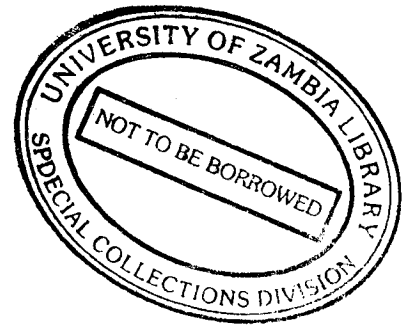


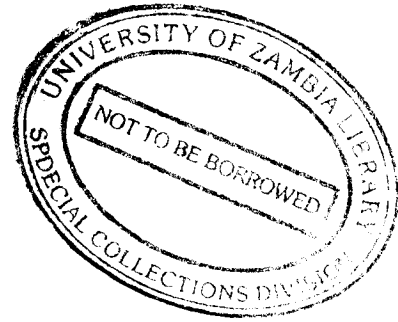
**ASPECTS OF ENVIRONMENTAL HEALTH IN ZAMBIA:
A CASE STUDY OF WATER AND SANITATION AS HUMAN RIGHTS**



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DECLARATION

I **GINA NYAMPACHILA NYALUGWE COMPUTER NUMBER 99547261** **HEREBY** declare that the contents of this Directed Research Paper are entirely based on my own findings and that I have not in any manner used any person's work without acknowledging the same to be so.

I therefore bear the absolute responsibility for the contents, errors, defects and any omission herein.

Date.....13/1/06.....

Signature.....*Gina*.....

DEDICATION

This work is dedicated to memory of my beloved parents Mr Katumba Crispin Nyalugwe and Mrs Angela Mbewe Nyalugwe. They birthed and nurtured me into the virtuous woman I am.

Fondly missed by your kasuli but never forgotten.

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Goodwell Mateyo, my friend and brother. Thanx for the many comfortable hours that graced me in your company! *Surtout pour m'aider a realise qu'on ne nait pas femme mais on le devient!* Be remarkable, be you.

PREFACE

Environmental Law comprises a varying range of rules. These rules are premised on protecting various components of the environment and provide a blue-print under which liability for environmental harm can arise.

Attempts have been made to harmonize laws pertaining to environmental degradation for the simple reason that environmental matters transcend boundaries. These laws in question are founded on the conviction that there is need for legal restraints on human behaviour vis- a- vis the environment. The laws in question are preventive in nature owing to the duty imposed upon states to guard against environmental degradation.

Chapter One outlines the basis of environmental law. It discusses the development of environmental law at a global, regional and national level. The chapter also highlights the major environmental problems in the three stated areas. One major problem is identified as poor provision of water and sanitation to the citizens. This problem is aggravated by the fact that environmental rights of which water and sanitation are part, are not enshrined in the Constitution. Further that Economic Social and Cultural Rights are not guaranteed in an explicit fashion.

Chapter two discusses the current status of water and sanitation in Zambia. It also highlights the pertinent problems attendant by inadequate water and sanitation systems.

The chapter further lays out and discusses the current legal framework governing the same.

Chapter Three firstly provides a discussion of Human Rights. Secondly is a legal analysis of whether a right to water is present in international legal instruments. Thirdly this chapter outlines the relevance of linking human rights and water. Fourthly is an outline of the current state of the Economic Social and Cultural Rights under the Zambian Constitution, with specific emphasis on the Bill of Rights and The Directive Principles of State Policy. A conclusion is in Chapter Four with possible recommendations to alleviate the problems outlined in the preceding chapters.

ABSTRACT

Provision of clean water and access to healthy sanitary systems are critical aspects of environmental health. In view of the Current Constitution of Zambia it is clear that these services are viewed as mere policy directives. However Economic Social and Cultural Rights should not be viewed as mere policy directives. It is a truism to note that they are human rights. Therefore, the extent of their efficacy can only be ascertained when the rights in question are enshrined in the Constitution in an explicit manner. This would mean that Government would be accountable to the citizens in a positive manner. It will be obliged to implement services that will enable the citizens to access clean water and sanitary systems at an affordable price and without any hinderances. It follows therefore that the current absence of environmental rights in the Constitution and non-enforceable character of Economic Social and Cultural Rights, renders their realization impracticable

In view of the fore-going, it is clear that the relevance of the rights contained in the Directive Principles of State Policy leaves much to be desired. It is hoped that Government would change its stance on inclusion of Economic Social and Cultural Rights in The Constitution by allowing for a Referendum Process to facilitate the amendment of the Bill of Rights. One of the basic values of all free and open societies is the recognition and protection of citizens' human rights. Provision of water and sanitation and access thereto are critical aspects of the citizens' health and well being. These will be far from attainable if they are not regarded as human rights.

CHAPTER ONE

1.0 INTRODUCTION

It has been thirty years since the emergence of several environmental campaigns. These have consequently formed a coherent system of environmental Law. The body of law in question comprises a varying range of rules. These rules are premised on protecting various components of the environment. Furthermore, they provide a blue print under which liability for environmental harm can arise. This includes any matters incidental there-to.

2.0 GENERAL INTERNATIONAL ENVIRONMENTAL LAW

International Law is that body of rules that governs the relationship between or among states. The rules in question which states feel bound to observe.¹ Therefore, it follows that International Environmental Law is composed of International Public Law Rules, tending to safeguard the essential components of the biosphere.²

The environment is whatever encompasses the external and internal conditions affecting the existence, growth and welfare of organisms.³ The environment is thus the inter active totality comprising individual species and organisms and the human habitat and infrastructure.⁴

¹ J.G Starke Introduction to International Law, 10th edition, Butterworths, London, 1984, P.3

² A.C Kiss, Survey Of Current Developments In International Environmental Law, Newyork Publishers, Washington, 1976, P.14

³ Ibid

⁴ Ibid

The growing interest for environmental protection is justified. Human existence largely depends on the environment.⁵ There is a nexus between environmental protection and the concept of sustainable development. The latter is development that meets the needs of the present without compromising the ability of the future generations; to meet their own needs.⁶ Natural resources are the basis of most developmental processes. Therefore, there is need to effect measures ensuring that the natural environment in which they are found is sustained. The concept of sustainability has two limbs. The first refers to the proper management of renewable natural resources. That is to say those natural resources that have the property of growth and regeneration.⁷ Secondly are those resources that are intrinsically non-renewable, for example minerals. Sustainability in this instance entails applying certain conservation principles that would make them renewable to some extent, for instance recycling.⁸

2.0 AWAKENING OF INTEREST IN THE ENVIRONMENT.

Several factors account for the international concern in environmental issues. Chief amongst these factors is the extra-ordinary scientific and technological advancements of the last four decades. Although economic growth has been boosted, these advancements have posed a great threat to the quality of human life.

⁵ L.K Caldwell, International Environmental Policy, 3rd edition, 1989, Butterworths, London, P.32.

⁶ Op.cit P.10

⁷ Ibid

⁸ Ibid

Another factor is the emergence of ecological movements. These have identified the major environmental problems which include:

- (1) Genetic Loss (Threatened extinction of presently endangered species.)
- (2) Disruption of the ecosystems.
- (3) Over-population by human beings is a critical factor in most environmental issues and requiring early corrective action; to counter escalating and economical impoverishment.
- (4) Deforestation and over-grazing.
- (5) Contamination (pollution) of the air, water and soil.
- (6) Degrading and depletion of fresh water.

Other factors include:

- (7) Sustainable assumptions that could lead to ecological and economical collapse, persistence of ideologies inconsistent with life on earth;
- (8) Deterioration and erosion of top-soil (especially disastrous in the tropical countries);
- (9) Climate change and deterioration of atmospheric quality caused by global warming , disruption of stratospheric ozone layer;
- (10) Sources and uses of energy-disruption of biochemical cycles and
- (11) Maintenance of the built environment and loss of cultural heritage in arts and architecture.⁹

⁹ Ibid

The above-mentioned processes , developments and conditions affect relationships among nations. Certain problems affect all nations, whereas others may have a regional significance in their primary effects.

