

## CHAPTER TWO

# INSTITUTIONS TO DETER THE UNLAWFUL DEPRIVATION OF THE RIGHT TO LIFE

### 2.0 Introduction

The promotion and protection of human rights does not end at standard setting. The standards set in international and national instruments have to be implemented. This may be done through formally established institutions with the mandate of supervising and monitoring the progressive compliance of states with their human rights obligations.

This mandate usually includes the power to receive and consider complaints from people or groups alleging violation of their rights. At international level there are currently six treaty bodies that supervise and monitor states' compliance with the standards they have set. However, the promotion and protection of human rights is primarily incumbent upon the state, the national laws must provide for effective institutional measures to ensure the citizens and residents enjoy their rights without undue interference from anyone.

A national human rights institution, no matter how wide the powers or efficient its operation, can never adequately substitute for a properly functioning court system.<sup>1</sup>

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<sup>1</sup> National Human Rights Institutions, United Nations, (1995)

. The national human rights institutions, the courts and other agencies must work with each other and ensure that human rights are fully and expeditiously observed and protected.

The rationale for setting national human rights institutions is that the courts, on the one hand deal with a variety of legal problems including human rights, while on the other hand national human rights institutions, will focus only on human rights and be able to develop expertise in this area. Another handicap of the court is that, the Constitution of Zambia limits the High Court's jurisdiction to matters within Article 11 to Article 26 inclusive. However, national human rights institutions are not restricted to the rights enshrined in the Constitution, but also to ensure that the rights and freedoms secured in international documents to which Zambia is a party are observed and respected.<sup>2</sup>

The Zambian State has put in place institutions that help to deter the unlawful deprivation of the right to life. This is pursuant to Article 2 (3) (b) and (c), which states that:

“Each state party to the present Covenant undertakes;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.”<sup>3</sup>

Human rights violations do not happen at an international level but at state level, hence States have a primary obligation to put an end to violation of human rights and in turn the right to life. Setting up national human rights institutions is judicial or administrative

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<sup>2</sup> Permanent Human Rights Commission - National Plan of Action (1999)

<sup>3</sup> ICCPR Article 2 (3) (b) (c)

arrangement. When a state establishes national human rights institutions it is in turn exercising its function and thus fulfilling its obligation.

On an international basis, ideals about national human rights institutions started when the Universal Declaration for Human Rights (UDHR) was adopted in 1948. In 1991 a group of experts met and adopted a set of standards, which would form the basis of guidelines for setting up national human rights institutions.

In 1993, the United Nations General Assembly adopted the standard principles relating to the status of national institutions for the promotion and protection of human rights. These are called the Paris Principles. The Paris Principles are not a treaty and in *stricto sensu* not binding but only form guidelines to be followed by a state. In 1993, the World Conference on Human Rights specifically recognized the right of each state to choose the framework for a national human rights institution that is best suited to its needs

The promotion and protection of human rights is primarily incumbent upon the state. The national laws must provide for effective institutional measures. These national human rights institutions, *inter alia*, include the courts, the Permanent Human Rights Commission, Zambia Police Service, Police Public complaints Authority and the Ombudsman. Other institutions include Non-Governmental Organizations (NGOs) such as Inter- African Network for Human Rights and Development (Afronet) and Foundation for Democratic Development and Process (Fodep). The scope of this chapter shall focus on analyzing how effective the judiciary, Human Rights Commission and the Ombudsman, are in the protection of the right to life.

## 2.1 The Human Rights Commission

Article 125 of the Constitution of Zambia establishes the Human Rights Commission (HRC), which is also known as the Permanent Human Rights Commission (PHRC). This Article states that:

- “(1) There is hereby established a Human Rights Commission
- (2) The Human Rights Commission shall be autonomous”

The Human Rights Commission is created by the Constitution but the enabling Act is the Human Rights Commission Act No. 39 of 1996. The HRC is an autonomous body and not subject to the control of any person or authority in the performance of its duties. This is pursuant to Article 125 (2) of the Constitution and section 3 of Act No. 39 of 1996 which provides that:

“The Commission shall not, in the performance of its duties, be subject to the direction or control of any person or authority.”

The Human Rights Commission was established following the recommendation to the Government by the Munyama Human Rights Commission of Inquiry. This was appointed in 1993 to broadly investigate and report on the human rights situation in the second republic and after 31st October 1991. Pursuant to section 5 of the Human Rights Commission Act, the Commission is composed of: the Chairperson; the Vice Chairperson; and not more than five other Commissioners. The President, subject to the ratification of the National assembly shall appoint these Commissioners.

### **2.1.1 Functions of the HRC**

Pursuant to section 9 of the Human Rights Commission Act:

“The functions of the commission shall be to-

- (a) investigate human rights violations;
- (b) investigate any mal administration of justice
- (c) propose effective measures to prevent human rights abuse
- (d) visit prisons and places of detention or related facilities with a view to assessing and inspecting conditions of the persons held in such places and make recommendations to redress existing problems;
- (e) establish a continuing program of research, education, information and rehabilitation of victims of human rights abuse to enhance the respect for and the protection of human rights;
- (f) do all such things as are incidental or conducive to the attainment of the functions of the Commission.”

The function to investigate any mal administration of justice does not entail overruling the court’s decisions but only to investigate the court proceedings. Such investigations can only be done after the court’s decision has been passed. The Commission does not have power to investigate a matter that is still in court. (s. 10 (5))

The Commission can visit prisons and places of detention, without notice, at any time. To check on the condition of the people and also the condition of the place to ensure the places comply with the required standards.

### **2.1.2 Powers of the Commission**

Under section 10 of the Act, the HRC has powers to investigate any human rights abuses. This mandate is different from the court’s mandate because the HRC ensures conformity to

international and national instruments. The HRC can investigate any human rights abuses, either on its own initiative or on receipt of a complaint or allegation by:-

- (1) an aggrieved person acting in such person's own interest
- (2) an association acting in the interest of its own members
- (3) a person acting on behalf of an aggrieved person
- (4) a person acting on behalf of and in the interest of a group or class of persons.

(s. 10 (1))

The *locus standi* in section 10 is wider than the *locus standi* in Article 28 of the Constitution, which only allows for the aggrieved party to complain.

The Commission also has the power to issue summons or orders requiring the attendance of any authority before the Commission and the production of any document or record relevant to any investigation by the Commission. (s. 10 (2) (a))

The Commission may also question any person in respect of any subject matter under investigation and require the disclosure of any information within such person's knowledge relevant to any investigation by the Commission. The HRC may recommend any punishment of any officer found by the Commission to have perpetrated an abuse of human rights. (s. 10 (2))

The HRC's utmost powers are only to make recommendations. The HRC may, where it considers necessary, recommend:-

- (a) the release of a person from detention;
- (b) the payment of compensation to a victim of human rights abuse, or to such victim's family;
- (c) that an aggrieved person seeks redress from a court of law; or

(d) such other action as it considers necessary to remedy the infringement of a right.

(s. 10 (4))

### 2.1.3 Complaints

Pursuant to section 11 of the Human Rights Commission Act, a person may make a complaint under the Act orally or in writing addressed to the Secretary of the HRC.

The complaint or the allegation must be signed or thumb printed by the complainant and must bear his or her name and address. The complaint or allegation must be brought within two years of the date on which the facts giving rise to any such complaint or allegation become known to the person complaining.<sup>4</sup>

The commission may refuse or decide to discontinue an investigation where it is satisfied that the complaint or allegation is frivolous, vexatious, and malicious or the particulars accompanying it are insufficient to allow a proper investigation to be conducted. The complainant must be informed in writing including reasons for the refusal or discontinuance of any investigation into his case.

