

A CRITICAL ANALYSIS OF THE CHILD'S RIGHT TO HEALTH IN ZAMBIA

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A dissertation presented in partial fulfillment of the requirements for the Award of the Degree of
Bachelor of Laws of the University of Zambia.

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DECLARATION

I, **Chuula Luyando**, computer number **29036674** do hereby declare that the contents of this dissertation are based on my own findings. I further declare that the information used herein that is not my own I have endeavored to acknowledge. I verily believe that this research has not been previously presented for a degree at the University of Zambia or any other University.

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DEDICATION

This research is dedicated to Violet Muchelemba, my amazing mother. You have been with me every step of the way. I love you very much and I thank God for you. God bless you.

ACKNOWLEDGEMENTS

My sincere gratitude goes first and foremost to God; he has been very kind to me. Thanks go also to my family for the support they have given me, especially my mother; to my supervisor Dr Lungowe Matakala for her patience; the children of Zambia who have inspired me; and to all the people and my amazing friends who helped me with my research. God bless you.

ABSTRACT

The right to health is a fundamental right that requires full respect and protection for every individual. It is even more important that children are adequately guaranteed this right. This research is an insight into the lives of children. It looks at the right to health of a Zambian child and whether or not this right is protected by the existing legislation. It gives an insight into the way the child's right to health is protected in Zambia and how it should be protected in the international sphere. The aim is to bring out the adequacies and inadequacies of the law and to come up with a good and lasting solution to the adequate protection of the right to health for children in Zambia. Currently there are prevailing circumstances that have led to children not adequately enjoying their right to health. The laws have gaps that need fixing; the manner in which the right is provided for in the current legislation is not as it should be. The research has been conducted using books, writings of scholars and also the opinions of specialists in the field of child rights. This dissertation concludes by determining that the right to health is an essential element for the development of the nation. It gives the manner in which the right to health for children should better be protected.

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The Adoption Act, Chapter 52 of the Laws of Zambia

The African Charter on Human and People's Rights

The African Charter on the Rights and Welfare of the Child

The Anti-Gender Based Violence Act number 1 of 2011

The Constitution, Chapter 1 of the Laws of Zambia

The Constitution of South Africa

The Education Act, Cap 134 of the Laws of Zambia

The Marriage Act, Chapter 50 of the Laws of Zambia

CONVENTIONS USED

The United Nations Convention on the Rights of the Child

The United Nations Covenant on Social Economic and Cultural Rights

The Universal Declaration of Human Rights

The Vienna Convention on the Law of Treaties

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4. Recontre Africaine Pour Les Defense des Droits de L'Hommes v Zambia of (1996) unreported
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1.0 CHAPTER ONE: BACKGROUND OF THE STUDY

1.1 INTRODUCTION

In 2004 it was estimated that forty million (40,000,000) children in the world below the age of fifteen suffer from abuse and neglect, and require health and social care.¹ The right to health is very important for the enjoyment of human rights. Children have to enjoy health before they can enjoy rights such as the right to life, right to education and so on.

In order for children to develop they require a comprehensive and adequate protection of their rights. Zambia has the Constitution providing for the right to health but not as a basic human right but merely in the directive state principles. The effect of this is that a person cannot sue for the state for failure to provide this right. This is unlike the right to life which is guaranteed in the Constitution.

Furthermore, Zambia is a state party to some international laws that guarantee this right such as the United Nations Convention on the Rights of the Child (hereinafter referred to as the CRC). It is the first legally binding international instrument to incorporate the full range of human rights- civil, cultural, economic, political and social rights.²

The CRC contains basic guidelines and as such every member of the international community that has ratified this Convention needs to encompass these rights because children in every country need to enjoy rights equally. Currently the CRC is the Convention that has received the widest ratification and some countries have actually made the Convention part of local

¹ Dan O'Donnell. Child Protection: A Handbook for Parliamentarians. UNICEF. (2004) at page 9

² <http://www.unicef.org/crc> accessed on 17th September 2012

legislation and therefore enforceable. However there are exceptions of nations such as Somalia and United States of America that have not ratified this treaty.³

In a modern society that has made vast steps in civilisation the right to basic health care is not debatable. It is one of the rights of a child that should be adequately met in addition to all other rights. This research is based on the fact that the right to basic health is now a fundamental human right and so it should be readily accessible to all children.⁴ This is especially in countries that have ratified various international instruments that ensure the right to basic health for all children. The current laws in Zambia should be able to accommodate this right and do so without reservation.

Developing countries usually face challenges as regards making this right justiciable but countries such as South Africa have constitutionalised this right and children enjoy the right to basic health care services. Furthermore, in South Africa children's right to basic health is a constitutional right and has been guaranteed as such therefore one can enforce this right in the courts of law⁵.

1.2 STATEMENT OF THE PROBLEM

The main problem is that Zambia has not been able to adequately provide protection of the right to health for children. This is despite the fact that the right to health is a fundamental human right in the international instruments to which Zambia is a signatory. Zambia has signed up to various Conventions that encompass the right of children to basic health and has even ratified other

³ <http://www.crin.org/resources/treaties/crc> accessed on 17th September 2012

⁴ <http://www.who.int/hhr> accessed on 18th September 2012

⁵ Article 27 of the Constitution of South Africa

Conventions such as the CRC.⁶ There is no specific local statute that provides specifically for the right to basic health of Zambian children but the Constitution of Zambia in Article 112 provides for the realisation of such a right. However, this right is merely a directive principle and is not a guaranteed right in the Zambian Constitution.

1.3 GENERAL OBJECTIVE

The main objective of this dissertation is to analyse the current laws that apply specifically to Zambian children, including international Conventions such as the United Nations CRC and to see whether or not they offer adequate protection of the rights of children as regards the right to health.

1.3.1 SPECIFIC OBJECTIVES

- To analyse the current state in which Zambia is as regards the laws that exist to protect children's right to basic health care.
- To consider the challenges that come with guaranteeing children the right to health and see how these challenges can be addressed.
- To discuss the essential elements of the CRC which are very important and require immediate implementation in Zambia to seal the gaps that currently exist in the local laws as regards the right to basic health care.
- To evaluate whether there is adequate implementation of the laws and also the challenges of international Conventions such as the African Charter on Human and People's Rights and the CRC that offer protection of this right.

⁶ Zambia became a signatory on 5th December 1991

1.4 RESEARCH QUESTIONS TO BE ANSWERED

- Are the current laws that exist adequate in ensuring that the fundamental human right to health of the child is protected?
- What are some of the loopholes or gaps in the current legal framework as regards child rights protection, particularly the right to basic health?
- How better can the right to health be protected in Zambia?

1.5 SIGNIFICANCE OF THE STUDY

This study is important as it will contribute to the development of law as regards the protection of the rights of children. It will draw attention towards the plight of children in Zambia. The study is an insight into the measures that Zambia needs to take to ensure that children have better access to their right to health, and indeed other social and economic rights, as they have been ignored for a long time.

The study is intended to highlight the various challenges that a country without adequate child rights protection faces. It is going to enrich knowledge and research in the field of child rights. Despite the wide ratification of international conventions there is still a lack of implementation of the CRC which requires states to be committed to protecting all rights of a child. Ultimately the matters raised in this dissertation should be able to provide possibility for a wider application to other fields of the law apart from children's rights

1.6 OPERATIONAL DEFINITION OF TERMS

a) Child

According to the CRC, a child is every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.⁷ Currently Zambian statutes do not have a uniform definition of who a child is. For example the Adoption Act defines a child as one who has not yet attained the age of twenty-one⁸, the Constitution in Article 24(2) defines a 'young person' as one under the age of fifteen, while the Marriage Act restricts the age of marriage to sixteen. This dissertation shall use the definition that is given by the CRC

b) Directive State Principles

These are provisions in the Constitution of Zambia that merely serve as a guide to the Executive, the Legislature and the Judiciary in the development of national policies, the making and enactment of laws and the application of the Constitution and any other law.⁹ What this means is that these rights are not justiciable as rights in the Bill of Rights are, they are merely guidelines.

c) Domestication

Zambia is a dualist state hence there is need for the process of domestication. This is a process by which parliament enacts and passes the relevant enabling legislation.¹⁰ So that means that in Zambia a treaty should go through the stages that a Bill passes through in parliament before it becomes binding law in the national courts.

