

AN ANALYSIS OF CHILD RELATED LEGISLATION IN ZAMBIA

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being a final year dissertation submitted to the University of Zambia, School of law, in partial fulfillment of the requirements for the award of degree of Bachelor of Laws.

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DECLARATION

I, MUBITA MUKELABAI, Comp. No. 26065401, do hereby declare that I am the author of this Directed Research paper entitled: **AN ANALYSIS OF CHILD RELATED LEGISLATION IN ZAMBIA**, and confirm that it is my own original work. I further declare that due acknowledgement has been given where other people's work has been used. I verily believe that this research has not been presented in the school or indeed in any other learning institution for academic purposes.

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DEDICATION

To my dear beloved wife Inonge Simonda, my children Sepiso and Limpo and my brother-in –law Christopher, this research work is dedicated to you, for it could not have been accomplished without your spiritual love and invaluable tolerance of my prolonged absence from home and ever busy schedule and for your family support throughout my studies at Unza.

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ABSTRACT

The Analysis of Child related legislation in Zambia aims at identifying the gaps existing in the Zambian legislation dealing with the protection of children's rights in view of the contemporary legal provisions enumerated in international instruments such as the Convention on the Rights of the Child(CRC) and the African Charter on the Rights and Welfare of the child(ACRWC). It is therefore envisaged that the research will help document some of the existing gaps and shortcomings so as to provide the basis for advocating for the enactment of a more modern and just legal framework which will help in addressing, in a more meaningful way, the contemporary concerns related to the protection of the child's rights.

The research starts by giving a background to the study and analyzing the statement of the problem as well as the rationale of the study. The second chapter discusses the constitutional issues affecting the rights the children, as contained in the current constitution of Zambia. These rights are analyzed in view of the protective provisions of the CRC and the ACRWC as well as constitutions of other modern democratic states like that of the Republic of South Africa. The Third Chapter is an analysis of the Juveniles Act of Zambia, with the view of identifying areas which do not adequately provide for the protection of the rights of juvenile offenders as required by international instruments dealing with protection of Juvenile delinquents. The fourth Chapter is an analysis of the Legitimacy Act and emphasis the need to harmonize the various provisions of the Act in order to bring it in line with contemporary developments in the law of inheritance and succession. The emphasis here is that the law no longer distinguishes between the rights of legitimate and illegitimate children and that the concept of illegitimacy has since been done away with both at common law and the Zambian national laws dealing with succession and inheritance. In the fifth chapter, the law relating to the adoption of children in Zambia is analyzed in the context of the principles outlined in the CRC which require state parties which permit the system of adoption should ensure that the best interest of the child is given paramount consideration in all matters affecting the child. The research is completed by a summary, conclusion and recommendations in chapter six. The recommendations have focused more on the gaps found in the statutes that have been reviewed and the proposals to address them.

ACRONYMS.

HIV	Human immune deficiency virus
AIDS	Acquired Immune Deficiency Syndrome
CRC	Convention on the Rights of the Child.
ACRWC	African Charter on the Rights and Welfare of the Child
FNDP	Fifth National Development Plan.
NPA	National Plan of Action.
DNA	Deoxyribonucleic acid
PTA	Parent Teachers' Association
MDG	Millennium Development Goals
UNDP	United Nations Development Program

LIST OF STATUTES

- The Adoption Act, Chapter 54 of the Laws of Zambia.
- The Affiliation and Maintenance of Children's Act, Chapter 64 of the Laws of Zambia.
- The African Charter on the Rights and Welfare of the Child, 1999
- The Births and Deaths Registrations Act, Chapter 51 of the Laws of Zambia
- The Constitution of the Republic of South Africa, Act no.108 of 1996.
- The Constitution of Republic of Zambia (as amended by Act no.18 of 1996)
- England and Family Reform Act of 1987.
- The Employment of young persons and Children's Act, Cap 274 of the Laws of Zambia
- The Final Draft Constitution of Zambia Act, 2010.
- The International Covenant on Economic, Social and Cultural Rights
- The International Labour Organization (1919)
- The Intestate Succession Act, Chapter 59 of the Laws of Zambia.
- The Juveniles Act, Chapter 53 of the Laws of Zambia.
- The Legitimacy Act Chapter 52 of the Laws of Zambia.
- The Matrimonial Causes Act No.20 of 2007.
- The United Nations Convention on the Rights of the Child, 1989
- Wills and Administration of Testate Estates Act, Chapter 60 of the Laws of Zambia.

LIST OF CASES

Feliya Kachasu vs. Attorney General (1967) ZR P.145

Michael Andrew Macgarry v Eric Victor Macgarry (1999) HP/374.

Oparaocha v Winnie Murambiwa (2004) SCZ Judgment no.15

R vs. Chinjamba 5 NRLR Vol. V 384.

Rita Mwalubanga v Jeep Juul Nielsen (2000) HPA/46

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CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE STUDY.

1.0 INTRODUCTION.

It has been stated that a child on account of his or her age and physical and mental state needs some special safeguards and care in any society¹. The Constitution of Zambia provides, as one of the fundamental freedoms, for the protection of young persons who includes children, from exploitations². However, an examination of a few selected pieces of legislation in Zambia reveals that there are still some shortcomings in these laws in as far as the protection of children's rights is concerned.

Zambia, as a party to many of the International Conventions dealing with the protection of the rights of the child, has an international obligation to ensure that its national laws conform to the international standard. There is therefore a need to harmonize the various child related legislation under review to ensure consistency with the international standards, in particular the provisions in the Convention on the Rights of the Child (C.R.C)³, the African Charter on the Rights and Welfare of the Child (AC)⁴ and the International Labour Organization⁵. This paper will therefore identify and analyze some of the existing gaps, discrepancies and weaknesses in the selected Child related legislations in Zambia and make recommendations that will help in coming up with an effective law reform process. The audit of these statutes will in this regard, analyze the main features of each of the selected legislation and assess whether or not it complies with the key principles underlying international

¹ D.Banda. A Critical Evaluation of the Juvenile Access to Justice in Zambia. A Research Paper Submitted to University of Zambia, 2010. Page.1

² Article 11(c) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia.

³ United Nations Convention on the Rights of the Child, 1989.

⁴ African Charter on the Rights and Welfare of the Child, 1990.

⁵ International Labour Organization, 1919.

human rights standards required by various human rights instruments dealing with the protection of children's rights and national youth policies adopted by Zambia.

In view of the above, the following pieces of legislation will be audited and analyzed: the Constitution of Zambia⁶, the Legitimacy Act⁷, the Juvenile Act⁸ and the Adoption Act⁹.

An analysis of each of the above pieces of legislation however reveals that there are still some gaps which need to be addressed if children's rights are to be fully protected.

1.1 BACKGROUND TO THE STUDY.

The constitution of Zambia is the Supreme law of the land¹⁰ and as such provides rights and guarantees freedoms to every citizen in the Bill of Rights¹¹. The Bill of Rights guarantees to everyone, including children, the right to life and freedom from discrimination on the grounds of sex, social status, colour, creed and status¹². However, there are still a lot of issues affecting the rights of children which are still a source of concern for the protection of children's rights. For instance the definition of discrimination in the constitution does not include discrimination based on disability, age or birth. Further, discrimination is constitutionally sanctioned in the area of personal law relating to adoption, marriage, divorce, devolution of property on death, e.t.c; which are all matters of great concern to the child, as shall be articulated in this report. This is because the best interest of the child principle is not taken to be of paramount importance in all these instances. The Adoption Act, for instance, still

⁶Chapter 1 of the Laws of Zambia (as amended by Act no 18 of 1996).

⁷ Chapter 52 of the Laws of Zambia (as amended by Act no.8 of 1996).

⁸ Chapter 53 of the Laws of Zambia (as amended by Act no.13 of 1994).

⁹ Chapter 54 of the Laws of Zambia (as amended by Act no.13 of 1994)

¹⁰ Article 1(3) of the Constitution of Zambia.

¹¹ Article 11 of the Constitution of Zambia.

¹² Article 11 of the Constitution of Zambia

requires parents of the child to be adopted to give their consent¹³ as opposed to the child's best interests. The implication one gets from reading the Act is that where a parent or guardian who is unable to satisfy the best interests of the child denies his or her consent, the court can not grant the adoption order regardless of the fact that the child's interests could have better been taken care of if the order was granted. Further, as regards marriage, customary law allows minors (children) to enter into the contract of marriage against the rules of Contract law¹⁴. Under Customary law, in Zambia, there is no specific contractual age for marriage as long as the parents have given their consent. A child can therefore validly enter into a contract of marriage under customary law¹⁵. From the foregoing, it is clear that there isn't sufficient constitutional provisions protecting the rights of the child in as far as specific personal laws are concerned. These lacunas in the Act will therefore be identified and analyzed in light of recommending more pragmatic ways of addressing issues affecting the rights of children.

The Legitimacy Act though enacted to amend the law relating to children born out of wedlock and ensure for their protection still needs some refining and update with the current contemporary developments in the world as regards the concept of illegitimacy. An analysis of certain section of this Act shows that children born out of wedlock from void marriages are not adequately protected under the Act¹⁶. The Act still discriminates on the rights of children not legitimated by the Act and whose parents die intestate when it comes to property settlement and succession¹⁷. It is therefore important that these provisions of the Act are reviewed to bring them in line with the United Nations Convention on the Rights of the Child.

¹³ Section 5 of the Adoption Act, Chapter 54 of the Laws of Zambia.

¹⁴ Under the Law of Contract a minor or a child has no legal capacity to Contract.

¹⁵ R vs. Chinjamba 5 NRLR Vol V 384.

¹⁶ Section 4 of the Legitimacy Act, Chapter 52 of the Laws of Zambia.

¹⁷ Section 8 of Intestate Succession Act, Chapter 59 of the Laws of Zambia.

The Juveniles Act makes provisions for the custody and protection of juveniles in need of care, and provides for the juvenile delinquents. The Act also makes provisions for the establishment of juvenile schools and reformatories. In order to ensure the full implementation of the principles and rights enumerated in the Convention on the Rights of the Child, there is need to establish an effective organization for the administration of justice and a comprehensive juvenile justice system. Certain provisions of the Juveniles Act therefore need to be reviewed to bring them in line with articles 37 and 40 of the CRC, which deals with juvenile justice. Issues to do with punishment and rehabilitation will therefore be analyzed with the emphasis on the need to strike a balance between punishment and rehabilitation, taking into consideration the particular needs and rights of juvenile offenders.