Pursuant to section 12 and 13 of the Act, the HRC must conduct all its sittings in public, provided that the Commission may hold its sittings in camera when the Commission considers it necessary. Reports of such sittings must be made public. The parties concerned are sent reports on the findings and, dependant on the findings made, the commission can make such recommendations, as it considers necessary to the appropriate authority. The appropriate authority must within thirty days from the date of such recommendations make a report to the Commission, of any action taken by such authority, failure to which

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<sup>4</sup> PHRC - National Plan of Action (1999)

constitutes an offence punishable, upon conviction, by a fine or imprisonment not exceeding three years, or both.

To enhance the promotion and protection of human rights vis-à-vis the right to life, the people of Zambia have gone as far as adopting a National Plan of Action. This will put into practice what the Bill of Rights, enshrined in the Zambian Constitution, stipulates. The major goal of this document is to enable the Permanent Human Rights Commission in conjunction with all concerned with the cause of human rights in Zambia to set priorities and strategies and carry out its functions in a more organized manner. With the ultimate objective of ensuring that the enjoyment of human rights vis-à-vis the right to life is a reality for every person in Zambia.<sup>5</sup>

#### **2.1.4 Weaknesses and Shortcomings**

The greatest weakness of the Permanent Human Rights Commission is that it does not have the power to compel the observance of its decisions. That is to say, the Commission has no enforcement powers. Instead the Commission only has power to recommend the action to be taken by other authorities. Even where the appropriate authority does not comply with the thirty-day requirement to make a report to the HRC, it is not clear as to whether the HRC can prosecute or rely on other authorities to take up the matter for prosecution.

The appointment process is also a source of concern vis-à-vis the independence of the HRC. The President without consultation is at liberty to appoint anyone, subject only to ratification

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<sup>5</sup> PHRC - National Plan of Action (Foreword)



by the National Assembly. This appointment tends to undermine the Commission's autonomy. The persons appointed might owe their allegiance to the appointing authority.

The Commissioners tenure of office shall not exceed three years, subject to renewal (s. 7 (1)). The Chairperson and Vice-Chairperson shall be persons who have held, or are qualified to hold, high judicial office. (s. 5 (3))

The National Plan of Action for the PHRC has recommended that a better appointment process would be one where the public through such organisations as the Law Association of Zambia (LAZ), religious organisations, NGOs and others nominate persons for appointment. This would allow for a greater representation of the public and persons appointed would be independent.

The PHRC does not have power to institute legal proceedings on behalf of complainants. The dependence by the PHRC on other authorities to take action does not give satisfactory assurance to the complainant for redress. This weakness thus hinders the PHRC's mandate to promote and protect human rights vis-a-vis the right to life. The dependence on other authorities implies that legal proceedings may take longer than if the commission itself were to take legal action.

Insufficient financial resources, is another of the major weaknesses of the Commission. Part 4 of the Human Rights Commission Act provides that the major source of the Commission's funds is the government. However, since establishment the Commission has hardly had enough resources to operate efficiently. A steady financial base is crucial to the effectiveness of an institution like the PHRC.<sup>6</sup>

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<sup>6</sup> National Plan of Action for Human Rights 1999 – 2009 (1999)

The commission must also be given greater autonomy in its finances instead of an arrangement where the President must sanction every grant or donation to the commission. The commission must be self - accounting in financial matters.<sup>7</sup>

Although the commission has all the above-mentioned weaknesses and shortcomings, its presence is still noticeable in that it highlights any abuses of human rights including the right to life whether perpetuated by the state party or any other body and so discourages further abuses.

## 2.2 The Judiciary

A properly functioning and independent judiciary is the basic structure for the protection of human rights at a national level. Article 28 of the Constitution empowers the High Court to hear and determine applications from persons alleging violations of their rights, including the right to life guaranteed in part 3 of the Constitution. The High Court, can in this respect, make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Articles 11 to 26 of the Bill of Rights. Any person aggrieved by any determination of the High Court may appeal to the Supreme Court, provided the High Court has not determined the matter to be frivolous and vexatious.

Much as the Zambian courts can entertain petitions on Article 12 of the Constitution, it is questionable whether this entertainment extends to the broad interpretation of the right to life. In order for such petitions to be entertained, Article 12 of the Constitution must be amended, to include the broad definition of the right to life.

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<sup>7</sup> *ibid*

It is important at this point to note that the justiciability of the right to life from a social and economic perspective may be hindered by the limits of available resources. This in turn is used as a valid defence for the state party, which in this case is Zambia. However the Human Rights Committee in General Comment number 3 (1990) has noted that it acknowledges the constraints due to the limits of available resources. The state party has various obligations, which are of immediate effect. This is inclusive of the obligation 'to take steps'. Thus while the full realization of the right to life may be achieved progressively, steps towards that goal must be taken within a reasonably short time. The committee wishes to emphasise, however, that even where the available resources are demonstrably inadequate, the obligation remains for a state party to ensure the widest possible enjoyment of the relevant right (the right to life) under the prevailing circumstances. The committee underlines the fact that even in times of severe resource constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programs. Hence it is not enough for the Zambian state to plead limited resources, because even within the limited resources it can still undertake some low cost programs, which will meet the basic requirements of the enjoyment of the right to life for an average Zambian.

### **2.3 The Ombudsman**

The office of the ombudsman has become an integral part of public institutions in a number of countries. In Zambia, the Commissioner of Investigations, the Deputy – Commissioner of Investigations and an Assistant Officer constitute the Investigator General. The

investigator General has the primary function of protecting the rights of individuals, including the right to life, who believe they are victims of unjust acts on the part of the public administration. Accordingly, the ombudsman will often act as an impartial mediator between an aggrieved individual and the government<sup>8</sup>.

The ombudsman receives complaints from members of the public and will investigate these complaints provided they fall within the ombudsman's competence. No complaint or allegation shall be received by the Commission unless it is made within two years of from the date on which the facts giving rise to any such complaint or allegation became known to the person making the complaint or the allegation<sup>9</sup>. The Ombudsman has powers over persons: in the service of the Republic; in the service of any institution where the government holds a majority of shares or exercises financial control; in the service of any commission. However, the Ombudsman has no power to question any decision of any court.<sup>10</sup> In the process of investigation, the ombudsman may have general access to any public documents relevant to his/her investigations. Though the ombudsman acts on complaints made, it may commence investigations on its own initiative.

### 2.3.1 Weaknesses of the ombudsman

The ombudsman does not have adjudicatory powers, but recommendatory powers (s. 21 (1)). The powers to decide reside in the President<sup>11</sup>. Another weakness is that the jurisdiction of the commission is so narrow. Under section 3 (2) of the Act, the Commission

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<sup>8</sup> United Nations Facts Sheet No. 19

<sup>9</sup> The Commission of Investigations Act, section 9 (4)

<sup>10</sup> Commission For Investigations Act, section 3 (1) & (2)

<sup>11</sup> section 2 (1) of The Commission for Investigations Act

has no power to investigate a subject of litigation before a court of law or a tribunal. It is sometimes subject to the President's directions (s. 21 (1)).

Under section 21 (3) of the Act a report to the National Assembly shall not disclose the identity or contain any statement which may point to the identity of any person into whose conduct an investigation has been or is about to be made. This is contrary to transparency and cannot be rationalized. Similarly, according to section 16 of the Act, investigations are conducted in camera and this is not an ideal way of conducting investigations.