⁷ Article 1

⁸ Section 52, Cap 54 of the Laws of Zambia

⁹ Alfred Chanda. Gaps in the Law and Policy in the Implementation of the Convention of the Rights of a Child in Zambia. Zambia Law Journal. Volume 3. 2000. University Press: Lusaka. (2000) At page 4

¹⁰ Margaret Munalula. Legal Process. (Lusaka: UNZA Press. 2004) at page 89

In the case of *Fellow Nanzaluka v Zambia Sugar Company plc*¹¹, Nanzaluka wished to invoke a provision of international law that would deem his dismissal as unlawful. The courts held that this could not be invoked because the Convention he was relying on had not been domesticated. This confirms that Zambia is a dualist state as opposed to a monist state.

d) **Dualism**

Dualism as a concept of international law is based on the concept that local laws and international law are two separate entities and they have an intrinsically different character.¹² What this means is that the two branches of law are to be treated separately. Each should operate where it is required to do so and without violation of the other, so for the rights in the CRC to be enforceable there must be domestication. However, currently the CRC as a whole is not domesticated hence the children of Zambia cannot enforce the rights in it.¹³ Nevertheless, it has been ratified and so it must be given some force.

e) **Right to Health**

Basic health as a right is a reference to the minimum standards required for access to health care. It is difficult to define what the minimum standard is precisely because states have different social and economic standards. According to the World Health Organisation the 'enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being.'¹⁴ This right has been defined in the category of social-economic rights. WHO has further

¹¹ Appeal No. 82 of 2001

¹² J G Starke. Introduction to International Law. 10th edition. (London: Butterworths. 1989) at page 72

¹³ The right to education for example has been domesticated through the enactment of the Education Act of

¹⁴ <http://www.who.int/hhr/en> accessed on 26th November, 2012

defined health to mean ‘a state of complete physical, social and mental wellbeing and not just the absence of disease.’¹⁵

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that ‘States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’. Article 12(2) further contains, among others, important determinants of the right to health such as prevention and treatment of diseases, essential for the enjoyment of the right. Most states in providing for the right to health refer to the right to healthcare. Even the CRC in Article 24 discusses both rights in the same provision.

The United Nations Convention on the Rights of the Child (CRC)

This is an international convention that relates to the rights a child in every country should be given. It contains the basic guidelines for child rights protection. It contains provisions that provide for the essential pillars of child rights which are; are non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and respect for the views of the child.¹⁶

In its preamble, the Convention states that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance¹⁷, therefore there is a need for children to have special protection for themselves. The Convention has a wide coverage of the essential requirements for children.

¹⁵ 1946 Constitution of World Health Organisation

¹⁶ <http://www.unicef.org/crc> accessed on 17th September 2012

¹⁷ Preamble to U N Convention on the Rights of a child

1.8 METHODOLOGY

The research methods to be used in this research shall be secondary information. This shall be through the use of text books, articles, journals, previously written researches and also electronic means (internet). Some statutes will be looked at also for ascertaining the gaps and inadequacies in how these laws apply in Zambia. There will also be an interview conducted with a professional in the field of child rights protection.

1.9 OUTLINE OF CHAPTERS

CHAPTER ONE

This chapter shall be an introduction to the rest of the research paper. Chapter one shall contain definitions of relevant terms and concepts to the research. The chapter will be a slight overview of what the research views as a problem and shall be a starting point for finding the solution to that particular problem. Finally, it shall state how the research shall be conducted.

CHAPTER TWO

This chapter shall briefly discuss the fundamental right to basic health and its importance in today's society. The chapter will discuss also be a main discussion of the law regarding the right to health. Domestic law and also international Conventions and treaties shall be discussed. There will be a discussion of the duties that arise from the different pieces of legislation that shall be discussed. It will briefly state challenges that are currently prevailing in light of the fact that children do not have a guaranteed right to health in the current Constitution. There shall also be a discussion of the challenges of making it a justiciable right and also the benefits of doing so. There shall then be a discussion as to the concept of dualism and whether it is playing a role in

the slow paced approach to achieving a totally effective child right protection legal system of the right to health



CHAPTER THREE

The contents of chapter two will include the basic overview of what child rights entail. How they must be protected and upheld. There shall be a discussion as to the obligations Zambia has as regards this right and the international standard required of every country in the quest to protect the rights of children. It will discuss the challenges that Zambia faces in realising this right. Furthermore there will be an analysis of the manner in which this right should be protected.

CHAPTER FOUR

As the final chapter, chapter four will be about the best route and methods that the Zambian legal system can take to protect the rights of children in Zambia. These shall take the form of recommendations. The conclusion will also be given in this chapter

2.0 CHAPTER TWO: THE LAW REGARDING THE CHILD'S RIGHT TO HEALTH

2.1 INTRODUCTION

The child and particularly their right to health is captured in various pieces of legislation, both local and international. Local pieces of legislation include the Constitution of Zambia. International instruments include the African Charter on the Rights and Welfare of the Child (ACRWC), The United Nations Convention on the Rights of the Child (CRC), The African Charter on Human and People's Rights (ACHR) and The United Nations Convention on Economic Social and Cultural Rights (ESCR).

2.2 NATURE OF HUMAN RIGHTS AND THEIR CATEGORIES

Human Rights have been defined as rights that accrue to a person by virtue of them being human.¹⁸ The whole concept of human rights has been propounded for many centuries by Greek philosophers such as Aristotle. Since human rights are considered by some natural law theorists to be from God human rights were seen as God ordained or God-given. What this entails is that there is no requirement for a person to perform any act in order to have these rights. They are his just by the fact that he exists.

Philosophers have argued that in order for man to be a part of society, man surrendered his rights to the state and this is governed by a social contract. The role of the state is to enforce, respect

¹⁸ Carlson Anyangwe. Introduction to Human Rights and International Humanitarian Law. (Lusaka: UNZA Press. 2004) at page 1

and permit the full realisation of natural rights.¹⁹ If it violates the rights of the people then the people are entitled to revolt.²⁰

Human rights have three major characteristics which are that they are; inherent and inalienable, universal and indivisible, interdependent and interrelated. The first characteristic of human rights is their inherent and inalienable nature. What this entails is that they are regarded as 'inherent' because they are the birth right of all human beings. The argument in this case is that man possesses certain rights in his natural state, devoid of intervention or support from society.²¹

Furthermore human rights are said to be universal and indivisible. What this entails is that they apply to every human being irrespective of one's status, origin, race, religion, culture or condition of the place where one lives.²² Therefore, a person living in the United States of America should be able to enjoy the same basic rights as one living in Zambia; the two should be afforded a chance to enjoy such rights without restriction.

The third characteristic is that they are indivisible, interdependent and interrelated. The concept of being interrelated is very cardinal to this essay because it propounds the thought that a person cannot enjoy one right in isolation of another. For example one cannot enjoy the right to life if does not have access to basic health care. Furthermore the right to health is affected one cannot enjoy their right to education because it is difficult if not impossible to function in ill health.

¹⁹Carlson Anyangwe. Introduction to Human Rights and International Humanitarian Law. (Lusaka: UNZA Press. 2004) at page 12

²⁰Misozi Masengu. Civil and Political Rights in Zambia: A Critical Analysis of A Prisoner's Right to vote.2010 In fulfilment of the Bachelor of Laws Degree at the University of Zambia at page 10

²¹Anyangwe Carlson. Introduction to Human Rights and International Humanitarian Law. (Lusaka: UNZA Press. 2004) at page 1

²² www.theewc.org accessed on 16th September 2012

2.3 THE CONCEPT OF CHILDREN'S RIGHTS

Human rights in earlier times were merely recognised in general, in that they applied equally to both adults and children. The concept of children's rights came about in the early years of the Renaissance and Reformation.²³ During this period children began to be considered as weak and innocent and requiring extra care from adults.

Later on, in the early twentieth century and specifically the 1970's and 80s that the concept of child rights emerged.²⁴ During this time there was recognition that children have interests, perhaps even rights that need to be considered distinctly and separately from those of adults and particularly their parents. So this entails that children have the basic human rights that accrue to adults but they further have rights that are specific to them. However, the question of what rights should be given to children is still being debated in courts, legislatures and scholarly and popular journals.²⁵

The question that would arise now is why there was or still is a need to recognise children as beneficiaries of rights specifically. Children have been defined in the CRC, as a person below the age of 18. In its preamble, the Convention states that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance²⁶, therefore there is a need for children to have special protection for themselves.

Most developing nations do not give the adequate attention to social economic rights as they should. Zambia for example does not guarantee the right to basic health and welfare. This is

²³[http:// www.justice.gc.ca/eng/pi/fcy](http://www.justice.gc.ca/eng/pi/fcy) (Canadian Justice Department Website) accessed on 17th September 2012

²⁴<http://www.justice.gc.ca/eng/pi/fcy> (Canadian Justice Department Website) accessed on 17th September 2012

²⁵ Goldstein. Medical care for children at risk, state supervision of parental autonomy. Yale law Journal. 86. 645. (1977)

²⁶ Preamble to U N Convention on the Rights of a child

despite the fact that a number of the international instruments to which Zambia is a party actually define this right as a fundamental human right. However, it is important to note that human rights are interdependent. This means that one right cannot be enjoyed without the enjoyment of another. Social and economic rights are just as important as civil and political rights all rights are based on a natural right.²⁷

As it stands now the right to basic health is a fundamental right. Children and adults alike cannot develop if they do not have access to at least a minimum standard of healthcare. According to Professor Chanda, the health services in Zambia are virtually broken down with situations where there are no medicines available in hospitals and most Zambian people cannot even afford to pay fees at local health centres.²⁸

2.4 DOMESTIC LAW RELATING TO THE CHILD'S RIGHT TO HEALTH

The earlier chapter defined the right to health from various international instruments and international cases. Following from that is the importance of acknowledging that this right exists and whether or not it is acknowledged in the domestic sphere, Zambia.

