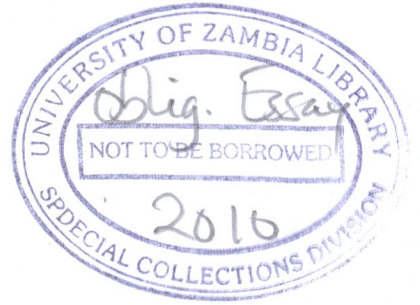


**THE EFFICACY OF LEGISLATION AS A TOOL FOR ECONOMIC
EMPOWERMENT-THE CASE OF ZAMBIA AND SOUTH AFRICA**



BY

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**An Obligatory Essay submitted to the school of Law of the University of Zambia in partial
fulfillment of the requirements for the award of the Degree of Bachelor of Laws (LLB).**

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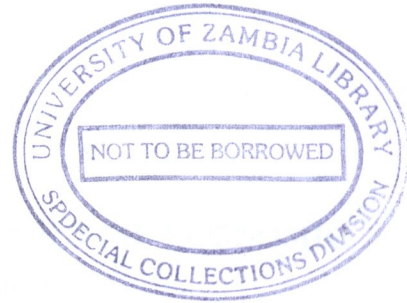
DECLARATION

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EMPOWERMENT-THE CASE OF ZAMBIA AND SOUTH AFRICA

BY

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THIS DISSERTATION REPRESENTS MY OWN ORIGINAL WORK SUBMITTED TO
THE UNIVERSITY OF ZAMBIA IN THE FULFILMENT OF THE REQUIREMENTS
OF THE LAW DEGREE.

Date 29/04/2010

SIGNED.....Obesa.....

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EMPOWERMENT-THE CASE OF ZAMBIA AND SOUTH AFRICA,**

IS APROVED AS FULFULLING THE REQUIREMENT OF A LAW DEGREE.

APROVED BY MRS NKOLOMA TEMBO

Date7/05/2010.....

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ABBREVIATIONS

AIDS	Acquired Immunal Deficiency Syndrome
BEE	Citizen Economic Empowerment
BEE Act	Black Economic Empowerment Act
BEEC	Black Economic Empowerment Commission
CEE Act	Citizen Economic Empowerment Act
CEEC	Citizen Economic Empowerment Commission
CEE	Citizen Economic Empowerment
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CMP	Common Minimum Programme
GATT	General Agreement on Tariffs and Trade
NEP	New Economic Policy
UDHR	Universal Declaration of Human Rights
UNIP	United Nation Independent Party
UPA	United Progressive Alliance
WTO	World Trade Organization
ZDA	Zambia Development Agency

ABSTRACT

Poverty the levels have been quite high in our country in the past years. This paper attempts to identify the relationship between legislation and economic empowerment of citizens both in Zambia and South Africa. In order to address this problem measures have been taken by the citizen economic empowerment commissions in both countries with the help of their governments. This research discusses effective measures which can be put in place to empower our citizens and combat poverty.

Chapter one is an introduction to the research. It elaborates the statement problem as well as the objectives and significance of the study.

Chapter two discusses Economic Empowerment in Detail-the implementation and Enforcement of the Laws. It further analyzes whether the Black Economic Empowerment and Citizen Economic Empowerment Acts are effective tools for economic empowerment. It will also highlight (if any) the provisions of the Acts that are discriminatory to people not targeted by the Acts and other related matters.

Chapter four discusses achievements of Economic Empowerment Acts. It makes a comparison with other developing countries where such acts have been in existence for a longer time.

Chapter five contains the criticism, conclusion, and recommendations.

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This work is dedicated to my late mother and father, Ben Mwila Mbesuma and Loveness Ponya Mbesuma you are the reason that I have gotten this far I only wish you were here to see it.

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CHAPTER ONE

1.0 INTRODUCTION

Looking at the case of Zambia and South Africa we find that both countries have enacted Acts to promote economic development through empowerment of their citizens. These countries require an economy that will meet all their citizens and their enterprise in a suitable manner; therefore if their country's economies build on the full potential of all persons and communities across the length and breadth of the country this can be possible.