The Adoption Act makes provisions for the making and registration of adoption orders as well as the registration and control of Adoption Societies. The Act still requires the parents or guardian of the infant to be adopted to give consent before the child can be adopted¹⁸. This consent may be given conditionally or unconditionally with respect to religious persuasions in which the infant is to be brought up¹⁹. Though, the court may dispense with the requirement for consent under such circumstances²⁰ or where parental consent is unreasonably withheld, the inference one gets from reading the Act is that, the requirement of consent is still considered to be of paramount importance as opposed to the best interest of the child, which should be the guiding principle and this conflicts with the provisions of the international

¹⁸ Section 5(4) of the Adoption Act.

¹⁹ Section 5(3) of the Adoption Act

²⁰ Where parental consent is subsequently withdrawn on the ground that the religious identity of the applicant is not known as provided for under section 5(4) of the Adoption Act.

instruments such as the Convention on the Rights of the Child and the African charter on the Rights and Welfare of the Child²¹. There is therefore need to review certain sections of the Adoption Act, in this respect, if children's rights are to be protected adequately.

1.2 STATEMENT OF THE PROBLEM.

There are growing concerns that the implementation of initiatives to improve and enhance the status of children and protect the child from various abuses as specified under various international conventions and treaties may be hampered by the national legislative and regulatory frameworks currently in force in Zambia. The current legal framework dealing with children's rights falls short of addressing contemporary issues related to children in many ways. This paper will therefore analyse and document the existing gaps and shortcomings in the selected child related legislation so as to provide the basis for advocating for the enactment of a more modern and just legal framework that will address, in a more meaningful way, the contemporary concerns affecting the child.

The government of the Republic of Zambia has put in place policies, strategies and programs to ensure that the children's rights as stipulated in various international instruments and national policies are protected. For instance, in 1994 the government adopted the National Program of Action (NPA) for children in Zambia²² which was a set of goals which the government undertook to achieve by the year 2000. The majority of these have still not yet been achieved as evidenced in the Fifth National Development Plan (2006 – 2010). This is despite the fact that the National Plan of

²¹ Under section 5(4) of Adoption Act, the court is obliged, in considering whether to grant leave or not for the withdrawal of consent, to have regard to the welfare of the child (instead of the best interest of the child as required by Article 21 of the Convention on the Rights of the Child and Article 4 African Charter on the Rights and Welfare of the Child)

²² The National Program of Action for Children in Zambia. 1994. Page.3

Action was an implementing tool for achieving the commitments made at the World Summit for Children in September, 1990 and under the Convention on the Rights of the Child (CRC)²³.

Zambia's National Policies on the rights of the child are aimed at improving the welfare and quality of life of children, all of which draw on the principle of non-discrimination, equity and the best interest of the child. These policies also cover broadly issues of child welfare, health and education as stated in the Millennium Development Goals (MDG). However, these MDGs will not be achieved by 2015 unless government takes deliberate positive efforts to this effect. The Child Rights Report in Zambia of 2005 states that:

“...the first progress report on the MDGs highlights the fact that having extreme poverty and reducing the maternal mortality ratio by three quarters, among other goals, are unlikely to be achieved by 2015 with current efforts....To achieve the MDGs, Zambia needs to improve the mechanisms for effective implementation of the programmes in the Public Sector Reform Programmes...²⁴”.

The National Child Policy of 2006²⁵ makes children the focus for development so as to ensure that children live to their fullest potential where rights and responsibilities are fulfilled. It must be noted that the National Child Policy is based on the CRC, thereby addressing explicit rights for improving the welfare of children. It incorporates issues that have emerged in the last decade and having an impact on the child development and welfare. It includes, among others, the issues of street children, vulnerable children and HIV and AIDS. However, in order to implement the policy framework, there is need for legislative, administrative and institutional interventions. These interventions will therefore also be identified in this paper.

²³ The National Program of Action for Children in Zambia. 1994.

²⁴ Children's Rights in Zambia: A Situational Analysis. November, 2005.

²⁵ Ministry of Sport, Youth and Child Development, National Youth Policy (2006).

1.3 PURPOSE AND SIGNIFICANCE OF THE STUDY

The current legal framework, apart from being outdated, may also fall short of addressing contemporary issues related to children such as the best interests of the child principle and the survival and development of the child concepts. It is envisaged that the analysis in this research paper will help document some of the existing gaps and shortcomings so as to provide the basis for advocating the enactment of a more modern and just legal framework that will help in addressing the concerns related to the protection of children's rights. An analysis of a number of legislations dealing with children's welfare shows that despite the parliament coming up with these legislations, children are still faced with many challenges as their interests and rights still remain unprotected or secured with the effect that these legislations are not effective in achieving their core objectives. Children continue to be discriminated in many instances and due to their weaker physical and mental state, they can not voice up to ensure the protection of their rights. Most of these child-related legislations need to be revealed so as to strengthen their legislative, regulatory and institutional framework.

It is therefore the aim of this study to highlight some of the weaknesses and discrepancies existing in these legislations and recommend some pragmatic solutions. Many international human rights instruments also outlines certain key principles as regards children's rights which States are obliged to observe as they enact their national laws such as the best interest of the child principle, the principle of non-discrimination, the right to life, survival and development and the right to participate and respect the views of children as contained under Articles 2,3,6 and 12 of the CRC. It is important to mention that though Zambia has not domesticated the

CRC, these principles must be embodied in our national laws if children's rights are to be fully protected.

1.4 OBJECTIVES OF THE STUDY

The main objective of this research is to carry out an audit and analysis of the selected child related legislation in Zambia and add to the body of knowledge of many previous researchers who have written on the subject with the view of identifying the existing gaps and make recommendations for an effective law review process. The specific objective are: to carry out an audit and analysis of the selected pieces of the child-related legislation and make recommendations for an effective review and reform process in future; to analyze the existing gaps in the selected pieces of legislation and recommend for their harmonization and consistency with international instruments such as the United Nations Convention on the Rights of a Child and to highlight problems faced in the implementation of measures put in place to ensure the protection of children's rights.

1.5 RESEARCH METHODOLOGY

This research will mainly be done through desk study. Published and unpublished work will be consulted as well as case law and the internet websites. Visitations to specific institutions dealing with specific topics under review such as the Social Welfare Department and the Zambia Law Development Commission will also be visited. The research will employ both the legal centralist approach and pluralistic approach in order to obtain the maximum benefit.

1.6 CONCLUSION.

Chapter one has basically highlighted the fact that though the Zambia has a lot of legislation dealing with the interest of children, there are still some lacunas in these laws and the need for a review can not be ignored. This review is necessary if the children's interests are to be protected fully and in line with the principles enumerated in international human rights instruments such as the CRC and the African Charter on the Rights and Welfare of the child. As the American professor, Roscoe Pound²⁶ puts it that:-

"Interests are the chief subject- matter of law and that the task of law in society is the satisfaction of human wants and desires and that the law as an instrument of social engineering should strive to achieve the maximum satisfaction of human wants and that we should continuously search for new means of achieving or promoting a better life".

Pounds analysis is a clear manifestation of the current state of the laws in Zambia. The current state of child related legislation in Zambia does not fully protect the rights and welfare of children and hence a call for a review is necessary. It is with this view in mind that an analysis of these legislations tries to highlight some of their shortcomings with the view of making recommendations for amendments so as to bring them in line with modern international human rights instruments which have been adopted by most civilized states.

²⁶ C.Anyagwe. An Outline of the study of Jurisprudence.Lusaka: UNZA Press (2005).Page.242

CHAPTER TWO

CONSTITUTIONAL MATTERS.

2.0 Introduction.

The Constitution of Zambia is the supreme law of the land and provides rights and guarantees for its citizenry in the Bill of Rights. The Bill of Rights guarantees to everyone, including children, the right to life²⁷ and freedom from discrimination on account of sex, social status, colour, creed and marital status²⁸. However, the definition of discrimination does not include discrimination based on disability, age or birth. Further, discrimination is constitutionally sanctioned in the area of personal law relating to adoption, marriage, divorce, burial and devolution of property etc, which are matters of great relevance to the child, as shall be articulated in the proceeding chapters.

2.1 Analysis of the constitutional provisions relating to children's rights.

The constitution of Zambia guarantees young persons, who include children, protection from all forms exploitation, neglect or any form of cruelty. Article 24 specifically seeks to protect young persons from occupations and employment that are prejudicial to their health or education or which are hazardous to their physical, mental or moral development, with the exception of employment, for a wage, under certain conditions²⁹. Further, Articles 14(1) and 15 protects persons from slavery and servitude, torture or inhuman and degrading punishment. These provisions do not specifically relate to or mention children but they nonetheless articulate children's rights as part of their human rights.

The constitution, apart from what has been stated already does not articulate children's rights adequately, particularly those outlined in the CRC notwithstanding that the same has not yet been domesticated in Zambia. Zambia however, having ratified the CRC has an international obligation to ensure that most of the pertinent

²⁷ Article 12, of the Constitution of Zambia.

²⁸ Article 20, of the Constitution of Zambia.

²⁹ The Employment of young persons and Children's Act, Chapter 274 of the Laws of Zambia.

provisions of the instrument are domesticated in its national laws and more so the Constitution, being the supreme law of the land³⁰. These are rights such as the right to survival and development, the right to a name and nationality and the right not to be subjected to torture or inhuman and degrading treatment or punishment. The current Constitution of Zambia does not include economic, social and cultural rights under the Bill of Rights like the constitutions of other states such as South Africa. These are contained under part nine of the constitution which deals with the Directive Principles of State Policy and are not justiciable³¹. The Constitution is silent for instance, on the right to education as a fundamental right, yet the right to education is essential to the economic, social and cultural development of a child and without a good educational background, it may be difficult to combat discrimination and exclusion of children. It is a truism that the future of any nation lies in children and without a good educational background, this dream can not be achieved. The Final Draft Constitution of Zambia Amendment Act of 2010 included some of these rights under the bill of rights and it is a unfortunate that Parliament could not adopt this bill for enactment.