## **2.4 Summary of the chapter**

The promotion and protection of human rights does no end at standard setting, as already stated in the introduction. With human rights violations happening at a national and not international level, the states, like Zambia have a primary obligation to put an end to human rights violations vis-a-vis the right to life. This can be done through national laws that provide for effective institutional measures. In Zambia, however, the effectiveness of these institutions is hampered by the presence of weaknesses. For instance, the Permanent Human Rights Commission has no power to compel the observance of its decisions. The PHRC is merely empowered to make recommendations thus making it a 'toothless' recipient of complaints alleging the violation of the right to life. The same applies to the ombudsman who does not have adjudicatory powers, but can only make recommendations. The judiciary can entertain petitions based on Article 12 of the Constitution. However, Article 12 only gives a narrow definition of the right to life. Therefore, the court's 'entertainment' may be limited to the narrow sense of the right to life.

## CHAPTER THREE

### INFANT MORTALITY AND LIFE EXPECTANCY

#### 3.0 Introduction

An infant is a child who is below the age of one year. Article I of the Convention on the Rights of the Child (CRC) defines a child as:

“Every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.

Thus, the rights of an infant are the same as the rights of a child, which are enshrined in the CRC. Articles of the CRC provide that:

- “1. States parties recognises that every child has the inherent right to life
2. States parties shall ensure to the maximum extent possible the survival and development of the child”

Pursuant to the above provision, an infant has the inherent right to life and the Zambian state has an obligation to ensure to the maximum extent possible the survival and development of the infant.

#### 3.1 The State's Obligations

Article 24 of the CRC provides, in summary that; the child has a right to the highest standard of health and medical care attainable. States shall place special emphasis on the provision of primary and preventative health care, public health education and the reduction of infant

mortality. They shall encourage international cooperation on this regard to strive to see that no child is deprived of access to effective health services.

### **3.2 Child Mortality**

Closely related to infant mortality is child mortality. This is evident in statistics or reports that do not distinguish between the two concepts. Thus, infant mortality shall be discussed in collaboration with child mortality. According to the 1992 and 1996 Zambia Demographic and Health surveys (ZDHS), child survival in Zambia is less probable today than it was ten years ago. Also according to Zambia's Initial and First Periodic Report on the implementation of the CRC, children under the age of five years make up 20% of the Zambian population and of this number 92% are able to access medical assistance and primary health care services.

#### **3.2.1 Provision of Medical Assistance**

There are gaps between urban and rural areas in the provision of medical assistance and healthcare. Children in urban areas have access to better medical services than their counterparts in the rural areas.

Studies show that children living in rural areas experience a higher risk of dying before the age of five than urban children, and the marked differences exist in mortality rates between provinces.

Differences in early childhood mortality are due to age and educational

Status of the mother, and mother's access to health care, that is to say, antenatal care, assisted delivery by a skilled birth attendant, and postnatal care.

### **3.3 The crises of Infant/Child Mortality**

The first month of life is a high - risk period for the newborn babies. During infancy, acute respiratory infections, diarrhoeal and malaria account for almost one third of deaths. HIV/AIDS is a significant cause of morbidity. Peri-natal transmission accounts for 75% of all paediatric AIDS cases. Major causes of morbidity and mortality for children between ages one and five years are malnutrition, diarrhoeal diseases, malaria and acute respiratory infections<sup>12</sup>. According to the 2002 statistics of the University Teaching Hospital (Board of Management). The five common causes of paediatrics (infants and children) were pneumonia, malnutrition, diarrhoeal, enteritis, bacterial diseases and malaria.

### **3.4 Measures taken by the State**

**3.4.1** Measures to decrease infant mortality include the National Program of Action for children (NPA). This has, inter alia, the following health related goals:

- (a) To reduce the infant mortality rate from 108 per 1,000 live births to 65 per 1000 live births. According to the ZDHS of 2001/2002, the statistics are now 95 as per 1000 live births.
- (b) To provide access to clean water and sanitary means of excreta disposal for 50% of the rural and 100% of urban households.
- (c) To reduce the under five mortality rate from 192 per 1000 live births.<sup>13</sup>

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<sup>12</sup> Ministry of Health Report - 2000 p.20



### **3.4.2 Child Immunisation**

The state party has also adopted the goal of Universal child immunisation as a preventative health intervention. All children below five years of age should receive antigens against six immunisations diseases, for instance tuberculosis and measles.

It is a requirement that all children should receive all doses of the antigens before the first birthday. The general target groups for immunisation are: Children 0 - 24 months; pregnant women; women of child bearing age 15 - 45 years; and school children in grades 1 and 7<sup>14</sup>.

### **3.4.3 Reducing Morbidity and Mortality**

The strategy of reducing morbidity and mortality associated with diarrhoeal among children under five entails improving the supply and availability of oral dehydration salts through health facilities, private practitioners, pharmacies and community health workers, and training health workers in the management of diarrhoeal disease in children. Mothers and caretakers are educated on how to provide oral dehydration therapy and continued nourishment to children with diarrhoeal diseases.

In order to ensure epidemic preparedness and effective control of disease outbreaks, the Ministry of Health is training health care providers and senior health managers at central, provincial and district levels, to prepare and equip them for effective, prompt response to epidemics.

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<sup>13</sup> ZDHS Statistics of 2001/2002

#### 3.4.4 The Nutrition Statistics of many Children in Zambia.

Half of the children below five years are malnourished and stunted, and 25% are underweight; 12% of babies are born with low birth weight and 7% of children under five have low weight for height resulting from recent illness or severe food shortage. Malnutrition accounts for 20 - 30% of hospital admissions and 40% of all deaths of children under in 14.<sup>15</sup>

Malnutrition in infancy is strongly associated with early introduction (a baby less than six months old) of non - breast foods deficiencies in weaning diet and constant illness especially diarrhoeal.

Exclusive breastfeeding is defined as feeding a baby only breast milk and nothing else it is medically indicated<sup>16</sup>. In order to reduce malnutrition in infancy, Zambia has adopted the Innocent Declaration on the protection, Promotion and support of breastfeeding. Breastfeeding at workplaces is encouraged.

The Government policy on breastfeeding emphasises exclusive breastfeeding for the first six months. Therefore it should be continued in addition to nutritious complementary foods well into the second year of life or beyond.

According to the report on the implementation of the CRC, Zambia reports that she adopted the Declaration on the Elimination of Micronutrient Malnutrition at the World Summit for children.<sup>17</sup>

The health condition of Zambian children is severely threatened by limited access to health services and the not so good preventative care offered in the home environment Even

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<sup>14</sup> Ministry of Health Report – 2000 p.25

<sup>15</sup> *ibid* p. 21

<sup>16</sup> PHRC *supra* note 3

though immunisation programs have been fairly successful, child mortality is still high. One out of five children does not reach the age of five (Committee for Campaign Against Poverty Report, 1998). The main causes of this are the biting poverty situation in the country, causing widespread malnutrition in the majority of households. (NPA)

### **3.5 Life Expectancy**

In the broad interpretation of the right to life, the Human Rights Committee, in General Comment No. 6, has stated that state parties should take measures to increase life expectancy.

According to the ZDHS Report of 2001/2002 the life expectancy in Zambia has dropped to 32 years.

This part shall firstly highlight the factors that cause mobility and morbidity in adults thus reducing life expectancy. The paragraphs will then proceed to look at any measures, if any have been undertaken to help reduce any such causes. Attention will then be paid to measures taken to improve any environment, which is a threat to the right to life such as prison conditions and waste collection services.

#### **3.5.1 Common Causes of Mortality**

According to the University Teaching Hospital (Management Board) 2002 Report, the statistic show that the five common causes of mortality are: PTB, malaria, infections of skin and subcutaneous tissue, and complication of pregnancy.

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<sup>17</sup> Zambia's Initial Report under the UNESCR p.66

The ZDHS report of 2001/2 reveals that malaria is the highest causes of death at 245 per 1000 population. The second highest cause of death is HIV/AIDS with a prevalence rate of 16% for the ages of 15 - 49 years. Women have a higher HIV incidence rate of 18% compared to men at 13% HIV/AIDS will be discussed in chapter 5.