2.2 THE NEED FOR AN INTERNATIONAL APPROACH.

With the passage of time, it dawned upon many a nation that issues pertaining to global environmental protection and resource management, required an international approach. This realization is accounted for along three broad fronts.¹⁰ The first is that the environment knows no frontier. Environmental components such as air, the oceans, rivers or wildlife cannot be compartmentalized according to existing borders. Hence, pollution and other genres of environmental harm are propagated, notwithstanding state sovereignty and its limits.¹¹ It is widely accepted that pollution not only affects border areas but also causes serious problems at long distances. A classical example is the Dutch Complaint. They contend that the pollution of the Rhine comes to their country not only from neighbouring ¹² Germany, but also from distant France and Switzerland.

Secondly, the interactions amongst all the components of the natural environment are so numerous and important that they cannot be isolated one from another.¹³ It has been observed that a considerable ratio of the world's polluting substances and waste go to the sea. Waters are not only essential for the food-supply of mankind, but also for the regeneration of air and the maintenance of climatic balances. Thus, the influence of a

¹⁰ Ibid

¹¹ Ibid

¹² Ibid

¹³ Ibid

given nuisance can affect indirectly, other various components of the global environment.¹⁴

Thirdly, economic considerations demand international co-operation to effect the actual implementation of measures tending to protect the environment.¹⁵ It has been argued that a government which adopts measures tending to protect the environment on the territory under its jurisdiction, may in so doing impose extra charges on its economy. For example, the cost of anti-pollution measures would necessarily be incorporated in the price of the country's products. This may result in a country risking mediocrity in international trade. Its interests will then be to join in the fight for environmental pollution by a higher tariff on importation. The reason being that they are contracting parties to international treaties prohibiting any increase of tariffs, or even abolishing tariffs on importation of goods. The ultimate solution will then be the harmonization of legislation concerning protection of the environment.¹⁶

The universal concern for environmental safeguard has given rise to the common concern of anthropocentric principle.¹⁷ The principle recognizes the fact that though the global atmosphere, biological diversity and tropical forests are not the common property of mankind. Global unity and co-operation is inevitable.¹⁸ The incorporation of the principle in recent conventions implies inter alia that the areas previously mentioned are

¹⁴ United Nations Document, International Law For Global Environmental Co-operation, 12th January, 1994, P.11

¹⁵ Ibid

¹⁶ Ibid

¹⁷ United Nations Charter, Article 2.(7).

¹⁸ Oscar Schachter, 'The Emergence Of An International Environmental Law;' Journal Of International Affairs. Volume 44 No. 2. P.456.

the legitimate concern of international action. The matter is therefore no longer under the exclusive domain of domestic jurisdiction of states.¹⁹

2.3 FORMATION OF INTERNATIONAL ENVIRONMENTAL LAW

Having identified the threat posed to the environment and the need for an international approach, it becomes evident that international legal restraints and obligations were necessary to cope with environmental damage that transcended national boundaries.²⁰

By and large, governments have responded through multinational and bilateral agreements. These agreements are tailored for particular scenarios. General principles of international Law have also emerged in international forums, through lawyer's commentaries, judicial and arbitral cases. Much of the verve for international legal restraints hails from outside national governments, that is to say scientific communities, the concerned public and international organizations.²¹

As earlier outlined, the necessity for international action on environmental problems was brought to the fore by scientists and inter-governmental meetings. Notably, the United Nations Conference on the Human Environment held in Stockholm in 1972.

¹⁹ Ibid

²⁰ Op.cit., P.458.

²¹ Stockholm Declaration On Human Environment, United Nations Document/A/CONF48/14(1972), principle 21.

(The Stockholm Conference) The Conference recognised the environment as a holistic entity, that required protection by international law and organizations.²² The declaration adopted unanimously in its proclamation of Agenda 21 the responsibility of all states to:

“Ensure that the activities within their jurisdiction and control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction”

However, Principle 21 alone was inadequate to curb the threat of environmental degradation. The Declaration itself included Principle 22 which called on states to :

“Develop further the international law regarding liability and compensation to victims of pollution and other environmental damage caused by activities within the jurisdiction, or control of such states to areas beyond their jurisdiction.”²³

These principles are often cited as the starting point of international environmental law. Although the term Environmental Law only came into usage after the Stockholm Conference, International Law took cognizance of trans-border environmental injury in some cases long before the Stockholm Declaration. For example, oil spills on the high seas, excessive fishing, trans-frontier fumes and the transport of dangerous substances; required legal answers before answers before International Law was recognized as such.²⁴

²² Ibid

²³ Principle 22, Stockholm Declaration.

²⁴ Schatcher, Op.cit., P. 459.

In the two decades since the Stockholm Conference, leading unofficial bodies of international lawyers²⁵ have adopted resolutions or other texts. These are reflective of the general principle that “a state is obliged to take such measures as may be practical to ensure that the activities within its jurisdiction do not inflict significant injury to the areas beyond national jurisdiction.”²⁶

In 1992, The United Nations Conference On The Environment and Development, alias the Earth Summit was held in Rio De Janerio, Brazil. More than 178 nations adopted Agenda 21 , a Programme Of Action for Sustainable Development, The Rio Declaration on Environment and Development, as well as the Statement Of Principles for the Sustainable Management Of Forests. Underlying the Earth Summit agreements is the idea that nations, through a global partnership for sustainable development can better manage and protect the ecosystem and bring about a more prosperous future for all humanity.²⁷

2.4 DEFINING ENVIRONMENTAL HARM AND RISK.

Liability in environmental law is centered around the concepts of environmental harm and risk. Owing to the diversity of components of the environment, there is no single general definition of environmental harm. However, it is implicit in the basic principles of the Stockholm Declaration, as well as in the proposals for international action.

For an act to amount to environmental harm, at least four conditions are necessary:

²⁵ I.C. J Reports (1949) PP. 4,22.

²⁶ Ibid

²⁷ Ibid

- a) The harm must result from human activity. This however does not extend to detrimental effects caused by environmental factors that cannot be reasonably said to have been caused by human conduct;
- b) The harm must result from a physical consequence of the causal human activity;
- c) The physical effects must cross national boundaries.
- d) The harm must be significant or substantial.²⁸

Environmental harm is considered to be significant if it is greater than the mere nuisance or insignificant harm, which is normally tolerated. However, the level of tolerance may not be the same in all states.²⁹

The concept of environmental harm carries with it the related concept of environmental risk. The latter has been defined as a concept which takes into account the uncertainties of future events as well as variations in severity of effects.³⁰

Underlying the notion of environmental risk is the fact that regulation should be directed towards action to minimize risk before harm occurs.³¹

Risk may be assessed through scientific and technical research; or by listing a body of activities and substances that present a higher than normal probability of causing trans-boundary injury.³²

²⁸ Ibid

²⁹ Schatcher , Op.cit , P. 460

³⁰ Ibid

³¹ Ibid

3.0 REGIONAL ENVIRONMENTAL LAW : SOUTHERN AFRICA.

World wide , concern for the protection of the environment has led to the formation of regional groupings aimed at addressing the critical environmental issues affecting their respective regions. This part will deal with environmental concerns as addressed by the Southern African Development Community (S.A.D.C).

Regional environmental law concerns itself with the arrangements regulating environmental law policy within a particular region; as opposed to global arrangements. The interest in conserving the environment in the Southern African Region came about in the early 1980's, via member states of S.A.D.C. and the international community.³³ After decades of sustainable development largely driven by increasing population, industrialisation and urbanization resulting in environmental degradation. The lives and livelihoods of many people and communities throughout the S.A.D.C. region³⁴ were and still are threatened. This trend resulted in many of the poor becoming poorer and as the number of poor people grew larger, greater pressures were put on the vulnerable soil, forests, water and wildlife resources.³⁵

The previously stated brought about the formation of the Environmental land Management Sector (ELMS), by S.A.D.C. in the mid 1980's. ELMS was charged with

³² Ibid

³³ Schatcher, op.cit, P. 461

³⁴ Agenda 21; Program Of Action For Sustainable Development, Rio- Declaration On Environment and Development, Rio de Janeiro, 1992, 3-4 June.

³⁵ Ibid

the overall responsibility for environmental co-ordination in the Southern African Region.³⁶ The programme is still operational under the present day S.A.D.C.

Most regional environmental policies are reflected in conventions. The S.A.D.C. has over forty conventions.⁽⁴⁰⁾ Conventions on the protection of the environment.

Rules regarding liability for environmental harm caused by a defaulting nation are similar to those applicable under general international environmental law. Procedure for conflict resolution is reflected in the various conventions.