The Constitution of Zambia provides for the Directive Principles of State Policy under part nine³². These principles are guidelines for good governance and the establishment of policies. However, these are not justiciable and can therefore not be enforced by the courts of law. Of relevance are Articles 112(d),(e) and (f) which stipulate that the state shall endeavor to provide; clean and safe water, adequate medical facilities and decent shelter for all persons and take measures to constantly improve such facilities and amenities; equal and adequate educational opportunities in all fields and at all levels for all and ; to persons with disabilities, the aged and any other disadvantaged persons such social benefits and amenities as are suitable to their needs and are just and equitable.

These rights, though progressive, have been asserted in a non-committal way in the Constitution so as to avoid an imposition of a positive duty on the part of the government to provide for them. It is a known fact that despite these directives, the government has not been able to adequately provide for them. Research has shown that most of these directives have not been attained by government due to lack of

³⁰ Article 1(3) of the Constitution of Zambia

³¹ See Article 111 of the Constitution of Zambia.

³² Article 112, of the Constitution of Zambia

political will. The Fifth National Development Plan (FNDP) articulates the reality on the ground; for example, where it provides under the education sector that:

“there is clear evidence of widespread stunting of children due to poor or insufficient diet, and the recent cycle of food insecurity, drought and floods has exacerbated the problem. Many Children go to school hungry and are unable to concentrate and thus performance drops”³³

The FNDP further states that –

“Between 1999 and 2002, some health indicators showed a marked decline in service delivery and quality of care while others registered a marginal improvement. The maternal mortality rate increased from 649 deaths per 100,000 live births in 1996, 729 deaths per 100,000 live births in 2002. On the other hand, infant mortality and under five mortality rates declined from 109 and 197 per 1,000 in 1996 to 95 and 168 per 1,000 in 2002 respectively. The factors that contributed to the some of the health indicators include HIV and AIDS pandemic, brain drain, poor state of health facilities, inadequate drugs and medical supplies and poverty levels”³⁴.

The FNDP clearly states that the current child mortality rates are still high and this is unacceptable. It is clear from the above that, the Constitution of Zambia, despite guaranteeing these rights of ‘all persons’, who includes children, does not go far enough in protecting and guaranteeing children’s rights as envisaged in the international human rights instruments. For instance, though every child in Zambia is supposed to have access to basic primary education³⁵, failure by the government or indeed any parent to provide for this basic human right can not be enforced by the Courts in Zambia as a matter of right as this right is not entrenched in the bill of rights. Both research and case law has shown that many children are still languishing in the streets and can not even afford the minimum basic education that the government is obliged and has promised to offer. Children are being thrown out of school for various reasons and a legal challenge on the infringement of this right through the court process has proved futile. For instance, in the case of *Feliya Kachasu vs. Attorney General*³⁶ an eleven year old pupil, who was a member of the Watchtower sect, was suspended from school pursuant to regulation 31(1) (d) of the then Education Act for refusal to sing the national anthem as a result of her religious belief. The applicant, through her father, challenged the constitutionality of this regulation and that it infringed on her freedom of conscience as guaranteed by the Constitution. Though the court found, *inter alia*, that the applicant’s freedom of conscience had been hindered by the school authorities action, in that it coerced her to

³³ Chapter 22 of the Fifth National Development Plan (2006 -2010)

³⁴ FNDP 2006 – 2010, Chapter 17, paragraph 17.2. Page.160.

³⁵ The government of the Republic of Zambia has passed a policy directive offering free primary education to children in all government schools.

³⁶ (1967) ZR Page.145

sing the national anthem contrary to her religious beliefs, it was held that such hindrance did not constitute a contravention of her right to the enjoyment of her freedom of conscience and that such hindrance was reasonably justifiable in a democratic society. In other words, the court was in effect sanctioning her sending away from school based on the reasons given by the school authorities.

It is clear from the foregoing that the legal status of a child in Zambia in relation to education is something that still needs to be looked at by the government and needs some constitutional protection. By this I don't meant that the government is not committed to improving the welfare of children when it comes to education. The government has for instance passed a policy directive in the education sector to ensure that all children attain the minimum levels of education "free of charge or without requesting parents to pay any tuition fees". This is with regards to primary school education in all government schools. In practice however, the above policy directive is more of a political statement than a policy directive as children are still required to pay user-fees determined by the various Parent Teachers Associations (PTA). Many children are therefore still being sent away from school for failure to pay these fees and this leaves them vulnerable³⁷. Further to this, this directive does not apply to privately owned schools which have mushroomed in the past decade and are preferred schools by most parents for their children due to good service levels. However, most of these schools are very expensive to the majority of the children who come from poor families. If the government of the republic of Zambia is serious about implementing this policy directive it must take progressive and positive steps in the strengthening the enforcement mechanism. This will be a progressive move than the mere issuance of the policy statement which it can not implement in practice. The Constitution does not even define who the child is and thereby setting no basic standard on which other legislation may provide for a child as pre-determined by the superior law. A child is therefore defined as the need of the subject matter determines this and unnecessarily exposes the child to exploitation as the definition will be based on the exigencies of the situation. To avoid this, Constitutions of other states such as

³⁷Mbala School defies govt policy on free education /<http://www.zambianwatchdog.com/2009/11/29>.

South Africa have clearly defined³⁸ who a child is thereby providing a precedent for other laws.

The government is obliged to protect and promote the human rights of all individuals. It, therefore, follows that since the government signed and ratified the majority of the international human instruments, especially the CRC, which was the first comprehensive rights based international treaty specifically constituted to protect and enhance the rights of the child, it is obliged to translate its international commitments into the Constitution and legislation against which a child can have legal protection and recourse. The CRC is a law making treaty. This means that participating states are therefore bound by it under international law to implement its provisions³⁹. The provisions of the CRC must therefore be domesticated by participating states and the constitution as the supreme law must reflect this spirit.

Zambia is also a party to the Covenant on Economic, Social and Cultural Rights⁴⁰ which provides that each state party to the covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical to the maximum of its available resources with a view of achieving progressively the full realization of the rights recognized in the covenant, by all appropriate means, including particularly the adoption of legislative measures⁴¹. The committee on economic, social and cultural rights, which is a body of independent experts that supervises the implementation of the covenant, has made a clarification on the nature of the obligation state parties under article 2(1) are obliged to undertake to the effect that :

“Whereas it is open to states to implement the rights in a progressive manner, they must take immediate steps to that end and do so to the maximum of its available resources. It is not open to states to delay indefinitely the implementation of the rights or to use resource constraints as an excuse for doing nothing”⁴².

It is clear from the foregoing that Zambia, as a party to the Covenant, has an international obligation to domesticate some of the Economic, Social and Cultural Rights in its national laws and it would do well to include those that relate to

³⁸ Article 28 (3) of the South African Constitution, Act no. 108 of 1996.

³⁹ Based on the principle of *Punct sunt servanda*

⁴⁰ The International Covenant on Economic, Social and Cultural Rights, 1966

⁴¹ Article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

⁴² (1995) General Comment no.3

children's welfare such as the right to education and health under the bill of rights as these are essential to the well-being and development of a child. The government of the Republic of Zambia can learn from the experiences of other states such as South Africa which has incorporated the second generation rights in the Bill of Rights. The South African Constitution, in relation to children's rights, has provisions entrenched in its bill of rights which provides for every child, the right to a name and nationality from birth⁴³; to family care or parental care, or to appropriate alternative care when removed from the family environment⁴⁴; to basic nutrition, shelter, basic health care services and social services⁴⁵; to be protected from maltreatment, neglect, abuse or degradation; to be protected from exploitative labour practices⁴⁶;... and that a child's best interests is of paramount importance in every matter concerning the child⁴⁷.

As can be seen from the South African experience, there is need for Zambia as a party to both the United Nations Convention on the Rights of the Child and the International Covenant on the Economic, Social and Cultural Rights to take progressive measures in ensuring that the rights affecting the welfare of children are entrenched in the constitution under the bill of rights.

The parliament could have taken advantage of the Constitution Review process spearheaded by the Mung'omba Constitutional Review Commission which the late president Levy Patrick Mwanawasa appointed in 2007 and implement some of these measures immediately. A perusal of the Final Draft Constitution of Zambia Amendment Bill of 2010 shows that indeed the Constitution Review Commission has did a tremendous job by including both the children's rights⁴⁸ and the Economic, Social and Cultural Rights⁴⁹ under the bill of rights. Most of the issues affecting the welfare of children such as the right to a name and a nationality⁵⁰; the right to parental care⁵¹; the right to be protected from all forms of exploitation and from performing work that is likely to interfere with the child's education or to be harmful to the

⁴³ Article 28 (1) (a) of the Constitution of South Africa.

⁴⁴ Article 28 (1) (b) of the Constitution of South Africa.

⁴⁵ Article 28 (1) (c) of the Constitution of South Africa.

⁴⁶ Article 28 (1) (d) of the Final Draft Constitution of Zambia Act, 2010.

⁴⁷ Article 28 (2) of the Final Draft Constitution of Zambia

⁴⁸ Articles 50 and 51 of the Final Draft Constitution of Zambia.

⁴⁹ Article 34 of the Final Draft Constitution of Zambia

⁵⁰ Article 50(3) (a) of the Final Draft Constitution of Zambia

⁵¹ Article 50 (3) (b) of the Final Draft Constitution of Zambia.

child's health⁵² ...e.t.c, are provided for in the Final draft Constitution Amendment Act. Further, the draft Constitution has also got the definition of a "young person" and provides that a "young Person" means a person under the age of fifteen years. It is difficult to appreciate the mischief which the Constitution Review Commission was trying to cure by the inclusion of such a definition in the constitution as it may be construed that anybody above the age of fifteen is an adult. However, this definition, as it applies to children's rights may fall short of that adopted by international instruments such as the CRC and the common law position, where a child has been defined as a person under the age of eighteen years⁵³. There is therefore need for the adoption of a definition which is in line with international human rights instruments dealing with the protection of children's rights.

2.2 Conclusion.

The Constitution of Zambia as the Supreme law of the land⁵⁴ needs to have clear provisions entrenched in the Bill of Rights that ensure adequate protection of children's rights so as to avoid the exploitation of children. This will encourage citizens, who include children; to take recourse in the courts of law should their rights be infringed. As a party to International Conventions dealing with the rights of children, Zambia needs to take progressive measures, both legislative and administrative, to ensure that children's rights are protected. A lot can be learnt from the experiences other States such as South Africa which have already embarked on this route. As already stated the failed constitutional review process embarked by the late president Mwanawasa was a big opportunity lost for the dreams of many vulnerable children and indeed the general citizenry as a whole.