In Zambia, the right to health of the child is not put in specific legal instruments for children. There are about numerous domestic laws that state who a child is in Zambia and each seems to give a different minimum age for a child.²⁹ Children derive their rights from Part III of the Constitution. The rights in the Constitution are generally seen as an entitlement of every person

²⁷Misozi Masengu. Civil and Political Rights in Zambia: A Critical Analysis of A Prisoner's Right to vote.2010 In fulfilment of the Bachelor of Laws Degree at the University of Zambia at page 14

²⁸Alfred Chanda.Gaps in the Law and Policy in the Implementation of the Convention of the Rights of the Child.Zambia Law Journal.Volume 32. (2000) at page 12

²⁹ Alfred Chanda. Gaps in the Law and Policy in the Implementation of the Convention on the Rights of the Child. Zambia Law Journal. Volume 32. Lusaka: Unza Press.at page 12 (2000)

in Zambia.³⁰ The rights in Part III include the right to life,³¹ the right to own property, and right to freely assemble and so on. The rights in the Bill of Rights do a good of encompassing civil and political rights. That being the case, there is room for argument the rights are not comprehensive enough and so are not adequate because there is a relationship between civil and political rights and social, economic and cultural rights. The two branches of human rights cannot be enjoyed one without the other. Therefore guaranteeing one without the other will not reach the full objective of protection of human rights.

The consequence of a right being in the Bill of Rights is that the right is justiciable, meaning that it is enforceable in a court of law. However, the right to health specifically is not even in Part III of the Constitution. It is instead found in Part IX of the Constitution. Article 110 states that "the application of the Directive Principles of State Policy may be observed only in so far as the state resources are able to sustain their application, or if the general welfare of the public so unavoidably demands, as may be determined by cabinet.' Furthermore Article 111 states that 'the Directive Principles of State Policy may be observed only in so far as State resources are able to sustain their application, or if the general welfare of the public so unavoidably demands, as may be determined by cabinet.' The consequence of this is that the right to health is not a guaranteed right.

However, the Constitution is not completely silent as regards the right to health. It is specifically stated as a Directive Principle of State Policy in Article 112³² which states that 'The following Directive shall be the Principles of State Policy for the purposes of this Part: d) the State shall endeavor to provide clean and safe water, adequate medical and health facilities and decent

³⁰ Chapter 1 of the Laws of Zambia

³¹ Article 11 of the Constitution

³² For Comparison see also the Ghanaian Constitution's Directive State Principles in Chapter six

shelter for all persons, and take measure to constantly improve such facilities and amenities.’ Paragraph (f) of the same Article further states that ‘the State shall strive to provide a clean and healthy environment for all.’ Seeing that the right to health encompasses not only physical health but mental and spiritual health, this provision is also relevant in discussing the right to health.

With the above discussion the issue that comes to mind is whether there is any justification for the right to health to continue to be in the Directive Principles of State Policy and not as a guaranteed right in the Bill of Rights. This is what this research seeks to explain. The right to health is not being given the adequate recognition that it deserves.

The rights of a child are human rights. The realisation that not all human beings have the same access to human rights and the fact that there are persons with their own needs made it necessary to create special treaties of human rights, including those for children. Aristotle once said, ‘if we believe men have any personal rights at all as human beings, they have an absolute right to such measure of good health as society, and only society alone is able to give it to them.’³³

The right to health has been said to be both preventive and curative. This means that there should be provision of medical care for the sick and extends to the underlying determinants of health.³⁴ These aspects can be realised through the three core obligations of each state, these are; to protect, fulfill and to respect.

The duty to respect the right to health obliges the State to refrain from interfering directly or indirectly with the right to health. The State should not, for example, limit access to health services or contraceptives; censor or misrepresent health information, or impose discriminatory

³³ Evelyn Ankuman. The African Commission on Human and People’s Rights: Practice and Procedures 147 (1996)

³⁴ General Comment 14, The Right to the Highest Attainable Standard of Health: E/C 12/2000/4, CESCR 11/08/2000

practices relating to women's health needs.³⁵ For purposes of this research, for the discrimination is in relation to the child's health needs. One question that arises from this duty is whether making health services only accessible to the rich amounts to 'limiting access to health care services.' If it does then that is a breach of the duty of a state to respect the right to health.

Protecting the right to health implies the State should prevent third parties from interfering with the right to health.³⁶ It includes ensuring that privatisation of the health care system does not threaten the availability, accessibility, acceptability and quality of healthcare goods and services. It also covers the protection of individuals from acts that may be harmful to their right to health, for example preventing women from undergoing harmful traditional practices such as female genital mutilation.

Thirdly, the duty to fulfill the right to health obliges the State to adopt appropriate legislative administrative, budgetary, judicial, promotional and other measures to fully realise the right to health.³⁷ The State must, for example, come up with policies and action plans to realise the right to health. They can embark on health campaigns, sensitisation programmes, proper and adequate budgetary allocations just so that the right in question is realised. It is the success of these policies that help the poorest child gain access to nutritious food, clean water, proper sanitation and other health requirements.

2.5 THE RIGHT TO HEALTH UNDER INTERNATIONAL LAW

The right to health under international law stems from various international treaties and conventions. Zambia in particular is a party to various international conventions ranging from

³⁵ www.actionforglobalhealth.eu accessed on 12th February 2013

³⁶ General Comment 14

³⁷ Sandra Kiapi. 'The Right to Health under the African Charter'. From www.wcl.american.edu accessed on 12th February 2013

regional ones such as the African Charter on Human and People's rights, to worldwide ones such as the United Nations CRC.

Professor Anyangwe argues that each and every member country to the Convention has an obligation to undertake all appropriate measures, legislative measures inclusive, in order for there to be an achievement of full child protection.³⁸ This can be done in various forms for example policy making, enacting laws or even public sensitisation. However, the best step to take would be that which ensures comprehensive protection of child rights. The country in question obviously needs to see which route is the best for them.

Zambia is a party to international instruments that provide for the protection of the right to basic health. As a result of such ratification of such instruments there is an obligation on Zambia to fulfil the rights provided for in the Conventions. One such Convention is CRC which in Article 24 guarantees the right to the highest standards of health care available. The biggest challenge with the CRC is that it has not been domesticated. This is another problem as regards the accessibility of rights to children.

International law is definitely a source of law in Zambia but it has to go through a process of domestication. This is a process by which parliament enacts and passes the relevant enabling legislation.³⁹ So until the treaties are domesticated they may apply to Zambia but are not enforceable in a court of law. This then in totality entails that one cannot enforce their rights pursuant to such a treaty or convention rendering it all of no benefit at all. The only elements of international law that appear not to require domestication though the position is not clear is that

³⁸Carlson Anyangwe. Introduction to Human Rights and International Humanitarian Law. (Lusaka: UNZA Press) at page 38

³⁹Margaret Munalula. Legal Process. (Lusaka: UNZA Press. 2004)at page 89

of customary international law. Munalula argues that allowing a treaty to immediately come into force upon being signed amounts to giving the executive law making powers.⁴⁰

International law has its constraints however. This is especially true in the case of monist countries such as Zambia that do not immediately domesticate the treaties to which they are parties. That leaves the enforcement mechanism weak to actually take action against such states. It is usual that these rights exist only as guides for some states, never as a benchmark. Some institutions that sometimes actually enforce these rights are further weakened by the fact that the access may be difficult or even biased.⁴¹

2.5.1 The African Charter on Human and People's Rights

The African Charter on Human and People's Rights (hereinafter referred to as "the Charter" for purposes of this section) is a regional instrument that was concluded in Banjul on 26th June 1981 and came into force on 21st October 1986. In its preamble the Charter states that states parties came up with it an "after recognising on the one hand that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of people's rights should necessarily guarantee human rights"⁴²

It further states that the states are "convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, cultural and social rights in their conception as well as universality and that the

⁴⁰ Margaret Munalula. Legal Process. (Lusaka: UNZA Press. 2004) at page 89

⁴¹ Ndulo Muna. Ed. Democratic Reform in Africa. Article by Daniel Manning 'Realising Rights Through Advocacy'. (Ohio: Ohio Press. 2006) at page 176

⁴² African Charter on Human and Peoples Rights

satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.”



The earlier declarations by the member states of the United Nations clearly show that the rights of every individual require special attention and that all rights cannot be separated from each other for them to be fully enjoyed. However, the fact that they are in the preamble means that they have no legal effect. Nevertheless, it makes it clear that economic, social and cultural rights are to be respected. Still everybody seems to be avoiding the real issue and that is make provisions that actually make this right enforceable in the courts of law and not merely making unjusticiable declarations.

Article 16 of the Charter states that, ‘every individual shall have the right to enjoy the best attainable state of physical and mental health’. This is further clarified in paragraph 2 of the same Article which states that ‘States Parties to the Charter shall take the necessary measures to protect the health of the people and to ensure that they receive medical attention when they are sick’. This provision encompasses actions such as immunization for children, provision of Anti-Retroviral drugs to HIV positive people, adequate nutritional standards and so on. The Protocol of this Charter also includes the right to health and reproductive freedom.

Despite the strong declarations among the African community to create an environment where social-economic rights are protected, some scholars have argued that these rights simply cannot be justiciable. They cannot be enforced through litigation and judicial enforcement the way civil and political rights can. According to Daniel Manning, the question as to whether or not courts can enforce these rights has two responses. The first reason is that, following research and experience, the courts have proved that they are a successful tool in making a difference. The

second reason is that litigation alone is not the only tool that can be used. Other tools can be used in place of litigation.⁴³ However the second reason can be disputed by the fact that courts have played a very vital role in the enforcement of this right and their role cannot therefore be underscored.

