courts or any other organs of state. Article 8A was never on the agendathen and maybe it is not on the agenda now. It is also possible that it was rushed into the Constitution without adequate consultation about its efficacy.[45]

Be that as it may, Article 8A provides thus;

> **8A National Interest**
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> *(1) Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives of state policy.*

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37 Report of the Uganda Constitutional Commission, Supra Note 9.

38 Objective I (i) of the National Objectives and Directive Principles of State Policy.

39 Mbazira, See FN 17, p.18.

40 Constitutional Petition No.6 of 1999, Judgment of Okello, JJA.

41 Oloka, See FN 20, p.14.

42 J.Oloka Onyango, Decentralisation without Human Rights? Local Governance and Access to Justice in Post-Movement Uganda, HURIPEC Working Paper No.12, June 2007, p.15.

43 Oloka, See FN.20, pp.172-173.

44 Ibid 4.

45 There is no record to show that there was even a semblance of consultation of the citizens and other stakeholders prior to including it in the Constitution. In fact, the Ssempebwa Commission which was tasked with the consultative process prior to the 2005 Amendments did not interface with it.

(2) Parliament shall make relevant laws for purposes of giving full effect to clause (1) of this article.

Mbazira (2008) has argued that the full effect of this provision was to make National Objectives and Directive Principles of State Policy justiciableand in fact it did as this provision read all of them into the main body of the Constitution.[46]However, as Twinomugisha (2015) points out, this would be an over-simplification of the issue as the resultant effect of clause (2) of Article 8A would mean that unless Parliament passes a law to give full effect to clause (1), the status of Article 8A remains fairly uncertain.[47]It is not clear what Article 8A (2) means by requiring Parliament to make relevant laws. Does this mean that all laws passed by Parliament must meet the standard of National Objectives and Directive Principles of State Policy?[48] Or would it mean that there must be a specific law that codifies all the aspects in the National Objectives into a single legislation?[49]What is clear is that unless this ambiguity is done away with, there cannot be a concrete understanding of the effect that Article 8A has on the status of National Objectives and Directive Principles of State Policy in Uganda. The test for the legitimacy of any law is whether it meets the Constitutional standard.[50] It would appear to us therefore that every law passed by parliament must be in conformity with the Constitution as a whole and Article 8A in particular. The emphasis of Article 8A is on 'relevant laws' not a single law and therefore the view that all laws must meet this standard is the more liberal and compelling one.

4.0 What Have The Courts Done With Article 8A?

The preceding section discussed what the historical background of Article 8A is and demonstrated that there remains an ambiguity as to what its legal effect is. This ambiguity can in a greater detail be resolved by judicial interpretation. In this section, we analyze some of the cases that the courts have interacted with and how they have dealt with them with respect to Article 8A.

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46 Mbazira, See FN.17, pp.9, 18.

47 Twinomugisha, See FN. 31, p.29.

48 The State of Implementation of Economic, Social and Cultural Rights in Uganda, A Parallel Report Submitted to The 53rd Session of the United Nations Committee on the Occasion of its Consideration of the 1st Periodic Report of Uganda, Prepared by the National Coalition on Economic, Social and Cultural Rights C/O Human Rights Network-Uganda, April 2015,p.1-2.

49 Ibid.

50 Constitution of the Republic of Uganda, 1995, Article 2(2).

The attitude of the courts has been one of caution and avoidance. The courts have shied away from dealing with the question of the enforcement of National Objectives and Directive Principles of State Policy even in the face of Article 8A.

4.1 In *Centre for Health Human Rights and Development and Ors v Attorney General,*[51] the petitioners petitioned the Constitutional Court seeking declarations to the effect that the non-provision of essential maternal health commodities in public health facilities and the unethical conduct and behavior of health workers towards expectant mothers are inconsistent with the Constitution and a violation of their right to health and other related rights namely, women's human rights,[52]right to freedom from torture[53] and the right to life.[54] The issues agreed uponwere many but for this discussion we shall focus on the third issue which was seeking to know whether non-provision of basic maternal health care services in health facilities contravenes Article 8A, NODPSP XIV and XX of the Constitution. At the outset of the petition, the lawyers from the AG's chambers raised a preliminary objection to the effect that the case raised matters that were in the realm of the political question doctrine[55] because the matters that the petitioners were litigating over were in the express purview of the executive and legislature. In essence, the court had no jurisdiction over this matter. The Constitutional Court held thus;

> "*Much as it may be true that government has not allocated enough resources to the health sector and in particular the maternal health care services, this court is ... reluctant to determine the questions raised in this petition. The Executive has the political and legal responsibility to determine, formulate and implement policies ofgovernment, for inter alia, the good governance of Uganda ... This court has no power to determine or enforce its jurisdiction on matters that require analysis of the health sector government policies, make a review of some and let on, their implementation. If this Court determines the issues raised in the petition, it will be*

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51 Constitutional Petition No. 16 of 2011.