⁵² Article 50 (3) (c) of the Final Draft Constitution of Zambia.

⁵³ Article 1 of Convention on the Rights of the Child; Article 2 of the African Charter on the Rights and Welfare of the Child.

⁵⁴ Article 3 (1) of the Constitution of the Republic of Zambia, Chapter 1 of the laws of Zambia.

CHAPTER THREE

THE JUVENILES ACT, CHAPTER 53 OF THE LAWS OF ZAMBIA

3.0 Introduction

This chapter aims at analyzing the root causes of juvenile delinquency and in this regard a review of certain provisions of the Juveniles Act will be done to see how it has responded to the principles enumerated in the CRC and the African Charter on the Rights and Welfare of the Child which promotes the protection of the rights of juvenile delinquents.

3.1 Causes of Juvenile Delinquency

Every sound juvenile justice system should be guided by the United Nations Standard Minimum Rules for the administration of justice (the Beijing Rules)⁵⁵, the United Nations Rules for the protection of juveniles deprived of their liberty (the Havana rules) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)⁵⁶ in order to establish a progressive justice system for young persons in conflict with the law. The UN Rules for the Protection of Juveniles Deprived of their Liberty (JDL Rules)⁵⁷ safeguards fundamental rights and establish measures for social re-integration of young people once deprived of their liberty whether in prison or other institutions. These rules however, are recommendatory and non-binding on States but serve as a useful guide in dealing with juvenile justice. This is disadvantageous because a state may either decide to follow them or not and if they do not, there are no sanctions that follow. These rules are important because they provide guidance to states for the protection of children's rights and respect for their needs in the development of separate and specialized system of juvenile justice. They are detailed norms for the administration of justice in tandem with children's right and have a development oriented approach.

⁵⁵ Adopted by the United Nations in 1985

⁵⁶ Adopted by the United Nations in 1990

⁵⁷ Adopted by the United Nations in 1990

Platt⁵⁸ in his book argued that social factors assist in explaining juvenile crime as well as how the child is handled for misconduct. In every setting, an individual is assumed to be influenced by the beliefs, knowledge and values of that society. The individual adopts himself to the changes in beliefs, knowledge and values of that society. This pertains to the recognized behavior accepted as legally and morally right in regard to the particular values and beliefs of a particular society. It is agreed that factors leading to rise of juvenile crime have been urbanization, population growth and social and technological change, poverty, lack of adult support, large household and high dependency ratios.⁵⁹ Juveniles are likely to come from homes where there is little understanding, affection and moral strength. The tendencies toward juvenile delinquency are deeply anchored in the body and mind and essentially derive their malformations of personality during the first years of life. Dr Spock⁶⁰, an American counselor stated that by the age of three, a child's tendencies have already been formed towards constructive or destructive behavior.

The other cause of juvenile delinquency is that most children, especially street kids, lack proper family life and in order to sustain themselves, they engage in crime. The statistics show that children who live on the streets are extremely vulnerable. According to a UNDP report, there are 75, 000 children living and working on the streets of Zambia. The majority of these are boys and over two-third are between 6 to 14 years. 40% have lost their parents and the other 7% have no home to return to.⁶¹ As a result, most of these children become delinquents.

Some behavioral scientists systems have come up with a way of assisting in the guidance and treatment of juvenile offenders. They have come up with a model that helps explain the behavior of juvenile offenders. This model is called the 'medical model' of corrections.⁶² According to this model, a criminal behavior is like a disease and can be cured provided the right therapy is applied. This therapy usually involves the creation of an atmosphere in which the individual is able to develop a range of social skills that will later help him to play positive role in society.

⁵⁸ P.Platt.The Foundation of Delinquent Behavior. (Essex: Faculty Law Review, 1969) .Page44

⁵⁹ H. Gibbens.Discovering family Life. (London: Longman Press, 1966) .Page 21

⁶⁰ B. Fine. One Thousand Delinquents. The First Six years of a Child's Life. (New York: 2000)

⁶¹ See Children's Rights in Zambia. A Situation Analysis. November, 2008. Page 29

⁶² F.A. Allen. The Borderline of Criminal Justice. Essays in Law and Criminology. (Chicago: University of Chicago Press, 1964)

3.2 An overview of the Juvenile Act.

The Juveniles Act makes provisions for the custody and protection of Juveniles in need of care, and provides for the correction of Juvenile delinquents. The Act also makes provisions for the establishment of approved schools and reformatories⁶³.

In order to ensure the full implementation of the principles and rights guaranteed in the CRC, there is need to establish an effective organization for the administration of Justice and a comprehensive juvenile justice system. Articles 37 and 40 of the CRC deals with Juvenile Justice. Article 37 contains the leading principles on the deprivation of liberty, the procedural rights of every child deprived of liberty, and the treatment and conditions for children deprived of their liberty, such as the right to be heard, to call witnesses, to be legally represented, and treatment by way of separation from adults. The United Nations Convention on the Rights of the Child provides that state parties shall seek to promote for the establishment of laws, procedures, authorities and institutions specifically applicable to children in conflict with the penal law⁶⁴. However, an examination of the Juvenile access to the justice system in Zambia and the Juveniles Act⁶⁵ reveals that there are still a lot of deficiencies both in the Act and the whole justices system in Zambia in the manner in which juvenile delinquencies are handled as required by the international standards. There is, therefore, need to strike a balance between punishment and rehabilitation, taking into accounts the particular needs, rights and interests of a child in the conflict with the law. The African Charter on the Rights and Welfare of the Child provides for the special treatment of every child accused or found guilty of having infringed the penal law and that such a child ought to be treated in a manner consistent with his or her sense of dignity and worth, which reinforces the child's human right and fundamental freedoms⁶⁶.

⁶³ Preamble of the Juveniles Act, Chapter 53 of the Laws of Zambia

⁶⁴ Article 40(3) of the Convention on the Rights of the Child

⁶⁵ Chapter 53 of the Laws of Zambia

⁶⁶ Article 17 of the African Charter on the Rights and Welfare of the Child

3.3 The observance of customary laws

The Juveniles Act makes provisions for the observance of customary law unless its observance would not be in the interest of a juvenile⁶⁷. This provision is lacking in that customary law by its nature and interpretation denotes children as property of their parents. The recognition of customary law has the effect of impacting negatively on the realization of a child's rights. For instance, under customary law, when a child commits an offence⁶⁸, the parents are normally required to discipline such a child without following any laid down guidelines in the implementation of the corrective actions. Some parents apply very harsh measures which may negatively impact on the child's mental and physical development. Further, there is no standard definition of who a child is under customary law and factors such as puberty or marital status are normally taken into account when determining the age limit of a child and any 'child' who commits a capital offence after attaining these levels of life, will be deemed as an adult offender and he or she might be dealt with harshly notwithstanding his or her real age. The best interest of the child is therefore not fully recognized under this section⁶⁹ as the provision only takes into account the 'mere interest' of such children as opposed to the 'best interests' as required by both the Convention on the Rights of the Child⁷⁰ and the African Charter on the Rights and Welfare of the Child⁷¹. On the other hand it is important to take into account the recognition of the importance of our cultural heritage and values as espoused under paragraph 7 of the preamble of the African Charter on the Rights and Welfare of the Child.

3.4 Power to discharge Juveniles

The Act empowers the Minister at any time, in his discretion, to discharge a juvenile from the care of the person to whose care he has been committed or from an approved school⁷². As regards this provision, I wish to recommend that this task should be conferred on someone who is more conversant with children's rights and juvenile issues such as the Commissioner of Prisons rather than the Minister. A Minister may

⁶⁷ Section 1(2) of the Juveniles Act

⁶⁸ Be it Capital or minor

⁶⁹ Section 1(2) of the Juveniles Act

⁷⁰ Article 3 of Convention on the Rights of the Child

⁷¹ Article 4 of African Charter on the Rights and Welfare of the Child

⁷² Section 29 of the Juveniles Act

not possess all the requisite skills and knowledge of the best practices of handling of juvenile delinquencies. Some scholars have in the past recommended for the creation of an independent office to be called the 'Commissioner for Child Welfare' to handle this aspect of juvenile rights⁷³ and a reform in this direction would equally be a good development.

3.5 Cruelty to Juveniles

The Act also provides that if any person who has attained the age of sixteen years and has the custody, charge or care of any juvenile but willfully assaults, ill treats, neglects or abandons such juvenile... such a person shall be liable either to imprisonment for a term not exceeding two years or to a fine not exceeding six thousand penalty units or to both⁷⁴.

Article 19 of the Convention on the Rights of the Child and Articles 16 and 21 of the African Charter on the Rights and Welfare of the Child provides for State Parties to take all appropriate measures, administrative, social and educational to protect the child from all forms of physical or mental violence, injury or abuse, negligent treatment, maltreatment or exploitation, including sexual abuse while in the care of any person who has the care of that child. This is in line with Article 24(2) of the Constitution and sections 168 and 169 of the Penal code. Further, every child has a right to be given support and protection by its parents or guardians.

From the foregoing, it is clear that section 46 of the Juveniles Act falls short of the principles espoused both in the CRC and the African Charter on the Rights and Welfare of the Child in as far as the protection of children's rights are concerned. An imprisonment penalty should not be applicable to a person who has attained the age of sixteen as that person is still a child as has been stated already. This is also contrary to the spirit of Article 40(4) of the CRC which provides that custodial punishment should be the last resort against other options. Further, Article 37 (b) of the CRC explicitly provides that deprivation of liberty including arrest, detention and imprisonment should be used as a measure of last resort and for the shortest

⁷³ A.W Chanda. 'Gaps in the Law and Policy in the Implementation of the Convention on the Rights of a Child'. Zambia Law Journal ,1999.Pages 45-55.

⁷⁴ Section 46 of the Juveniles Act

appropriate period of time so that the child's right to develop is fully protected and ensured.

As regards to procedure in the administration of Juvenile access to justice⁷⁵, which is basically the right to be heard, the right for parents to be present during the proceedings, and the right to call witnesses, again the Act falls short of the internationally adopted standards.

