

**ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ZAMBIA: A CRITICAL  
LOOK AT THE PROVISIONS RELATING TO THEIR PROTECTION IN THE 2010  
DRAFT CONSTITUTION.**

**BY**

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**ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ZAMBIA: A CRITICAL LOOK  
AT THE PROVISIONS RELATING TO THEIR PROTECTION IN THE 2010 DRAFT  
CONSTITUTION.**

BY

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A dissertation Submitted to the University of Zambia in partial fulfillment of the award Bachelor of Laws  
Degree (LL.B).

## DECLARATION

hereby declare that this dissertation represents my own work and that it has not previously been submitted for a degree at the University of Zambia or another University.

.....

## Approval page

This dissertation of Hamwela Chisuwo B is approved as fulfilling the requirements or partial fulfillment of the requirements for the award of the Bachelor of Laws Degree (LL.B) by the University of Zambia.

.....*Alene*.....

Signature of Examiner

.....05/05/11.....

Date of Approval

## ABSTRACT

This dissertation critically analyses the provisions in the draft constitution of the Republic of Zambia, 2010 with regard to economic, social and cultural rights. This paper is written in a setting where currently in Zambia, civil and political rights are constitutionally guaranteed rights. They are contained in the Bill of Rights, Part III of the Zambian Constitution, Chapter 1 of the Laws of Zambia. These rights are justiciable in the Zambian context in that any Zambian citizen can bring an action in the courts of Law for any violation of his/her rights.

Economic social and cultural rights are non justiciable. The draft constitution has included them in the bill of rights. This dissertation looks into whether these rights realisable in the Zambian context and what measures can be adopted to ensure the enjoyment of these rights.

This paper recommends, in the short term, before economic, social and cultural rights are made justiciable, that firstly, Zambian courts must engage in judicial activism by interpreting civil and political rights widely so as to encompass economic, social and cultural rights. Secondly, Zambia must promote and monitor compliance with the International Covenant on Economic, Social and Cultural Rights, 1966 to which Zambia is a party and is bound by the principle of *pacta sunt servanda*. This includes ensuring that Zambia strides to achieve the Millennium Development Goals are consistent with Zambia's obligations under international human rights instruments. Thirdly, Zambia must ensure that domestic legislation embodies the economic, social and cultural needs of individuals.

In the long-term, when economic, social and cultural rights are made justiciable, this paper recommends, firstly, that institutions should be set up to improve implementation of economic, social and cultural rights. Second, economic, social and cultural rights should be considered in national plans of action. Thirdly, Zambia must find ways to enforce economic, social and cultural rights such as the strengthening of the social welfare. Fourth, Zambia should work to combat corruption. Fifth, Zambia needs to ensure that social goods are made available to individuals at affordable prices. Sixth, Zambia needs to ensure that an expanded approach to access to court is adopted, allow for courts of law to be ultimate judge in relation to whether or not resources have been used to their maximum and ensure that appropriate compensation is given to victims of infringement of economic, social and cultural rights.

## **DEDICATION**

For Bertha and Augustine-my beloved mother and father: For making me believe that I had it in me to be all I could dream.

## ACKNOWLEDGEMENTS

Where do I begin? I feel like my life up to this point, I owe to so many and in their own small way, all these many have contributed to what has culminated into this paper.

My siblings-you with whom I started this journey: Chisengele, Virginia, Sikawala, Paul, Nsoozi, Augustine, Chilaba, and both Big and Small Mutinta. For the love and support, and setting exceedingly high standards for me.

Banji and Cecilia: for providing me with a warm home and raising me, like your own. For believing in me, even when I didn't quite believe in myself. While here, special mention of Nelly (what would I do without you?), small Banji, Matenta, Bimba and Jahon.

My supervisor, Mrs. Anne Chewa Chanda, for the patient guidance. For always being available when I needed assistance. I take the blame for all the errors in this work. For any glory I may receive, I gladly hand to you the lion's share.

My friends, too numerous to list, I owe to you more than I can express. Tundo, Ignatius, Mofya, Simon, Mwamba, Lois, Mukonde, Mwambi, Lweendo, Layeni, Chris, Yosa, Situlile, Alice, Milao, Bwalya, Monje, Murah, Choolwe, Kaumbi, Pamela, Mable, Chawa, Roy, Sharon and all you beautiful spirits with whom I have and continue to share great memories. Though we may go vast distances away from each other, may the story of friends forever be ours.

My cousin and nieces, Matanana, Patricia and Bibiana, in that order –for making the load lighter.

All these special people mentioned and those not mentioned, but locked in my heart nonetheless, this dissertation and the degree it unlocks is as much yours as it is mine.

## **LIST OF AUTHORITIES**

### **Statutes**

#### **Acts of Parliament**

The Citizens Economic Empowerment Commission Act, Number 9 of 2000

The Constitution, Chapter 1 of the Laws of Zambia.

The Financial Intelligence Centre Act, Number 40 of 2010

The Forfeiture of Proceeds of Crime Act, Number 19 of 2010

The National Constitutional Conference Act, Number 19 of 2007

The Public Interest Disclosure (Protection of Whistle Blowers) Act, Number 15 of 2010

The Zambia Development Agency Act, Number 11 of 2010

#### **Policy documents**

The Zambia National Gender Policy, 2000

#### **Proposed legislation**

The Draft Constitution of the Republic of Zambia, 2010

### **Cases**

Francis Bandhua Mukti Morcha v. Union of India [(1984) 3 SCC 161]

Francis Coralie Mullin v The Administrator, Union Territory of Delhi (1981) 2 SCR 515

People's Union for Civil Liberties v. Union of India & Others Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001.

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## CHAPTER 1

### 1.0 INTRODUCTION TO THE RESEARCH

Human rights are concerned with the dignity of the person. They are the means by which an individual can attain and pursue human values aimed at promoting and achieving human dignity. The classic definition of human rights is that they are entitlements that are due to every human being. They are claims that every individual has on their State. They are universal claims, due to every human being in every human society irrespective of geographical location, historical, cultural, ideological, political or economic background, system or stage of development<sup>1</sup>.

In every society, a duty is placed on the State to protect the human rights of its citizens. These human rights are rights inherent in all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. Human rights are interrelated, interdependent, and indivisible<sup>2</sup>.

The role of human rights in any society is to act as a sure check on governmental power by ensuring that the power of the state is subject to the freedoms of individuals. Professor Lauterpacht stated this position thus<sup>3</sup>:

The substance of natural rights has been the denial of the absoluteness of the state and its unconditional claim to obedience; the assertion of the value and of the freedom of the individual as against the state, the view that the power of the state and its rulers is derived ultimately from the assent of those who compose the political community; and the insistence that there are limits to the power of the state to interference with man's rights to do what he conceives to be his duty.

Human rights are in three categories: civil and political rights; economic social and cultural rights and third generation rights. Civil and political rights and economic social and cultural rights have gained world prominence and it is argued that every society must protect both groups of human rights.

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<sup>1</sup> P, Matsheza, Human Rights Enforcement and Implementation Mechanisms, Harare: Kuku Publishing Services, 2001, Page 9

<sup>2</sup> C Anyangwe, Introduction to Human Rights and International Humanitarian Law, Lusaka: UNZA PRESS, 2004, Pages 22-23

<sup>3</sup> H. Lauterpacht, An International Bill of Rights of Man, New York: Columbia University Press, 1945, Page 17

Civil and political rights are personal liberties that belong to an individual, owing to his or her status as a citizen or resident of a particular country or community. These include the right to life, freedom of expression and association, freedom of movement and freedom from slavery and servitude<sup>4</sup>.

Economic, social and cultural rights on the other hand are a broad category of human rights that include the right to work, right to education, right to the highest standard of physical and mental health, right to adequate housing, the right to food and right to safe and clean water<sup>5</sup>.

At the international level, economic social and cultural rights are found in the Universal Declaration of Human Rights (1948) where they are characterised as indispensable rights for human dignity and the free development of personality, realised through national and international co-operation. Several other UN covenants that guarantee economic social and cultural rights and their protection include: the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 which Zambia ratified in 1984 but has not yet domesticated or made part of local law; the Discrimination (Employment and Occupation) Convention, 1958 and the Indigenous and Tribal Peoples Convention, 1989; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979 and the Convention on the Rights of the Child (CRC), 1989.

The Bill of Rights, Part III of the Zambian Constitution, contains fundamental human rights. It is worth noting that only civil and political rights are protected in the Bill of Rights. The economic, social and cultural rights of Zambian citizens are not granted constitutional guarantee and protection.