The next chapter of this research shall give more insight as to how litigation is important and also discussing the countries that have made the right to health justiciable. The South African Constitution is a good example of how courts have enforced this right through litigation. It is a fact that courts cannot create resources but they can push for effective use of available resources and can compel the executive and legislature to implement progressively a priority to meet basic rights of the citizens of a country.⁴⁴

In order to make the provisions of the African Charter enforceable, there was the setting up of the Human Rights Commission and then later the African Court of Human Rights. The commission made various decisions where individuals and even states were parties to the proceedings. The Commission decided some cases relating to Zambia and many other countries.⁴⁵

The African Court of Human Rights⁴⁶ however, requires for states to consent to its jurisdiction. Zambia has not expressly consented to the jurisdiction of the court since it came into force in 2004. Furthermore, the jurisdiction of the court is very wide as to include the determination of

⁴³ Daniel Manning.. 'Realising Rights through Advocacy'. Ndulo Muna.ed. Democratic Reform in Africa (Ohio: Ohio Press) at page 176

⁴⁴ Daniel Manning. Ndulo Muna. ed. Democratic Reform in Africa. 'Realising Rights Through Advocacy'. (Ohio Press:Ohio) at page 176

⁴⁵ See *Zambian cases of Legal Resources Foundation in v Zambia of 2001* or *Recontre Africaine Pour Les Defense des Droits de L'Hommes v Zambia of 1996*

⁴⁶ Established under the 1998 Protocol to the ACHPR

matters arising from the United Nations Conventions that relate to human rights.⁴⁷ Despite this fact, Zambians cannot sue for enforcement of their right to health because not only are their rights not guaranteed through any international Convention but also there is no jurisdiction for the court to hear the matters that are arising from matters concerning Zambia.

All the provisions in the African Charter should be enjoyed by children also despite the fact that they are not specific in their wording. In fact, children require an even stronger protection mechanism so further steps need to be taken. In addition to the Charter, they have their very own Charter regionally and even on a worldwide scale.

2.5.2 The African Charter on the Rights and Welfare of The Child (ACRWC)

This Charter is a regional instrument that refers to the rights of African children, the first one in the region. It defines a child as a person below the age of 18.⁴⁸ It has received wide ratification but has had many challenges in its enforcement. In Article 14 of the Charter it states that ‘every child shall have the right to enjoy the best attainable state of physical and mental and spiritual health.’ This provision brings in a different aspect of spiritual health. The Charter seems to have widened the provisions of other international children’s Conventions. The Charter even states the duties and responsibilities that children have towards their family, state and the international community.⁴⁹ This to certain extent is way of codifying African customs into the written law.

Article 20 states that States parties are obliged to assist parents or guardians of children and ‘if necessary’ provide material assistance particularly in relation to nutrition, health, education,

⁴⁷ Article 2 of the Charter and also Article 28 of the Charter

⁴⁸ Article 2

⁴⁹ Article 31

clothing and housing. It places on states the duty to protect the right to health by reducing infant mortality rates, providing medical assistance and healthcare to all children.⁵⁰

Evidently, the ACRWC gives children the right to health as a fundamental right. The other provisions of the Charter can be used to further protect this right such protection from child abuse and child labour. The ACRWC does not provide for derogations. Zambia became a party in the year 2008 on 2nd December.⁵¹ But she still needs to take further steps other than ratifying and letting the matter end there. The continued violation and failure to implement the provisions in the Charter amount to serious violations. Zambian children are not being recognized specifically in any piece of domestic legislation as regards their right to health. By virtue of continuous signing of the treaties discussed the Zambia is showing that it recognizes this right. But has chosen not to enforce it, or at least has chosen not to embrace it as quickly as she should.

The Charter has a Committee of Experts that looks into ensuring that states are following the provisions of the Charter. The Committee can do this through various means such as reporting.⁵² If a state reports and expresses its challenges, then the Committee is free to give suggestions and recommendations as to how the state can improve. There has been very little action from the Committee because many states are signatories but very few have actually made the rights in the Charter applicable domestically. The effect then is that they are not justiciable and the state is not legally bound to perform this particular duty.

Health is an indispensable component for the realization of all other rights. Poor health is one of the leading causes of under development, poverty and deaths. It drains the state of much labour

⁵⁰ Article 16 (1) and (2)

⁵¹ <http://www.pages.au.int/acrwc> accessed on 9th June 2013

⁵² http://www.claiminghumanrights.org/children's_charter.html accessed on 10th June 2013

and human resource.⁵³ Africa is considered to be progressing too slowly in relation to the rest of the world in development and at the same time has some of the highest rates of poor nutrition and health care services, there seems to be a relationship between the two.

2.5.3 The Universal Declaration of Human Rights (UDHR) and Its Application to Children

The UDHR is a United Nations instrument that came into force 10th December, 1948. It encompassed the basic rights of human beings and their freedoms.⁵⁴ The provisions of the UDHR were not intended to be of legal force but they have slowly crystallised into customary international law status and so they are now binding on states.⁵⁵ Since the Declaration is not a legally binding instrument it does not have signatories. Also it is general in its wording but it has universal application so the rights declared by it can apply to children and young people. However, because children are usually in positions in which they can be oppressed and victimized more than the average citizen, there was a move to further protect them with their own piece of legislation, namely the Convention on the Rights of the Child, CRC.⁵⁶

There are provisions in the UDHR that relate to health, they are not specific to children but they apply to children also, as was explained above. Article 25 (2) provides that ‘motherhood and childhood are entitled to special care and assistance and all children whether born in or out of wedlock shall enjoy the same protection.’ Further in Article 25 (1) it states that ‘everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family including food, clothing, housing and medical care and necessary social services...’ The rights

⁵³ Sandra Kiapi. Interpreting the Right to Health under the African Charter, citing from Africa’s Right to Health Campaign on www.wcl.american.edu accessed on 18th May 2004 accessed by author on 12th February 2013

⁵⁴ UDHR Preamble

⁵⁵ Misozi Masengu. A Critical Analysis of the Prisoner’s Right to Vote. In partial fulfilment of the Bachelor of Laws degree. At page 24 citing Rodley N. Treatment of Prisoners under International Law. London: Clarendon Press. (1987) at page 257

⁵⁶ <http://www.unac.org/rights/question> accessed on 7th June 2013

in the Declaration require that countries provide a manner of protecting their citizens by providing adequate medical services. A minimum standard that ensures that they have the basic health requirements is all that is needed from this provision.

The UDHR has influenced the framing of many human rights treaties including those in Africa. Many Constitutions have been influenced by both the CRC and the UDHR and have included specific provisions for children in their Constitutions. For example in Sudan in Article 14 of its Constitution states that ‘the state shall care for children and youth, protect them from physical and spiritual neglect and shall implement policies for moral care and national education...’ this is a positive trend but Zambia is still lagging behind in this cause.

2.5.4 The United Nations Covenant on Economic, Social and Cultural Rights (ESCR)

This Covenant came into force in the year 1966. As was discussed in relation the other general Conventions, the ESCR also applies to children. The Convention recognizes that economic, social and cultural rights are fundamental for the development of every human being. It recognises that all rights are indivisible and so must be protected in a holistic manner.⁵⁷ Zambia has ratified this Convention but has not domesticated it. The effects of this have already been discussed. The right to health is an economic, social right and so it is encompassed by this Covenant.

2.5.5 The United Nations Convention on the Rights of the Child (CRC)

This Convention has been discussed in the earlier chapter and a brief history of it has been given. Zambia is a state party to the CRC after ratifying in the year 1991, about 22 years ago. The Convention gives a wide variety of rights to children ranging from civil and political rights to

⁵⁷ Preamble to the ESCR

economic, social and cultural rights. The CRC is also for realising harmonious development of children.⁵⁸



The Convention defines a child as one who is below the age of 18.⁵⁹ Article 24 specifically refers to right to health. It states that ‘States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or right of access to healthcare services.’ In Zambia very few children have access to health care facilities, nutritious food, medicines and so on.⁶⁰ The provisions of the CRC have however not been domesticated in Zambia. This is a major setback in child rights. Children’s right to health can be neglected and the child will not have any recourse.

In attaining full protection of this right, the CRC includes duties such as diminishing infant and child mortality,⁶¹ ensure appropriate pre-natal and post natal health care for mothers,⁶² to combat disease and malnutrition, including within the framework primary healthcare, through inter alia, the application of readily available technology through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution⁶³ the fact that Zambia is a developing country and faces financial challenges is recognized by the CRC.⁶⁴ Of course this does not in any way allow for infringement of the right in question. The right to health also requires consideration of an individual’s biological and

⁵⁸ Preamble of the CRC

⁵⁹ Article 1

⁶⁰ www.who.int/mediacentre accessed on 12th January 2013

⁶¹ Article (24) (2)(a)

⁶² Article 24 (2)(d)

⁶³ Article 24 (2) (c)

⁶⁴ Article 24 (3)

socio-economic preconditions for health as well as a state's available resources to enable its citizens to realise their right to health.⁶⁵

2.6 THE RIGHT TO HEALTH UNDER CUSTOMARY INTERNATIONAL LAW

Customary international law is a branch of international law that stands separate from treaty law. According to the International Court of Justice (ICJ) Statute customary international law is a general principle that is accepted as law and is binding on all States without exception irrespective of their express consent.⁶⁶ The characterisation of the right to health as such would then broaden this right and create a situation where its enforcement is beyond treaty based obligation.⁶⁷

In order for a particular norm or provision to become customary international law it should have the two essential elements and these are state practice and *opinio juris seve necessitatis*. This was decided in the *North Sea Continental Shelf Case*⁶⁸ where the equidistance principle was held not to be customary law because it did not have a number of states using it and even those that used it did not seem to do so as a matter of law. The exact opposite was decided in the case of *Nicaragua v USA*⁶⁹ where the courts stated that despite the fact that the USA may not have allowed jurisdiction to the ICJ based on a treaty provision, the court would still hear the matter because the breach of a duty not to use force on another state had been breached. The court stated that prohibition of the use of force by one state against another had crystallised into customary international law.