### **3.5.2 Measures taken by the State. - Malaria**

Malaria is a disease transmitted from person to person by certain species of mosquito. It causes acute bouts of fever, which recur at intervals. Malaria is a major public health problem in Zambia.<sup>18</sup>

Three main types of control measures are in use:

- (i) administration of drugs to infected people
- (ii) killing of adult mosquitoes
- (iii) control of mosquito breeding by eliminating or treating suitable habits.

#### **3.5.2.1 Administering of Drugs to Infected People.**

Treatment for malaria may remove the symptoms of the disease but it does not necessarily eradicate the parasites from the blood stream or livers of all carriers.

The routine administration of drugs, for instance in salt, like vitamin A in sugar, has been suggested, but there is a danger in the long run of exacerbating the increase of the problem of resistance to these anti-malaria drugs.

### 3.5.2.2 Killing of Adult Mosquitoes

This is accomplished with insecticide applied to walls of houses. It has successfully reduced the incidence of malaria in some areas; but even where this is so, the mosquitoes remain and the malaria can be re-introduced. A promising approach developed in recent years is to use bed nets treated with insecticide. However, these nets must be cheap and easily accessible to an average Zambian in order for them to help eradicate malaria.

### 3.5.2.3 Treatment or Elimination of Breeding Sites

An egg laid in water by a mosquito develops into a mosquito fourteen days later. During this time, the egg can be killed by chemical larvicides. Vegetable and mineral oils may be used, though they must be applied more frequently and in greater quantities than most insecticides. Rather than treating breeding sites, they may be eliminated by draining.

## 3.6 Environmental Health

A major challenge facing those concerned with environmental health in developing countries is that of excreta and refuse disposal systems appropriate to high -density and low income communities, which do not have adequate sanitation. These range from the totally unplanned squatter settlements and slums to planned high - density housing areas where adequate sanitation has not been provided.

Under sanitation, some examples of excreta related infections are: diarrhoeal, dysentery, cholera and typhoid. All such diseases are caused by pathogens transmitted in human excreta, normally in the faeces.<sup>19</sup>

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<sup>18</sup> Sandy, Caimoross and Richard Feachem, *Environmental Health Engineering in the Tropics*, 2<sup>nd</sup> ed., John Wiley & Sons, New York

<sup>19</sup> *ibid*

All such diseases in turn lead to death and thus a clean environment is essential to the promotion and protection of the right to life.

The excreta related diseases could be controlled, at least partially, by improvements in water supply and hygiene. These diseases may also be affected by improvements in excreta disposal, ranging from the construction or improvement of toilets to the choice of methods of transport, treatment, and final disposal or re-use of excreta.

### **3.6.1 Waste Collection Services**

Large volumes of refuse are produced and form an enormous public health and aesthetic problem in most developing country cities, such as Zambian cities.

Large unplanned dumps of refuse can be seen in many cities and these provide support for communities of people, rats and dogs who scavenge for them.

A variety of health hazards are associated with the mismanagement of refuse. Fly breeding will always be encouraged by uncovered piles of rotting refuse and the flies play a role in the transmission of diseases such as diarrhea. Piles of refuse will also contain mosquito-breeding sites where pools of rainwater have formed. The mosquito will breed and transmit diseases such as yellow fever. Rats will also breed and live in and around refuse. They may promote or transmit a variety of diseases including plague.

### **3.6.2 Measures Taken**

In order to curb such health hazards, the Lusaka City Council has embarked on a strategic municipal solid waste management plan. Based on this, new waste management systems to

serve the entire city are being introduced. Presently, two models for serving conventional and peri-urban areas have been adopted.

In order to implement an affected waste collection service in conventional housing and commercial areas, Lusaka City Council has established partnerships with private waste management companies. To facilitate their intervention, the city has been divided into 12 waste management districts. Each of these districts is composed of residential and non-residential areas. The districts include, inter alia, Barlestone, Matero, Kalundu and Kabwata. The new waste collection system based on franchise contracts has commenced. Lusaka City Council awarded the first two franchise contracts in August 2003. Thus, waste collection has started in some waste management districts. Over time the system is expanding and in 2005 the entire City of Lusaka shall be covered by the new waste collection system.<sup>20</sup>

### 3.7 Prison Conditions

The prevailing prison conditions in Zambia may be described as inhumane and pathetic. The problems faced by Zambian prisons include, inter alia, overcrowding, with particular reference to Kamwala Remand Prison, Lusaka Central Prison and Mwembeshi Open Air Prison.

The extent of this problem was described by High Court Judge Japhet Banda as:

“What I saw was beyond human imagination. The situation is pathetic and something must be done. I was told that in a cell meant for 15-20 there are about 70-80 prisoners. The prisoners sleep whilst standing or seated on the hard cold floor.”<sup>21</sup>

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<sup>20</sup> Lusaka City Council – Solid Waste Management Plan

<sup>21</sup> ‘Prison Conditions shock High Court Judge’, Times of Zambia 12<sup>th</sup> August 1998

Overcrowding creates a haven for the spread of various communicable diseases. Contagious diseases such as tuberculosis, scabies, anemia, dysentery and malaria are rampant in prisons. Nearly all prisons throughout the country have been plagued by outbreaks of diseases that have claimed many lives.<sup>22</sup> Such deaths are exacerbated by acute food shortages with an average of one meal per day.

Overcrowding makes it almost impossible to separate the terminally ill, such as those suffering from tuberculosis, from the rest of the inmates.

The HIV/AIDS scourge has not spared the prison population. The rate of infection in the prison is widespread. This is aggravated by the unnatural sexual acts amongst the inmates. It is a known fact that AIDS affects the immune system thus the more one is exposed to infections or communicable diseases in the crowded cells, the more easily the AIDS becomes full blown.

In addition, there are inadequate medical facilities for these prisoners, as the prison clinics are not well stocked with drugs and the requirement of unaffordable user fees.

All these factors undermine the right to life. A lot of prisoners die in prison and the number of deaths is increasing at an alarming rate.<sup>23</sup>

However, very little has been done towards the improvement of Zambian prisons. For instance the council that has the duty to inspect prisons has not fulfilled this duty in years. Thus, the state of prisons does not meet the required public health standards and this goes unchecked. Nevertheless there has been an attempt to decongest the prisons with the help

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<sup>22</sup> 'The Sad Tale of Zambian Prisons', Times of Zambia, 17<sup>th</sup> October 1995

<sup>23</sup> PHRC – A Report on the Condition of Prisons in Zambia (2002)



of the courts and the Permanent Human Rights commission. However, this effort alone is not enough to stop any further violation of the right to life.

### **3.8 Summary**

Infant mortality and child mortality inhibit the infant/child's enjoyment of his/her inherent right to life. The state is under an obligation to reduce the rate of such mortalities.

The major causes of deaths in infants and children are diarrhea and malnutrition. The government has since embarked on some programs to reduce mortality associated with diarrhea and malnutrition such as improving the availability and supply of oral dehydration salts and the government policy of emphasizing exclusive breastfeeding. However, though these are positive steps taken, they are far from attaining their goal. In rural areas most children continue to die from malnutrition.

On life expectancy, the government is under an obligation to ensure an increase of life expectancy by ensuring a clean environment. The Lusaka City Council waste collection is only centered in Lusaka but nothing has been done about the other cities which will continue to be covered by large unplanned dumps of refuse. The council's program should be decentralized. The prison conditions should also be given serious attention by the government. The cells should be decongested or more prisons should be built so as to stop the prison from being a haven of right to life violation.