The Zambian Constitution, Chapter 1 of the Laws of Zambia, in part IX contains the directive principles of State policy which give direction to the State to provide an environment wherein the citizens are provided with an enabling environment economically, socially and culturally. Unlike the Bill of Rights which is Part III of the Constitution, Part IX of the Constitution is not justiciable

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<sup>4</sup> What are Human rights? Available at <http://legal-dictionary.the-free-dictionary.com> accessed on 15/09/2010  
<sup>5</sup> What are Economic, Social and Cultural Rights? Available at <http://www.amnesty.org> accessed on 15/09/2010

The National Constitution Conference, created by the National Constitutional Conference Act<sup>6</sup>, submitted to the government the draft constitution in August, 2010. In part IV, the Bill of rights, the draft constitution contains economic, social and cultural rights. The addition of economic, social and cultural rights to the Bill of Rights is a new phenomenon in Zambia.

This paper analyses the provisions in the final draft Constitution and relates them to the enforcement mechanism for economic, social and cultural rights to determine whether or not economic, social and cultural rights shall be afforded effective protection in Zambia. The paper goes further to highlight the benefits that Zambia might enjoy from the protection of economic, social and cultural rights by exploring the human rights approach to development.

**1.1 Statement of the problem**

As highlighted above, in Zambia, civil and political rights are constitutionally guaranteed rights. They are contained in the Bill of Rights, Part III of the Zambian Constitution<sup>7</sup>. These rights are justiciable in the Zambian context in that any individual can bring an action in the courts of Law for any violation of his/her rights.

Economic, social and cultural rights are non justiciable. The draft constitution has included them in the bill of rights. Are these rights realisable in the Zambian context? What measures can be adopted to ensure the enjoyment of these rights?

**1.2 Significance of the study**

This research comes at a time when economic, social and cultural rights have just been included in the draft constitution. The research highlights the importance of guaranteeing and protecting economic, social and cultural rights. This research goes further to look into whether Zambia is ready to protect economic, social and cultural rights and whether, the form these rights have taken in the draft constitution shall provide the required enjoyment of these rights. This research is an addition to the ever so valuable discourse on the need to protect and guarantee all human rights equally.

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<sup>6</sup> The National Constitutional Conference Act, no. 19 of 2007

<sup>7</sup> Chapter 1 of the Laws of Zambia

### **1.3 Objectives of the study**

- a. To highlight the equal importance of civil and political rights on one hand and economic, social and cultural rights on the other.
- b. To analyse the provisions relating to economic, social and cultural rights in the draft constitution.
- c. To ascertain if they are likely to offer effective protection of human rights.
- d. To propose appropriate measures to be taken to ensure enjoyment of economic, social and cultural rights is achieved in practice.
- e. To showcase the development based benefits Zambia stands to enjoy through protecting economic, social and cultural rights.

### **1.4 Research questions**

1. What are human rights?
2. What are economic, social and cultural rights?
3. Why should economic, social and cultural rights be afforded equal importance with civil and political rights?
4. What is justiciability?
5. Why is justiciability of economic, social and cultural rights important?
6. What economic, social and cultural rights are intended to be protected in the draft constitution? Will they render sufficient human rights enjoyment?
7. How can development be fostered by economic, social and cultural rights protection?

### **1.5 Research methodology**

This research uses desk research namely: consultation from statutes, international instruments, articles, journals, textbooks, periodicals, paper presentations, newspapers as well as research via internet generated presentations on the subject matter.

### **1.6 Outline of chapters**



## **Chapter 1**

### **INTRODUCTION TO THE RESEARCH**

This chapter introduces the research and in general terms gives the synopsis of the research. It also deals with the basic aspects of the research. These include the introduction; statement of the problem, objectives of the study, significance of the study, research questions, methodology and the chapter lay out. The chapter also gives an introduction to human rights in general terms to give a background to the research.

## **Chapter 2**

### **WHY ECONOMIC SOCIAL AND CULTURAL RIGHTS SHOULD BE MADE JUSTICIABLE**

This chapter first gives an overview of why economic social and cultural rights are as important as civil and political rights and why both sets of rights require equal protection. The chapter also introduces and elaborates the principle of Justiciability and its importance.

## **Chapter 3**

### **ECONOMIC SOCIAL AND CULTURAL RIGHTS IN THE DRAFT CONSTITUTION: WILL THEY ACTUALLY ENSURE ENJOYMENT OF HUMAN RIGHTS?**

This chapter looks at the actual contents of the draft Constitution in relation to economic social and cultural rights and whether the form these rights have taken is sufficient in the protection of human rights. In achieving this task, the principle of progressive realisation is discussed. The chapter gives ways in which progressive realisation of human rights can be utilised to protect economic social and cultural rights by drawing examples from countries that have actually domesticated economic social and cultural rights. Finally, the chapter gives ways in which economic social and cultural rights can be protected in light of limited resources.

## **Chapter 4**

### **ECONOMIC SOCIAL AND CULTURAL RIGHTS AND THEIR PROPENSITY TO FOSTER GOOD GOVERNANCE AND DEVELOPMENT (RIGHTS BASED APPROACH TO DEVELOPMENT)**

This chapter looks at the actual benefits that Zambia will get from making economic social and cultural rights justiciable including good governance and an improvement in societal development from the rights based approach.

## **Chapter 5**

### **CONCLUDING REMARKS AND RECOMMENDATIONS**

This chapter gives concluding remarks and recommendations from the research. The recommendations and concluding remarks provide reasoned insight into the matter of economic, social and cultural rights.

## **CHAPTER 2**

### **WHY ECONOMIC, SOCIAL AND CULTURAL RIGHTS SHOULD BE MADE JUSTICIABLE.**

#### **2.1 Introduction**

Since 1966, when the twin covenants, the International Covenant on Economic and Cultural Rights and the International Covenant on Civil and Political Rights came into existence, there has been a clear elevation of civil and political rights over economic, social and cultural rights. In many countries, Zambia inclusive, civil and political rights have been afforded constitutional guarantee and protection while the economic, social and cultural rights have remained without such constitutional guarantee. It is trite that human rights of all form, be they economic, social and cultural or civil and political, are meant to be accorded equal protection.

This chapter explores the main reasons that have led to this very apparent divide between the two main sets of human rights. The chapter also looks into the issues that are likely to surround the justiciability of economic social and cultural rights in the form they have taken in the draft constitution 2010.

#### **2.2 Justification for the equal status of economic, social and cultural rights and civil and political rights**

Economic, social and cultural rights have taken a subordinated role in comparison to civil and political rights in Zambia, as in many other jurisdictions. Since independence, all of Zambia's constitutions have provided for the justiciability of civil and political rights. Economic, social and cultural rights on the other hand have never been justiciable in Zambia. A dichotomy thus clearly exists between the status of civil and political rights and that of economic, social and cultural rights.

This dichotomisation has been attributed to a number of reasons including, firstly, the fact that economic, social and cultural rights are considered to require a proactive role of the State involving financial and material resources which, more often than not, are claimed not to be available. It is thus claimed that economic, social and cultural rights are so costly that if they

were made justiciable, the institutions of government would run down due to limited resources. Secondly, the dichotomy is due to the fact that economic, social and cultural rights have been seen for a long time as ‘secondary rights’ compared to civil and political rights. Their so-called ‘vague’ wording and problematic justiciability, caused mainly by their expense, have caused this status. There is also still, it is argued, inadequate common understanding of these rights in terms of their content and nature of States’ obligations<sup>8</sup>.

Thirdly, there is also the argument in support of the subordinated nature of economic, social and cultural rights to civil and political rights based on the assumptions that economic, social and cultural rights have a historical origin different from that of civil and political rights and that they are not capable of being universalised in both theory and practice. The former asserts that what is to be properly understood as the source of human rights is the natural law theory which it is argued, is concerned with individual autonomy and freedom, and provides a justification for civil and political rights but not for economic, social and cultural rights<sup>9</sup>. In this sense, the demand for the status of human rights for the economic, social and cultural rights works against the basis of human rights, namely individual autonomy and freedom. Autonomy entails that the citizen must be ‘left alone’, within the confines of the law, by the state. Economic, social and cultural rights require that the state positively reach out to the citizen to ensure a minimum dignity of existence.

Fourth, it is claimed that treating economic, social and cultural rights as rights undermines the enjoyment of individual freedom, distorts the functioning of free markets by justifying state intervention in the economy, and provides an excuse to downgrade the importance of civil and political rights.<sup>10</sup>

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<sup>8</sup><http://www.unesco.org/new/en/social-and-human-sciences/themes/human-rights/advancement/networks/larno/economic-social-and-cultural-rights/> ACCESSED ON 20/02/2011

<sup>9</sup>M Craven, The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development, Oxford: Clarendon Press, 1995, Page 10

<sup>10</sup>J. Henry Steiner and Philip Alston (eds.), International Human Rights in Context. Law, Politics, Morals, Oxford, Oxford University Press, 2000, Page 237.

Fifth, it is claimed that since economic, social and cultural rights are specific to a distinct group of people, they are not universal human rights and cannot in any way be universalized in practice due to factors such as scarcity of resources<sup>11</sup>.