⁶⁵ www.who.int/mediacentre accessed on 12th January 2013

⁶⁶ Article 38

⁶⁷ Andrew Clapham and Mariano Rubio. 'The Obligations of States with Regard to Non-State Actors with Regard to the Right to Health'. Accessed from www.who.int on 10th July 2013 at page 22

⁶⁸ ICJ Reports (1969)

⁶⁹ ICJ Reports (1986)

In order to determine whether or not the right to health is now customary international law it must be established that the two elements are present. The first element to be considered is state practice. The matter to analyse is whether or not states have taken steps to be part of Conventions that provide for the right to health. The CRC itself has the widest ratification of all treaties providing for the right to health of this right. Other Conventions include the Convention on the Prevention of all Forms of Discrimination against Women (CEDAW) has 170 states parties, Convention on the Elimination of all Forms of Racial Discrimination has 165 states parties. These treaties have been widely accepted by the international community and they refer to health for persons in one way or another.⁷⁰ In addition there is the fact that some states have actually made this right justiciable while those that have not made this right justiciable still mention it in their Constitutions, just like Zambia.

According to Toebe's the fact that the right to health is codified in many Constitutions implies that States generally recognise their responsibility regarding the health of their people and if States recognise such a right at constitutional level they will also logically recognise the existence of an international right to health.⁷¹ Furthermore, those countries that have not made this right justiciable are still parties to treaties or Conventions that provide for protection of the right to health.⁷²

The other element is that there should be state practice. The many signatories are already an example of how states are actually taking part in the realisation of this right. The reference to

⁷⁰ Andrew Clapham and Mariano Rubio. 'The Obligations of States with Regard to Non-State Actors with Regard to the Right to Health'. Accessed from www.who.int on 10th July 2013 at page 22

⁷¹ B.C.A Toebe's. 'The Right to Health as a Human Right in International Law'. Antwerpen :Intersentia (1999) at pages 77-79

⁷² Martin Hevia and Carlos Vacaflores. 'Effective Access to Justice Against State and Non-State Actors in the Framework Convention on Global Health: A Proposal'. Volume 15. Number 1. (2013). Accessed from www.hhrjournal.org on 12th July 2013 at page 8

such a law in national legislation is also another indicator. Furthermore states are also now giving force to this right in their domestic courts for example South Africa, India and even in Ireland.⁷³ In relation to the above discussed existing state of the right to health, it would not be wrong to conclude that the right to health is now supposed to be a general part of customary international law.

2.7 VIOLATION OF THE RIGHT TO HEALTH IN ZAMBIA

Violation of the right to health is not only through express breaches by the state but also through the direct action of states or other entities insufficiently regulated by states.⁷⁴ The United Nations estimates that there are about 4.8 million Zambians without access to clean water and about 6.6 million people lack access to proper sanitation.⁷⁵ This is a country that has ratified all the Conventions above, some for more than one decade. According to Water Aid Zambia, there are over 5000 children who die every year from diarrhea caused by unsafe water and poor sanitation in Zambia. This is despite the fact that Zambia has been rated by some scholars as one of the fastest growing economies in the world.⁷⁶ There needs to be more strides taken to ensure that vulnerable people, especially children do not lack access to basic health needs such as clean water.

Some steps have been taken to minimise the problem such as UPR Recommendation (11) that allowed for allocation from the budget to street children shelters and rehabilitation, establishment

⁷³ Andrew Clapham and Mariano Rubio. 'The Obligations of States with Regard to Non-State Actors with Regard to the Right to Health'. Accessed from www.who.int on 10th July 2013 at page 22

⁷⁴ S Kiapi. The Right to Health under the African Charter of Human rights from www.wcl.america.edu accessed on 12th February 2013 at page 9

⁷⁵ www.unicef.org accessed on 10th June 2013

⁷⁶ www.wateraid.org/wherewework/page/zambia accessed on 9th June 2013

of a few rural health centres but there is still no national strategy for prevention. Even disabled children have been captured in this recommendation but still it does very little to fix the problem as a whole.⁷⁷ It is no use remedying the effects of the problem when the symptoms still remain.

2.8 CONCLUSION

In conclusion, this chapter has shown the obligations that Zambia has at both domestic level, regional level and international level. It is evident that the continued lack of concentration on the right to health is amounting to a violation and Zambia has no excuse to continue subjecting children to such treatment. There is definitely an allowance for developing countries to take slower strides than developed nations but two decades of failure to validly implement the CRC leaves much to be desired.

Now that the status of a child under the law has been established under the law, the next chapter shall look into the right to health specifically. It shall discuss other jurisdictions that have made this right justiciable and how they have managed to do so. Furthermore, the challenges that Zambia faces as a developing country in relation to the right to health shall also be discussed and suggest ways in which these challenges can be remedied.

⁷⁷www.wateraid.org/wherewework/page/zambia accessed on 9th June 2013

3.0 CHAPTER THREE: PROTECTION OF THE CHILD'S RIGHT TO HEALTH IN ZAMBIA

3.1 THE RIGHT TO HEALTH AS A BASIC HUMAN RIGHT FOR CHILDREN

The right to health falls in the category of social and economic rights. The cold war introduced a separation of human rights into the hierarchical enclosures of civil and political rights in one dimension and social, economic and cultural rights in another.⁷⁸ Civil and political rights have gained a lot more recognition than Social and economic rights. An endeavor to define the right to health is not easy. It is influenced by factors such as geography, cultural and various social economic rights⁷⁹

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ESCR) provides that 'States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. Article 12(2) further contains, among others, important determinants of the right to health such as prevention and treatment of diseases, essential for the enjoyment of the right.

The African Charter on Human and Peoples Rights in Article 16 (1) and (2) states that "every individual shall have the right to enjoy the best attainable state of physical and mental health and that every state party to the Charter shall have a duty to ensure that they take measures to protect

⁷⁸ John Akokpari and Zimble John. ed. *Africa's Human Rights Architecture. The Conundrum of Development and Human Rights in Africa*. Cape Town: CTP Book Publishers at page 29

⁷⁹ Sandra Kiapi. *Interpreting the Right to Health under the African Charter*. East African Journal of Peace and Human Rights. Vol11:1. 1980

the health of their people. These are international law provisions, and as mentioned earlier, they are not enforceable or binding in Zambia unless they have been domesticated.⁸⁰

The UN Committee on Economic, Social and Cultural Rights (ESCR Committee) in its General Comment 14, while clarifying the content of the right to health, has noted that the right to health contains both freedoms and entitlements. In other words, an individual should have the right to control his/her body and health, including sexual and reproductive health, and the right to be free from coercive medical treatment and experimentation.⁸¹ It emerges therefore that acts such as forced marriages and child bearing, performing medical trials on people without consent could amount to a violation of the right to health.

Therefore, the entitlements relate to the right to 'a system of health protection which provides equality of opportunity for people to enjoy highest attainable level of health'. There must not be discrimination as regards the right to protection of this right.

Children also specifically should enjoy the right to health without discrimination. The statistics of children that currently do not enjoy adequately the right to health in Zambia are staggering. According to the UNICEF there are about 119 under-five deaths per 1000 live births. Furthermore, about 52% of children are stunted, 18% are underweight and 5% are wasting.⁸² They further state that the leading causes of death of children below the age of five years include neonatal causes, pneumonia, malaria, diarrheal diseases and HIV.

Furthermore, there are an estimated 12 000 children living with HIV of which about 59 000 remain in need of anti-retroviral therapy, (ART). In Zambia there is a general lack of

⁸⁰ The concept of domestication has been defined in chapter one

⁸¹ Kilander Magnus.ed. International law and domestic human rights litigation in Africa. Pretoria: Pretoria University Law Press. (2010) at page 157.

⁸² <http://www.unicef.org/Zambia> accessed on 25th March 2013

infrastructure (health care centres), material and adequate numbers of trained personnel hence the right to health for children is not being realised adequately. The high levels of poverty in the country do not make it any better because poor children will not access healthcare while their rich counterparts easily do so without barriers.