## CHAPTER 4

### THE RIGHT TO LIFE AND ABORTION

#### 4.0 Introduction

Abortion continues to be a worldwide problem. As Lader put it:

“Abortion remains one of the crucial philosophical, religious and medical dilemmas of our time it has become too dangerous to grapple with. It touches our most sensitive nerves, for abortion involves the “ultimate control by a woman over her own procreativity”.<sup>24</sup>

The word abortion is derived from the Latin word “abron” which means to detach from its proper site.<sup>2</sup> In the early 20th century, abortion was used to refer to early expulsions of foetus and miscarriages in the second trimester of pregnancy. Today, abortion is generally defined as:

“The expulsion of the embryo, before it is viable outside the uterus.”<sup>3</sup>

In the legal sense abortion entails that the expulsion of the foetus is to be done before the 28th week of pregnancy after which time it can live outside the womb.<sup>4</sup> However, with the development of medical science and technology, a foetus is able to live outside the womb even before the 28th week of pregnancy, especially with the help of incubators.

An abortion may be spontaneous or induced. A spontaneous abortion, which is often referred to as a miscarriage, is one which occurs naturally and may be caused by foetal

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<sup>2</sup> R. H. Schwarz, *Septic Abortion*, Philadelphia, Lippincott (1968)

<sup>3</sup> Longman, Longman /encylopaedia, (1989)

<sup>4</sup> National Council of the Lay Apostolate - A Guide to Abortion in Zambia

malfunction, or maternal illness like diabetes and high blood pressure.<sup>5</sup> On the other hand, an induced abortion is the deliberate termination of the foetus from the uterus.<sup>6</sup> The scope of this chapter will focus on induced abortion.

The aim of this chapter is to look at the effect of abortion on the right to life and the abortion laws in Zambia that protect the unborn child's right to life and finally the decriminalisation of abortion which is a threat to the right to life. This will be achieved by looking at both sides of the debate on the decriminalization of abortion. This debate can be summarized as: The Woman's Right to Privacy v The Right of an Unborn Child.

#### **4.1 The Woman's Right to Privacy**

The human rights advocates who strongly support the woman's 'right to privacy' believe that abortion is a private decision between a woman and her doctor. There is also a belief in the 'right to choose' and they are strongly pro – choice. The right to abortion empowers women and is an important part of women's health rights and women's reproductive freedom. Those who support this notion, believe that restricting partial – abortion is reasonable, but clinics access should be unfettered, since other women may choose differently. Pro – choice is respected, however, some restrictions are acceptable.

The European Commission on Human Rights, held in the case of Brunnermann and Scheutan v Federal Republic of Germany<sup>25</sup>, that:

“Not every restriction on the termination of an unwanted pregnancy constituted an interference with the right of respect for private life of the mother. Article 8 (1) of

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<sup>5</sup> Tieze and Heshaw, Induced Abortion, a World Review (1986)

<sup>6</sup> Ibid

<sup>25</sup> (1977), Eur. Comm. H.R.R.R. 244

the European Convention on Human Rights could not therefore be interpreted as meaning that pregnancy and its termination were, in principle, solely a matter of the private life of the mother.”

Therefore, limitations are permissible on the private life of the mother.

It was also held in the case of H v Norway<sup>26</sup>, that:

“Father’s right to respect for privacy and family life not violated by failure of mother to consult him before having an abortion since any interpretation of a father’s right in connection with an abortion must first of all take into consideration on the mother’s right.”

## 4.2 International Instruments on Abortion

4.2.1 The International Convention on Civil and Political Rights (ICCPR) guarantee of the right to life in Article 6 requires government to take positive measures aimed at preserving life. Such measures should respond to the needs of both women and men, in keeping Articles 3 and 26, which guarantee the right to equal enjoyment of the rights in the Covenant and equality before the law. Because reproductive health care is an essential condition for women’s survival, these provisions collectively give rise to a governmental duty to ensure the full range of reproductive health services, including the means of preventing unwanted pregnancy.

The Human Rights Committee has recognized in General Comment 19 (39) that State’s duties to protect and ensure the right to life includes a duty to protect women who terminate pregnancies. It has been called upon State’s to take measures “to ensure that women do not risk life because of restrictive legal provisions on abortion, “that is to say, being forced to

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<sup>26</sup> (1992), Eur. Comm. H.R., 73 E.H.R.R

seek abortions under unsafe conditions. In this regard, the Committee has condemned legislation that criminalizes or severely restricts access to abortion and has recommended liberalization of criminal abortion laws.

4.2.2 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides, in Article 12, on access to health, that:

“State’s Parties shall take all measures to eliminate discrimination against women in the field of health care services, including those related to family planning”.

While CEDAW does not include the word “abortion”, the CEDAW Committee interprets Article 12 to include abortion as family planning. Countries that restrict or outlaw abortion are reprimanded and instructed to change their laws.

In 1998, the UN Division for the Advancement of Women, Department of Economic and Social Affairs, the World Health Organisation and United Nations Population Fund met in Tunisia and set forth a framework to implement Article 12 of CEDAW.

One of the problems identified was the discrimination in reproductive health care. It was recommended that:

“ Lack of autonomy, failure to enforce laws in women’s favour, discrimination in laws such as criminalization of abortion, inadequate allocation of health resources and failure by governments to implement remedial measures sanctioned by international agreements, all contribute to (women’s) relatively poor health status in many societies”.

In most countries, women are primarily valued as mothers and the interruption of pregnancy is socially censured. Gender discrimination is a determining factor in legal, political and religious barriers to women's access to safe abortion.<sup>27</sup> Governments are called upon to legalise abortion. In doing this, Governments and Legislators should address the reality and consequences of unsafe abortion by revising and modifying laws and policies which perpetuate damage to women's health, loss of life and violation of gender equality in health.

#### **4.3 The Effect of Abortion on the Right to life and the Laws on Abortion.**

On the other hand, those who strongly oppose the decriminalization of abortion believe that abortion is immoral because it kills a human being and should never be abandoned.

Article 12 (2) of the Zambian constitution provides that:

“No person shall deprive an unborn child of life by termination of pregnancy except in accordance with the conditions laid down by an Act of Parliament for that purpose...”

It may be deduced from the above provision that induced abortion is a violation of the unborn child's right to life. The right to life is the first and foremost of all rights. All persons have a fundamental unalienable, natural right to life regardless of function, religion, sex, race or condition of dependency.

The legal toleration of abortion can in no way claim to be based on respect for the conscience of others, precisely because society has the right and the duty to protect itself against the abuses, which can occur in the name of conscience and under the pretext of freedom. As such the first duty of government is to ensure legal protection of this right.

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<sup>27</sup> Women and Health Mainstreaming the Gender Perspective into the Health Sector – Tunisia (1998)

This is done through the criminalization of abortion in the Penal Code<sup>28</sup>, and the law governing abortion in the Termination of Pregnancy Act<sup>29</sup>.

#### 4.3.1 The Penal Code

Sections 151 and 153 of the Penal Code deal with abortion. These sections prohibit abortion. Under section 151, any person who with intent to procure the miscarriage of a woman, by unlawfully administering or cause her to take any poison is guilty of a felony. Section 152 makes a person guilty of a felony if she is pregnant and with the intention of procuring her own miscarriage, administers to herself any poison. The last instance, section 153 applies to persons who unlawfully supply or procures anything knowing that it will be used to procure miscarriage.

#### 4.3.2 The Termination of Pregnancy Act.

This Act has liberalised the law on abortion. Section 3 of the Termination of Pregnancy Act regulates the act of abortion by providing for the grounds on which abortion may be done without committing a crime. These are that:

- (a) The continuance of the pregnancy would involve;
  - (i) risk to the life of the pregnant woman;
  - (ii) risk of injury to the physical or mental health of the pregnant woman or;
  - (iii) risk of injury to the physical or mental health of any existing children of the pregnant woman, greater than if the pregnancy were terminated

Or

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<sup>28</sup> CAP 87 of the Laws of Zambia

<sup>29</sup> CAP 304 of the Laws of Zambia.