State parties to a dispute are required firstly to try and resolve the matter amicably, failure to which the matter can be brought before the S.A.D.C Court of Justice. If no solution is found, the matter then referred to the International Court of Justice, whose decision is final.

S.A.D.C's commitment to protect the environment is evident. In its policy goals, the issue of strengthening International Laws on the environment is addressed.³⁷ An effective legal and regulatory framework is also provided for by :

- a) Reviewing and strengthening the effectiveness of environmental laws and regulations;
- b) Establishing equal access to legal redress and remedies for environmental harm;

³⁶ Idem. P. 466.

³⁷ Ibid

- c) Ensuring equal access to legal redress and remedies for environmental harm;
- d) Improving industrial capacity for the monitoring and enforcement of compliance;
- e) Establishing regional training centers and databases on environmental law.³⁸

The following have been identified as the key environmental issues in the S.A.D.C :

1. Population growth pressures on the resource base
2. Land degradation.
3. Soil erosion.
4. Water and air pollution, especially from agro-chemicals.
5. Deforestation.
6. Declining biodiversity.³⁹

Since environmental law is a relatively novel branch of law, rules regarding global and national environment are in exhaustive. There yet remains much to be done in order to create a sound legal framework. Therefore dynamism and flexibility are to be exercised to meet the ever rising challenges of environmental degradation. For nations with a written Constitution like Zambia, this is best attainable by the entrenchment of environmental laws in the constitution as regards citizen's rights.

³⁸ Ibid

³⁹ Goal 39, SADC Policy Goals.

3.1 NATIONAL ENVIRONMENTAL LAW : ZAMBIA

Recognition of protection, preservation and improvement of the environment has been made by many nations, Zambia inclusive.⁴⁰

Attempts to safeguard the environment are traceable to the year 1980, when the International Union For Conservation Of Nature and National Resources.(I.U.C.N) was commissioned. The reason behind its formation was to prepare a world conservation strategy in response to escalating global environmental problems.⁴¹ Under the aegis of Zambia's first republican president, Dr. K. D. Kaunda; an initiative was taken to prepare a national strategy for Zambia.⁴² Accordingly, the National Conservation Strategy for Zambia was adopted in 1985 via the Ministry of Lands and Natural Resources.⁴³ The strategy in question included a wide scope of policies, plans, organization and action for the better management of Zambia's vast but fragile Natural Resources.⁴⁴

Some of the achievements of the National Conservation Strategy include setting up the institutional and legal frameworks, the establishment of the Environmental and Pollution Control Act, no. 12 Of 1990 and the Environmental Council Of Zambia.

⁴⁰ S.A.D.C. Policy and Strategy For Environment and Sustainable Development, 1996, P.3

⁴¹ Ibid

⁴² State Of The Environment Report In Zambia, 1994, p.27.

⁴³ Ibid

⁴⁴ Ibid

Unfortunately, the National Conservation Strategy fell short of a mechanism to translate much of the policy guideline into firm and implementable actions as regards the identified environmental concerns.⁴⁵

Due to the massive changes in macro-economic policies and structures in Zambia since 1985, naturally corresponding changes in environmental policies became inevitable.

With the advent of institutions such as the Ministry Of Environment, it became necessary to review the environmental policy. These events led to the formation of the National Environmental Action Plan (N.E.A.P) of 1994. The N.E.A.P as identified key environmental issues, analysed their underlying causes and recommended actions and strategies to resolve them. Furthermore, it recommends the institutional framework, prioritises the actions within a stipulated time for implementation.

The N.E.A.P carries out its objectives through the Environment Support Programme. (E S P), which has been described as a mechanism of N.E.A.P, through which the latters policy statements and recommendations are translated into bankable projects for program implementation.⁴⁶

As a member of S.A.D.C , Zambia has also intergrated S.A.D.C policies on the protection of the environment through the conventions it is party to.

⁴⁵ Ibid

⁴⁶ Concept Paper On ESP Of NEAP, P.2

Several rules of a varying nature vis-à-vis environmental protection are constituted in thirty-two (32) different pieces of legislation. The main governing piece of legislation is the Environmental Protection and Pollution Control Act no.12 Of 1990. Liability for environmental harm is determined by the various pieces of legislation.

Five major environmental problems in Zambia have been identified. These are: Deforestation, water and soil pollution, soil degradation, wildlife depletion and desertification.

Currently, the most pertinent environmental problem in Zambia and one that requires immediate action is that of access by the citizens to adequate and clean water supply. Water Pollution is cited as one of the critical environmental problems in Zambia.

However, environmental problems have two limbs to them. The first of which is the actual physical problem as in water pollution. Second is the question of policy implementation. Failure by stakeholders, chief amongst who is the government to realize that the citizenry have a right to a healthy environment. Presently, the Supreme Law of the Land does not expressly guarantee the citizen's rights to social amenities. This factor has negatively impacted on the access to clean water and sanitary services. Owing to the fact that water is life; and any contamination poses a serious health threat to the lives of the citizens', the remaining of this dissertation will discuss in detail the problems of water and sanitation. In addition, relevant legislation will be reviewed.

CHAPTER TWO.

1.0 WATER AND SANITATION.

In the past century, the world's population tripled while global demand for water has increased six-fold.⁴⁷ Today, more than a billion people lack safe drinking water and almost two and a half billion live without access to sanitation systems.⁴⁸ An estimated 14 to 30 thousand people, mostly young and elderly, die everyday from avoidable water-related diseases.⁴⁹ If the current trends persist, by 2025 two-thirds of the world's population will be living with serious water shortages or almost no water at all.⁵⁰ The availability of adequate water supply is crucial to every aspect of human life; a water crisis would have adverse impacts on health and welfare, the environment and economics world-wide.

Therefore, the availability of clean, fresh water is one of the most important issues facing humanity today. As growing demands outstrip supplies and pollution continues to contaminate rivers, lakes and streams; the link between social well-being and environmental health will become increasingly important. Consequently, securing social well-being without acknowledging the environmental realities will untimely fail.

⁴⁷ UNFPA, Population Issues (1999) "Population and Sustainable Development", at www.unfpa.org/modules/6billion/populationissues/development.htm

⁴⁸ UNDP, Millenium DevelopmentGoals, at <http://www.undp.org/mdg/>

⁴⁹ UN Press Release, Water Year 2003: International Year Aims to Galvanize Action on Critical Water Problems. Published by the United Nations Department of Public Information.DPI/2293A December 2002.

⁵⁰ UNESCO Courier, February 1999.

In view of the above-mentioned, it is notable that Zambia is endowed with sufficient water resources, to meet the present and foreseeable future demand of water. Unless these water resources are utilized in a sustainable manner, it will be difficult to ensure their availability as regards quality and quantity.⁵¹

There is an inextricable link between water supply and sanitation. The latter term is the process of collection, treatment and disposal of human excretion and domestic waste, in a manner that is affordable and sustainable.

Currently⁵², Zambia has over 105 water schemes and 35 sewer systems. Of the latter only 9 adequately treat the sewerage load. A total of 900 residents out of Lusaka's population being 1.2 million do not have access to sewers. This situation is prone to a high rate of infections. In addition, although 75% of water supplied by local and utility companies is treated, the majority of Zambians drink untreated water.⁵³

Implicit in the fore-going is the notion that the majority of Lusaka residents and Zambia as a whole are yet to have access to healthy water and sanitary systems.

It follows therefore that in Lusaka City, a major contributing factor to the dismal water and sanitary system supply, is that of solid waste. Solid waste is “garbage, refuse, sludge and other discarded substances resulting from industrial and commercial operations, and from domestic and community activities.

⁵¹ The Environmental Council Of Zambia, State Of The Environment Report 2000.

⁵² Ibid

⁵³ Environmental Protection And Pollution Control Act No. 12 Of 1990. Section 47.

In addition to being the capital city of Zambia, Lusaka is also the fastest growing City in the Country with a growth rate of 6.2% annually. This increase in population is best illustrated by the formation and expansion of numerous illegal or un-planned settlements. This has resulted in the uncontrollable accumulation of solid waste.⁵⁴

Problems associated with solid waste are three-fold. Solid waste has an impact on ground water. It is used as a source of drinking water. Therefore, there is a great potential of contamination. Secondly, it poses a health hazard as infections or human diseases thrive in such an environment. Lastly, solid waste has a negative aesthetic effect. One can therefore not appreciate the beauty of a city's infrastructure.