In effect however, economic, social and cultural rights are just as important to the full realisation of human rights as are civil and political rights for a number of reasons. The main reasons in support of the equal protection and treatment of economic, social and cultural rights and civil and political rights are discussed below.

First and foremost, civil and political rights and economic, social and cultural rights have and must be allowed to enjoy equal status because human rights are universal and inherent. Human rights of all classifications are found everywhere and anywhere human beings are found and do not vary in time and space. Being universal, human rights are not assumed to be equally recognised, protected and enforced in the same manner across the world. What is considered to be universal is the concept of human rights not the extent of enjoyment from place to place<sup>12</sup>.

The universality of human rights, civil and political and economic, social and cultural is well summarised in the following words:

All human rights are universal, indivisible and interdependent and interrelated. The International community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis<sup>13</sup>.

This entails that any attempt to class human rights in a way that elevates one classification above the other flies in the face of the universality of human rights.

Second, it is accepted human rights wisdom that human rights are inter-dependent, indivisible and not in a hierarchy<sup>14</sup>. These classifications entail that human rights depend on each other for their full enjoyment and due to this inter-dependence; human rights cannot be divided and separated. Such inter-dependence also entails that human rights, be they civil and political or

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<sup>11</sup> Accessed at <http://socialrights.net/a-false-dichotomy/> on 19/01/2011

<sup>12</sup> C Anyangwe, Introduction to Human Rights and International Humanitarian Law, Page 22

<sup>13</sup> The Vienna Declaration and Programme of Action (New York: United Nations Department of Public Information) 1993

<sup>14</sup> R Javaid, International Human Rights Law, England: Pearson, 2003, Page 6

economic, social and cultural cannot be arranged in a hierarchy wherein some are more important than others.

The fact that human rights are interrelated and not in a hierarchy is clear in a number of examples: For instance, one cannot enjoy their right to life if their right to health is not protected. Similarly, one cannot enjoy their right to freedom of expression if their right to education is stifled due to the simple fact that for one to properly and eloquently express their views, education is necessary.

It is such interrelatedness of human rights that prompted the Indian Supreme Court in *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*<sup>15</sup> to comment thus:

The rights to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities of reading, writing and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.

What the Supreme Court of India sought to put across is the fact that economic, social and cultural rights and civil and political rights are linked and related and one set of rights cannot be fully enjoyed without the other. Attempting to have the right to life exist without a proper right to healthcare for instance, would result in the right to life being seriously compromised.

In the case of *People's Union for Civil Liberties v. Union of India & Others*<sup>16</sup>, the Supreme Court of India noted that the petition before them in that matter involved a "survival right", the right to food, enforceable under Article 21 of the Indian Constitution which protects the right to life. The Court added that the right to food is integral to the right to health and life. The Court noted that all of these rights are interrelated and indivisible and emphasized that the lack of

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<sup>15</sup>(1981) 2 SCR 515

<sup>16</sup>Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001

effective implementation of health and nutrition schemes essentially creates a denial of the right to life.

It emerges clearly from the discussion above that although in many jurisdictions, Zambia inclusive, civil and political rights have been elevated to a standard of protection far superior to that which economic, social and cultural rights have, both sets of rights are inter-dependent and interrelated and are therefore of equal importance. Without one set of rights, the other cannot possibly exist.

### **2.3 Justiciability of economic, social and cultural rights-who may approach the court and what is the role of the court?**

For a matter to be justiciable, one of the preliminary issues to be determined is whether or not the person coming before court has standing or locus standi to approach the Court. In Zambia's current constitution<sup>17</sup>, Article 28 (1) provides in part as follows:

...if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him [emphasis added], then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress ....

On a true construction of Article 28 above, it can be inferred that for one to have access to court in a matter involving an alleged infringement of their constitutionally protected rights, the violation must have been committed against the person approaching the court. Musumali J in *Stora Mbuzi and Maxwell Mwamba v Attorney General*<sup>18</sup> buttressed this position when he stated thus:

My firm view is that a citizen has a right to sue on Constitutional issues unless the Constitution itself explicitly or by necessary implication has taken away that liberty. For instance in cases of human rights, a person who "alleges that any of the provisions of Articles 11 to 26 has been, is being or is likely to be contravened in relation to him. . ." has locus.

There may be other provisions in the Constitution where only such firmly interested persons may sue on them. In the absence of such provisions in respect of Constitutional provisions, a citizen has liberty to come to the High Court, and on appeal, to this court and seek redress. This is the position, I am sure, in all

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<sup>17</sup> Chapter 1 of the laws of Zambia

<sup>18</sup> 1993/SCZ/10 (Unreported)

countries with Constitutions, written or not. This freedom is particularly important in democratic countries as it is one way of enabling a citizen to have a say in the governance of his country. So the citizen needs to know that he enjoys this right, whether or not she/he is a meddlesome type.

The position taken by Musumali J on the issue of access to court in constitutional matters is that only persons whose human rights have been, are being or is likely to be contravened in relation to them can have access to court. This approach on access to Court shuts the door to public interest litigation and is therefore not very progressive. It is this confined standard of access to Court in relation to constitutional matters that the draft constitution, 2010, intends to remedy. Article 74 sub article (2) of the draft constitution of the Republic of Zambia, 2010, has adopted a more liberal approach on access to Court. Article 74 provides thus:

74 (2) - Any person or organisation with a sufficient interest may bring an action against the violation of another person's or a group's human rights and freedoms:

Provided that the person or organisation that may bring an action under this clause is-

- a) A person acting on behalf of another who cannot bring an action in their own name;
- b) A person acting as a member of, or in the interest of, a group or class of persons; and
- c) An association in the interest of its members.

This approach taken on access to court in the draft constitution is similar to that prevailing in India and South Africa. The Civil Society for Poverty Reduction argues that Zambia stands to learn a lot from the South African Jurisdiction in relation to broadening the legal definition of "*locus standi*" to include these categories of claimants: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members<sup>19</sup>. The position on access to court that the draft constitution of the Republic of Zambia has taken is, quite clearly, consistent with that prevailing in South Africa and it is likely to open the doors to public interest litigation.

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<sup>19</sup> S Mwale, Can we afford Economic Social and Cultural Rights in the Constitution? Paper presented at Alliance Francaise , 20<sup>th</sup> April 2006, p14



In India also, the courts have been so judicially creative as to make access to court even more liberal. In *Bandhua Mukti Morcha v. Union of India*<sup>20</sup>, an Indian court held that where a person or class of persons to whom legal injury is caused by reason of violation of a fundamental right is unable to approach the court of judicial redress on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting *bona fide* can move the court for relief. This is so that fundamental rights may be meaningful not only for the rich and the well to do who have the means to approach the court but also for the large masses of people who are living a life of want and destitution and who are by reason of lack of awareness, assertiveness and resources unable to seek judicial redress.

Adopting the Indian approach on access to court will have immense benefits for enjoyment of economic, social and cultural rights in Zambia as the disadvantages of litigation, which are exemplified by its expense, can be overcome by the possibility of suits being instituted on behalf of indigent individuals by more financially able persons or groups.

Such an expanded approach of access to court as is evident in the draft constitution of the Republic of Zambia and the South African and Indian jurisdictions will enhance the instances of public interest litigation. Public interest litigation is a well known means of ensuring clear protection of human rights. Public interest litigation has been said to be a weapon by which the poor, helpless or disabled seek judicial redress for violations committed against them. It provides a vehicle through which the poor and down trodden can have their day in court.

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<sup>20</sup> [(1984) 3 SCC 161]

## **2.4 Conclusion**

This chapter has established that economic, social and cultural rights are of equal importance to civil and political rights. Side lining economic, social and cultural rights while upholding civil and political rights is, to say the least, folly. Civil and political rights require, for them to be fully enjoyed, economic, social and cultural rights and vice versa. These two sets of human rights are, as pointed out, inter-dependent and not in a hierarchy.

Further, this chapter has highlighted the weaknesses that lie in Zambia's law on access to court for violations of constitutionally protected human rights. It is submitted that the doors of the courts must be left wide open to any one that seeks to approach the court, on their own behalf or on the behalf of others, as is the case in India and South Africa, to ensure that any alleged breaches of constitutionally guaranteed human rights are dealt with appropriately.

This chapter having explained why economic, social and cultural rights and civil and political rights are of equal importance and why the provisions in the draft constitution, 2010 on access to court are more progressive than those in the current constitution, the next chapter deals with the provisions relating to economic, social and cultural rights in the 2010 draft constitution. The main focus of the next chapter is progressive realisation of economic, social and cultural rights and how it can be achieved.