3.2 NUTRITION AS A CONCERN IN ZAMBIA AND ITS' RELATIONSHIP TO HEALTH

Despite having provisions such as the ones discussed above, many African countries are still lagging behind in terms of nutrition for children. Nutrition is an important aspect in the right to health because it is a factor in ensuring that people are healthy. One cannot be healthy if they do not have proper nutrition. Apart from the fact that malnutrition retards development it is also taxing on the right to health. According to the United Nations report, malnutrition is estimated to cost the world \$3.5 trillion, or \$500 for every person in healthcare and lost productivity.⁸³

Zambia is not spared from this dilemma because there are malnourished children in Zambia. Steps need to be taken to ensure that there is adequate nutrition for Zambian children. This right is being neglected by the three organs of government, despite the fact that it affects them too. It is very challenging for a country like Zambia to break out of poverty when there is little production. If the legislature takes steps to make enforceable laws or domesticate them, then the executive makes sure that the provisions are domesticated through working policies and then the judiciary enforces these rights in the courts of law, then the right to health can be seen as an actual reality and not just a theory as it is today.

⁸³ www.bbcworldnews.com accessed on 9th June 2013

Nutrition is a growing concern worldwide as evidenced by the Enough Food for Everyone Campaign summit held in Ethiopia and Brazil in June, 2013. The United Kingdom pledged to spend about 375 million to realize the goal of adequate nutrition in the poorest parts of the world, the money is aimed at preventing infant deaths from under nutrition which is the biggest underlying cause of death in children aged under 5 in the world.⁸⁴ Africa, Zambia to be specific needs to improve the manner in which the right to health is regarded because it is a very 'costly' right to ignore. But it is obvious that for rights to actually be recognised and given their full potential there should be complete change in people's current attitudes.

3.3 THE FOUR CORE ELEMENTS IN REALISING THE RIGHT TO HEALTH

The protection of human rights requires that states are actively involved in the development of human rights standards, institutions and supervisory mechanisms. At national level it is imperative that they comply with international standards.⁸⁵ In order for a state to fully realise the right to health there are four core elements that should be fulfilled. These four elements according to United Nations are availability, accessibility, acceptability and lastly quality. it is clear that the right to health is not easy to define, this is because it is treated in a different way in each jurisdiction owing to the fact that it does not only require the recipient of the right to enjoy it but also the state, international organisations, non-governmental organisations (NGOs), health personnel among others.⁸⁶

In realising these four elements the state has three duties to perform. These are the duty to protect, duty to fulfill and the duty to respect. The states duties when applied to children should

⁸⁴ www.bbcworldnews.com accessed on 9th June 2013

⁸⁵ www.humanrights.is/the-human-rights-project accessed on 11 th July 2013

⁸⁶ Depoina Poutakidou. 'The Right to Healthcare in today's Challenging World: is Justiciability the Answer?'.1st runner-up 4th International Focus Programme Essay Competition on Health Law.Greece (2012)

ensure that children be given the fullest opportunity to actualize or develop their talents, unhindered by unreasonable obstacles such as poverty, tribe, geographical origin, religion or socio-economic status and this duty is imposed on all democratic states.⁸⁷ The first duty, to protect entails that the state or government should act in such a manner as to ensure all rights are protected. They must control actions of third parties also in protecting these rights. The next duty to fulfill means that states have an obligation to provide and facilitate realisation of a particular right.

The duty to respect requires states not to take measures that will result in individuals suffering from human rights violations.⁸⁸ They should put in place mechanisms that will adequately safeguard the well-being of the citizens. The duties of a state are to be achieved progressively.⁸⁹ That means that steps must be taken and these steps should result in adequate changes and these changes should be done within a reasonable time.

3.4 RIGHT TO HEALTH IN ZAMBIA AND IT'S ENFORCEMENT IN ZAMBIAN COURTS

The right to health as has been earlier discussed has not been given a fundamental position in the Zambian legal system. It has instead been given a back-row seat and therefore it has not actually been well debated. Many people are aware of the fact that the right to health is not enshrined in Part III of the Zambian Constitution. They do not see the need to go to court to debate a matter that is not even enforceable in the Zambian courts. This is despite the fact that Zambia is a state

⁸⁷ Henrietta Mensa-Bonsu and Christine Downona-Hammond, eds. Article by Mends E.H. 'The Right of the Child in Ghana-the Socio-cultural milieu'. (Accra: Woeli Publishing Services. 1994) at page 16

⁸⁸ www.fao.org accessed on 10th July 2013

⁸⁹ www.fao.org accessed on 10th July 2013

party to many international treaties that provide for this right. The provisions in question are not domesticated hence not enforceable.

What is obvious is that due to the fact that socio-economic rights and in particular the right to health are not justiciable the result is that there is very little or no litigation on the issue. Subjecting the right to health as a socio-economic right to judicial review or enforcement by the courts makes litigation an important tool. Litigation helps in ensuring that the right in question is given an interpretation such as its scope, recipients and so on. Basic needs such as food, water, social security and healthcare require state intervention for them to be recognized adequately.⁹⁰

Skilful litigation can help to ensure that governments fulfil their constitutional and international treaty obligations. Such assurances are especially valuable in countries in which social security systems are still being developed.⁹¹ Zambia is one such country that is developing its social security systems and such systems can be made stronger by ensuring the stakeholders have a say in how their country is managed.

Litigation generally, and public interest litigation in particular provides an avenue for individuals or groups to redress human rights violations. Although litigation is by no means the only avenue for realising the right to health, it remains one of the most important tools of achieving change in society.⁹² For example Public Order Act of Zambia was challenged in the courts for having provisions that the plaintiffs thought were a violation of their rights to freedom of assembly and association. The courts in analysing the matter held that the provisions be declared null and void

⁹⁰Muna Muna. *Democratic reform in Africa*. (Ohio: Ohio University Press. 2006) at page 59

⁹¹ Kilander Magnus(ed). *International law and domestic human rights litigation in Africa*. (Pretoria: Pretoria University Law Press. 2010) at page 155

⁹² Kilander Magnus(ed). *International law and Domestic Human Rights Litigation in Africa*. (Pretoria: Pretoria University Law Press. 2010) at page 154

because they infringed on the rights of the plaintiffs.⁹³ This is a clear example of how rights that are in the Bill of Rights are justiciable and their violations be challenged in the courts to give an element of force to the rights mentioned. However it must be noted that the rights in the case above are civil-political rights and socio-economic rights. This means that the latter are not given the necessary force that they require.

The republic of South Africa is a good example of a country that has made the right to health justiciable. One would argue that the right that is guaranteed in the South Africa is not a right to health but in the definition of the right to health in Article 12 states that in the enjoyment of the right to health there is a requirement for access to treatment and prevention of disease. Then healthcare is defined as the service that is responsible for looking after the health of all the people in a country or an area.

In South Africa one of the cases litigating the right to health is the case of *Minister of Health and others v Treatment Action Campaign*.⁹⁴ In that case, the South African government argued that providing Nevirapine (an anti-retroviral drug) in public hospitals to prevent transmission of HIV from pregnant women to their children was too expensive and that there was no medical proof guaranteeing the safety and efficacy of the drug.

In its judgment, the Constitutional Court of South Africa rejected the government's excuse of lack of resources and found that refusal on the part of the government to make the drugs available in public health institutions contravened the right to health guaranteed under section 27 of the Constitution of South Africa. The Court then ordered the government to ensure that these drugs were made available in public health institutions. In the words of Forman, the decision in

⁹³ Christine Mulundika and others v The People (1995) ZR SC

⁹⁴ 2002 (5) SA 721 (CC)

Treatment Action Campaign 'broke the deadlock on a social struggle where political debates had consistently failed to achieve satisfactory outcome'.⁹⁵

In the Nigerian case of *Okogie and others v Attorney General of Lagos State*⁹⁶ the applicant challenged the policy of the Lagos state government to abolish private schools within the state claiming that it was in violation of the right to education guaranteed under section 16 (chapter II) of the 1979 constitution, which is similar to the provision of the 1999 Constitution. The Court held that by virtue of section 6 of the 1979 Constitution or (section 6 of the 1999 Constitution) the provisions of chapter II of the Constitution were not enforceable and that it was not in the power of the Court to make any pronouncement on them.

In deciding the matter the court was of the view that such a decision must be made either by the executive or the legislative arm of government. If ever there was any hope of litigating on socio-economic rights (contained in chapter II of the Nigeria Constitution) prior to *Okogie* case, this hope was dealt a deadly blow by the Court in that case. Although this case was decided before Nigeria incorporated the African Charter into its domestic law subsequent decisions by the courts have not differed so much as Nigerian courts have continued to shut the door to prospective socio-economic rights litigants⁹⁷ it is important to note that Nigeria is a dualist state just like Zambia.

At the core of the South African Constitution is the right to equality. Also their Constitution seems to be based on the belief that civil and political rights cannot be separated. The Zambian Constitution does not provide a specific provision to state the right to equality in itself and seems

⁹⁵ Magnus Kilander (ed). *International Law and Domestic Human Rights Litigation in Africa*. (Pretoria: Pretoria University Law Press. 2010) at page 154

⁹⁶ *Archbishop Okogie and others v The Attorney-General of Lagos State* (1981) 2 NCLR 350

⁹⁷ Magnus Kilander (ed). *International Law and Domestic Human Rights Litigation in Africa*. (Pretoria University Law Press. 2010) at page 156

to give more force to civil and political rights. There must be a general realisation that the two areas are mutually exclusive and should be given equal force. One cannot enjoy the right to life if they do not have the right to shelter or food. Life when always on an empty stomach will likely be bleak. The right to health operates to a great extent as a prerequisite to all other human right in both regional and international treaties therefore to deny somebody the right to health is to deny them access to all their other rights.⁹⁸

In Zambia cases based on discrimination based on a status of health have been litigated but cases enforcing the right to health have not. One such example is the case of *Kingaipe and another v The Attorney General*⁹⁹. The petitioners in this case challenged the Air Force's mandatory HIV testing without consent. According to them, the testing was done without their consent and when found positive for HIV were administered ARVs without them knowing the nature of the drugs. They also argued that they had been dismissed based on their HIV status. The courts decided in favour of the petitioners and stated that the testing without consent amounted to a violation of their freedom of privacy and that the discharge was based on the medical condition of the petitioners and not their HIV status. This case illustrates health status litigation but it also highlights that the right to health is not being litigated by the courts.