(b) that there is substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.”

Such abortions are to be done by a medical practitioner, upon him and two other practitioners reaching any of the above stated conclusions, in good faith.

However, the grounds for termination of pregnancy are so broad, ranging from health to social reasons, as to allow for the deprivation of the unborn child's right to life anyhow. The degree of risk is also not defined thus anything may qualify as a risk.

#### **4.4 The Decriminalisation of Abortion**

There is an ongoing debate on the decriminalisation of abortion. This means that abortion will no longer be a crime and the pregnant woman can abort at will. This will in turn mean that the unborn child will be deprived of its inviolable right to life, whose life will be regarded as valueless and at the mercy of the 'mother'.

##### **4.4.1 What Does Decriminalisation of Abortion Mean?**

This is the removal of all reference to abortion from the Zambian Penal Code, thus allowing abortion to be performed on any unborn child for “any” or “no” reason up until the child is born.

In this situation, it would mean that there are no legal safeguards in place to protect the lives of the unborn child.



#### **4.4.2. What would be the Impact for Zambia?**

The real impact of the decriminalisation of abortion would be the removal of all legal protection for the nine months of life in the womb.

#### **4.5 What would be some of the Effects?**

With no criminal law, abortion numbers would increase because people often equate the lack of criminal sanction with acceptable behavior. The abortion industry would expand.

#### **4.6 Would the Decriminalisation of Abortion be an act of Justice?**

No. By omission the law would be condoning the taking of the life of the most defenseless human in society, and thereby place itself far away from natural justice and its basic principle. “That all human life is inherently valuable and must be protected by law.” In any society the law must protect the voiceless and the weak, and be seen to protect them.

#### **4.7 What is the Value of the Provisions of the Zambian Penal code?**

The Zambian Penal code has, in principle stated that the life of the child in the womb is worthy of protection. If abortion were removed from the Penal code, unborn Zambian babies would lose this protection.

#### **4.8 Is Unborn Human Life Worthy of Protection?**

Yes. The unborn human as a member of the human family is entitled to full legal protection.

With the development of technology, a lot more is known about unborn human life than ever before. Through photographs and scanning it is possible to actually 'see' into the womb and experience life within.

The unborn child can be treated as a patient, separate from his/her mother. Now that the new human can clearly be identified, society should be considering how to increase legal protection for him/her.

#### **4.9 How Would the Decriminalisation of Abortion Change our Society?**

Society exists to preserve itself and its individual members. Any law, which condones the destruction of a member purely for convenience, erodes and attacks that society. If abortion on demand were no longer illegal, the number of abortions would exceed the number of live births.

##### **4.9.1 How Would Hospitals be affected?**

If decriminalisation was accepted then it may be expected that abortions be carried out in hospitals. Hospitals may be asked to show cause why they should **not** perform abortions, thereby risking the loss of limited government funding.

##### **4.9.2 Is Abortion not Another Medical Procedure?**

No other medical procedure has as its explicit aim - the termination of another's life. The aim of medicine is to cure only those abortions performed to prevent the death of the

mother as currently enshrined in the Termination of pregnancy Act, could be called a medical procedure.

#### 4.9.3 What is Zambia's Position on the Decriminalisation of Abortion?

It is important to note that this is not an active debate in Zambia as it is in the Western world. In Zambia a woman does not have the freedom to do anything she wants with her body. Thus she cannot and must not claim the right to declare the unborn to be inferior. Nor say "it would be better for this baby if he/she were not born", nor claim to know that those who might turn out to be handicapped would prefer to be dead. 'Unwanted ness' can never be justification for killing.

Abortion is still a crime in Zambia as provided for in the Penal code. It would be an abomination to the Zambian culture, which values both unborn and born life, for abortion to be decriminalised.<sup>30</sup>

#### 4.9.4 Summary

Abortion continues to be a world - wide problem. This entails the expulsion of the foetus at a time when it can live outside the womb.

All persons have a fundamental unalienable, natural right to life regardless of the condition of dependency. Therefore, the first duty of government is to ensure legal protection of this right.

The government of Zambia has since provided this protection by the criminalisation of abortion in the Penal code. The Termination of Pregnancy Act also prescribes the circumstances under which abortion is 'lawful'. The Termination of Pregnancy Act,

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<sup>30</sup> Ministry of Legal Affairs – Oral Interview

however, has a weakness in that the critical words such as 'risk' and its degree are not well defined which broadens the scope of 'lawful' abortion which in turn results into the deprivation or violation of the unborn child's right to life.

Zambia's position on the debate of decriminalisation of abortion is that abortion is still a crime as entrenched in the Penal code. The culture has an important role to play in maintaining this position in that it is an abomination to expel a foetus whose life is highly valued.

## CHAPTER FIVE

### THE RIGHT TO LIFE AND HIV/AIDS

#### 5.0 Introduction

During 1998, in Africa, the cradle of humanity, there were an average of 5,500 funerals due to Acquired Immune Deficiency Syndrome (AIDS) every day. By the end of the year, more than 33 million people were living with HIV/AIDS world - wide. Everyday 16,000 more people become infected.<sup>31</sup>

The Zambia Demographic Health Survey Report of 2001/2 revealed that the HIV/AIDS has a prevalence of rate of 16% for the ages of 15 – 49 years. Women have a higher HIV incidence rate of 18% compared to men who have 13%.

These facts indicate that a threshold has been crossed. Enormous deaths and loss due to AIDS is now a reality for many developing countries in Africa, such as Zambia.<sup>32</sup>

These deaths due to HIV/AIDS are alarming and an encroachment on the right to life. The protection of the right to life in this aspect is however undermined by the fact that access to both preventative measures and treatment is severely limited.

The Human Rights Committee, in General Comment number 6 has noted that the state should take measures to increase life expectancy. The increase of life expectancy, *inter alia*, means that the state must adopt measures to eliminate any epidemics, which are prejudicial to the right to life<sup>33</sup>.

Currently Zambia is faced with the HIV/AIDS pandemic. This is an epidemic that is constantly depriving people of their lives. The state must be seen to be adopting measures to curb this epidemic.

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<sup>31</sup> Richard Willis, *The AIDS Pandemic*, The Stanborough Press Ltd, England p.10 (2002)

<sup>32</sup> Commission on Human Rights. Fifty-Fifth Session. Item 14 of the Agenda UNAIDS (1999)

<sup>33</sup> *supra* note 3

This chapter will focus on the concerted efforts taken by the government to curb the HIV/AIDS pandemic that is affecting the greatest number of people in the Zambian communities.

In 1998, the Office of the High Commissioner for Human Rights (OHCHR) and the Joint United Nations Programme on HIV/AIDS (UNAIDS) issued the *International Guidelines on HIV/AIDS and Human Rights*. These guidelines built on expert advice to integrate the principles and standards of international human rights law into HIV/AIDS response. These guidelines were further revised in 2002 in order to update them to reflect new standards in HIV treatment and evolving international law on the right to health.<sup>34</sup>

The revised Guideline 6 provides that:

" States should enact legislation... so as to ensure ... adequate HIV prevention and care information, and safe and effective medication at an affordable price.

States should also take measures necessary to ensure for all persons, on a sustained and equal basis, the availability and accessibility of ... information for HIV/AIDS prevention, treatment care and support, including antiretroviral and other safe and effective medicines... "

It must be noted that these guidelines are not binding but merely provide guidance for states. Zambia is a party to these guidelines.