## CHAPTER 3

### **ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE DRAFT CONSTITUTION: WILL THEY ACTUALLY ENSURE ENJOYMENT OF HUMAN RIGHTS?**

#### **3.1 Introduction**

The preceding chapter gave an overview of the reasons why economic, social and cultural rights and civil and political rights must be protected equally and gave an introduction on the principle of justiciability. This chapter introduces the principle of progressive realisation and analyses the provisions of the draft constitution, 2010, on economic, social and cultural rights with emphasis on Article 64 which makes economic, social and cultural rights progressively realisable.

Resource constraints have continuously been the excuse for most governments not making economic, social and cultural rights justiciable. It is a known fact that implementation of economic social and cultural rights requires a financial effort and intervention by the State. The protection of economic, social and cultural rights actually presupposes the availability of resources and therefore, the protection afforded to them by one country shall, more often than not, differ from that offered by another due to differences in resource endowments<sup>21</sup>.

As a solution to resource constraints in relation to economic, social and cultural rights, the principle of progressive realisation has been employed as the standard for protection of economic, social and cultural rights. This standard of protection is unlike the standard of protecting civil and political rights which standard is that of immediate protection.

The economic, social and cultural rights enshrined in Zambia's draft constitution, 2010 are the rights to pension, gratuity and retrenchment benefits; the right to labour relations; social protection; health and education and; the right to language and culture. From the list of economic, social and cultural rights in the draft constitution, 2010, the rights to self determination; the right to protection and assistance for the family, including special assistance for mothers and children and; the right to the enjoyment of the highest attainable standard of

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<sup>21</sup> C Anyangwe, Introduction to Human Rights and International Humanitarian Law, Page 34

physical and mental health<sup>22</sup> are conspicuously missing. Despite the missing rights however, the inclusion of these rights in the draft constitution is commendable because for the first time, individuals shall be able to sue upon breaches of economic, social and cultural rights.

The most discussion worthy point created by the addition of economic, social and cultural rights in the draft constitution is mostly to be seen in Article 64 of the draft constitution for the Republic of Zambia, 2010, which provides for their progressive realisation. In this discussion, progressive realisation shall be looked at from the approach adopted in the enforcement of the International Covenant on Economic, Social and Cultural Rights, 1966 and the enforcement of economic, social and cultural rights in the South African jurisdiction.

### **3.2 Progressive realisation in the International Covenant on Economic, Social and Cultural Rights, 1966.**

To understand the principle of progressive realisation, principles established in relation to obligations in the International covenant on economic, social and cultural rights are instructive. It is established that the main components of progressive realisation are as discussed below<sup>23</sup>.

Firstly, it is not intended to give countries an excuse to do nothing. It gives governments the opportunity to address their resource limitations by progressively realizing their economic, social and cultural rights obligations. This means that States must take steps to do what they can as soon as they can, with the intention of achieving full realisation of economic, social and cultural rights as soon as possible. This basically entails that if, within the available resources in a country, economic, social and cultural rights can be enjoyed to a certain extent, the country in question is bound to respect them and cannot, to an action for non-enjoyment of these rights use progressive realisation as a defence. Progressive realisation does not stand to absolve countries from their duty to ensure enjoyment of economic, social and cultural rights.

Secondly, if there are economic, social and cultural rights that governments are able to implement immediately then they must do so. For example, the obligation not to discriminate

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<sup>22</sup> International Covenant on economic social and cultural rights, <http://www2.ohchr.org/english/law/cescr.htm> accessed at on 19/01/2011

<sup>23</sup> Available at <http://www.dpi-icrpd.org/index.php?q=en/node/60> accessed on 15/01/2011

has been interpreted by human rights treaty monitoring bodies as an obligation of “immediate effect,” and therefore not subject to progressive realization<sup>24</sup>.

Thirdly, governments must take steps to the maximum extent of their available resources. When considering the resources available governments should examine both internal and external sources of resources, including international cooperation where appropriate, such as technical assistance and development aid.

Fourthly, even where resources are unavailable or severely constrained, governments still have the obligation to promote the widest possible enjoyment of economic, social and cultural rights to the extent possible. This includes the obligation to devise strategies and programmes for the promotion of these rights. This requirement calls for the creativity of governments in ensuring protection of economic, social and cultural rights. This can be extended to the government empowering its citizens such that the citizens are able, without State assistance, to enjoy economic, social and cultural rights. An illustration of this point is the government ensuring that its adult citizens are so financially stable as to be able to provide food for their families.

The International Covenant on Economic, Social and Cultural Rights provides that the state is under an obligation, “to take steps ... to the maximum of its available resources”.<sup>25</sup> The State party is obliged to take all appropriate means, including particularly the adoption of legislative measures. Legislation is however not all that is required of a state party.

The United Nations committee on economic, social and cultural rights has clarified the meaning of “taking steps” by State parties by stating that the steps should be immediate and deliberate,

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<sup>24</sup> S. Kalantry, Jocelyn E. Getgen & Steven Koh, Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR accessed at [http://www.escr-net.org/usr\\_doc/Enhancing\\_Enforcement\\_of\\_Economic,\\_Social,\\_and\\_Cultural\\_Rights\\_Using\\_Indicators.pdf](http://www.escr-net.org/usr_doc/Enhancing_Enforcement_of_Economic,_Social,_and_Cultural_Rights_Using_Indicators.pdf) on 20/01/2011

<sup>25</sup> R. Robertson “Measuring State Compliance with the Obligation to Devote the ‘Maximum Available Resources’ to Realising Economic, Social and Cultural Rights”, 1994, 16 Human Rights Quarterly Page 693, 694.

concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant<sup>26</sup>.

The requirement that the taking of steps by State parties should be immediate, deliberate, concrete and targeted towards the meeting of the obligations in the covenant entails that progressive realisation of economic, social and cultural rights is not in itself an excuse for the complacency of State parties. This argument has been put forth thus:

It is noted that the ‘availability of resources’, although an important qualifier to the obligation to take steps, does not alter the immediacy of the obligation, nor can resource constraints alone justify inaction<sup>27</sup>.

The government of a State party is therefore obliged to work tirelessly towards ensuring enjoyment of economic, social and cultural rights with or without resource constraints.

In effecting progressive realisation of economic social and cultural rights, two matters should be considered. First, determining the resources available and secondly, whether these are being used to the maximum extent. Determining available resources is relatively easy because more often than not, what resources are available to the government, be they monetary or not, is a matter in the public domain. This is information that can be found in such documents as the national budget. Determining whether the resources have been used to the maximum extent is what may prove problematic because this is in a province of information most available to the government and not the public.

There are several general points to note on the determination as to whether the resources available are being used to the maximum extent. First, there are “minimum subsistence rights for all”, whatever the economic position is. In other words, there are minimum core obligations which apply regardless of resources. Secondly, “available resources” is broadly interpreted, and includes those which can be accessed through international co-operation and assistance. Thirdly, emphasis should be placed on the “equitable and effective use of and access to the available resources”. This includes the development of processes that are transparent such as the release periodically of information on how resources have been used for the furtherance of enjoyment of

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<sup>26</sup> United Nations Committee on Economic, Social and Cultural Rights, General Comment No.3 (1990)

<sup>27</sup> M Ssenyonjo, Economic, Social and Cultural Rights in International Law, Oxford: Hart Publishing, 2009, Page.50

economic, social and cultural rights. Finally, in distributing resources, priority should be given to the rights in the International covenant on economic, social and cultural rights<sup>28</sup>.

The Limburg principles on the implementation of the International Covenant on Economic, Social and Cultural rights<sup>29</sup> lay out, among others, the following principles with regard to progressive realisation of economic, social and cultural rights.

Firstly, in the use of the available resources, due priority shall be given to the realisation of rights recognized in the International Covenant on Economic, Social and Cultural Rights, 1966, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services. This in effect entails that the realisation of economic, social and cultural rights must be prioritised and not indiscriminately set aside.

Secondly, international co-operation and assistance must be directed towards the establishment of a social and international order in which the rights and freedoms set forth in the International Covenant on Economic, Social and Cultural Rights, 1966, can be fully realised. This entails that ultimately, the aim is to set an international standard of protection of economic, social and cultural rights. A time is contemplated when full realisation, and not progressive realisation, shall be the standard of protection of economic, social and cultural rights.

### **3.3 Progressive realisation: the South African experience**

The position on economic, social and cultural rights and their progressive realisation in South Africa is clear in a number of cases decided by the South African Constitutional Court. In *Government of South Africa v. Irene Grootboom and Others*<sup>30</sup>, the constitutional court stated in

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<sup>28</sup> C Harvey, *Integrating human rights: Socio-economic rights and budget analysis*, European Human Rights Law Review 2010.