The preceding problems are concretized by the fact that the citizens are ignorant of their rights vis-à-vis the environment. The general public do not realize the importance of maintaining a clean environment. Furthermore, they do not realize the consequences of not having one. The environmental laws notwithstanding.

2.0 LEGAL FRAMEWORK.

2.1 THE ENVIRONMENTAL PROTECTION AND POLLUTION CONTROL ACT, 1990.

This is the principle piece of legislation that provides for the protection of the environment. The Act provides for the protection of the environment and the control of pollution. It also establishes the Environmental Council of Zambia, prescribes the functions and powers of the council and any matters incidental to the fore-going.

⁵⁴ The State Of The Environment Report, 2000. P116

The duty of the Environmental Council Of Zambia as postulated in Section 6 (1) of the Act is:

“To do all things as are necessary to protect the environment and to control pollution, so as to provide for the health and welfare of persons, plants, animals and the environment, subject to the Act.”

Solid waste is dealt with under Part vi of the Act. The Council has supervisory power over district councils. To this effect, it can give specific or general directions to district councils regarding their functions relating to the collection and disposal of waste operations⁵⁵The Act also makes some prohibitions on persons against discharging waste so as to cause pollution in the environment⁵⁶ Furthermore, through the powers conferred upon it in sections fifty five (55) and ninety six (96), the Council has formulated regulations that deal with different aspects of solid waste management. These include inter alia:

a. The Water Pollution Regulations.

These address issues relating to effluent and waste water discharges. They specifically provide that sewage and other effluents from any industry or trade should not be discharged into the aquatic environment, without a valid licence from the same must be done in conformity with the standards laid down in the regulations discussed above.⁵⁷

⁵⁵ Section 48 Of CHAPTER 204 OF THE LAWS OF ZAMBIA.

⁵⁶ Section 50 Ibid.

⁵⁷ Statutory Instrument No. 73, 1993.

b. The Air Pollution Regulations

Aspects of solid waste management include prohibition against burning waste in open air without a permit from the council.⁵⁸ They also provide specifications for waste incineration plans.

2.2 THE WATER ACT CHAPTER 198 OF THE LAWS OF ZAMBIA

This Act consolidates and amends the law in respect of ownership, control and the use of water. It also provides for matters incidental to the same. Of particular interest is Section 55 of the Act. It is provided for under this section that any person who willfully or through the negligence pollutes any public water so as to render it harmful to man, beast, fish or vegetation; shall be guilty of an offence.

2.3 THE PUBLIC HEALTH ACT CHAPTER 295 OF THE LAWS OF ZAMBIA

The purpose of this Act is to provide for the protection and suppression of diseases and to regulate all matters connected with public health in Zambia. Section- sixty five (65) of the Act imposes a duty on local authorities to maintain cleanliness and prevent nuisances. As to what constitutes a nuisance section sixty seven (67) observes that any septic tank, waste pipe, sewer, garbage receptacle, dustbin; being in the opinion of the medical officer in such a foul state.

A specific reference is made in Section seventy-eight (78) as regards the duty imposed on local authorities as to pollution of water supply. Local authorities are mandated under sub-section (a) to take all reasonable and practicable measures to prevent any pollution

⁵⁸ Statutory Instrument No. 141, 1996.

dangerous to health of any supply of water, which the public has a right to for drinking or domestic purposes.

2.4 THE LOCAL GOVERNMENT ACT

Local authorities under the Act have the authority to establish and maintain sanitary and ablution facilities and to maintain drains, sewers and works for the disposal of sewerage and refuse.⁵⁹

It may appear that the legal framework on water and sanitation is wide and comprehensive. The following section is therefore devoted to a discussion of the same.

2.5 DISCUSSION OF THE LEGAL FRAMEWORK.

Although the laws relating to inter alia water and sanitation and solid waste management are comprehensive, there still exists a few problems affecting the efficacy of these laws. The nature of the problems will be divided into two. The first part will deal with local problems and the second with those problems that have an international bearing.

It follows therefore that one major problem is that of enforcement. The Environmental Protection and Pollution Act, The Public Health Act, The Local Government Act and The Water Act; entrust the responsibility of enforcement in case of a violation with institutions. These institutions, specifically the Environmental Council of Zambia and The Lusaka City Council have no capacity to enforce the same.⁶⁰ For example in the case of Lusaka, the Lusaka City Council whose responsibility it is to carry out the obligations associated with waste management is financially constrained. The council relies mainly

⁵⁹ Local Government Act No. 21 Of 1991

⁶⁰ Environmental Council Of Zambia.

on revenue collection, which in themselves are insufficient. In addition the government grants due to the council has been reduced substantially.⁶¹

These financial restraints have had serious repercussions on the efficient delivery of the previously stated social services. First of which is the fact that the total expenditure devoted to delivery of a particular service is in-sufficient in comparison with the particular service in question. Revenue collected is therefore spent on paying workers salaries.

Secondly, there is a general lack of sufficiently trained staff to manage the technical matters related to water supply, sanitation and regulation of solid waste.⁶² This is further exacerbated by the use of very old equipment.⁶³

Thirdly, the role of the Council in relation to waste is mainly supervisory. It can thus among other things institute legal action against defaulters. However, the Council has no capacity to effectively do so because it only has one Legal Counsel, who cannot by himself handle litigation country wide. The tendency of the Council in the past years has been to hire services of private legal practitioners. This has proven to be too expensive given the current economic hardships prevalent in the country.

An issue of concern arising from the above discussion is whether the Council or indeed local authorities in general can be sued in the light of their obligations under the

⁶¹ Ibid

⁶² Solid Waste Management Master Plan Project For The City Of Lusaka. Phase 1, Diagnosis Report, 1997, P.40

⁶³ Ibid at P.40

respective Acts. This is observed in the light of the fact that for liability in environmental matters to arise, there must have been a negligent or wilful failure to take reasonable steps to prevent or stop an act causing harm to the environment.⁶⁴ It appears that local authorities being body corporate can be sued for failure to perform their statutory duties in relation to the management of water and sanitation and solid waste in general. Whether or not they can be held liable is another matter because their failure is as a result of the serious financial difficulties they encounter.

Notwithstanding the previously stated, it must be noted that anyone can bring an action against local authorities for failure to perform their obligations under a given law. Everyone has an interest in the environment and can therefore be affected in the event of any occurrence of pollution there-in. It has been held that anyone with an interest in a matter can institute proceedings in relation to the same.⁶⁵

As regards the problems that have an international bearing, it follows that Zambia is bound by the international agreements that it has ratified. These impose certain obligations, which will be elucidated in the ensuing chapter. However, it is important to note that water and sanitation are Economic Social and Cultural Rights. These require a financial effort to be implemented, an active intervention by the State. However the state no matter how poor it is cannot use poverty as an excuse. If it does, it would be in breach of its international obligations under the Covenant.⁶⁶ Zambia's Constitution as amended 1996 is conspicuously silent on the place of International Law in Zambia's

⁶⁴ Act No.12, 1990.

⁶⁵ Maxwell Mwamba and Stora Mbuzi v The Attorney General, S C Z Judgement No. 10 of 1993.

⁶⁶ Ibid

Municipal Law. As a Common Law Jurisdiction, Customary International Law forms part of Municipal Law.⁶⁷

However, an Act of Parliament is necessary in order to transform a treaty into domestic Law. When a treaty has been integrated in the domestic legal system, it stands in a position subordinate to the Constitution, but coordinate with Acts of Parliament. In the absence of such integration, the treaty in question although binding on Zambia at International Level, has no domestic applicability whatsoever.

Zambia is a signatory to many human rights instruments and declarations. On the one hand, although these instruments do not constitute hard law and therefore not directly binding on the State in a legal sense, they are broadly invoked as standards in connection with human rights issues. This is exemplified by The Universal Declaration of Human Rights, which provides a framework for development of human rights issues.

On the other hand, every nation is expected to obey International Law. Regardless of Zambia's Constitution or legal system. A State should not use its domestic Law as a pretext to breach an international agreement, in this respect in the case of E S C Rights.