## **5.1 Treatment Measures**

The advancement of antiretroviral therapy (ART) has brought with it a fresh breath of hope for mankind, particularly those living with HIV/AIDS. The taking of a combination of HIV drugs is aimed at reducing cell mutation and boosting the immune system by halting or

delaying conditions favorable to the development of opportunistic diseases.<sup>35</sup> The importance of ARVT, therefore, is to prolong the life of those living with HIV/AIDS, increasing their life expectancy. This, in turn, ensures the enjoyment of the right to life.

Once an individual starts antiretroviral therapy, dependence on the drug increases because most of these therapies require that people living with HIV/AIDS take these pills for the rest of their life. Any attempt to stop taking the drugs results in a rapid deterioration of one's health. Failure to take the pills may also result in the virus mutating, getting stronger and becoming resistant to the medication.<sup>36</sup>

The Zambian government has an obligation to ensure that availability and cost do not encumber people living with HIV/AIDS from accessing these drugs. This obligation is yet to be achieved because ARVT drugs are expensive and beyond the reach of an average Zambian

#### **5.1.1 Government's Effort to Ensure the Access to ARVT**

It is important to note that in Zambia there is no pharmaceutical company that manufactures ARVT drugs. These drugs have to be imported from the world's leading pharmaceutical companies in order for them to be availed to Zambian citizens.

This reliance on multinational pharmaceutical companies implies that whatever ARVT drugs are available are not affordable where most needed. However, an initiative has been announced by three of the world's leading pharmaceutical companies. They have struck a deal to supply cheap HIV/AIDS drugs to the government of Ivory Coast, a deal which

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<sup>34</sup> HIV/AIDS and Human Rights International Guidelines – 'Access to Prevention, Treatment, Care and support

<sup>35</sup> *supra* note 31 p. 34

<sup>36</sup> *ibid*

might be repeated in other African countries from which Zambia might benefit.<sup>37</sup> The Bill Clinton HIV/AIDS Fund has also pledged to provide cheap HIV/AIDS drugs to African countries<sup>38</sup>.

On the other hand, there are ethical concerns which have been expressed by many African countries in that they do not want to be 'guinea-pigs' for overseas drugs companies,<sup>39</sup> nor, in the light of present infection and death rates, do they want to be given placebos in the place of effective drugs.<sup>40</sup>

In spite of the above-mentioned factors, the Zambian government must be seen to take positive steps towards making ARVT drugs available. This has been achieved by the ongoing 'pilot-case' project where 10,000 people have been identified through public hospitals such as the University Teaching Hospital, to be in dire need of the ARVT drugs. However, the criteria used to identify such persons are not transparent. This prejudices the health of those who are in genuine need.

Nevertheless, 10,000 are far from meeting the current statistics of people living with HIV/AIDS. The government has in turn obligated itself to increase the number from 10,000 to 100,000 Zambian citizens to be entitled to free ARVT drugs<sup>41</sup>. Zambia should also embark on other measures, which will enhance access to ARVT drugs from the multinational pharmaceutical companies such as parallel imports. Parallel importation may be defined as:

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<sup>37</sup> Dynes, Michael, Cheap Aids drugs give hope to Africa, **The Times**, 12 March (2001)

<sup>38</sup> The Times of Zambia, 6<sup>th</sup> November 2003

<sup>39</sup> Lyons, Marinez, Perspectives on Aids in Uganda, Boulder, Colorado (1997)

<sup>40</sup> EDITORIAL, Journal Protest, **New Scientist**, 25 October (1997)

<sup>41</sup> *supra* note 36



“The importation of a patented product onto an already established market, without the patent holder’s consent.”<sup>42</sup>

Since treatment measures are not adequate in curbing the HIV/AIDS pandemic the government should maximize on preventative measures.

It may be stated that, the State has not yet realized its obligations towards

## 5.2 Preventative Measures

The United Nations Secretary General stated that:

“Our first objective must be to halt and reverse the spread of virus (HIV)... Prevention can save many millions of lives, and in several African countries it has been shown to work.”

For instance, HIV infection rates have stabilized in Senegal and Uganda’s extremely high rates have been reduced.<sup>43</sup>

The Zambian government has adopted measures, which focus on the prevention of HIV infection. These measures or programs have specific target groups such as young people and pregnant women.

### 5.2.1 Young People

Protecting young people from HIV infection requires information and education that encourages safe and responsible behavior and helps them to avoid risk-taking situations involving alcohol, drugs and unprotected sex.

The Zambian government, through the Ministry of Education has introduced an educational policy that ensures that both primary and secondary school pupils are taught sex education. This in turn enlightens the pupils on how HIV is transmitted. Sex education encourages the

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<sup>42</sup> W. Cornish, *Intellectual Property*, 4<sup>th</sup> ed. Butterworths, London (1992)

pupils to engage themselves in responsible behavior and helps them avoid risk-taking situations such as unsafe sex. In an effort to educate young people the government encourages peer education where it embarks on training young people to work with other young people.<sup>44</sup>

### 5.2.2 Pregnant Women

The increase in infection observed in women and children is a worldwide phenomenon. In sub-Saharan Africa around 23-35 % of babies born to HIV- infected women also become infected. These are likely to acquire the infection either through exposure to maternal blood through the process of birth or subsequent breast-feeding.<sup>45</sup>

Mother to child transmission has raised a concern as to whether or not breast-feeding is still to be the recommended practice for infant feeding. The consensus is that it is far too early, if at all, to consider abandoning breast-feeding.<sup>46</sup>

The Zambian government supports action to help HIV negative women stay that way, and to help HIV positive women learn how to care for themselves, prepare for safe childbirth, and prevent transmission to their children and partners.

Voluntary counseling and testing at antenatal clinics are central components of HIV prevention.

### 5.2.3 The ABC of Prevention

The principal message of HIV prevention has been summed up in the ABC slogan:

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<sup>43</sup> United Nations Population Fund - 'Preventing Infection, Promoting Reproductive Health' Program

<sup>44</sup> *supra* note 36 p. 78

<sup>45</sup> George Bond, Community Based Organisation in Uganda: A Youth Initiative (1997)

A – abstain

B – be faithful

C – condom if necessary

While the slogan may be easy to remember, its practice has been less easy to uphold for a variety of practical and cultural reasons.

Former Health Commissioner of Illinois, USA, Dr Herbert Ratner wrote:

‘Today abstinence and monogamy are no longer distainfully dismissed as religious dictates. Rather they are seen as the pragmatic answer to a pressing problem, abstinence before marriage and monogamy thereafter are sexual norms protective of homo sapiens which serve the survival of the human animal.’<sup>47</sup>

It is the condom part of the slogan that has received the greatest emphasis as a preventative measure for HIV infection. This is an emphasis that many now viewed as adding to the problem as much by its use as its lack.

Where condoms are available, and with the appropriate level of health promotion, the up-take in condom use is marked. For instance, Zambian sex workers aware of the HIV risk insist on condom use by their clients.

In many societies such as Zambia, sex is a taboo subject, so any counsel with regard to condom use may not be available. Some faith communities may feel inhibited from promoting condoms in case it is thought they are promoting the promiscuous behaviors often associated with their use. These are issues that must be resolved by all concerned with in the fight to control HIV/AIDS. Only by bringing all the facts into the open will people be able to make intelligent decisions.

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<sup>46</sup> EDITORIAL, HIV fuels the partnership debate, Baby Milk Action Debate, (2000)

<sup>47</sup> Herbert Ratner, Aids - The Answer, **Family Life Bulletin**

It must be noted that although efforts are being made towards the prevention and treatment of HIV/AIDS, at the same time, human rights violations including discrimination and stigma faced by people living with or affected by HIV/AIDS, still constitute a major barrier to both prevention efforts and access to care.<sup>48</sup>

Currently in Zambia, there is no law that prohibits the discrimination of people living with HIV/AIDS. HIV/AIDS is not one of the specified grounds in Article 23 of the Constitution, on which discrimination is prohibited. This is contrary to the spirit of Article 2 (1) of the ICCPR, which prohibits discrimination on the basis of 'other status'. This has been interpreted to include HIV/AIDS as 'other status'

Article 23 of the Constitution should therefore, be amended to include HIV/AIDS as one of the grounds on which discrimination is prohibited.