<sup>29</sup> The Limburg principles on the implementation of the International covenant on economic, social and cultural rights available at <http://www.idpsrilanka.lk/html/IDP%20Related%20Norms%20and%20Laws/Principles,%20Standards%20and%20Guidance/1986%20%20%20Limburg%20Principles%20on%20the%20Implementation%20of%20the%20International%20Covenant%20on%20Economic%20Social%20an.pdf> accessed on 28/01/2011

<sup>30</sup> Case CCT 11/00, judgment of 4 October 2000.: 2001(1) SA 46(CC) ‘(Grootboom)’

relation to progressive realisation of the right to housing, an economic, social and cultural right that:

‘The state’s obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.’

The thrust of the holding in this case is that the extent of the State’s duty to its citizens varies depending on the circumstances. For instance, the extent of the State’s obligation to build infrastructure for education is lower in urban areas than in rural areas because in most instances, rural areas are left unattended for prolonged periods.

In relation to the obligation on the State to progressively realise economic, social and cultural rights within ‘available resources’, the South African constitutional Court in *Soobramoney v Minister of Health, KwaZulu-Natal*<sup>31</sup> gave the parameters in which the government must ensure enjoyment of these rights when it stated thus:

What is apparent from these provisions is that the obligations imposed on the State ... in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.

From the decision in the *Soobramoney v Minister of Health, KwaZulu-Natal*, it is clear that the role of the government is that of balancing available resources with the need of citizens to have full enjoyment of economic, social and cultural rights. This balancing act was referred to as the balance of goals and means in *Government of South Africa v. Irene Grootboom and Others*<sup>32</sup>. The goal is to fully realise economic, social and cultural rights and it has to be balanced with the available means.

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<sup>31</sup> 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC)

<sup>32</sup> Case CCT 11/00, judgment of 4 October 2000.: 2001(1) SA 46(CC)



We learn from the South African approach to progressive realisation of economic, social and cultural rights therefore that the obligation that lies with the state varies depending on the circumstances. Also, we learn that the duty of the state is to balance two competing interests: the interests of the citizens to have their economic, social and cultural rights protected and availability of resources. The government must ensure in relation to this balancing that both interests are well represented.

### **3.4 Progressive realisation of economic, social and cultural rights in the draft constitution of the Republic of Zambia, 2010.**

The draft constitution, 2010 provides in Article 64 for progressive realisation of economic, social and cultural rights. It provides in sub article 1 thus:

‘Parliament shall enact legislation which provides measures which are reasonable in order to achieve the progressive realisation of the economic, social and cultural rights under this Bill of Rights.’

This provision places a positive obligation on Parliament to legislate for the enhancement of economic, social and cultural rights. This is a progressive provision as it imposes the standard of reasonableness in relation to the legislation that Parliament must enact. The standard of reasonableness is objective and therefore desirable. An example of such reasonable and progressive legislation that is in force in Zambia is Citizens Economic Empowerment Commission Act<sup>33</sup> which provides, among other things, for the functions of the Commission and sets out the following, inter alia, as its functions:

6. (1) The functions of the Commission shall be to promote the empowerment of citizens that are or have been marginalized or disadvantaged and whose access to economic resources and development capacity has been constrained due to various factors including race, sex, educational background, status and disability.
- (2) Without limiting subsection (1), the functions of the Commission shall be to-
  - (b) Promote gender-equality in accessing, owning, controlling, managing and exploiting economic resources;

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<sup>33</sup> Act number 9 of 2006

(d) Promote the employment of both genders by recommending to appropriate authorities the removal of structural and discriminatory constraints and practices that hinder any particular gender from employment opportunities;

The above provision has the effect of obligating the Citizens Economic Empowerment Commission to promote empowerment among others, to citizens whose access to economic resources and development capacity has been constrained by their sex. The commission is further mandated to promote gender equality in accessing, owning, controlling, managing and exploiting economic resources. Further, the commission is mandated to promote employment of persons of both genders. This entails that whether it is in relation to resources or employment, women must be considered alongside the male folk. This ensures, economically at least, that women are not discriminated against in access to economic resources.

Also, Section 12 of the Zambia Development Agency Act<sup>34</sup> provides thus:

12. (1) The Agency shall, in consultation with the private sector and, in particular, the business community, recommend to the Minister coherent trade and industry development strategies-

(g) To promote gender equality in accessing, owing, managing controlling and exploiting economic resources;

The above provision entails that the Zambia Development Agency in consultation with the business community is mandated to recommend to the Minister, among other things, to promote gender equality in the way that economic resources are accessed, owned and managed. Paragraph (g) of sub article (1) of Section 12 of the Zambia Development Agency Act mandates the Zambia Development Agency to recommend to the Minister strategies to promote gender equality in accessing, owing, managing controlling and exploiting economic resources which in the long run will ensure advancement of women. This is a way of ensuring that women are given equal access to economic resources as are men.

Article 64 sub article 2 of the 2010 draft constitution provides thus:

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<sup>34</sup> Act number 11 of 2006

(2) The government shall take measures including-

- a) Affirmative action programmes designed to benefit disadvantaged persons or groups;
- b) Legislation-
  - i) That promotes equity, equality and freedom from discrimination and establishes or provides for standards relating to the achievement of those measures;
  - ii) That ensures that State organs and State institutions fulfil the obligations of the State under the Bill of Rights;
  - iii) That ensures that persons fulfil their obligations under the Bill of Rights.

This provision is also progressive as it places an unfettered obligation on the State to take measures aimed at ensuring equality and equity. One of the ways in which equality and equity can be attained is through the use of measures that do not discriminate against persons of any description. Also, the provision recognises the other way in which to ensure equity and equality is to take affirmative action to uplift disadvantaged groups from their predicaments. This in effect reduces the divide between the rich and the poor. The constitution is, after all, a means through which the citizens of a country can overcome such hardships as poverty, disease and abuse of liberties and attain a dignified livelihood.

Article 64 sub article 3 of the draft constitution, 2010, provides thus:

- (3) Where a claim is made by the State, that the State does not have the resources to implement a particular right or freedom-
  - a) It is the responsibility of the State to show that the resources are not available;
  - b) a court, tribunal or Human Rights Commission shall not interfere with a decision by a State organ or State institution concerning the allocation of available resources solely on the basis that the court, tribunal or Human Rights Commission would have reached a different conclusion.

This provision places the burden of proving that resources are not available on the State. This is an apt provision because invariably, it is only the State that can have information as to whether or not resources are available and if resources are available, what they have been used for.

Paragraph (b) sub article 3 of article 64, however is not so progressive. The provision interferes with the independence of courts, tribunals and the Human Rights Commission in providing that these institutions cannot interfere with the decision made by a State organ or institution only on the basis that they would have reached a different conclusion. Judicial or administrative independence entails that a court, tribunal or indeed the Human Rights Commission must be unfettered in its discretion to interfere with any action of the State. This is the foundation of checks and balances which are a way of ensuring separation of powers. This very important check on the State is, quite regrettably, fettered in this particular case.

### 3.5 Conclusion

This chapter has shown how progressive realisation can be best utilised to ensure protection and enjoyment of economic, social and cultural rights by drawing from the experiences from the International Covenant on Economic, Social and Cultural Rights and the South African Jurisdiction.

We learn from these experiences that the State has a duty to take measures, legislative or otherwise, to ensure enjoyment of economic, social and cultural rights. The non-availability of resources is not in itself a sufficient excuse for not respecting and protecting economic, social and cultural rights. The State must therefore be creative in ensuring the respect, enjoyment and protection of economic, social and cultural rights. Also, it is clear that the role of the State is to ensure a balance exists between the need to protect economic, social and cultural rights and the available resources.

With regard to Article 64 of the 2010 draft constitution which provides for progressive realisation of economic, social and cultural rights, it has been established that the provision is mostly progressive in that it places very clearly positive obligations on Parliament and government to legislate and take measures for the furtherance of economic, social and cultural rights' protection. The only flaw is in paragraph (b) of sub article 3 of Article 64 of the 2010 draft constitution which precludes the court, tribunal or the Human Rights Commission from interfering with the decision of the State organ or institution solely for the reason that the court, tribunal or Human Rights Commission could have reached a different decision. This provision interferes with the independence of Courts, tribunals and the Human Rights Commission and acts as an affront to checks and balances and the principle of separation of powers.

This chapter having established that progressive realisation is a workable means of protecting economic, social and cultural rights, the next chapter takes a look at the benefits that Zambia, by including economic, social and cultural rights in the Bill of Rights, is likely to enjoy by discussing the rights based approach to development.

## **CHAPTER 4**

### **ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THEIR PROPENSITY TO FOSTER GOOD GOVERNANCE AND DEVELOPMENT (RIGHTS BASED APPROACH TO DEVELOPMENT).**

#### **4.1 Introduction**

The preceding chapter introduced the principle of progressive realisation and analysed the provisions of the draft constitution, 2010, on economic, social and cultural rights. This chapter looks at the actual benefits that Zambia will get from making economic, social and cultural rights justiciable including good governance and an improvement in development from the rights based approach.