3.6 The procedure in Juvenile courts

The child in conflict with the law needs the protection of the justice system. Section 64 fails to state in clear terms the need for the court to deal with such matters affecting Juveniles expeditiously in line with Article 17(2) (c) of the CRC which obliges state parties to ensure that every child accused of infringing the penal law should have the matter determined as speedily as possible by an impartial tribunal. The above requirement has been embedded in constitutions of many modern democratic states like that of South Africa where it provides that everyone who has been arrested for allegedly committing an offence has the right to be brought before a Court in the shortest possible time⁷⁶. It would be good to have a similar provision both in the Act and the Constitution specifically relating to Juvenile trial. The Zambia Constitution has a similar provision dealing with the rights of a detained person, including children, requiring for a speedy trial, where it provides for a maximum period of 14 days after detention in which one has to be furnished with grounds for detention or to be charged⁷⁷. This period is too long in relation to children's rights due to their mental development. Children must always be given preference when it comes to the administration of the justice system and there is need to reduce the period provided for both trial and determination of juvenile matters.

3.7 Methods of dealing with Juvenile Offenders.

Section 73 of the Juveniles Act deals with methods of dealing with Juvenile offenders. These include; dismissing the charge, making a probationary order, sending an

⁷⁵ Section 64 of the Juveniles Act

⁷⁶ See Article 35(d) (1) (2) of the Constitution of South Africa Act no.108 of 1996 which provides for 48 hours after arrest....

⁷⁷ Article 26(a) of the Constitution of Zambia(as amended by Act no18 of 1996)

offender to an approved school, reformatory, canning, payment of fine charges or costs, ordering the guardian or parent of the offender to give security for the good behavior of the offender, imprisonment and dealing with the case in any other manner in which the case may legally be dealt with.

As regards section 73, there is need to introduce a system of diversion when it comes to dealing with juveniles. The child's best interest shall best be saved by diverting any matter in which a child is involved away from the court process. Canning for instance, is not in the best interest of the child as corporal punishment has since been abolished in Zambia and is unconstitutional⁷⁸. There is need to introduce other forms of punishment such as community service as a mode of punishment and classify specific tasks which the Juvenile should perform.

3.8 Authority to make approved school orders

The Act further empowers the court to make orders for approved schools where juveniles between the ages of sixteen and nineteen may go to⁷⁹. As regards this section, there is need for consistency in the use of age as a factor in determining who qualifies to go to reformatory schools. The age of nineteen stated in this section goes beyond the definition of a child under the Convention on the Rights of the Child of 1989⁸⁰ and gives the same legal protection to persons over eighteen years of age. There should, therefore, be a focus to restrict the application of this section to children under the age of eighteen and exclude adults above eighteen who should instead be treated as Juvenile adults as provided for under section 2(1) (a) of the Act⁸¹.

3.9 Commutation of committal time

Sections 85 of the Act also need to be analyzed in the context of the discretionary powers vested in the Minister. It provides for commutation of committal time by the Ministers upon report by the Commissioner for Juveniles Welfare where a person detained in an approved school is exercising bad influence on the inmates or is not benefiting from the training in the school. This however, places too much discretion

⁷⁸ See Article 15 of the Constitution of Zambia.

⁷⁹ Section 78 of Juveniles Act.

⁸⁰ It provides, under article 1, for 18 years

⁸¹ Chapter 53 of the Laws of Zambia

on the Minister who may not be the best person to make that decision. Further, Section 95 sets out the establishment of Reformatory Boards and empowers the Ministers to appoint members on such Boards. Good governance dictates that there should be transparency in the appointment of Board Members. The Act does not, however specify what type of qualification a person who serves on that board should have. The potential danger of this provision is that Board Members would serve at the whim of the Minister in order to ensure their security of tenure and this may result in corruption thereby preventing the juvenile's accessibility to justice.

3.1.1 Inspection of voluntary homes and removal of Juveniles from there

The last section to be analyzed in this chapter is section 45. It provides for the appointment of a juveniles inspector to inspect any voluntary home from time to time. It however excludes any home under the authority of a government department. This defeats the whole purpose of carrying out inspections by excluding other institutions. An inspection is carried out for purposes of ensuring that the general welfare of children in a home meets the standards, and that other criteria are met and are conducive to juveniles. It is difficult to understand the mischief which parliament was trying to cure by excluding children who are kept under the authority of a government department.

3.1.2 Conclusion

The general conclusion of chapter three, drawn from a broad analysis of data, is that the law falls short in the implementations of the provision of the Convention on the Rights of the Child, and the fact is that Zambian Statute books in relation to the laws relating to a child are fraught with inconsistencies, contradictions and negative overlaps. There are a number of key issues that need to be addressed through legislative, administrative and advocacy interventions. The research has identified key issues relating to children as specified in the Juveniles Act and the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The implementation of these policies will therefore help in bettering juvenile access to justice. There is therefore need for the amendment of the Juveniles Act in order to bring it in line with contemporary principles found in international instruments dealing with the treatment of juvenile delinquents.

CHAPTER FOUR

THE LEGITIMACY ACT, CHAPTER 52 OF THE LAWS OF ZAMBIA.

4.0 Introduction.

This chapter is an analysis of the law relating to children born out of wedlock and the protection of their rights in line with the requirements of the International instruments dealing with the rights of the Child. In this regard, certain provisions of the Act will be analyzed with the view of identifying the shortcomings and propose possible amendments. Provisions of the Legitimacy Act which adequately protects children's rights in its current text will also be highlighted.

Legitimacy is simply the status of a child at birth. If a child is born in wedlock by parents who are legally married to each other he or she is considered at law as a legitimate child and is illegitimate if born out of wedlock. There is a presumption of law that a child born in marriage is legitimate and that the husband is deemed to be the father of a child who is conceived by or born to his wife during their marriage⁸². The presumption on children born out of wedlock is however rebuttable if the mother can show that the man is the father to the child. Proof of paternity is therefore now possible through a DNA⁸³ test if the parties consent. The objective of the Legitimacy Act is to amend the law relating to children born out of wedlock and to provide for matters incidental thereto⁸⁴.

4.1 Interpretation

Section 2 setting out the definitions does not define who the child is. Instead, the word 'person' is used throughout the Act except for some clauses which specify the age of the person affected by the provisions of the Act. This section also defines the term 'legitimated person' as a person legitimated by the Act.

⁸² A Dickey. Family Law (3rd Ed.), LBC Information Services (1997)

⁸³ Deoxyribonucleic acid is the test used to establish parentage using blood, semen, hair roots etc., if a person disputes the Parentage. See S.M Cretney and J.M Masson .Principles of Family Law (6th Ed), Sweet and Maxwell (1997) .Page 631.

⁸⁴ The preamble of the Legitimacy Act, Chapter 52 of the Laws of Zambia.

The legitimacy Act has not been reviewed for a long time now and has therefore not been harmonized with recent developments found in other laws that apply to children. The Legitimacy Act and its objectives⁸⁵ need to be analyzed in relation with the more modern legislation dealing with the rights of children such as the Intestate Succession Act ⁸⁶ and the Wills and Administration of Testate Estates Act⁸⁷ which do not distinguish between a legitimate and an illegitimate child⁸⁸. The implication one gets from reading section two, in isolation, is that if the child is not legitimized⁸⁹ under the legitimacy Act as required, then that child would be considered as an illegitimate child and therefore his or her rights, such as maintenance and inheritance, would be detrimentally affected. The effect of requiring a child to be legitimated affects the child's birth status according to the Births and Deaths Registration Act⁹⁰ as children born out of wedlock have to have the consent of their putative father before their birth certificates can be issued with the father's surname. In other words the child would not be considered as a child of that father unless the father accepts the child as such. The Legitimacy Act in effect, discriminates against illegitimate children who have not been legitimated under the Act⁹¹.

Article 2 of the Convention on the Rights of the Child sets the principle of non-discrimination which provides for the application of all rights to children without exception. The Article also provides for state's obligation to protect children from any form of discrimination irrespective of the child's or his or her parent's birth or other status. The African Charter on the Rights and Welfare of the Child further provides that every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter irrespective of the child's or his or her parent's birth or other status⁹².

⁸⁵ The purpose of the legitimacy Act is to amend the law relating to children born out of wedlock and to provide for any other matters incidental thereto.

⁸⁶ Chapter 59 of the Laws of Zambia

⁸⁷ Chapter 60 of the Laws of Zambia

⁸⁸ A Child is defined under both statutes as a child born in or out of wedlock....

⁸⁹ Legitimatization is the acceptance of a child by the putative father as a child of the family

⁹⁰ Chapter 51 of the laws of Zambia

⁹¹ Section 15 of the Birth and Death Registration Act provides that no person shall be bound as the father to give notice of an illegitimate child and no person shall be registered as the father of such a child except on the joint request of the mother and himself and upon acknowledging himself in writing to be the father of the child in the presence of the Registrar.

⁹² Article 3 of the African Charter on the Rights and Welfare of the Child.

It is clear from the above provisions both in the Convention on the Rights of the Child and the African Charter on the Rights and welfare of the Child that these treaties do not distinguish a child's rights whether or not the child is born in or out of wedlock.

The Constitution of Zambia further sets out the provisions for the protection against discrimination⁹³ and prohibits laws from making any provision that is either discriminatory in itself or in its effect and defines the term 'discrimination' in terms of Article 23(4) to mean:

"Affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, color or creed whereby persons of one such description are subjected to disability or restrictions to which persons of another such description are made subject or are accorded privileges or advantages which are not accorded to persons of another such description".

From the Constitutional definition, it is clear that a person's status at birth is not one of the grounds covered under the definition of discrimination. Discrimination on the ground of birth is therefore somehow impliedly sanctioned under the constitution. The Legitimacy Act is the effect of the permissive nature of the ant-discrimination clause in the Constitution. It is therefore important to include a person's social status in the constitution as one of the grounds for discrimination so that other subordinate laws such as the Legitimacy Act can copy from the Superior law.

4.2 Legitimation by subsequent marriage

Section 3 legitimates persons born before the parents married, but later married, and also persons born whilst their mother or father was married to a third person. Children of persons legitimated under the Legitimacy Act are not entitled to any interest in real or personal property unless after the date of Legitimation of their parents⁹⁴. Section 3 provides that:

" (1) Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in the Republic, render that person, if living, legitimate-

(a) in the case of an illegitimate person whose father or mother was married to a third person when he was born, from the appointed date or from the date of the marriage whichever last happens; or ...

⁹³ Article 23(1) of the Constitution of Zambia.

⁹⁴ Section 3(2) of the Legitimacy Act, Chapter 52 of the laws of Zambia.

- (2) The legitimation of a person under this Act does not enable him or his spouse, children or remote issue to take any interest in real or personal property save as is hereinafter in this Act expressly provided.
- (3) The provisions contained in the Schedule shall have effect with respect to the re-registration of the births of legitimated persons”.