Therefore, it is safe to argue in view of the fore-going as a signatory to the instruments ratified by Zambia, it has a duty to work for the common good and general welfare of all citizens.⁶⁸ The government also has the responsibility to uphold human rights and given the available resources to make them available to all over a period of time.

⁶⁷ Anyangwe op. cit., p195.

⁶⁸ Ibid.

CHAPTER THREE

1.0 WATER AS A HUMAN RIGHT

The first part of this chapter briefly defines the term human rights. The second part comprises a legal analysis of whether a right to water is present in international legal instruments. Thirdly, the relevance of linking human rights and water will be addressed.

Finally, the current state of Economic Social and Cultural Rights under the Zambian Constitution will be outlined. Emphasis will be on the Bill of Rights and The Directive Principles of State Policy.

2.0 DEFINITION OF HUMAN RIGHTS

Literary, Human Rights mean the fundamental rights of man. Since all human beings have the same basic nature and have it equally, the rights based on this nature are necessarily universal and held by all.⁷⁰

Human Rights can be classified in different ways. For the purpose of this paper, focus will be on the distinction implied in the Universal Declaration of Human Rights.

It follows therefore that the First Generation of Human Rights is said to represent Civil and Political Rights. These are set out in Articles 2-21 of The Universal Declaration of Human Rights. They are later given binding effect in the International Covenant on Civil and Political Rights of 1996. The exercise of Civil and Political Rights is said not to require any state intervention. The correlative state obligation is absolute and immediate because they are cost free.⁷¹

⁷⁰ Anyangwe, op. cit., p1.

The second generation of rights is said to comprise the Economic Social and Cultural Rights. These are enshrined in Articles 22-27, and are given binding legal character. In contrast with the first generation rights, Economic, Social and Cultural Rights are positive rights. They demand an active state role to ensure their enjoyment. It is probably for this reason that the states' obligation is qualified as progressive, depending on resources.⁷²

It has been further observed that Economic Social and Cultural Rights are those rights which mandate that social conditions be adequate for meeting physical, moral and biological requirements for every category of people.⁷³ They aim at ensuring everyone's access to resources, opportunities and essentials for an adequate standard of living. Among the Economic Social and Cultural Rights most discussed in Zambia for the inclusion in the new Constitution's Bill of Rights are: the rights to education, health, food, safe water and sanitation, housing, employment, culture and a clean environment.⁷⁴

The Third Generation of rights is Collective Rights. They are said to reflect the idea of solidarity. They are contained in Article 28 of the Universal Declaration of Human Rights. The rights to self determination and to a healthy environment are some of the rights included in this group of rights. As in the previous genre of rights, the correlative state obligation is also qualified here and progressive.⁷⁵

⁷¹ Ibid p26.

⁷² Ibid

⁷³ Simon Mwale, 'Zambia's Economic Social and Cultural Rights: Why Should They Be In The New Constitution?' In "Jesuit Centre For Theological Reflection Policy Brief, Promotion Of Social Justice and Concern For The Poor, 3rd and 4th quarter, 2004.p1.

⁷⁴ Ibid

⁷⁵ Ibid p27.

Implementation of Economic, Social and Cultural Rights requires a financial effort, an active intervention by the state.⁷⁶ However, the state no matter how poor it may be, cannot use poverty as an excuse. If it does, it would be in breach of its international obligation under the covenant.⁷⁷

In view of the fore-going, the nation of Zambia presented a report to the Economic Social and Cultural Committee.⁷⁸ The report in question outlines the administrative, legislative and policy measures Zambia has put in place in order to bring its national laws and policies, in line with the provisions of the Covenant on Economic Social and Cultural Rights. It further outlines the various challenges and difficulties that the state party has experienced in implementing the Covenant.⁷⁹ Some major constraints hindering the satisfactory dispensation of these provisions include inter alia; the HIV/ AIDS Pandemic whose negative effects permeate human resource distribution, high rates of un-employment which have contributed to many families being deprived of essential economic and cultural rights and rapid population growth which has contributed to inadequate resources in housing, education, health, and other social services which include water and sanitation.⁸⁰ In its efforts to ease the harsh impact of growing economic and social hardships, the State party has embarked on a reform programme, the report states. This however has yielded very little result and the State party has had to be included on the donors programme for Heavily Indebted Poor Countries. Within the report, the State party has also stressed the measures it intends to embark on as a step to fully realize economic, social and cultural rights.

⁷⁶ Anyangwe, op.cit., p34

⁷⁷ Ibid. p38

⁷⁸ (E/ 1990/ 5 /add.60) , presented by G.M.K. Imbwae, Permanent Secretary At The Ministry Of Justice Of Zambia, April 27th 2005.

⁷⁹ Ibid.

⁸⁰ Ibid.

Some of the measures recognized are Policies such as the national housing policy; Acts such as the Employment Act, Programmes such as the promoting reproductive health campaigns programmes and Treaties that the State party has ratified.⁸¹

3.0 INTERNATIONAL LAW AND A HUMAN RIGHT TO WATER

The intention of this part of the chapter is to find common ground between traditional human rights and other realms of international law. This is inclusive of Environmental Law. A complementarity now exists between protection of the environment and protection of human rights. This arises out of the need to democratize the business of development. There is a need to make those engaging in such activities, more accountable to their internationally recognized standards by protecting human rights and the environment.⁸²

There have been both express and implied references to a right to water in public international law, at whose core the importance of water for human need is considered.⁸³

A right to water is the right to access sufficient water.⁸⁴ The term access includes economic accessibility that is affordability. The term sufficient refers to both quality and quantity of water, necessary to meet basic human needs.⁸⁵

Article 38(1) of the Statute of the International Court of Justice is relied upon in determining sources of international law for the purposes of the legal analysis set out below.⁸⁶

3.11 Conventions and Declarations.

a) Global Instruments:

⁸¹ Ibid.

⁸² Anyangwe, op. cit. , p44.

⁸³ John Scanlon et al, 'Water as a Human Right?' 7th International Conference on Environmental Law on Water and The Web Of Life, Sao Paulo, Brazil June 2-5 2003.

⁸⁴ Ibid. p3.

⁸⁵ Ibid.

⁸⁶ Ibid.

i. The 1996 Covenants.

The legally binding human rights covenants of 1966, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic Social and Cultural Rights implicitly recognize a right to water. Although this right is more strongly recognized in the latter Covenant.⁸⁷ The ICCPR affirms the right to life⁸⁸ According to the Human Rights Committee (HRC), in adopting a general comment on this issue, it should be interpreted expansively.⁸⁹ Disregarding this new development and assuming a narrow interpretation of such a right would nevertheless require the inclusion of the protection against arbitrary and intentional denial of access to sufficient water.⁹⁰ The unavoidable truth therefore is that water is the most fundamental resource necessary for the sustenance of human life.

In the ICESCR, it may be argued that the right to water is already apparent in Articles 11-12. To this effect, General Comment Number 15 observes, "The human right to water is indispensable for leading a life in human dignity. It is prerequisite for the realization of other human rights."⁹¹ Member States have a constant and continuing duty to progressively take active steps in order to ensure that everyone has access to safe and secure drinking water and sanitation facilities. This should be done without discrimination of any kind.⁹²

ii) The Declaration on the Right to Development.

⁸⁷ Ibid. p.4

⁸⁸ ICCPR Art. 6(1) : 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

⁸⁹ Human Rights Committee, General Comment No.6 adopted at the Sixteenth session (1982) on Article 6 of ICCPR.

⁹⁰ Supra p.5

⁹¹ United Nations Economic and Social Council, Committee on Economic Social and Cultural Rights, General Comment No. 15(2002) The Right To Water(Articles 11-12 Of The ICESCR)29TH Session, Geneva, 11-29 November 2002. E/C.12/2002/11

⁹² Ibid Article 2 (2).

Article 8 (1) of the Declaration on The Right To Development observes that, “states should undertake at, at national level, all the necessary measures for the realization of the right to development. Further that states shall ensure inter alia, equality of opportunity for all in their access to basic resources.” To this effect, it was confirmed by The General Assembly in its resolution 54/175 that “the rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and the International Community.”⁹³

iii) The Convention On The Elimination On All Forms Of Discrimination against Women and The Convention On The Rights Of The Child.