The concept of human rights is people centred. The concern and aim of human rights is to promote the well-being and freedom of all people based on their inherent dignity and equality. On the other hand it can be said that the concern of human development is the realisation by all of basic freedoms. It involves creating an enabling environment and opportunities for man to reach his full potential. Societal development does not only centre on economic growth, but equitable distribution of societal resources, enhancement of people's capabilities and widening of their choices.

It is trite that human rights violations are both a cause and consequence of poverty. As such, human rights reinforce the demand that poverty reduction be the primary goal of development policy making and therefore require the process of formulating a poverty reduction strategy to include the principles used for identifying and prioritising action to improve the situation of the poorest.

According to the Human Development Report of the United Nations Development Programme 2000, human development and human rights are close enough in motivation and concern to be

compatible and congruous, and they are different enough in strategy and design to supplement each other fruitfully<sup>35</sup>.

Human rights and development then share a common concern with a view as to the necessary outcome of improving people's lives. Human rights contribute to human development by guaranteeing a protected space where one class in society cannot monopolise development processes, policies and programmes. The human rights framework also introduces the important idea that certain actors have duties to facilitate and foster development. This leads us to the concept of a rights based approach to development.

Article 1 of the Declaration on the Right to Development<sup>36</sup> defines a rights-based definition of development as a comprehensive economic, social, cultural and political process whose object is the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the resulting benefits. The right based approach is therefore a deliberate way of fostering development wherein the needs of the people, including health, education, shelter and clean and safe water, are given effect.

A rights-based approach to development is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights<sup>37</sup>. In essence, a rights based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development, including their monitoring, by invoking key principles that include equality and equity, accountability, empowerment, participation and paying special attention to vulnerable groups. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.

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<sup>35</sup> Available at United Nations Development Programme (UNDP), Human Development Report 2000: Human rights and human development (New York, 2000), p. 19, available at [http://hdr.undp.org/reports/view\\_reports.cfm?year=2000&country=0&region=0&type=0&theme=0](http://hdr.undp.org/reports/view_reports.cfm?year=2000&country=0&region=0&type=0&theme=0). accessed on 26/01/2011

<sup>36</sup> Adopted by General Assembly resolution 41/128 of 4 December 1986 <http://www2.ohchr.org/english/law/rtd.htm> accessed on 26/01/2011

<sup>37</sup> Available at <http://hdr.undp.org/en/reports/global/hdr2000/> accessed on 26/01/2011

Some of the main indicators of development are poverty reduction, good governance, economic growth and most recently, attainment of the Millennium Development Goals. The relationships between the above development indicators and human rights are discussed below.

## **4.2 Actual links between human rights and development related considerations**

### **4.2.1 The relationship between Millennium Development Goals and human rights.**

In 2000, member States of the United Nations renewed their commitments to promote and protect human rights and agreed on the Millennium Development Goals: eight quantified and time-bound development goals. The eight Goals, which are to be achieved by 2015, are to:

- 1) Eradicate extreme poverty and hunger;
- 2) achieve universal primary education;
- 3) promote gender equality and empower women;
- 4) reduce child mortality;
- 5) improve maternal health;
- 6) combat HIV/AIDS, malaria and other diseases;
- 7) ensure environmental sustainability;
- 8) achieve a global partnership for development.<sup>38</sup>

These provide a focus for efforts to reduce poverty and a common basis for measuring progress.

The Millennium Development Goals are aimed at setting an international standard of human rights entitlements and obligations. By so doing, the monitoring of Millennium Development Goals' achievements is essentially a way of monitoring of the progressive realisation of economic, social and cultural rights. It is trite that the Millennium Development Goals are important milestones for the realisation of the often neglected economic, social and cultural rights.

Human rights on the other hand help sharpen the strategies for achieving the Millennium Development Goals by addressing the discrimination, exclusion, powerlessness and accountability failures that lie at the root of poverty and other development problems<sup>39</sup>.

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<sup>38</sup> Available at [http://unstats.un.org/unsd/mi/mi\\_goals.asp](http://unstats.un.org/unsd/mi/mi_goals.asp) accessed on 13/02/2011



For example, Millennium Development Goal 2 sets the target of 2015 for achieving universal primary education. Experience shows that school fees keep more girls than boys out of school. Reducing the ability to reach Goal 2 also affects Goal 3 on gender equality. Human rights reinforce strategies to achieve Goal 2 by establishing the right to universal, free primary education, and by ensuring that growth strategies are tailored to the needs of girls and other specific marginalized groups<sup>40</sup>.

There are other ways in which human rights strengthen efforts to achieve the Millennium Development Goals.

Firstly, by reinforcing the legitimacy of the Millennium Development Goals' implementation strategies by building upon human rights treaty obligations voluntarily undertaken by governments can strengthen the reality of the Millennium Development Goals. Zambia for instance has ratified, but not domesticated a host of international human rights instruments. The International covenant on economic, social and cultural rights, 1966, is one such instrument. The obligations on Zambia imposed by these international human rights instruments must however be obeyed. The international law principle of *pacta sunt servanda*, contained in Article 26 of the Vienna Convention, 1969, which provides that States must be bound by their international obligations, does after all, apply to Zambia. Zambia must for instance ensure that the obligation to progressively realise economic, social and cultural rights, under the International covenant on economic, social and cultural rights, 1966, is obeyed despite the absence of domestication.

Secondly, human rights can strengthen Millennium Development Goals by the harnessing the mobilising potential of human rights discourse. This is clear in the number of civil society organisations concerned with advocating for human rights. In Zambia for instance, the Jesuit Centre for Theological Reflection, the Civil Society for Poverty Reduction and Caritas Zambia represent only a small fraction of the huge number of civil society organisations advocating for economic, social and cultural rights to be enshrined in the Bill of rights. Millennium Development Goals are likely to benefit from this advocacy for human rights and vice versa.

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<sup>39</sup> UNDP, Human Development Report 2003: Millennium Development Goals: A compact among nations to end human poverty (New York, 2003), pp. 1 and 30

<sup>40</sup> Frequently asked questions on a human rights-based approach to development cooperation, Geneva, 2006, Available at [www.ohchr.org/Documents/Publications/FAQen.pdf](http://www.ohchr.org/Documents/Publications/FAQen.pdf) on 13/02/2011

Thirdly, human rights can enhance Millennium Development Goals by enhancing the sustainability of the strategies to meet the Goals, looking beyond global averages to address the root causes of poverty and underdevelopment, including patterns of discrimination against particular groups. Underdevelopment and poverty are two of the causes for economic, social and cultural rights not being enforced. They act simultaneously as causes for most countries not achieving their Millennium Development Goals. Curing the root causes of poverty and underdevelopment such as the lack of prioritisation of resources, corruption and general mismanagement of resources can act as a way of improving the enjoyment of economic, social and cultural rights and attainment of Millennium Development Goals.

Fourth, human rights enhance Millennium Development Goals attainment by using human rights processes and institutions for example the courts, national human rights institutions, informal justice systems and mechanisms at the international level to strengthen transparency and accountability for the achievement of the Millennium Development Goals<sup>41</sup>. If economic, social and cultural rights are included in the Bill of Rights, individuals shall be able to bring actions against the state for their infringement. A state party that lamentably fails to meet its obligations set by the Millennium Development Goals does infringe economic, social and cultural rights. Enforcing economic, social and cultural rights, in the event that they are added to the Bill of Rights, will strengthen the attainment of Millennium Development Goals.

It becomes clear from the above discussion that making economic, social and cultural rights progressively realisable is likely to better the chances of attaining the Millennium Development Goals.

#### **4.2.2 The relationship between human rights enjoyment and poverty reduction**

It has been long established that poverty is not only a lack of material goods and opportunities, such as employment, ownership of productive assets and savings, but the lack of physical and social goods, such as health, physical integrity, freedom from fear and violence, social belonging, cultural identity, organizational capacity, the ability to exert political influence, and

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<sup>41</sup> Frequently asked questions on a human rights-based approach to development cooperation, Geneva, 2006, Available at [www.ohchr.org/Documents/Publications/FAQen.pdf](http://www.ohchr.org/Documents/Publications/FAQen.pdf) on 13/02/2011

the ability to live a life with respect and dignity<sup>42</sup>. For instance if the right to education is not protected, there is a chance that the majority of a population will not have the requisite skills to sustain their lives and the lives of their families. As a result of this human rights violation, the descendants of these indigent and uneducated citizens are also likely to be indigent and uneducated and the cycle continues as such.