52 Article 33 of the Constitution.

53 Article 24 of the Constitution.

54 Article 22 of the Constitution.

According to Black's Law Dictionary, 9th Ed, p.1277, The Political Question Doctrine is a judicial principle that a court should not decide an issue in the discretionary power of the executive or the legislature.; In the case of *Marbury v. Madison 5 U.S. (1 Cr.) 137 (1803),* the US Supreme Court held that the province of the court was solely to decide on the rights of individuals and not to inquire how the Executive, or Executive officers perform duties in which they had discretion and secondly, that questions, which are by their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court.

> *substituting its discretion for that of the Executive granted by law ... From the foregoing, the issues raised by the petitioners concern the matter in which the Executive and the Legislature conduct public business, issues or affairs which is their discretion and not of this court. This court is bound to leave certain constitutional questions of a political nature to the Executive and the Legislature to determine.*"[56]

The Court demonstrated that it was unwilling to take a bold step and declare the constitutionality of the right to health.This decision was not only a threat to the enforcement of ESCRs,[57]it was also an indication that the judiciary was unwilling to move past the cowardice that has characterised it in the face of heavy executive interests.[58]The case also demonstrated that the court was still held back by the vagaries of this history of cowering into submission when the Executive appears before the court instead of allowing history to aid a pragmatic enforcement of ESCRs.[59] The case was appealed to the Supreme Court, Uganda's highest appellate court.[60]

The Supreme Court in dealing with the same matters in *CEHURD and Ors v AG*,[61]expounded on the duty that courts have in protecting human rights of any nature. The court held that the petitioners had raised competent questions for interpretation of the Constitution,[62]that the Constitutional court had the requisite jurisdiction to hear the matters raised in the Petition[63] and should go ahead to decide it on its merits.[64]The court also held that the Political Question Doctrine had limited application in Uganda,[65]which was very important because it deprived courts of the convenient excuse not to hear matters that were purportedly within the "preserve of the executive and the legislature." In essence, the court was saying that such an excuse would not hold forte in a constitutional democracy like Uganda. Chief Justice Bart Katureebe also unequivocally noted that the Constitutional Court could determine whether implementation of programs and policies was consistent with National Objectives and Directive Principles of State

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56 Cehurd and others v AG, p.25.
57 Ben Twinomugisha, Supra, p.37.
58 This cowardice can be traced from as early as 1966 in the infamous case of *Ex-Parte Matovu;* this subject is sufficiently dealt with by Prof.J.Oloka Onyango in his Inaugural Lecture, "Ghosts and the Law."
59 Maale Mabirizi and Ors v The Attorney General, Consolidated Constitutional Appeals No. 2,3 and 4 of 2019, Judgment of Stella Arach-Amoko,p.49, Para20.
60 Article 132(1) of the Constitution of the Republic of Uganda.
61 Constitutional Appeal No. 1 of 2013.
62 Ibid, Judgment of Esther Kisaakye, JSC, P.12.
63 Constitutional Petition No. 16 of 2011.
64 Ibid, pp.27-32; Judgment of Katureebe, CJ, pp1-2.
65 Ibid, Katureebe, CJ, pp.4-29.

Policy.[66]He also noted that an interpretation of Article 8A of the Constitution had to be made by the Constitutional Court.[67] In his own words, the Chief Justice said;

> "*The court would have to interpret what amounts to "all practical measures to ensure the provision of basic medical services." The court should also be guided by* ***Objective I*** *which spells out that "the objectives and principles shall guide all organs and agencies of the State, all citizens, organizations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society." (Emphasis added) The court should, in my view, also have to consider* ***Article 8A*** *about the National interest which states that:* ***'Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.***"

One can indeed understand the sentiments of optimism that this decision aroused. These words by the highest authority in the judiciary were putting all doubts to rest about what courts can and should do with National Objectives and Directive Principles of State Policy; courts should enforce them because they are justiciable. However, one wonders why the Supreme Court did not go ahead and unequivocally make that determination without having to send it back to the Constitutional Court. The Supreme Court was seized with jurisdiction to do such a thing. It is important to note that a lot has been written about the jurisdiction of the Constitutional Court and the High Court but very little has been said about the nature of the appellate jurisdiction of the Supreme Court in Constitutional appeals. This is part of what exacerbates the situation. There are arguments against the monopoly of Constitutional interpretation that the Constitutional Court enjoys and that the framers of the Constitution should have given this jurisdiction to other courts to allow them to freely engage with the Constitution.[68] In other words, other courts should be able to ably determine whether an act or omission by any person or authority is in consonance with the Constitution. It should not be left to the Constitutional Court alone. In fact, the Constitutional Commission noted that there were many fears surrounding this sort of monopolisation of Constitutional interpretation.[69]The solution to these fears of monopolisation were to be resolved by creating an avenue for appeals on matters of constitutional