Hitherto now, only the above stated Human Rights Treaties, CEDAW and CRC respectively, refer directly to a right to water.⁹⁴

CEDAW obliges State Parties to eliminate discrimination against women, particularly in rural areas to ensure that women enjoy adequate living conditions vis-à-vis housing, sanitation and water supply.⁹⁵ The express recognition of water may be viewed as a testament to the uneven burden traditionally placed on women in developing countries to collect water over long distances. It also represents an attempt to redress this burden.⁹⁶

Conversely, in The Convention on The Rights of The Child, the pressing water issue for children is more related to health and hence water quality is emphasized. Thus, Article 24(2) (c), recognizes the right of a child to enjoy the highest attainable standard of health in order to inter alia combat disease; through the application of available technology and the provision of adequate food and clean drinking water.

⁹³ GA/RES/54/175, 15TH February 2000.

⁹⁴ Scanlon et al, op.cit.p6

⁹⁵ Ibid.

⁹⁶ Ibid.

3.12 Customary International Law.

The development of Environmental Law as a recognized body of Law has created an additional source of law for analysis of the existence of a right to water. This is because uniform State practice may provide evidence of opinion juris.⁹⁷ It is appropriate to consider national constitutions as a source of an emerging right to water and court interpretations, of fundamental rights contained in those constitutions.⁹⁸ Whilst over 60 constitutions refer to environmental obligations, less than one-half expressly refer to the right of its citizens to a healthy environment.⁹⁹ However, it is notable that only the South African Bill of Rights enshrines an explicit right of access to sufficient water.¹⁰⁰ In view of the previously stated, a position that a uniform constitutional practice has emerged is rather doubtful.¹⁰¹ More so considering the fact that despite the increasing prevalence of constitutional environmental norms, most countries have yet to interpret or apply such norms.

Other recent judicial decisions show inter alia that recognition of a human right to water, though not recognized in the law of nations per se is an emerging trend.¹⁰² In The case of **GABCIKOVO-NAGYMAROS PROJECT (HUNGARY-SLOVAKIA)**¹⁰³, it was observed that the protection of the environment is... a vital part of contemporary human rights doctrine. It is a sine qua non for numerous human rights such as the right to health and life itself. Therefore, damage to the environment can impair all the rights spoken of in the Universal Declaration of Human Rights¹⁰⁴ and other human rights instruments.

⁹⁷ Scanlon et al, op.cit. , P8.

⁹⁸ Ibid

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Environmental Law Institute Report, 'Constitutional Environmental Law : Giving Force to Fundamental principles in Africa,' (May 2000) at 6.

¹⁰² Ibid.

¹⁰³ Judgement of 25th September 1997, B.ICJ/6929210707575.

¹⁰⁴ 1948.

While there is no express recognition, human rights courts have been prepared to liberally interpret existing provisions in their decisions. This is exemplified in the communications against Zaire.¹⁰⁵ In this case, the African Commission argued that the failure of government to provide basic services such as inter alia safe drinking water, electricity and the shortage of medicine...constitutes a violation of Article 16 of The African Charter.¹⁰⁶

In conclusion, the human right to water does exist as water is the most essential element of life. However, as is evident from the previously stated, this right has not been clearly defined in international law. Furthermore, it has not been expressly recognized as a fundamental human right.

4.0. The Correlation Between Water and Human Rights

The value of explicitly recognizing water as a human right is apparent. It can be set out along four broad lines:

Firstly, there is an emerging approach to sustainable development. That approach is essentially a rights based approach founded on equity. Strengthening universal human rights in the environmental and social spheres will enable significant changes towards the eradication of poverty. This is founded on the notion that human rights can not be secured in a polluted environment.¹⁰⁷

Secondly, although water has not been clearly stated as a human right, it sits at the very essence of other fundamental rights. It is essential to ensuring the continuance of life. In addition, it is also necessary to produce food. According to the World Health Organisation estimates, 80% of illnesses in Developing Countries and more than a third

¹⁰⁵ 25/89, 47/90, 56/91, 100/93 (joined)

¹⁰⁶ 'Every individual has the right to enjoy the best attainable state of spiritual and mental health and that parties should take necessary measures to protect the health of their people.'

¹⁰⁷ A./RES/46/121, 17TH Dec 1991, General Assembly, Resolution on Human Rights and Extreme Poverty.

of deaths, are results of drinking contaminated water.¹⁰⁸ It is safe to contend therefore that the right to water needs to be recognized as a self-standing right. However, this can only be done if it is not perceived within the ambit of other associated human rights.

Thirdly, the protection of the right to water is an essential pre-requisite to the fulfillment of other rights. Formal recognition of such a right would mean acknowledging the environmental and water dependant dimensions of human rights.

Consequently, it would become increasingly difficult to disregard International Environmental provisions relating to the protection and management of water. The enforcement and implementation of this right is thereby concretized.¹⁰⁹

The fourth and most pertinent basis for water and human rights linkage is that of obligations. It follows that a human right to water would impose obligations on states. Human rights need to be translated into specific national legal obligations and responsibilities.¹¹⁰

4.1 Current Status of Economic Social and Cultural Rights Under The Zambian Constitution.

i) The Bill of Rights and The Directive Principles of State Policy.

A Bill of Rights is a statement of basic human rights that can either be incorporated into the Constitution, or annexed to some other legislation aimed at guaranteeing and giving legal protection to human rights and fundamental freedoms.¹¹¹ Under the Zambian Constitution, the Bill of Rights is found under part three As regards its

¹⁰⁸ WHO & UNICEF, "Global Water Supply & Sanitation Assessment 2000."

¹⁰⁹ Scanlon et al, op. cit., p18.

¹¹⁰ Ibid.p19

¹¹¹ Ibid

nature, its provisions are justiciable and entrenched in the Constitution. Article 11 provides:

“ It is recognized and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, color, creed, sex or marital status, but subject to the limitations contained in this part, to each and any of the following;

- a) life, liberty, security of the person and the protection of the law;
- b) freedom of conscience, expression, assembly, movement and association;
- c) protection of young persons from exploitation;
- d) protection for the privacy of his home and other property and from deprivation of property without compensation...’’,¹¹²

It can be deduced from the preceding that the rights in question are Civil and Political Rights. Further that the wording suggests that these rights are not absolute. They are subject to limitations that are designed to ensure that the enjoyment of the said rights and freedoms, does not prejudice those of others or the public interest.¹¹³

The provisions of the Bill of Rights are so entrenched that they require a referendum in the event of amendment as provided for under Article 72. This implies that the guaranteed rights cannot be lightly modified. A disadvantage however would be that the range of guaranteed rights would be improved.¹¹⁴

¹¹² The Constitution Of Zambia Act, Chapter One Of The Laws Of Zambia.

¹¹³ Ibid.

¹¹⁴ Anyangwe, op. cit. , p201.

Further, the rights may be claimed only against the state and not against individuals. This implies that it has a vertical and not horizontal application, and the rights cannot be prayed in aid in private litigation between individuals.¹¹⁵

It is trite observation that human rights may be violated not only by the state or any of its organs. They may also be violated by non-state entities. Therefore, there is need no compelling reason why a bill of rights should not apply horizontally.¹¹⁶

It is clear from the discussion of the Bill of Rights that Economic Social and Cultural Rights are not included therein.

Some of the Economic Social and Cultural Rights are mentioned within Part (ix) , The Directive Principles of State Policy.¹¹⁷ It is trite law that these are not justiciable

.¹¹⁸ However a government can be sanctioned politically at the elections by being voted out of office, for non-delivery.¹¹⁹

As nebulous as the State obligations may seem, they are not completely devoid of importance. Zambia being party to the Covenant on Economic Social and Cultural Rights, has an obligation to domesticate the provisions of the treaty. In addition, Zambia is obliged to ensure the progressive realization within the maximum availability of its resources.¹²⁰

This aspect is evident as perceived in Zambia's recent report before the Economic Social and Cultural Committee¹²¹ where Zambia outlined the measures undertaken to domesticate the provisions of the Covenant within its National Laws. One major constraint outlined as is commonplace for most developing States is that of poverty.

¹¹⁵ Ibid.p205

¹¹⁶ Ibid.

¹¹⁷ Article 112 of Chapter 1 of The Laws Of Zambia.

¹¹⁸ Article 111.

¹¹⁹ Supra, p203.

¹²⁰ Ibid.