Human rights, being concerned with human dignity, ensure that poverty reduction is at the heart of their protection. If poverty is reduced, more citizens have access to education, health, clean and safe water, and also, the quality of life is improved. The net effect of such poverty reduction is that it leaves human rights protected. Human rights require the process of formulating a poverty reduction strategy to include a number of elements and principles<sup>43</sup> including the following:

Firstly, identifying and prioritizing action to improve the situation of the poorest. Empowerment of the poorest in society is one such action. This can be achieved through ensuring that the poorest in society are presented with opportunities to develop skills with which they can make a living. Also, this can be achieved by ensuring the equitable distribution of wealth in society such that it is not concentrated within the confines of few in society. This can be achieved by increasing social expenditure. Social expenditure includes spending resources on such vital social goods as schools, hospitals and other recreational facilities that benefit all in society.

Secondly, by analysing the underlying power relations and the root causes of discrimination. The unequal treatment of men and women in most societies presents a perfect example. Men will for instance have access to the best employment opportunities and, in the worst instances, be paid more than women for equal work done. Such discrimination leads to great poverty on the part of the group discriminated against. Non discrimination is a tenet of all human rights discourse. Eliminating discrimination is a sure way of reducing poverty.

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<sup>42</sup> D Narayan, Voices of the Poor: Can Anyone Hear Us? (2000) New York: Oxford University Press, published for the World Bank and the International Bank.

<sup>43</sup> Frequently asked questions on a human rights-based approach to development cooperation, Geneva, 2006, Available at [www.ohchr.org/Documents/Publications/FAQen.pdf](http://www.ohchr.org/Documents/Publications/FAQen.pdf) on 13/02/2011

Zambia has made some strides in ensuring that the power relations between men and women are harmonised. The national Gender Policy, 2000 in summary addresses the following gender issues:

- a) the power relations between men and women in domestic, community and public domains which are impediments to the advancement of women;
- b) The feminization of poverty as reflected in women's limited access to and control over productive resources, and social services, remunerative employment opportunities and minimal participation in political and managerial decision making processes.;
- c) Cultural and traditional practices that systematically subject females to male subordination;
- d) Limited access by women and girls to and use of basic health services, inadequate reproductive health facilities, maternal and child health care;
- e) Lack of access by women and girls to adequate food, safe water and sanitization.
- f) Lack of access by women to credit, improved technology, land and extension services which constrain agricultural productivity;
- g) Disparities in access to and limited opportunities for education, science and technology, skills, development and training;
- h) Lack of appreciation by society that there is a structural linkage between gender and environment;
- i) The dichotomy between domestic and industrial energy requirements which has left issues of domestic and industrial energy requirements largely in the hands of women;
- j) Statutory and customary practices which hamper women's and men's full participation in national development and;
- k) Prevalence of gender violence.

The National Gender Policy casts lights on the main issues that women are faced with in Zambian society as regards equality with their male counterparts. These include the various power relations between men and women; the feminization of poverty; corrosive cultural and indeed systematic practices that subject women to subordination by males; limited access by women to health and education facilities and; gender violence.

Thirdly, economic, social and cultural rights aid poverty reduction by ensuring that both the process and the concrete poverty reduction targets are consistent with international human rights standards. This entails for instance that in attempting to reduce the poverty of the majority, the minority are not discriminated against. This also entails that the measures taken to ensure poverty reduction are sustainable such that in ensuring present poverty reduction, the fight against poverty is not lost in the long run. Engaging in poverty reduction programmes that harm the environment is one such way of ensuring that immediate poverty reduction programmes are harmful in the long run.

Fourthly, human rights aid poverty reduction by identifying indicators and setting benchmarks so that the progressive realization of economic, social and cultural rights can clearly be monitored. Poverty is worst when the poor have no access to food, health services, clean water and sanitation. These are all economic, social and cultural rights. In ensuring economic, social and cultural rights are protected therefore, poverty reduction is achieved.

Human rights are therefore vital in the struggle to uplift the living standards of poorest of the poor. They ensure that wealth is equitably distributed among all factions of society, be they poor or wealthy as the case may be.

#### **4.2.3 The relationship between human rights and good governance**

Good governance is a multi faceted concept. There is therefore no accepted definition of what it is. However, there is a significant degree of consensus that good governance relates to political and institutional processes and outcomes that are deemed necessary to achieve the goals of development. It has been said that good governance is the process whereby public institutions conduct public affairs, manage public resources and guarantee the realisation of human rights in a manner essentially free of abuse and corruption, and with due regard for the rule of law. The

true test of good governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights. The key question is: are the institutions of governance effectively guaranteeing the right to health, adequate housing, sufficient food, quality education, fair justice and personal security?<sup>44</sup>

Human rights are principles that persons in government must uphold. In upholding human rights, the State in any country safeguards good governance. On the other hand, without good governance, the protection of human rights would not be sustainable. The principles of good governance therefore provide a conducive environment in which the protection and enjoyment of human rights thrives.

Specifically, human rights and good governance are related in four main ways. These are:

#### **4.2.3.1 Democratic institutions**

Good governance is concerned with, among other things, the reform of democratic institutions such as a representative legislature, impartial judiciary and efficient executive. When human rights are at the centre of the reform of these democratic institutions, avenues are created for the public to participate in policy making through formal institutions and informal consultation. Human rights, being concerned with ensuring that the legitimate interests of all persons in society are represented also ensure that there is inclusion of multiple social groups in decision making. With an independent judiciary in place, claims by citizens claiming violation of human rights are bound to be heard and determined appropriately. With a representative legislature, laws are likely to be promulgated that enhance human rights. With an efficient executive, human rights laws once promulgated shall be enforced effectively. There is therefore no better form of good governance than that supported by proper human rights respecting mechanisms.

#### **4.2.3.2 Service delivery**

Good governance advocates for reform in delivery of social goods and services by insisting on transparency and accountability. By social goods, we refer to goods that benefit the largest number of people in the largest possible way such as schools, hospitals and social recreational

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<sup>44</sup> Available at <http://www2.ohchr.org/english/issues/development/governance/> accessed on 13/02/2011

facilities<sup>45</sup>. Reform in the delivery of social goods therefore involves ensuring that social goods are intended to benefit the majority of the people and that they actually reach their target group. Such honest reforms enhance enjoyment of human rights by increasing the capacity of the state to deliver public goods and services which are vital for the enjoyment of a number of rights such as the right to education, health and food.

#### **4.2.3.3 Rule of law<sup>46</sup>**

Rule of law aids good governance by ensuring that laws are made and applied equally to all members of society. Equal application of laws leads to the attainment of non-discrimination which is a principle cutting across all human rights.

#### **4.2.3.4 Anti-corruption**

In fighting corruption, good governance efforts rely on principles such as accountability, transparency and participation to shape anti-corruption measures.<sup>47</sup> When corruption reduces, there are more resources to be spent correctly and for the benefit of the citizens of a country. Where there are more resources to be spent for public good, social goods such as education facilities and health facilities are bound to proliferate.

#### **4.2.4 The relationship between economic growth and human rights**

Most economic, social and cultural rights require to be realised progressively due to resource constraints. Since resources are needed to realise these particular rights, their speedy realisation depends on softening the resource constraints, which in turn requires economic growth. If economic growth is achieved sustainably, human rights are bound to be protected. The relationship between human rights and economic growth was summarised by Maxwell<sup>48</sup> as follows:

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<sup>45</sup> Available at [http://www.investopedia.com/terms/s/social\\_good.asp](http://www.investopedia.com/terms/s/social_good.asp) accessed on 14/02/2011

<sup>46</sup> Available at <http://www2.ohchr.org/english/issues/development/governance/> accessed on 13/02/2011

<sup>47</sup> Available at [http://www.gdrc.org/u-gov/doc-oecd\\_ggov.html](http://www.gdrc.org/u-gov/doc-oecd_ggov.html) accessed on 13/02/2011

<sup>48</sup> S Maxwell, *The Washington Consensus is dead! Long live the meta-narrative*, ODI working paper 243, London, Overseas Development Institute, January 2005, Page 6 available at: [http://www.odi.org.uk/publications/working\\_papers/wp243.pdf](http://www.odi.org.uk/publications/working_papers/wp243.pdf). accessed on 13/02/2011

‘Growth alone is not enough. Growth without equity, without social inclusion, will not reduce poverty. Equity has an instrumental logic (redistribution can make growth easier and poverty reduction faster) but also has intrinsic value in a fair global society.’

It remains abundantly clear that in real terms, economic growth can take place in a society even when the vast majority of resources are in the hands of very few. When human rights are factored into economic growth however, the growth is sustainable and equitable thereby benefiting all in society including future generations.



### **4.3 Conclusion**

This chapter has established that enshrining economic, social and cultural rights in the constitution, apart from being a welcome development in human rights terms is likely to have other benefits such as poverty reduction, attainment of the Millennium Development Goals, improvement in good governance and a properly trickle down based form of economic growth.

It becomes clear that enshrining economic, social and cultural rights in the constitution shall serve the multiple purpose of improving Zambia's human rights profile and also, it will better the lives of the people and effectiveness of governance. It is a development that will benefit the citizens and raise the quality of administration by the government.