There is no doubt that other countries have been able to take very drastic steps to ensure the protection of children's rights by the courts of law. Another example is Kenya which ratified the Convention in 2001 on July 21st has made big steps in the right direction. Kenya's formal child protective system has been developing since independence in the early 1960s. Legislation addressing children's issues was in place since this time and included the Children's and Young

⁹⁸ University of Minnesota Human Rights Library on [http://www.umn.edu/humanrts/edumart/studyguides/right to health](http://www.umn.edu/humanrts/edumart/studyguides/right%20to%20health) accessed on 1st February 2013

⁹⁹ (2010) High Court

Person's Act and the Guardianship of Infants Act.¹⁰⁰ They have also created children's courts which are courts of first instance, with the effect that they are beneath the High Court in the court structure.¹⁰¹

3.5 CHALLENGES OF REALISING THE RIGHT TO HEALTH IN ZAMBIA

Developing countries in general have had a problem with realising socio-economic rights. Challenges range from lack of funds, political instability, lack of sensitisation as regards these kinds of rights and so on. Most of them also do not recognise an international human right to health that governments of nations bound by international conventions are required to respect, protect, and fulfil.¹⁰²

3.5.1 Who Has the Duty to Provide This Right

These treaties clearly assume that the financing and delivery of health care is an appropriate function of government. But it is clear that Zambia is behind in the fight for the right to health. Who is to blame exactly? The government has the responsibility to provide this right but why has Zambia not been able to protect the child's right to health. First, while civil and political rights attract significant public attention in developed countries, and hence, significant financial and other support towards their protection in developing countries, the same is not the case for economic, social and cultural rights.

Many people in developing countries, are still of the idea that economic, social and cultural rights are "second generation rights" therefore not very important. In some cases there is outright resistance to accepting that economic, social and cultural rights are even human rights at all.

¹⁰⁰ <http://www.law.yale.edu/rcw/jurisdictions/Kenya> accessed on 17th September 2012

¹⁰¹ <http://www.law.yale.edu/rcw/rcw/jurisdictions/kenya> accessed on 17th September 2012

¹⁰² <http://www.actionforglobalhealth.eu> accessed on 27th March 2013

Consequently, international organizations and non-governmental organizations (NGOs) end up having to provide most of the external support for the promotion and protection of these rights.¹⁰³

In Argentina the right there is a landmark case of *Mariela Viceconte v Ministry of Health and Social Welfare*¹⁰⁴, in this case the plaintiff sought to require the state to provide a vaccine against the Argentine haemorrhagic fever that threatened the lives of 3.5 million people. The plaintiff sought to invoke the state's obligation to prevent treat and control endemic and epidemic diseases in Article 12 of the ESCR. The court held that the state was the main guardian of the right to health and had a duty to provide the vaccine because of the duty imposed on it by the ESCR. The court even imposed a deadline for provision of the vaccine despite the fact that the state claimed it did not have resources. This case is a good example of how the courts can take part in the political process by impacting how administrative and political authorities set priorities and allocate budgets.

The result of the notion above is that very few countries actually strive to make this a justiciable right. Hence the citizens are left with no recourse even when this right is violated. There are no means through which one can adequately enforce this right. The right is not prioritised so it is neglected and the children suffer as a result. This is one of the challenges of realising this right.

Non-State entities in Zambia also have a duty towards the people of Zambia regarding the right to health. They are not to engage in activities that can cause harm to the citizens. If they do breach the requirements for protecting the right to health, they should be able to face sanctions and perform actions that will correct their error.

¹⁰³S Musungu. 'Developing Countries and the Promotion of the Right to Health in Multilateral Institutions: A Review of Developments in Trade and Health Institutions' 2004 at page 368

¹⁰⁴ FACA Exp 31 777/6 Federal Administrative Court of Appeals of Argentina, Fourth Chamber (1998)

Parliaments are the principle representative institution of a State. They are responsible for representing the interests of all sectors of society, articulating these interests into relevant policies and making sure that these policies are implemented efficiently. Parliaments and their members should be among the key champions of child protection. They have the capacity not only to influence the decisions and actions of government but also to connect with communities and constituencies to influence opinions and actions.¹⁰⁵ Therefore it is the parliament that has a role to play in the protection of a child in Zambia. In Zambia the authority of parliament to make laws is pursuant to Part V of the Constitution of Zambia¹⁰⁶ which creates the legislature.

The major participants in this field are the government itself, the legislature and the citizens. The constitutional provisions in the Zambian Constitution are merely in the directive principles. This is not enough to guarantee full protection and realization of the right to basic healthcare. Professor Chanda argues that there is need for these rights to be given the recognition they deserve. He argues that the usefulness of the Directive Principles is highly questionable.¹⁰⁷ There is a need for the right to health to be given full constitutional force.

3.5.2 Lack of Adequate Resources

Another challenge is the governments claiming lack of adequate resources to make the right to health enforceable in the courts of law. The Zambian government has to rely on foreign assistance in order to procure necessary equipment for health care facilities to function properly. One example is the project embarked on by the Zambian and Dutch governments to modernise the equipment in hospitals.

¹⁰⁵ Dan O'Donnell. Child Protection: A handbook for Parliamentarians. 2004. UNICEF at page 22

¹⁰⁶ Chapter 1 of the Laws of Zambia

¹⁰⁷ Alfred Chanda. Gaps in the Law and Policy in the implementation of the Convention on the Rights of the Child. Zambia Law Journal. Volume 31. University Press: Lusaka (2004)

Before this project was started in 2009 more than 90% of the equipment being used in hospitals was obsolete.¹⁰⁸ So if there is not enough foreign support very little is achievable. However, as was seen in the South African cases the government should not use lack of resources as an excuse for deprivation of rights to citizens whether they are socio-economic rights or not.

Another case that reiterates the role of the government in providing the socio-economic rights is the *Grootboom Case*.¹⁰⁹ This case discussed the right to shelter, sanitation, housing and so on. In this case a number of people, children included, brought an application for temporary shelter due to the fact that they had been evicted from private land on which they had been squatting. They suffered such that they were using one tap and had no sanitation facilities.

In giving their judgement the Constitutional Court held that Section 26 of their Constitution covered rights such as the one in question and held that the government had a duty to adopt reasonable policy, legislative and budgetary measures to provide relief for people who have no access to land, no shelter and living in deplorable conditions. The judgement dealt adequately with the right of children to nutrition and shelter, this is the same provision that contains the right to health care.¹¹⁰

The government agreed to take steps to make amends and rectify the situation but did not intend to provide relief individually. The government did not fulfil its obligations even after the decision by the court. The result was that the court was compelled to order them to do so.¹¹¹

¹⁰⁸ <http://www.healthcare.phillips> accessed on 22nd March 2013

¹⁰⁹ 2000 (II) BCLR 1169 (CC)

¹¹⁰ Section 28 (10) (c)

¹¹¹ Penelope Andrews. 'The South African Constitution as a Mechanism for Redressing Poverty'. Muna Ndulo. ed. Democratic Reform in Africa. (Ohio: Ohio University Press. USA.2006) at page 61

So the government of South Africa has given itself the duty to protect the socio-economic rights of citizens. In addition it has even allowed the citizenry to provide checks on its performance and ensure that it fulfils its obligations. This is unlike the situation in other countries where governments give themselves the duty to protect this right but do not make themselves accountable by letting the citizens enforce the right in a court of law. So the government says they will protect your right to health, but they will not actually protect your right.

3.5.3 Political Instability and Poverty as a Threat to the Right to Health

Many countries in Africa have high rates of poverty, Zambia included. In Africa more than 40% of its inhabitants live on less than \$2 a day.¹¹² Sub-Saharan Africa is the only region in the world where the overall human development index (HDI), a development indicator that looks at development from the dimension of income, education and health has been declining since the 1990's.¹¹³

Another hindrance to the realisation of the right to health is the political instability and rampant conflicts in most countries. The number of wars in Africa and their intensity are particularly hurtful to children because they result in children losing their parents to war and also the children themselves end up being drafted to be soldiers in the wars. There are over 250 000 child soldiers in Africa as at the year 2008.¹¹⁴ Children especially females have their right to health affected

¹¹² John Akokpari and Zimble John.ed.Africas Human Rights Architecture. The Conundrum of Development and Human Rights in Africa. (Cape Town: CTP Book Publishers. 2008) at page 79

¹¹³ UNDP (2005) Human Development Report. New York: Oxford University Press. At page 21

¹¹⁴ John Akokpari and Zimble John.ed.Africas Human Rights Architecture. The Conundrum of Development and Human Rights in Africa. (Cape Town: CTP Book Publishers. 2008) at page 78

because it results in rampant rapes and even in being sold as sex slaves. This results in most girl children being infected with the HIV virus.¹¹⁵

Another effect that war has on the right to health is that war causes psychological harm on the children that are victims of war. Many children get to see their parents being shot and their sisters or other relatives being raped or abused.¹¹⁶ This is definitely a violation of the right to health. Health as stated in the international instruments relates also to mental health and not just physical health. Zambia has not had war or at least any armed conflict in over forty years. Therefore this cannot be an excuse in Zambia. More needs to be done to ensure that the Zambian government provides the right to health for every citizen, especially children. If the Zambian child is left to be a victim of poverty then there will be no protection of the right to health. There are poor people in many countries including South Africa but that has not hindered the provision of the right to health in their legislation.