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66 Ibid, p.17.
67 Ibid, P.18.
68 Mbazira, See FN.17, p.46.
69 Report of the Uganda Constitutional Commission, See FN 9, Para.17.90.

interpretation.[70] This is the genesis of the appellate jurisdiction of the Supreme Court in matters of that taste. The jurisdiction of the Supreme Court in Article 132(3) of the Constitution is to the effect that any party aggrieved by a decision of the Court of Appeal sitting as a Constitutional Court is entitled to appeal to the Supreme Court against the decision. That jurisdiction is premised on the need for promptness in dealing with the matter.[71]The answer in knowing what the Supreme Court can and cannot do lies in the understanding of the word "decision" as it appears in Article 132(3). This is important because it would be helpful to know whether the Supreme Court as in *Cehurd* can restrict itself to decisions on the preliminary objections since that was the 'decision' of the Constitutional Court or whether the Supreme Court can liberally probe into the decision behind that decision and then deal with that which the Constitutional Court was reluctant to deal with. The latter seems to be the approach that the Court took in *Paul Kawanga Ssemogerere, Zachary Olum and Anor v AttorneyGeneral,* [72]wherethe Constitutional Court was faulted for misdirecting itself to the effect that it would have no jurisdiction to inquire into whether the amending sections, if they properly became part of the constitution, were unconstitutional. The Supreme Court went ahead and declared the Constitutional (Amendment) Act unconstitutional without having to send it back to the trial court for determination.[73]This approach would mean that the Court would be in the unenviable or enviable—depending on which side of the fence you sat— position of determining a matter which the Constitutional Court sought to escape under the guise of technicalities and in many ways that feeds into Article 126(2)(e); substance not form. The point we are making is, that if faced with an opportunity, the Supreme Court should never defer a matter of Constitutional importance to a subordinate Court if it can offer an opinion on the same, even if that opinion is in obiter.

There were many other ways that the Supreme Court could have gone around it without necessarily offending the sacred territory of jurisdiction. In such a case, it could even have given the Constitutional Court a definite timeline within which to determine the matter. While there may be questions of judicial independence that may arise, the Constitution already considers

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70 Ibid, Para.17.92.
71 Ibid, Para.17.92(c).
72 Constitutional Appeal No.1 of 2002.
73 Ibid, Judgment of Kanyeihamba, JSC.

Constitutional petitions such as Petition *16* with a unique urgency.[74]It is the business of the Supreme Court to ensure that all subordinate courts are properly directed in matters of law so much so that even where the Supreme Court has been relying on an erroneous precedent, it can depart from it when it seems right to do so and the subordinate courts will be bound by such precedent.[75]The *Cehurd* appeal was an even more interesting opportunity because the Chief Justice was a member of the panel and as such could issue such orders as to the specific timeline within which to hear the petition.[76]

Instead, the situation became more appalling because ever since the Supreme Court laid down this decision in 2015, the Constitutional Court has never delivered a judgment on the merits of Constitutional Petition.In fact, the case only came up for mention recently, almost 8 years since its first filing.[77] Is this not a denial of justice to the litigants in that case?[78]The two CEHURD cases in the highest courts in the land were an opportunity to unequivocally break the silence on Article 8A's import and they did not. The courts chose the exhausting path of exclusionary jurisdiction than the liberal path of complimentary jurisdiction. As it stands, in *Petition 16,* the anxiety over the merit of its merits continues to grow.

The *Age Limit cases*[79] have also made an attempt at discussing the import of Article 8A in the Constitution. The Constitutional Court decision was laden with an extensive discussion on the place of National Objectives and Directive Principles of State Policy. Cheborion,JCC observed that National Objectives read together with Article 8A form part of the basic structure of the 1995 Constitution of the Republic of Uganda.[80]In very emphatic terms, Justice Elizabeth Musoke observes that "pursuant to Article 8A, the Objective Principles are now justiciable."[81]The

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74 Article 137(7) permits the Court to even suspend any other matters before it to dispose of a Constitutional Petition.

75 The Constitution of the Republic of Uganda, 1995. Article 132(4).

76 Ibid, Article 133(1) (b).

77 On 2nd May 2019, the Constitutional Petition came up for mention, 8 years since it was first filed. Accessible at: https://www.cehurd.co.org.

78 Under Article 126(2) (b) of the Constitution, one of the principles a court of judicature should be alive to when dealing with any case is that justice must not be delayed. This is in consonance with the appellate jurisdiction that the framers of the Constitution the intended for the Supreme Court in cases requiring Constitutional interpretation.