This section as a whole needs to be amended in line with the more modern legislation dealing with the rights of the children already mentioned under the analysis of section 2 above.

Section 3 is also discriminatory and contrary to Article 1 of the African Charter on the Rights and Welfare of the Child. The exclusion of children who have not been legitimated is detrimental to the realization of those children’s rights under the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child. Discrimination of children is also contrary to the best interest of the child principle under Article 3 of the CRC and Article 4 of the African Charter on the Rights and Welfare of the Child (ACRWC). The child who is not legitimated would be excluded from property rights of his or her putative father. Section 3 reflects the main objective of the Act and has a direct impact on section 2 of the Affiliation and Maintenance of Children’s Act, where children who are not legitimated by the subsequent marriages of their parents would be excluded from maintenance by the parent who did not legitimize them unless the child has been accepted by either parent to be a child of the family or is an adopted child⁹⁵. The Affiliation and Maintenance of Children’s Act defines ‘marital child’ as a legitimated person within the meaning of the Legitimacy Act⁹⁶. The effect of section 3 of the Legitimacy Act is to perpetuate the discrimination against children who are not legitimated throughout the legal framework dealing with children with a few exceptions⁹⁷. Under rule 26(1) of the Births and Deaths Registration (General) rules of the Births and Deaths Registration Act⁹⁸, a child who is legitimated under section 3 of the Legitimacy Act has to be re- registered in the Births and Deaths Register.

⁹⁵ Section 2(b) ;(c) of the Affiliation and Maintenance of Children’s Act, Chapter 64 of the Laws of Zambia.

⁹⁶ Section 2(a) of the Affiliation and Maintenance of Children’s Act

⁹⁷ Unless the child is either an adopted child within the meaning of the Adoption Act or has been accepted by either party to be a child of the family as provided for under section 2 of Chapter 64 of the Laws of Zambia.

⁹⁸ Chapter 51 of the Laws of Zambia.

4.3 Legitimacy of Children of Certain Void Marriages

Section 4 of the Legitimacy Act provides that the child of a void marriage shall be treated as the legitimate child of his parents if at the time of intercourse resulting in the birth or at the time of the celebration of the marriage both or either of the parties reasonably believed that the marriage was valid. Subsection 2 of section 4 specifically states that the section only applies if the father was domiciled in the republic at the time of birth or immediately before his death.

Section 4 is discriminatory in nature and contrary to Article 2 and Article 3 of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child respectively which forbids any form of discrimination on the rights of the child. Section 4 discriminates an illegitimate child on account of the father's domicile at the time of its birth and because legitimacy is tied to domicile issues. Domicile is the connecting factor which links a person to a particular legal system and the law of his domicile is his personal law⁹⁹. A person's domicile is his domicile of origin and not necessarily his permanent home as was held by Lord Cranworth V-C in *Whicker v Hume*¹⁰⁰. The domicile of a child is the domicile of both or either of the parent. A Child born in Zambia is a Zambian domicile if either parent was a Zambian at the time of his or her birth¹⁰¹ and depending on how the child is registered. There is no need to tie legitimacy issues to the father's domicile at the time of the child's birth. This is because wherever the father may be domiciled, he still remains the putative father of the child if he accepts the child to be his¹⁰². The question for inquiry here is who the father of the child is and not the legal system applicable to the child as that automatically follows the domicile of both or either parent.

4.4 The legitimacy of children of voidable marriages

Section 5 legitimates a child of a voidable marriage where a decree of nullity is granted in respect of a voidable marriage.

⁹⁹ J.G Collier. Conflict of Laws, Cambridge University press, London, 2001.3rd Ed. Page 37.

¹⁰⁰ (1985)HLC 124 at 160.

¹⁰¹ Article 5 of the Zambian Constitution

¹⁰² One of the definitions of a 'marital child' under section 2 of the Affiliation and Maintenance of Children's Act is "a child who has been accepted by either parent to be a child of the family".

The Legitimation of a child of a voidable marriage is done on the principle that when a child is born is born, the marriage was not yet annulled. There is therefore a presumption of legitimacy which exists and based on this, the child's status is not altered. The child is therefore not disadvantaged under this section and the section conforms to the best interest of the child principle as required by many international conventions to which Zambia is a party such as the CRC and the African Charter on the Rights of the Child.

4.5 Declaration of Legitimacy

Section 6 provides the procedure to be followed by a person claiming that his or her parents have become legitimated persons and thereby requesting the court to declare that he or she is the legitimated child of those parents.

The implementation of section 6 is in accordance with Article 12 of the CRC and Article 4 of the African Charter on the Rights and Welfare of the Child, which both require that a child who is capable of expressing his or her view must be given a chance to do so and due weight should be attached to his or her opinion. By petitioning the court, the child's view and opinion are taken into account. Section 6 is therefore in compliance with Article 4 of the African Charter on the Rights and Welfare of the Child and Article 3 of the CRC promoting the best interests of the Child principle. The legitimation affords the child chance of exercising his rights under the Act as well as under the Intestate succession Act¹⁰³ and the Affiliation and Maintenance of Children's Act¹⁰⁴ which both recognize a legitimated child in their application.

4.6 Rights of illegitimate child and mother of illegitimate child to succeed to intestacy of the other

Section 13 provides that where a mother of an illegitimate child dies before a child is legitimated and does not have any legitimate issue surviving her; the illegitimate child shall be entitled to take an interest as if he had been born legitimate. The estate of an illegitimate child who dies intestate before being legitimated devolves to the mother.

¹⁰³ Chapter 59 of the Laws of Zambia.

¹⁰⁴ Chapter 64 of the Laws of Zambia.

The exclusion of the illegitimate child from having an interest in the mother's estate if the mother has legitimated children is discriminatory against the illegitimate child. This is clearly not in the best interest of the child as the implication one gets from reading this section is that if his or her mother dies intestate and leaves behind legitimate and illegitimate children, her property shall devolve to her legitimate children unless the illegitimate children were accepted as children of the family before the death of their parent.

4.7 Custody orders of illegitimate children

Section 14 empowers the High Court to make custody orders relating to the custody of illegitimate child and the right to access of either parent of the child. When considering the custody application by either parent, the Court has a mandatory duty to regard the welfare of the child as the first and paramount consideration. The Court takes into consideration whether from any point of view the claim of the father in respect of such custody, is superior to that of the mother and vice versa. The Court may also vary, alter or discharge any of its orders made under section 14.

Section 14 to some extent conforms to the requirements of Article 3 of the Convention on the Rights of the Child (CRC) and Article 4 of the African Charter on the Rights and Welfare of the Child (ACRWC) by giving the Court mandatory duty of putting first the Welfare of the child. It should however be noted that the phrases 'best interest of the child' and 'welfare of the child' are not synonymous. The two phrases do not mean the same thing and it would be good for the legislature to adopt the former phrase, being the one adopted in most international instruments dealing with the protection of children's rights. The parents competing interest should therefore not at any time override the best interests of the child.

4.8 Extra Marital Children

Section 15 provides that no person shall be bound as father to give notice of an illegitimate child and no person shall be registered as the father of such child except on the joint request of the mother and himself and upon him acknowledging himself in writing to be the father of the child in the presence of the registrar.

Section 15 offers very little protection to the illegitimate child and is not in the best interest of the child and against the spirit of Article 3 of the Convention on the Rights of the Child and Article 4 of the African Charter on the Rights and Welfare of the Child. Notice of the illegitimate child is given by way of registration with the Registrar as required by the Births and Deaths Registration Act¹⁰⁵. The registration of the child is done on the prescribed form which provides for details of the mother and father and also details of the marriage. Where the form is blank with respect to particulars of the marriage of the parents, it can be presumed that the child is illegitimate. Paternity can also be presumed where there is a maintenance agreement between the mother and father of the child as was in the case of *Rita Mwalubanga v Jeep Juul Nielsen*¹⁰⁶ or where a man acknowledges that he is the father of a child by executing some formal instrument to that effect as was held in the case of *Charity Oparaocha v Winnie Murambiwa*¹⁰⁷. The brief facts of this case were that a Nigerian man resident in Zambia registered two of his extra-marital children at the Nigerian High Commission and obtained passports for them in his name. The court held him to be the putative father of the two children by his action.

The above authorities show that the legitimacy of an otherwise illegitimate child can sometimes be inferred from the father's independent and secret actions though the procedures under section fifteen have not been complied with.

However an overall analysis of section 15 shows that it is still discriminatory against illegitimate children whose rights to succession of their father's property have to depend on the goodwill of their putative father to accept them. According to section 15, if an illegitimate child (extra marital child) is not accepted by the father as the child of the family, then that child's rights are likely to be affected in as far as succession and maintenance is concerned. This is not the case, for instance, with the Intestate Succession Act¹⁰⁸ which does not distinguish between the legitimate and the illegitimate child. Both the mother and Putative father of the child have a duty of ensuring that the rights of their child are fully provided for and protected whether the child is born in or out of wedlock.

¹⁰⁵ Rules 23 and 24, Births and Death Registration Rules. The Births and Death Registration Act.

¹⁰⁶ (2000) HPA/46

¹⁰⁷ (2004) SCZ Judgment no.15.

¹⁰⁸ Chapter 59 of the Laws of Zambia.

4.9 Conclusion

In conclusion, it is clear that the Legitimacy Act needs to be harmonized with the modern developments on the laws of maintenance and inheritance to remove the conflict as to the status of the child born out of wedlock. The reference to ‘illegitimate child’ has long been done away with by many statutes¹⁰⁹ and international conventions and such children no longer suffer any disadvantage at law today. At Common law, in the eighteenth century, an illegitimate child was referred to as a bastard and could not inherit the fathers property¹¹⁰. This has since been changed by the Law Reform of England¹¹¹ which ended the distinction between children based on the marriage status of their parents. The Convention on the Rights of the Child and the African Charter on the Rights of the Child have also brought new and important dimensions to children’s rights as they proscribe any form of discrimination, which includes social status’ on children. The best interest of the child principle is also emphasized in these instruments and requires that child who is able to express him or her self should be given a chance to do so and that due weight should be given to his or her views. The various provisions of the Legitimacy Act which do not conform to these standards should therefore be amended in order to bring them in line with the international instruments dealing with the rights of the child to which Zambia is a party¹¹². This is necessary if children’s rights are to be adequately protected.