¹²¹ E/1990/5/Add.60, April 2004. op. cit. , p21,ref no.77

However, it has been observed that this can hardly be a compelling plea since there can never be a point in time when resources would be sufficient.¹²²

It is trite observation that the protection accorded to Economic Social and Cultural Rights under the current Constitution is inadequate. It is clear therefore that the current state of affairs in which the Zambian Constitution has only ‘ Directive Principles of State Policy’ means that the successful achievement of E S C Rights is quite elusive. They lack enforceability. There is need to concretize the said rights in question by enshrining them into the Bill Of Rights.

ii) **Issues Arising out of Enshrining ESC Rights in The Constitution.**

The issues can be set out along two broad fronts the first being that of cost and the second practicality.

As regards the latter, two sub-issues arise. The first being whether the Government of Zambia has the necessary resources to facilitate a referendum process. The process in question is to allow for the amendment of Part 111 (Bill of Rights) of The Constitution as demanded by Article 79 (3). Studies have shown from earlier Constitutional Review Commissions that Government has been quick to reject proposals of amendment via the preceding mode, on the pretext of lack of resources. This was evident in the submissions by the Mvunga Commission of 1991, Mwanakatwe Commission of 1996 and presently the Mungomba Constitutional Review Commission. This action by the Government is clear testimony of the fact that they are not willing to compromise a referendum process with the limited resources available.

Granted this scenario, it has been noted earlier that there will never be a single moment in time when resources will be adequate.¹²³ Therefore, what Government should realize is

¹²² Anyangwe, op. cit. , p228.

that it would be advantageous to engage in a referendum process in order to have a Constitution that will stand the test of time.

Although the Mwanakatwe and Mungomba Commissions have advocated for adoption of the Constitution by a Constituent Assembly, their efforts have been thwarted by the government. Worse still, the current government has reiterated the fact that Parliament is vested with the power of initiating legislation as per Article 62 of The Constitution. Further that adopting and enacting the Constitution via a Constituent Assembly would in essence be an abdication of the role of Parliament, as guaranteed by Article 62 and 79 respectively.. This reasoning does not hold. Firstly, adoption of the Constitution by a Constituent Assembly does not imply that Parliaments' legislative power as per Article 62, will be overridden. In essence Parliament should utilize its powers under the said Article to provide for the establishment of a Constituent Assembly, which it is certain Parliament can ably do.

Such debates are on-going, notwithstanding Governments steadfast contention of adopting the Constitution by Parliament.¹²⁴ Adoption of the Constitution by Parliament has a further danger of Government monopoly. It will not be representative for the same reason that the majority of seats in Parliament is taken up by the ruling party. This implies that the Constitution will be rendered a document of a few persons so as to further political expediency.

The second aspect to the cost of the entire process is whether the Government will be able to provide for the basic needs of its people. Firstly, it is important to understand the importance of having the said rights enshrined in the Bill of Rights. Realization of E S C Rights has direct implications for global and national development. One attempt to

¹²³ Ibid.

¹²⁴ November I Demonstrations over Constitution Making Process, Lusaka 2005.

achieve improved global development has been the proclamation of the Millenium Development Goals (MDG's) ¹²⁵ These goals aim at positively addressing the crippling poverty and growing suffering gripping the world over. Member States such as Zambia have committed themselves by 2015 to reduce by half inter alia; extreme poverty and hunger, combat HIV/AIDS and other diseases and ensure environmental sustenance.¹²⁶ To ensure that 100% of all budgeted resources for poverty reduction programmes reach the intended beneficiaries, enshrining of ESC Rights in the Zambian Bill of Rights, would be an appropriate mechanism. This would mean that funds would be constitutionally ring-fenced .¹²⁷

Citizens will also be afforded a chance to seek legal redress if these rights are denied or infringed upon, unlike the case is presently.¹²⁸

It is a truism to note that Zambia is ranked among one of the most poorest nations worldwide. This has obvious necessary implications on its delivery of social services. Accordingly, it has been observed that there is a clear conflict between Zambia's debt servicing and ESC Rights obligation , for debt servicing diminishes Governments resource capacity to provide basic social services.

ESC Rights implies increasing such funding. Zambia being hard pressed for resources, will find it difficult to meet basic needs of its citizens in view of the current debt overhang , that continues to consume resources.

The second question that arises in putting E S C Rights into the Constitution is that of practicality. This can be ascertained by scrutinizing the nature of the judiciary. Here

¹²⁵ United Nations , Septemeber 2000.

¹²⁶ Ibid.

¹²⁷ Mwale, op. cit. ,p2

¹²⁸ Ibid.

meaning is it independent and can it deal with matters concerning Economic Social and Cultural Rights.

Given the centrality of human rights, it may be thought that when it comes to human right cases, judges would be at least minimally activists. However, all too often African Judges in general espouse a restrictive view of judicial restraint.¹²⁹ This passivity arises from fear of the executive branch of government.

For example in the matter between DEAN NAMULYA MUNGOMBA v ATTORNEY GENERAL (1997) HP/2617 UNREPORTED.

The applicant challenged the declaration of a State of Emergency following an abortive coup. He stated inter alia that the conditions on the ground did not warrant such a declaration and further because it was declared two days after the President had announced that the situation was calm and under control. In dismissing his application, Justice Kabalata maintained inter alia that the declaration was perfectly legal. He further contended that for as long as the president had consulted with cabinet and the National Assembly approves, the courts have no jurisdiction in the matter. Doing so would be an abdication of the presidents' duty as provided for under the Constitution. . It follows therefore that absence of Judicial Review of the merits of the declaration of a State of Emergency constitutes a great threat in modern democracies, especially with fundamental freedoms and liberties of the individual as guaranteed by the Constitution. Courts however have a positive duty to enforce human rights enshrined in the Bill of Rights. It is the legitimate and proper function of the courts to enforce the provisions of the BOR against government.¹³⁰ An example of judicial activism is exhibited in the landmark decision in the CHRISTINE MULUNDIKA AND 7 OTHERS v THE

¹²⁹ Anyangwe, op. cit. , p212.

¹³⁰ Ibid.

PEOPLE. SCZ JUDGEMENT NO. 25 of 1995. It was held inter alia that Sections 5(4) and 5(7) of the Public Order Act contravened the applicants' rights to the freedoms of expression and assembly as guaranteed by the Constitution. The impugned sections were accordingly nullified by the court.

It follows therefore, that if ESC Rights are to be enshrined in the Bill of Rights, the same level of activism is to be shown by the courts in matters pertaining to these rights.

The next question arising is whether the Judges before whom matters are brought are well able to determine these matters thoroughly with the necessary expertise that they require.

Suffice to observe that both the Mvunga and Mwanakatwe Commissions recommended for the establishment of a Constitutional Court. This in essence would be helpful in decongesting the already over burdened courts in , as well as encourage specialization. Judges will be required therefore to have a certain level of knowledge for example in Environmental Law, so as to determine a particular case bordering on the same.

Therefore, whilst the enshrining of the ESC Rights into the Bill of Rights is necessary, logistics of setting up a constitutional Court with original jurisdiction should equally be addressed, short of which the judiciary will be extremely burdened. The Mungomba Constitutional Review Commission has already made this submission. Unfortunately Government in its White Paper has rejected the recommendation to adopt the Constitution by a Constituent Assembly as well as to enshrine Environmental Rights therein.

The South African Constitution contains Economic Social and Cultural Rights and allows its citizens to have legal redress for the protection of these rights. Here meaning that it gives aggrieved citizens access to recourse through the courts of law.¹³¹

¹³¹ Mwale op. cit. , p9

The rights in question are regarded as rights of 'progressive realization.' However, different rights are formulated differently. For example, Section 26 provides to housing and Section 27 provides for the access to health care, food, water and social security. The latter have been formulated as rights of access.

Therefore, in order to realize these rights, the State must take reasonable legislative and other measures within its available resource to achieve the progressive realization of each of these rights¹³².

However, it is notable that sections 25 and 29 which provide for the rights to property and education respectively, are considered "full blown," unqualified rights.