79 Constitutional Petitions Nos. 49 of 2017, 3 Of 2018, 5 Of 2018, 10 Of 2018, And 13 Of 2018 And Constitutional Appeals No.2, 3 And 4 Of 2018.

80 See FN 79, Judgment of Cheborion- Barishaki, para.15, p. 764.

81 See FN 79, Judgment of Elizabeth Musoke, JCC, Para.5, p.649; We should note in passing, that it was in Justice Elizabeth Musoke's court that the Political Question Doctrine ghost resurrected to deny litigants in a health-related case a fair day in court. In *Institute of Public Policy Research (Uganda) v The Attorney General*, the applicant appeared before the court to apply for an injunction against the government. This

Supreme Court in the *Age Limit Case* did not depart from the reasoning of the Justices of the Constitutional Court with respect to the place of National Objectives and therefore, there is cause for optimism. The Supreme Court posited that the National Objectives and Directive Principles of State Policy are part of the preamble of the Constitution which postulates that there was need to end a history of exploitation and injustice.[82]The National Objectives are part of the basic structure of the Constitution.[83]In essence, they form an important part of the 1995 Constitution and therefore should not be treated with disdain by the courts or anyone for that matter.[84]The Supreme Court was reading from the same script as the Constitutional Court in that regard and the sum of the two courts' conclusions is that Article 8A strengthened the position of National Objectives and Directive Principles of State Policy. Article 8A in effect clothed with might what the Constitutional Commission had left in weakness, the National Objectives do not just have a role to guide in interpretation (which seems to be the compromise, Okello, JSC adopted in *Zachary Olum*,[85]) they have a central role in determining whether governance in Uganda is based on national interest and common good by virtue of Article 8A. The Courts are saying, that before Article 8A, these National Objectives had a fringe role that could potentially be ignored, however with Article 8A in the equation the status and force with which National Objectives speak has been fundamentally amplified-they are justiciable.[86]

Two things need to be noted though, the first is that application of Article 8A in the Age Limit cases was with respect to civil and political rights of participation in governance. These are already protected in the main body of the Constitution.[87]So there remains a fair share of uncertainty as to whether the courts will be as emphatic when it comes to an outright economic, social or cultural right where the same Article 8A is the saving provision for their enforcement.[88]The reasoning is that the very things that forced the Constitutional Commission to

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was the Brain-Drain case where the Ministry of Foreign Affairs intended to export Ugandan doctors and nurses to Trinidad and Tobago. On that occasion, Justice Elizabeth Musoke relied on the PQD and the litigants were stopped in their tracks. Even then, Article 8A was operational, did she ignore it, was she unaware or was it convenient to ignore it then? The past may not be past.

82 Constitutional Appeals Nos. 2, 3 and 4 of 2018, Judgment of Ekirikubinza, JSC, p.21.

83 Ibid, p.21.

84 Ibid.

85 See FN 32.

86 See FN 81.

87 Article 38 of the Constitution.

88 Part of this uncertainty is deduced from the inconsistencies which we highlighted in passing in FN 81.

veil majority of the ESCRs in the National Objectives rendering them unjusticiable are still existent, the resources are still meagre and the political players are still non-committal.[89]

The second thing is one highlighted above, is the judiciary sufficiently armed with courage to enforce ESCRs with the aid of Article 8A even when it is not convenient? Is there a willingness of the Courts to be more liberal and non-conformist? These questions will hover over the judiciary at least until we see the outcome of *Petition 16*.

5.0 CONCLUSION·

We have traced the track-record of judicial interaction with Economic, Social and Cultural Rights in Uganda even when they are not expressly provided for in the main body of the Constitution. We have also shown how Courts dealt with cases of this nature before the enactment of Article 8A that read National Objectives and Directive Principles of State Policy into the Constitution. We then traced the history of Article 8A and how it found itself in the Constitution and we made the point that perhaps because of its belated addition, it was not initially taken seriously by the courts. We then showed how 10 years after its inclusion in the Constitution, the courts began to recognize that Article 8A had a cutting edge and now has attained that coveted status of being justiciable. We conclude by highlighting, that attaining that tag in pronouncement may not in itself make it obvious that the courts will consider National Objectives justiciable in all circumstances. In fact, it is possible that the courts will shy away from actually enforcing Article 8A strictly when it is in favour of an economic, social or cultural right, but we will count our blessings.

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[89] This attitude is visible in the way government actors treat judicial pronouncements with contempt as has been seen in the manner in which the government refused to comply with the orders of the Supreme Court in Amama Mbabazi v Y.K. Museveni and Ors, Presidential Election Petition No.1 of 2016. This is now a subject of court process in a case that has been filed by Prof. Fredrick Ssempebwa and Prof. Fredrick Jjuko together with Kituo Cha Katiba against the Attorney General in the Supreme Court.

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