¹⁰⁹ Such as the Affiliation and Maintenance of Children’s Act, Chapter 64 of the Laws of Zambia; the Intestate Succession Act, Chapter 59 of the Laws of Zambia.

¹¹⁰ L Mushota. Family law in Zambia: Cases and Materials, UNZA Press, 2005. Page. 419.

¹¹¹ England and Family Reform Act of 1987.

¹¹² Such as the Convention on the Rights of the Child; the African Charter on the Rights and Welfare of the Child.

CHAPTER FIVE

THE ADOPTION ACT, CHAPTER 54 OF THE LAWS OF ZAMBIA.

5.0 Introduction

The analysis of the Adoptions Act, under this chapter, is aimed at identifying provisions of the Act which are still a source of concern in as far as the protection of children's rights is concerned. The paper will therefore highlight provisions of the Act which needs to be amended as well as those that will be found conforming with the view of demonstrating the legislative efforts in ensuring that children's rights are adequately protected. The purpose of the adoption Act as read from the preamble of the Act is to make provision for the making and registration of adoption orders, the registration and control of Adoption Societies. It regulates the making of arrangements by Adoption Societies and other persons in connection with the adoption of children. The Act also empowers the Commissioner of Juvenile welfare to supervise adopted children in certain cases¹¹³.

The concept of adoption is however alien under customary law where a child is viewed as belonging to everybody in the extended family and does not have to be formally adopted through a court system. Under Customary law therefore, any member of the extended family who exercises physical custody of the child, exercises parental rights over the child¹¹⁴. However, if any child from a customary set up has to be adopted through a court system, then the Act will still come in force.

5.1 Definition of 'Infant'

Section 2 which is the interpretation section defines the word 'infant' to mean a person who has not attained the age of twenty- one years, but does not include a person who is or has been married.

The definition of infant in the context of the Adoption Act goes beyond the definition of 'child' in Article 2 of the African Charter on the Rights and Welfare of the Child, which provides for eighteen years. Further, it excludes any person below the age of 21

¹¹³ The preamble of the Adoption Act, Chapter 54 of the Laws of Zambia.

¹¹⁴ L Mushota .Family law in Zambia .Page 387.

years who is or has been married. If one gets married say at sixteen years and divorces or is widowed at seventeen or any age below twenty- one years, that person is not regarded as an infant according to this definition. It means therefore that, once a person has been married, even if the marriage is dissolved for whatever reasons before the person attains the age of twenty- one years, that person may not be adopted. The provision implies that the child's right to be adopted is lost or forfeited because of that child's previous marital status. This clearly may not be in the child's best interest. The definition is therefore discriminatory on account of marital status and is contrary to the principle of non- discrimination emphasized under Article 2 of the Convention on the Rights of the Child and Article 3 of the African Charter on the Rights and Welfare of the Child.

5.2 Restrictions on making adoption orders

Section 4 restricts the class of people eligible to adopt an infant. The restrictions are based on the age of the intending adoptive parents, the number of people who can adopt an infant, and the prohibition of a male as a sole applicant to adopt a female child.

The restrictions contained in this section are safeguard measures intending to protect the best interest of the child. The eligibility criterion is the maturity and the circumstances of the individual adopting. In terms of age, the applicant or in case of a joint application, one of them must have attained the age of twenty- five years and must at least be twenty – one years older than the infant¹¹⁵. This provision also discriminates against the unmarried male person as a sole applicant who may not be the putative father of the infant but has a genuine passion to help the infant. Further, there are certain sections of people in society who because of their religious persuasions may not want to get married in life¹¹⁶ but are of high moral and social standing in society. Criteria should be put in place to allow such people to adopt children. This section therefore discriminates both on the rights of the child to be adopted and the male applicants on account of status against article 2 of the CRC and article 3 of the African Charter on the Rights and Welfare on the Child. The criterion here should have been whether the child's best interest will be protected.

¹¹⁵ Section 4(1)(a) of the Adoption Act.

¹¹⁶ For instance, Catholic Priests

5.3 Consent to adoption

Section 5 provides that an adoption order can be made when consent to the adoption has been given by the parent or guardian of the infant or any person who maintains that infant. The court may however dispense with any consent requirement before the adoption where the court is satisfied that the person who is required to give such consent has abandoned, neglected or persistently ill-treated the infant, or has persistently neglected or refused to contribute the maintenance of the infant or where the person to give the consent can not be found or is incapable of giving his consent or that his consent has been unreasonably withheld¹¹⁷. The consenting parent or guardian is not entitled to remove the infant once it is placed in foster care of the prospective adoptive parent, unless the court grants leave for such removal. In exercising its powers the court will have regard to the welfare of the infant¹¹⁸.

Article 21 of the Convention on the Rights of the Child requires that state parties which recognize and permit the system of adoption should ensure that the best interests of the child are the paramount consideration. Section 5 does not mention anything to do with the best interest of the child as a determining factor. Instead there is much emphasis on Consent with a few exceptions under which the court may dispense with the consent requirement. It is clear that these exceptions are not exhaustive and an addition in the Act should have been added for the court to dispense with the requirement of consent where such is in the best interest of the child.

5.4 Adoption and interim orders

Section 7 sets out the conditions under which the court may make an adoption order. The court has to be satisfied that the necessary consent has been given by the appropriate person and that he or she understands the nature and effect of the adoption order, in particular, in the case of any parent that they understand that the adoption order will permanently deprive them of their parental rights; that the adoption order will be for the welfare of the infant, and that, due consideration for this purpose is given to the wishes of the infant having regard to the age and understanding of the infant.

¹¹⁷ Section 5(1) of the Adoption Act.

¹¹⁸ Section 5(4) of the Adoption Act.

In certain cases, the court may grant interim adoption orders, under section 8 giving the applicant not more than two years probationary period on such terms as regards provision for maintenance and education and supervision of the welfare of the infant as the court may think fit.

Section 7 is meant to ensure that all the parties concerned understand the effect of the adoption. Where it is found that the parties to the adoption process did not understand the effect of the adoption, the courts have the power to revoke the adoption order. In the case of *Michael Andrew Macgarry v Eric Victor Macgarry*¹¹⁹, the applicant sought an order for the revocation of the order made in relation to her children on the ground that she did not at the time understand the effect of the adoption. She further contended that the order had created abnormal relationships in the family between the adoptive parents, the applicant and the adoptees.

The court held that since the applicant did not fully understand the effect of the adoption, the adoption order should be revoked. The order was accordingly revoked.

Section 8 sets out important children's rights considerations in applications for adoption orders. The satisfaction of the conditions set out ensures that informed consent of all the parties has been obtained. The reference to the welfare of the child and the participation of the child in the adoption process conforms to the requirements of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The court must be satisfied that the child's best interest will be promoted by the adoption order. However, it will be noted that this section falls short on the 'best interest' standard set out in Article 3 of the CRC and Article 4 of the AC, as it merely provides for the 'welfare of the child' as opposed to the 'best interest of the child'.

5.5 Affiliation orders

Section 17 provides for affiliation orders¹²⁰ in force at the time of the adoption of an illegitimate infant. Of important to note is the requirement that if the child is adopted

¹¹⁹ (1999) HP/374

¹²⁰ Section 2 of the Affiliation and Maintenance of Children's Act defines 'Affiliation Order' as an order made by the court declaring a man to be the father of the child identified in the order.

by his mother and the mother is a single woman, the payments which are being made by the putative father of the child in support of the child, shall cease if she subsequently marries¹²¹.

It is not clear whether the proposed consideration of circumstances is made to be a mitigatory factor against the discontinuation of the payments. The proposal may be included to assist in determining the best interest of the child involved after the mother remarries. This is because there is no guarantee that the man who has married the mother of the adopted child will be of better financial status than the putative father, hence the child may just end up suffering in certain instances. Regard should therefore be had to the best interest of the child as a determining factor and this should be reflected in the Act when determining such matters.

Further, in cases of children under affiliation orders¹²² and who are adopted by their mothers, there is no guarantee that if the mother marries, the child will be accepted to be a child of the family by the mother's spouse. If the child is not accepted, the Matrimonial Causes Act¹²³ would not apply to that child¹²⁴. By being excluded from being considered as a child of the family, the child would lose his or her property rights in relation to the mother's property and that of the putative father.

5.6 Restrictions on making arrangements for adoption and registration of adoption societies

Section 18 makes it illegal for anybody of persons to make any arrangements for the adoption of an infant unless that body is a registered Adoption Society. Section 19 gives powers to the Commissioner of Juvenile Welfare to register Adoption Societies.

¹²¹ Section 17(2) of the Adoption Act provides that where an infant to whom any such order or agreement as is mentioned in subsection 1 relates is adopted by his mother, and the mother is a single woman, the order or agreement shall not cease to have effect by virtue of subsection (1) upon the making of the adoption order, but shall cease to have effect if she subsequently marries.

¹²² An affiliation order is normally to a single mother of the child ordering the father of the child who, prior to the order was either unknown to be the father of the child or was out of the jurisdiction. The father normally accepts, either by agreement or court order, to be paying maintenance fees to the mother for the child.

¹²³ No.20 of 2007 of the Laws of Zambia.

¹²⁴ The preamble of the Matrimonial Causes Act provides for among other things, that it is an Act which provides for the maintenance, custody and guardianship of children of the family. Section 3 also excludes its application to marriages contracted in accordance with customary law.

Adoption societies are institutions involved in both local and international adoptions. Sections 18 and 19 are meant to curb abuse and commercialization of adoption and to ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures that the adoption is permissible in view of the child's status as concerns parents, relatives and legal guardians¹²⁵.

The requirement of registration of Adoption Societies is one of the measures of combating the illicit transfer and non return of children abroad. In order to safeguard and ensure the best interest of the child, adoption of the child is authorized only by competent authorities¹²⁶. Adoption Societies are recognized stakeholders in the adoption process. It is therefore important that such societies be registered and monitored by the government institution and in this case the Ministry of Community development and Social Welfare would be the appropriate ministry to deal with such matters.

5.7 Inspection of books

Section 21 makes provision for the Commissioner to inspect any registered Adoption Society's books, accounts and other documents relating to the performance of the Society. This section also provides for a penalty for failure to comply with the Commissioner's request.