Since 1996 when the South African Constitution came into effect, several cases on socio-economic rights have been brought before a specially established Constitutional Court. Out of these, the Constitutional Court has ruled in favour of the claimants of the rights, essentially ordering government to provide for the same or to take reasonable measures towards realizing the same.¹³³

Two outstanding and frequently cited examples are the case of **GROOTBOOM v OSTENBERG MUNICIPALITY AND OTHERS**,¹³⁴ and **TREATMENT ACTION CAMPAIGN (TAC) v MINISTER OF HEALTH**.¹³⁵

The former case dealt with housing and land rights as positive obligations. Homeless claimants argued inter alia that they had rights which the government was ignoring. As a remedy, the Constitutional Court ordered the State to provide relief for those desperate people not catered for in the housing scheme.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ 2001 (10) S A 46 (CC).

¹³⁵ 2002(10) BCLR 1033 CC.

In the latter, the applicants sought to compel the South African Government and its relevant agencies to allow the provision of Anti-retroviral Drugs. Specifically Nevirapine to all HIV- positive pregnant women, in order to prevent HIV mother to child transmission. It was contended further that confining the use of Nevirapine to research and training sites could not be regarded as reasonable, and thus constituted a violation of the constitutional right to access to adequate health care.

It is clear that Zambia can take a leaf from South Africa. The first is to put E S C Rights and remedies in an explicit fashion in the Constitution. Secondly, there is need to broaden the legal definition of “locus standi” to include these categories of claimants¹³⁶: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the public interest; and anyone acting in the interest of its members.

Moreover, the enforcement mechanism for E S C Rights must be established by including within the Judiciary a special Constitutional Court.

As regards locus standi, it has already been submitted that human rights should be made to apply horizontally. This is because human rights are violated not only by the state but also by none state entities.¹³⁷

The only reason necessitating locus standi would be that of preventing busy bodies from wasting the courts time.

This aspect was brought to the fore in the matter between **MAXWELL MWAMBA AND STORA MBUZI v THE ATTORNEY GENERAL.**

It was averred that a balance needs to be struck between the two aspects of the public interest. One of which is the desirability of encouraging individual citizens to participate

¹³⁶ Mwale, op. cit. , p10.

¹³⁷ Anyangwe, op. cit., p229.

actively in the enforcement of the law, and the undesirability of encouraging meddlesome private 'Attorney Generals to move the court in matters that do not concern them. It was observed obiter by Judge Musumali that in the absence of constitutional provisions requiring locus standi, a citizen has liberty to come to the high Court , and on appeal , to the supreme court and seek redress. This is the position... in all countries with constitutions, written or not. This freedom is particularly important in democratic countries, as it is one way of enabling a citizen to have a say in the governance of his country. Therefore, the citizen needs to have a say in the governance of his country, whether or not he or she is a meddlesome type.” Economic Social and Cultural Rights need to be implemented with the same notion in mind.

CHAPTER FOUR

CONCLUSION

The most pertinent environmental problem facing the Zambian populace today has been identified as that of access of its citizens to adequate sanitation and a clean water supply.

It is undoubtedly a serious problem that requires immediate attention from concerned stakeholders. The country is increasingly faced with the problems of access to clean water and sanitary systems, which problems have become a source of public concern.

Environmental problems have two limbs to them. On one end lies the actual physical problem, which in this case is water pollution, and prevalence uncontrolled of solid waste. On the other end is the question of implementation.

It is notable that the existing legal framework, like any other laws on the environment, is aimed at minimizing the risk of environmental harm. The threat posed by an activity in question being the focal point. This is on account of the fact that almost all human activities tend to cause some form of environmental harm. Environmental Law is thereby concerned with reducing the impact of this risk.

The laws on water and sanitation are comprehensive to the extent that they address the relevant issues pertaining to pollution of the same. However, as has been noted, the major problem is with the actual implementation of the provisions of the relevant Acts. These are those of management. Local authorities dispensed with the management of these services are mostly under staffed and further do not have the necessary funds to maintain a well managed and organized system of water and sanitation. As a result, the general public has been constantly exposed to risks of diseases attendant by unhealthy water and sanitation supplies.

Worse more, it has been observed further that the role played by the agencies provided for by the Acts in question is merely a supervisory one.

Presently, the Constitution being the Supreme Law of The Land does not expressly guarantee the citizens rights to social amenities.

The foregoing has negatively impacted on the citizens right to social amenities, thereby negatively impacting on the citizens access to clean adequate water and healthy sanitary services.

Zambia is on the verge of its Fourth Constitutional Making Process. Giving this fact, there is need to put in place measures that will ensure that Economic Social and Cultural Rights are guaranteed in an explicit fashion. This will enable citizens to put government to task in the event of negligence in delivery or non delivery of social services altogether.

The practice in drafting environmental policies or indeed other policies in general has been that interested parties have been excluded in the drafting of the policies in question. There is need for a paradigmatic shift. The citizens who are directly in touch with the natural resources need to be included from the beginning.

There is a need therefore to recognize that the provision of social service is not one of mere policy, but as a human right. The link between social well-being and environmental health will become increasingly important and securing social well-being, without acknowledging the environmental realities will untimely fail.

RECOMMENDATIONS

It is clear from the preceding part that most problems leading to the inefficacy of the legal framework on water and sanitation, is that of financial constraints on the part of the

institutions responsible for such management. Furthermore, the general public are ignorant on matters relating to the environment. This scenario is further worsened by the fact that Economic Social Cultural Rights are not explicitly guaranteed in the Constitution. This renders their practicability a mere ideal. Failure to entrench the rights in question in the Bill of Rights is an overall contributing factor to the current status of the said rights, and the consequent non-availability to the Zambian Populace. It is against such a background that the following recommendations be made:

1. Efforts to have Economic Social and Cultural Rights in the Zambian Constitution in the past hitherto date have been part of the lobbying campaign as evidenced by the submissions from the Mwanakatwe, Mvunga and currently the Mungomba Commission. These have further advocated for the adoption of the constitution by a Constituent Assembly and not Parliament. Reasons being that it will enable the enactment of a constitution that will stand the test of time and is reflective of the peoples' wishes. This is a realistic demand and recommendation since Part (ix) of the current Constitution has clearly failed to meet their basic needs.
2. There is need to broaden the legal definition of locus standi to include all groups of persons either directly or indirectly affected by provision of certain social amenities, or better still that of water and sanitation. By enshrining the ESC Rights in the Constitution, a provision be made that the rights contained therein apply both horizontally and vertically. It is evident that the bulk of environmental harm is perpetrated by non-state entities. Given the fact that Human rights are essentially claims by individuals against the state, it follows that private bodies also inflict harm on the environment. If a good law is to be one that is generally applicable, then the Bill of Rights should apply both ways as outlined above.

3. Thirdly, a provision be made in the Constitution to set up a Constitutional Court with original jurisdiction. This will encourage specialization in the judiciary. Further it will ease the already over burdened High Court by way of directing cases that deal with Human Rights specifically to the Constitutional Court. In addition, judges will be encouraged to specialize in the various arenas of human rights, whether they be of a political or a social, economic and cultural nature. Judges will therefore be more knowledgeable in their respective fields.
4. There is need to concretise International Instruments that Zambia has ratified within its national laws. Zambia's Constitution as amended 1996, is visibly silent on the place of international Law in Zambia's Municipal Law. In the absence of such integration, the treaty although binding at international level, lacks the requisite domestic applicability. Zambia is a signatory of many human rights instruments and declarations having a bearing on the provision of adequate water and sanitation systems. Incorporating the provisions of the said into for example the Water Act, concretizes the nature of local provisions and enhances enforcement. Furthermore, these instruments can complement the local laws and also supplement them where they are lacking or silent on a particular point.
5. Local authorities should work in collaboration with Non-governmental Agencies, the local business community and well-wishers in fundraising ventures. This will enable the said supplement on funds from the government. There is also a need to engage the private sector to invest in areas of water and sanitation. These can be discharged with the functions of water purification in selected areas as well as garbage disposal at a fee. The latter is already in progress.

6. The Environmental Council of Zambia must boost its already existing environmental awareness campaigns. This can be done via the community especially those in the peri-urban areas. Schools, hospitals, work places and other places offering social services should be targeted. There must also within the Council be established a water and sanitation management fund. This would ideally target all persons involved in the emission of harmful substances into the water, or those whose activities have a bearing on the general sanitation of their surroundings to contribute funds. The purpose of these funds would be to help the relevant authorities in carrying out their supervisory role in discharging relevant functions related thereto.

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