### 5.3 Summary

HIV/AIDS is one of the major causes of high mortality rates. This reduces life expectancy and is therefore a violation of the right to life. According to the interpretation of the right to life in General Comment number 6, the Zambian state is obliged to take positive steps to curb the HIV/AIDS pandemic. The government has since embarked on such measures as the provision of free ARVT drugs to 10,000 people (currently) and making condoms available as a means of preventing HIV infection. This does not imply that the government should now reduce its fight against HIV/AIDS because the current statistics reveal that a lot more needs to be done. It must be noted that the war against AIDS is won every time a person makes an effort to prevent its spread. Hence both the government and its citizens must be in the forefront of this war and do all that we can do to halt the AIDS pandemic.

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<sup>48</sup> HIV/AIDS and Human Rights International Guidelines – 'Access to Prevention, Treatment, Care and

## CHAPTER SIX

### CONCLUSION

#### 6.1 Summary

In perhaps no other area of international law are challenges as great and as urgent today as they are with regard to the right to life. There can be no issue of more pressing concern to international law than to protect the life of every human being from unwarranted deprivation. In the world in which we live the right to life faces numerous threats and widespread violations.

The Human Rights Committee (HRC) in its General Comment No. 6 noted that the right to life is usually interpreted in the narrow sense, which is reflected in the maxim 'thou shalt not kill'. The HRC further stated that the right to life must be interpreted in the broad sense.

The modern or broad definition of the right to life encompasses the deprivation of life by starvation and lack of fulfillment of basic needs such as foods, basic health facilities and medical care.

This broad definition of the right to life requires that the States parties to the ICCPR, such as Zambia, take any positive measures towards the fulfillment of the duty to respect and ensure life. In respecting the right to life the Zambian government should ensure that any further violations of the right to life are prevented through legislative enactments and any other modes of prevention such as court pronouncements. In ensuring the right to life the Zambian government must take positive measures to increase life expectancy, which it has attempted to do by putting in place control measures against the spread of malaria, which is one of the high death rate causes, such as administration of drugs to infected people.

The Zambian government should also implement measures to reduce infant mortality. One of the ways in which this has been is through the instigation of programs against malnutrition, and the government policy of exclusive breast-feeding for infants.

On the contentious issue of abortion, the Zambian government has maintained its position that abortion is illegal except when performed under the qualifying circumstances in the Termination of Pregnancy Act. From this perspective Zambia is a high promoter of the unborn child's right to life.

‘The right to life is a supreme right from which no derogation is permitted even in times of public emergency’

(HRC, General Comment No. 6)

## 6.2 Recommendations

### **The right to life and the law**

Article 2 (1) of the ICCPR requires that State's parties such as Zambia take positive measures to ensure the right to life. This means that the government must take any measures to prevent the deprivation of the right to life. Currently, Zambia has Article 12 of the Constitution, which prevents violation of the right to life. However, this instrument only defines the right to life in the narrow sense. This narrow approach is no longer adequate because the right to life goes beyond the traditional view.

Thus there is a need for Article 12 to be amended so that it will encompass the broad definition of the right to life. Such an amendment will make the deprivation of the right to life by starvation and lack of fulfillment of basic needs justiciable. Provided that one can prove that the state has not taken all possible measures to fulfill its obligation. The state can

no longer plead 'lacks of resources', the resources are available and if properly allocated would be enough to at least provide the basic needs to the people within the Zambian territory.

However, it must be noted that amending the Constitution is not the best way of enforcing the right to life in the broad sense. Therefore, countries such as India have adopted a practice of enforcing the right to life through the social and economic rights or the directive principles. The court in India has always recognised the right to health as being an integral part of the right to life

This principle got tested in the case of Francis Coralie Mullin v The Administrator, Union Territory of Dehli<sup>49</sup>. The Supreme Court did not stop at declaring the right to health to be a fundamental right and at enforcing that right of the labourer. It directed the government to formulate a blue print for primary health care with particular reference to treatment of patients during emergency.

### **Institutions to Deter the Unlawful Deprivation of the Right to Life**

The Permanent Human Rights Commission (PHRC)

The greatest weakness of the PHRC is that it does not have the power to compel the observance of its decisions. That is to say, the Commission has no enforcement powers but merely recommends.

This weakness makes the PHRC a 'toothless' promoter of human rights vis- a-vis the right to life.

The PHRC must be given quasi-judicial power to enforce its decisions. This will in turn make it an effective institution to promote and protect the right to life.

## The Judiciary

Currently, it may not be practicable for the courts of law to entertain petitions based on the broad interpretation of the right to life. This is because the law providing for the right to life does not encompass the broad definition of the right to life. In order to empower the courts of law to entertain such petitions Article 12 of the Constitution must be amended.

## The Ombudsman

The ombudsman, like the PHRC does not have the powers to adjudicate, but merely recommends. In order to make this institution effective it must be given powers to enforce its decisions, such that all decisions of the Ombudsman will be binding.

## Infant Mortality and Life Expectancy

The government has since embarked on some programs to reduce mortality associated with diarrhoea and malnutrition such as improving the availability and supply of oral dehydration salts. However, these measures are not all-encompassing, they are not inclusive of the rural areas where most children continue to die from malnutrition.

The government measures and policy should not just be based in urban areas but should extend to rural areas as well so as to ensure that the whole population is catered for.

On life expectancy, the government is under an obligation to ensure a clean environment so as to prevent health hazards. The council waste collection program must not just be centered in Lusaka but should extend to all towns and cities in Zambia so that the country as a whole will maintain a clean environment. The government should also take serious measures to correct the prison conditions by firstly, decongesting them and then to ensure that the

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<sup>49</sup> (1981) 2 SCR 516



council fulfils its obligation to inspect the prisons and ensure that health standard are observed.

### Abortion and HIV/AIDS

On abortion, the grounds for termination of pregnancy in the Termination of Pregnancy Act are so broad as to allow for the deprivation of the unborn child's right to life. These grounds should be revised and narrowed, the 'degree of risk' should also be defined, in order to avoid broad interpretation.

On HIV/AIDS, the ARVT drugs, as has been demonstrated are not enough to cater for the millions of people that are dying from AIDS. The best way is for the government to actively embark on HIV/AIDS awareness campaigns in primary and secondary schools, higher learning institutions and places of work. Such a duty must not be left to the NGO's alone. All the people including both children and adults must be taught about the transmission, dangers and preventative options of HIV/AIDS.

Another issue that arises under the right to life and HIV/AIDS is the thought of punishing HIV+ people who intentionally infect others with the virus, by using the criminal law. The willful transmission is prejudicial to the right to life of innocent parties and these need to be protected by the law.

At present the criminal law in Zambia does not have a specific provision, which deals with people who willfully or otherwise infect others with HIV, or even AIDS, and neither does the Public Health Act nor any other piece of legislation. Proponents of criminalizing the transmission of HIV/AIDS by infected persons argue that HIV people who place others at

risk of infection should be criminally prosecuted because it is necessary to punish and denounce such objectionable conduct.

On the other hand, those against criminalization argue that not only are criminal prosecutions unlikely to be effective in addressing most instances of HIV transmission but that such a coercive social response may do more harm than good. Invoking criminal sanctions would surround people living with HIV/AIDS with further stigma such criminalization will deter people from voluntary counseling and testing for fear that knowing their HIV + status may endanger them to criminalization for willful transmission.

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