Section 21 is important for transparency and accountability reasons. Article 24 of the African Charter on the Rights and Welfare of the Child requires that competent adoption authorities should conform to applicable laws and procedures and conduct procedures in accordance with the relevant and reliable information. Correct and appropriate information are important features in an adoption process in order to safeguard the best interest of the child. This section is in line with article 24 of the African Charter on Rights and Welfare of the Child. Article 21 of the CRC also under – pins the importance of reliable information and the safeguarding of the best interest

¹²⁵ Article 21(a) of the Convention on the Rights of the Child and Article 24(a) of the African Charter on the Rights and Welfare of the Child.

¹²⁶ Articles 21 and 24 of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child respectively respectively.

of the child by all competent authorities involved in the adoption process. It would thus be a good idea to increase the penalty in section 21(3) of the Adoption Act for defaulters as a deterrent measure.

5.8 Arrangements by the adoption societies for adoption

Section 22 prohibits adoption societies from making arrangements for the replacement of an infant in the care and possession of a person resident abroad, unless with approval of the Minister.

The provision regulates and oversees the activities and operations of Adoption Societies. In respect of inter- country adoption, the Minister is empowered through the Commissioner for Juveniles welfare to grant a licence where an infant is sent abroad for adoption¹²⁷. These measures protect the child and ensure that the best interest of the child are given paramount consideration in the adoption process. Further, the minister ensures that any adoption is conducted in an authorized manner by competent authorities as already alluded to under article 21 of the CRC and article 24 of the African Charter on the Rights and Welfare on the Child. Section 22 therefore conforms to the international standards and does not need any amendment.

5.9 Restrictions on sending infants abroad

Section 32 prohibits inter-country adoption, except with the Minister's approval. The section makes it illegal for any person to make arrangements for the adoption of an infant who is resident in Zambia to be transferred to any person who is not the guardian or relative of the infant and who is resident abroad.

Article 21 of the Convention on the Rights of the Child and Article 24 of the African Charter on the Rights and Welfare of the Child acknowledges inter-country adoptions and encourages it as an alternative means of child care if the child can not be placed under foster or adoptive family, or cannot in any suitable manner be cared for in the child's country of origin.

¹²⁷ Section 32(2) of the Adoption Act

The African Charter on the Rights and Welfare of the Child requires that the child affected by inter – country adoption should enjoy safeguards and standards equivalent to those existing in the case of the national adoption¹²⁸. Inter- country adoption gives rise to diverse issues such as cultural and different social dynamics. It is important therefore that inter-party adoptions should be handled with maximum consideration taking into account the best interest of the child as well as other cultural issues of the child's home country.

Section 32 does not adequately ensure that the child's best interests are given paramount consideration and that the adoption is the best alternative means for the child's care as provided for in the African Charter on the Rights and Welfare of the Child¹²⁹ as it does not take into account the child's cultural background as one of the factors to be taken into consideration. Further, the section does not take into account the views of the child where the child is able to express him or herself as required by the Convention on the Rights of the Child¹³⁰.

5.1.1 Licence to send the infant abroad for adoption

Under section 33, the Commissioner may grant a licence for the care and possession of an infant, for whose adoption arrangements have been made, to be transferred to a person resident abroad. Before granting the licence, the Commissioner should be satisfied that the application is made by or with the consent of every person or body of persons who is a parent or guardian of the infant in question, or who has the actual custody of the infant, or who is liable to contribute to the support of the infant.

The section further requires that there should be a report from a Zambian Consular Officer, or any other trustworthy person, that the person to whom the care and possession of the infant is proposed to be transferred is a suitable person to be trusted¹³¹. In addition, the transfer must be for the welfare of the infant and due consideration being given to the wishes of the infant having regard to the age and understanding of the infant.

¹²⁸ Article 24 (c)

¹²⁹ Article 24 (b)

¹³⁰ Article 12

¹³¹ Section 33(b) of the Adoption Act

Section 33 does not go far enough in protecting the child as it does not provide for measures to ensure that the adoptive parents and adoptee are counseled and are subjected to home visits and management by qualified professions.

5.1.2 Conclusion

It is clear from the above that there are still some 'grey areas' in the Act which have to be amended if the protection of children's rights is to be fully realized and in view of the modern international standards set out both in the United Nations Convention on the Rights of the Child¹³² and the African Charter on the Rights and Welfare of the Child¹³³. The analysis has shown that the definition of 'infant' under section 2 of the Act needs to be amended so as to remove the discriminatory aspect on account of the status of children who might have found themselves married at an early stage but have not managed to maintain that status¹³⁴. Children who get married at an early age before they attain twenty – one but are either later divorced or widowed are excluded from the definition of 'infant' under section 2 just because they were once married. This is against the principle of non-discrimination emphasized in Article 3 and Article 2 of the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of the Child respectively. Section 4 of the Adoption Act has also been found to be discriminatory on account of the status of the genuine male applicants who may want to adopt a female child. It was emphasized that regard should be had to the best interest of the child when determining the qualification for adoption. Under section 5 dealing with the requirement for parental consent, it was emphasized that the 'best interest of the child' should be included as one the exceptions for dispensing with the requirement of parental consent. This is in line with Article 3 and 21 of the Convention on the Rights of the Child respectively. Section 17 of the Act which deals with the adoption of an illegitimate infant and the discontinuation of payment of maintenance cost for the child to the woman when she remarries has also been analyzed in the context of Article 3 and 21 of the CRC respectively. This section has been found to be lacking in as far as the best interest of the child principle is concerned and needs amendments. The Convention on the Rights of the Child requires that in all actions concerning children, whether administrative or otherwise,

¹³² The Convention on the Rights of the Child, 1989.

¹³³ African Charter on the Rights and Welfare of the Child, 1999.

¹³⁴ Section 2 of the Adoption Act defines 'infant' as a person who has not attained the age of 21 but does not include a person who is or has been married.

the best interest of the child should be given paramount consideration¹³⁵. This principle is not emphasized in the Act but instead the Act seems to have adopted the term 'welfare of the child'. This term is restrictive in application as the satisfaction of the 'mere interest' of the child will suffice as being enough for the 'welfare of the child'.

¹³⁵ Article 3 of the Convention on the Rights of the Child.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.0 Conclusion

This paper sought to analyze the various child related legislation in Zambia in view of the current legal protection guaranteed in various international instruments dealing with children. The paper highlighted that the current state of the law relating to children's rights do not fully protect the interest of the child as required by the international human rights instruments dealing with the rights of the child and as such there is need for a review.

The paper now proceeds to give a summary of these chapters.

Chapter one gave a background to the study and explained the rationale behind the study. It highlighted the fact that though Zambia has a lot of legislation dealing with the interest of the child, there are still some lacunas in these laws and the need for a review can not be over emphasized. This review is necessary if the child interests are to be protected adequately and in line with the principles spelt out in international human rights instruments such as the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

Chapter two was an analysis of the Constitution of Zambia. It was discovered that Constitution though Supreme, does not fully recognize and adequately protect the rights of children in its current context. This is because the various provisions protecting the rights of children are worded in broad terms offering the same protection for children and adults. It was therefore discovered that the best interest of the child principle is not adequately emphasized in the constitution.

The general conclusion that has been drawn from chapter three is that the Juveniles Act still falls short of the provision ensuring the protection of children's rights as provided for in the Convention on the Rights of the Child and thus it is fraught with inconsistencies. The chapter also highlighted that the provisions of the Act requiring

the imprisonment of Juvenile delinquents should be amended and replaced with other forms of punishment befitting the child due to the negative effects that the imprisonment can have on the upbringing of the child.

Chapter four has basically emphasized the need for the Legitimacy Act to be repealed and harmonized with the new developments found in other modern laws dealing with maintenance, inheritance and succession so as to remove the conflict currently existing as regards to children born out of wedlock. It was discovered that the reference to a child as 'illegitimate child' has long been done away with by many statutes¹³⁶ and international conventions as such children no longer suffer any disadvantage at law today.

Chapter five discussed the need during the adoption of process to have regard to the best interest of the child as opposed to parental consent or any other factors. It was emphasized that international instruments dealing with the rights of children require that children who is able to express themselves should be given a chance to be heard in matters affecting them. The exclusion of children who were once married from the definition of 'infant' has been found to be discriminatory and against the principle on non- discriminatory spelt out in Article 2 of the Convention on the Rights of the Child.

In conclusion, the paper is of the view that the current legislative framework dealing with the protection of children's rights in Zambia has a lot of lacunas which have to be filled if the gap between the guaranteed rights what is offered in the Zambian legislations is to be bridged.

6.1 Recommendations

In order to improve the protection of children's rights, the paper therefore recommends that:

1. The Zambian legislation dealing with the protection of children's rights should be amended and harmonized with the provisions of international instruments dealing with children's rights.

¹³⁶ Such as the Affiliation and Maintenance of Children's Act, Chapter 64 of the Laws of Zambia; the Intestate Succession Act, Chapter 59 of the Laws of Zambia.

2. The rights affecting children should be enshrined under the bill of rights of the Zambia Constitution.
3. The Constitution as the Supreme law should define who a child is so as to provide a guide to subsidiary legislation. The age limit for the child must be the same as that provided for in the Convention Relating to the Rights of the Child.
4. The best interest of the child principle should be emphasized as being of paramount importance in all matters affecting children as opposed to the child's welfare. This should be expressly stated in the laws under review.
5. In the case of Juvenile offenders, the provision requiring the imprisonment of Juvenile delinquents under the Juveniles Act should be struck out and replaced with other forms of punishment such as community service, which should clearly spell out what roles and tasks the juvenile must perform.
6. The legitimacy Act should also be amended and harmonized and updated with current developments found in other laws governing intestate and succession to remove the distinction between illegitimate and legitimate children.
7. The Adoption Act should expressly provide for the consideration of the views of children who are able to express themselves in matters affecting them. The Act should also expressly provide that during the adoption process, the best interest of the child shall be given paramount consideration and this should be one of the grounds for dispensing with the requirement for parental consent.
8. All the provisions in the Zambian legislation under review which still discriminates against the child regardless of status should be amended so as to conform to the provisions of international human rights instruments dealing with the protection of children's rights.
9. Finally, legislation relating to juvenile justice should be reviewed and modernized as a matter of urgency. There is need to holistically look into the area of procedure relating to the development and implementation of measures dealing with children who come in conflict with the law without always resorting to judicial proceedings. However, should the court process be a considered as an appropriate route, the need for expediency should be emphasized and the specific time frame for this should be clearly stated both in the Constitution and the Juveniles Act.

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