3.6 CONCLUSION

This chapter has endeavoured to explain what the right to health entails. It has discussed the duties that state has towards children in their country. The essential elements of the right have been discussed and it has been established that if these are met then a state is able to claim adequate protection of the right to health. As it stands now, the statistics have shown that many children in Zambia are still not being provided with health care services and so cannot be said to be 'healthy'.

¹¹⁵ [http:// www.warchild.org](http://www.warchild.org) It is estimated that about 200 000 women and girls have been raped or been victims of sexual violence in the last fifteen years. Accessed on 20th March 2013

¹¹⁶ www.unicef.org/graca/summry accessed on 22nd March 2013

4.0 CHAPTER FOUR: RECOMMENDATIONS

4.1 INTRODUCTION

The research has established that the right to health is a fundamental human right. This is despite the fact that it has not been given the valid attention it deserves. This has been attributed to the challenges of resources, the fact that the right is not easy to define, the Constitution currently has not made it a justiciable right and so on. Various standards have been set both regionally and internationally. The African Union and the United Nations have both provided for the right to health, and children have specifically been mentioned as critical recipients of this right.

Zambia is a party to many treaties that encompass the right to health. Despite the wide ratification there is still a need for more to be done. By virtue of being party to the treaties Zambia is to obey the rule of '*Pacta Sunt Servanda*'. This is a provision that entails that all states that are party to a treaty must perform their obligations in good faith and are bound by the provisions of that particular treaty.¹¹⁷

Research on law would make a greater contribution to development if it went beyond purely doctrinal study and examined the relationship between legal rules and institutions and specific developmental efforts and examined the actual and potential impact of law on developmental goals.¹¹⁸ That is the essence of this chapter, to find a solution to the problem in the research and recommend how to solve the problems.

¹¹⁷ Vienna Convention on the Law of Treaties, Article 26

¹¹⁸ 'Law and Development: The Future of Law and Development Research.' A Report of the Advisory Committee on Law and Development of the International Legal Centre and Scandinavian Institute of African Studies. Sweden. (1974) at page 20

4.2 INCLUDING THE RIGHT TO HEALTH IN THE CONSTITUTION BILL OF RIGHTS

The right to health is a right that has been established to be just as important as any other right. This is seen in the fact that human rights are inter-dependent. The laws of Zambia do not give this right a chance to be enforced by the courts of law. The Directive State Principles are clear as to the fact that they will not be enforceable in the courts unlike the right to freedom of movement for example.

When a matter is justiciable it means that it can be resolved appropriately by the courts of law. The benefits of justiciability have been discussed in the research and it has been established that a justiciable right is better protected by the state than one that is not justiciable. So in order for this right to health for children to be adequately respected and protected there must be an inclusion of the said right into the Bill of Rights.¹¹⁹

Currently the Zambian Draft Constitution seeks to include the right to health for children and all persons in general. Article 55 (5) (f) states 'Every child has a right to adequate nutrition, shelter, adequate healthcare, social protection and social services.'

This provision if enacted will be a big step towards the protection of the right to health for children. By itself it manages to encompass the provisions in the CRC, ACHPR and other international conventions. Necessary limitations can be included but they should not be such that they limit the enjoyment of the right to health such that it is impossible to enjoy fully. The provision in the Draft Constitution is able to encompass the fact that the child's right to health should be adequately provided for because it is important in for development of the country. This

¹¹⁹ Part III of the Constitution

provision is only going to be effective if it is accompanied by adequate and realistic policies and political will from the stake holders. Ms Ngosa Kaloto Lesa, UNICEF Child Protection Specialist, is of the view that in order to protect the rights of the child adequately the laws in Zambia need to be updated or new ones be created that will adequately address the rights of children. The Draft Constitution if enacted is a realisation of Ms Lesa's recommendation.¹²⁰

4.3 DOMESTICATION

Domestication refers to the parliament of a Zambia taking steps to make the treaties that Zambia is state party to applicable in Zambia. The issue of domestication comes about owing to the fact that Zambia is a dualist state as opposed to a monist state.¹²¹ This makes the rights in the treaties justiciable. Without domestication the right to health is rendered useless locally.¹²²

This researcher prooses that the relevant international pieces of legislation that relate to the right to health for the child be domesticated, and not only should they be domesticated but this should be done at a faster rate than is currently being done.

Domestication should be done using the relevant means and procedures and it can be done in such a way that the provisions are made in such a way that they are specifically apply adequately to all situations especially those that are unique to Zambia. Domestication could sometimes entail that there is the enacting of a specific Act that relates specifically to the rights of children and this Act should include the right to health in it. An example of when Zambia did this is the

¹²⁰ Interview conducted on Wednesday, 21st November 2012 at UNICEF offices

¹²¹ Starke J G. Introduction to International Law. 10th edition. (London: Butterworths. 1989) at page 72

¹²² Misozi Masengu. A Critical Analysis of a Prisoner's Right to Vote. In partial fulfilment for the Bachelor of Laws Degree at the University of Zambia (2006) at page 56

Anti-Gender based Violence Act¹²³ which domesticated the CEDAW, or the Education Act¹²⁴ which domesticated the right to education in international instruments such as the CRC.

4.4 **A STRONGER POLICY FRAMEWORK**

The right to health requires each and every member of the community to play a role in the enjoyment and protection of this right. It is the duty of each citizen not to engage into activities that will be harmful to them or to the other citizens like throwing garbage into the community water source. Even the mines should not perform their activities in such a manner that they pollute the environment. It is the duty of the government to put in place laws that will put limits on the activities of companies such as mines so that there is an enjoyment of the right to health. This draws from the element of the right to health encompassing that persons should enjoy the highest possible state of health. Actions such as pollution would be a hindrance to this.

Better policies need to be implemented such that they should be able to reach and every child. Children in the rural areas are the most at risk when it comes to failure to enjoy the right to health. Hospitals are usually too far away, parents usually cannot afford the fees in hospitals and so on. One good policy that is currently underway is the Child Health Week campaign that takes place bi-annually. This is a policy and programme that educates parents on the importance of child health and most important to this recommendation it created provision of free immunisation facilities for children and free mosquito nets for pregnant mothers.¹²⁵

The researcher recommends that there needs to be a creation of even more comprehensive policies that encompasses the right to health and they should be a big number of them that should

¹²³ Act number 1 of 2011

¹²⁴ Cap 134 of the Laws of Zambia

¹²⁵ www.unicef.org/zambia accessed on 12th July 2013

be focused solely on rural areas. These policies should be done in languages that should be understood by the rural people. They should be as clear as possible and should be followed by strict and efficient checks on the progress they are making. Each policy should be made in such a way that it suits the area of people it is targeting.

4.5 POLITICAL WILL AND INCREASED FUNDING

In order to realize the earlier stated recommendations, the most important thing is political will. The government and all stake holders need to take positive steps to not only provide for the said right, but also to provide adequate funding towards the policies. Also funds are required to build more hospitals, clinics and even health centres for the people, adequate numbers of health personnel, so that it is easier for people and in this case children to access easily. Implementation is the biggest challenge for most countries including Zambia.

Increased funding is also important because it can provide for the education of Zambians. Parents of children are then better equipped to look after their children and also to know the duties that their governments has towards them. Many children sometimes suffer from poor health because their parents are not knowledgeable of the importance of health issues, for example some parents take their children to undergo unsafe procedures like circumcision, and they have superstitious beliefs regarding acts like immunisation and other similar issues.

Therefore the researcher recommends that funding in the field of health should be greatly improved and prioritised. The argument that Zambia does not have the needed resources has been tackled in the research and it has been shown that countries should still strive to provide the best that their country is capable of, by all means necessary.

4.6 CONCLUSION

The right to health for children is a fundamental and basic human right. It is a right that is at the basis of other human rights because its enjoyment helps a child to enjoy other rights. Zambia is a country that should now be able to provide a higher standard of protection of this right. The obligation to do so comes not only from international provisions but also from domestic law. The only impediment is that the domestic law has not given it the required recognition that it deserves. International law states that the right to health is fundamental to all children. The continued lack of adequate recognition of this right is a violation of the child's right to health.

This research has shown that the child's right to health has not been adequately provided for and protected by the state. This chapter has then provided recommendations as a way to remedy the situation that is currently prevailing on the ground. Children deserve better protection at domestic level. International law has provided a very comprehensive framework for the said right. By virtue of Zambia being a state party to the provisions of international law, Zambia agrees to the provisions of the treaties. If the status quo in Zambia remains as it is, then the child's right to health will continue to be inadequately recognised.

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