The next chapter provides a conclusion to this paper and makes recommendations as to how the enjoyment of economic, social and cultural rights can be made a reality in Zambia.

## Chapter 5

### 5.0 CONCLUSION AND RECOMMENDATIONS

#### 5.1 General conclusion

This research aimed at ascertaining Zambia's readiness for Constitutional protection of economic, social and cultural rights. The research has shown that economic, social and cultural rights must be afforded as much protection as is afforded to civil and political rights. This is because the two sets of human rights depend on each other and to enjoy one fully, the other has to be enjoyed fully. A clear illustration of this is the relationship between the right to health which is an economic, social and cultural right and the right to life which is a civil and political right. The right to life cannot be enjoyed fully without the right to health. If one's health is compromised, so is their life. Quality of life is directly linked to quality of health.

Secondly, this research has shown that Zambia's current approach to access to court for breach of constitutionally guaranteed human rights is quite limited. The research has identified Article 74 of the 2010 draft constitution as being more progressive than the current law on access to Court. This is because Article 74 of the 2010 draft constitution extends access to court to anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members. Article 74 of the 2010 draft constitution is likely to increase public interest litigation which will in turn increase protection of human rights. Article 28 of the current constitution<sup>49</sup> is deficient because it restricts actions for human rights infringement only to persons whose human rights have been, are being or are likely to be contravened.

Thirdly, this paper has shown that compared to the rights in the International Covenant for Economic, Social and Cultural Rights, the rights to self determination; the right to protection and assistance for the family, including special assistance for mothers and children and; the right to the enjoyment of the highest attainable standard of physical and mental health are not included in the 2010 draft constitution.

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<sup>49</sup> Chapter 1 of the Laws of Zambia

Fourth, this paper has shown that the standard of progressive realisation of economic, social and cultural rights can be applied best by drawing inferences from the implementation of economic, social and cultural rights in the International Covenant on Economic, Social and Cultural Rights, through the United Nations Committee on Economic, Social and Cultural Rights, and the South African jurisdiction. From these two systems of implementation, it is clear that the non-availability of resources is not in itself a sufficient excuse for not respecting and protecting economic, social and cultural rights. The State must therefore be creative in ensuring the respect, enjoyment and protection of economic, social and cultural rights. Also, the role of the State is to ensure a balance exists between the need to protect economic, social and cultural rights and the available resources.

Fifth, this research has shown that Article 64 of the 2010 draft constitution in sub article (3), paragraph (b) precludes the court, tribunal or Human Rights Commission from interfering with the decision of the State organ or institution solely for the reason that the court, tribunal or Human Rights Commission could have reached a different decision. This provision interferes with the independence of courts, tribunals and the Human Rights Commission and acts as an affront to checks and balances and the principle of separation of powers.

Sixth, this research has shown that enshrining economic, social and cultural rights in the constitution has advantages that surpass the mere protection of human rights. These benefits include poverty reduction, attainment of the Millennium Development Goals, improvement in good governance and people centred economic growth. Summed up, these benefits constitute the rights based approach to development. This approach provides that there is a link between human rights protection and proper, sustainable development, be it economic, political, social, cultural or institutional. Protecting economic, social and cultural rights in the constitution is therefore a way of addressing a number of problems with one solution. It is like the proverbial multiple-edged sword.

This research has shown that enshrining economic, social and cultural rights will be a vital addition to Zambia's human rights profile. Zambia is ready to protect economic, social and cultural rights. This is because in the protection of these rights, the standard is that of progressive

realisation. Measurement of compliance with progressive realisation obligations is dependent on the available resources at any given point.

Having established the above, this research proceeds to make recommendations. These recommendations are modelled to render opinion on ways in which Zambia would best uphold the economic, social and cultural environment in Zambia, currently and when they are finally included in the bill of rights.

## 5.2 Recommendations

### 5.2.1 Immediately applicable recommendations

(a) Encourage judicial activism with regard to matters of human rights protection. A clear example is India where courts have consistently found that breaches of economic, social and cultural rights are in fact breaches of civil and political rights because of the inter-dependence of these rights. The rights to health and food for instance have been held to be survival rights so important to the right to life that without them, the right to life is compromised. Also, the Directive principles of state policy, contained in part IX of the Constitution<sup>50</sup> can be used to guide the State in its operations to ensure that regard is given to the enjoyment of economic, social and cultural rights. Though not justiciable, these directive principles must be used as a useful guide for responsible governance.

(b) Monitor and promote compliance with the International Covenant on Economic, Social and Cultural Rights, 1966, to which Zambia is party. Though Zambia has not domesticated the covenant, the principle of *pacta sunt servanda*, that a country is bound by its international obligations, enshrined in Article 26 of the Vienna convention binds Zambian.

(c) Ensure that domestic legislation that has an impact on the enjoyment of economic, social and cultural rights is in compliance with international human rights norms and provides for sufficient protection of economic, social and cultural rights. Legislation of such a nature will improve the economic, social and cultural situation in Zambia even before constitutional guarantee.

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<sup>50</sup> Chapter 1 of the Laws of Zambia

(d) Use the existing tools and interpretations, including those developed by the United Nations Committee on Economic, Social and Cultural Rights and its general comments, as well as the Limburg Principles. In budgeting for instance, regard must be given, in resource allocation, to the economic, social and cultural rights enshrined in the International Covenant on Economic, Social and Cultural Rights, 1966 so as to progressively realise them.

(e) Ensure that the Millennium Development Goals process is consistent with Zambia's obligations under international human rights instruments and that their implementation is undertaken from a rights-based perspective. This includes being alive to the reality that in furthering the agenda of Millennium Development Goals for instance, there must be no discrimination. This will ensure an even enjoyment of economic, social and cultural rights that is consistent with the principles of human rights including non-discrimination.

### **5.2.2 Long term recommendations**

(a) Establish or strengthen, where appropriate, governmental institutions to guide planning for, and implementation of, economic, social and cultural rights. Such institutions as the Human Rights Commission have been vital in protecting civil and political rights and would assist greatly in the enjoyment of economic, social and cultural rights.

(b) Ensure, where national plans of action are developed, that economic, social and cultural rights are taken into full consideration. Zambia for instance launched the Sixth National Development Plan, from 2011-2015. Economic, social and cultural rights must be at the heart of such national planning to ensure their realisation is brought to the fore.

(c) Find ways to enforce economic, social and cultural rights including through departments of social welfare, the courts and civil society, to ensure better awareness of the justiciability and enforceability of economic, social and cultural rights. The Ministry of community development and social services is in charge of the social welfare offices across the country. These offices must be strengthened to ensure that they bring economic, social and cultural rights enjoyment to reality. Increased funding and trained human resource are some of the ways in which this can be achieved.

(d) Work with bodies, within their prescribed mandates, to combat corruption, which has a direct impact on the enjoyment of economic, social and cultural rights. The Anti Corruption Commission is such an institution. The fight against corruption is likely to receive a welcome boost by the enforcement of the recently passed Forfeiture of Proceeds of Crime Act<sup>51</sup>, Financial Intelligence Centre Act<sup>52</sup> and the Public Interest Disclosure (Protection of Whistle Blowers)<sup>53</sup>.

(e) Ensure that essential services which lead to the enjoyment of economic, social and cultural rights are provided at a minimum and affordable level. This includes keeping the cost of living to a bare minimum so as to cater for even the poorest of the poor. This can be achieved through government subsidies, price control, and hiking the national minimum wage to a level exceeding the cost of a monthly household food and essential services basket. Though such a step may not be feasible in the short term, measures can be taken for its progressive realisation.

(f) Allow for an expanded approach to access to court to open the door to public interest litigation. This will improve the protection of economic, social and cultural rights. Some potential litigants may in some instances be put off in their pursuit of justice by the expense of litigation. Where access to court is expanded however, this constraint is surmounted because actions can be brought on behalf of the indigent by interest groups.

(g) Allow for the courts to be the ultimate judge in relation to whether or not available resources have been used to the maximum extent in progressively realising economic, social and cultural rights.

(h) Provide a proper system of compensation for infringements of economic, social and cultural rights to make litigation worthwhile and deter infringement on the part of the State. The effectiveness of any human rights system is hinged on the compensation available to litigants. This is likely to encourage potential litigants to go to court.

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<sup>51</sup> Act number of 19 2010

<sup>52</sup> Act number 40 of 2010

<sup>53</sup> Act number 15 of 2010

### **5.3 Conclusion**

This chapter, in summary, has shown that Zambia is ready to protect economic, social and cultural rights in the constitution. The obligations that these rights impose are intended to be progressively realised. Zambia will therefore not have to strain its resources in ensuring protection of these rights. The only duty that shall lie on the State is to ensure that the available resources are used, to a maximum, to ensure that economic, social and cultural rights are protected to that extent.

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