Zambia is a country defined by extreme poverty by 2000 over 70% of the population lived on less than a dollar a day. Zambian children are also malnourished and along with the impact of HIV/AIDS epidemic these factors have contributed to declining life expectancy for the average Zambian¹. There are vast disparities in the living conditions between Zambia's rural and urban inhabitants. For example while 64% of the urban population has access to safe water, only 27% of the rural population are so fortunate.² Moreover 46% of urban population lives below the poverty line compared to a massive 88% in the rural areas.³ In more general terms the disparity of wealth between Zambia's rich and poor is also considerable. Income has not grown as fast as inflation. These are the inequalities that the CEE Act is trying to correct.

Empowering citizens alone in a country is a form of positive discrimination or affirmative action. The term affirmative action refers to policies that take race, ethnicity, physical disabilities, military career, sex or a person's parent's social class into consideration in an attempt to promote equal opportunity or increase ethnic or other forms of diversity.⁴ The focus

¹ Zambia poverty and wealth www.nationencyclopedia.com 24th April 2010

² Ibid

³ Ibid

⁴ N. Sinmazdemir. (2009) "Positive Discrimination, Negative Consequences? Preferential Policies, Redistribution and Democratic Stability" Paper presented at the annual meeting of the Midwest Political Science Association 67th Annual National Conference, The Palmer House Hilton, Chicago.

of such policies ranges from employment and education to public contracting and health programs.

The impetus towards affirmative action is twofold: to maximize diversity in all levels of society, along with its presumed benefits and to redress perceived disadvantages due to overt, institutional or involuntary discrimination.⁵ Affirmative action is also known as reservation in India and employment equity in Canada.⁶ Obstacles which include amongst other things poor schooling and poor training are present in both Zambia and South Africa. Positive discrimination therefore levels the playing field. It would have been ideal if such measures were not necessary and everyone was presented with the same opportunities early on in life, but given such inequalities do exist this action is necessary. Affirmative action has historically been implemented in India in the form of reservation or quotas in government positions, employment, and education for lower castes and minorities.

In 2003 South Africa enacted the broad based Economic Empowerment Act. This policy of Black Economic Empowerment (BEE) is not simply a moral initiative to redress the wrongs of the past. The Employment Equity Act and the Broad Based BEE Act aim to promote and achieve equality in the workplace (in South Africa termed "equity"), by not only advancing people from designated groups but also specifically disadvantaging the others.⁷ By legal definition, the designated groups include all people of color, white females, people with disabilities, and people from rural areas. The matters covered include equity ownership, representation at employee and management level (up to board of director level), procurement from black-owned businesses and social investment programs, amongst others.⁸

⁵Ibid

⁶ Affirmative Action www.wikipedia.com accessed 13th January 2010

⁷ Affirmative Action www.newworldencyclopedia.com. 13th January 2010

⁸ Ibid

The Citizens Economic Empowerment Act (CEE) was passed into law in Zambia on the 27th of September 2006 which aims to provide opportunities for disadvantaged citizens to participate in business activities. It is largely based on the BEE Act

Both the BEE and CEE have provisions that lead us to think that black or citizen economic Empowerment is driven by legislation and regulation. Therefore in this paper we discuss whether legislation is a tool for economic empowerment by seeing whether it helps the poor or not.

1.1 DEFINITION OF BLACK ECONOMIC EMPOWERMENT

What is Black Economic Empowerment (BEE)?

There are various definitions of Black Economic Empowerment better known as BEE and which will be referred to as BEE.

The following definition of BEE was adopted by the Black Economic Empowerment Commission. It defined BEE as an integrated and coherent socio-economic process.⁹ BEE is located within the context of the country's national transformation program, namely the Reconstruction and Development Program (RDP)¹⁰.

The BEE Act defines BEE as empowerment of black people that includes workers, women, youth, people with disabilities and people leaving in rural areas through diverse but integrated socio-economic strategies that include, but not limited to-

- I. increasing the amount of black people that manage, own and control enterprises and product assets;
2. facilitating ownership and management of enterprise and productive assets by communities, workers, cooperative and other collective enterprise;
3. human resource and skills development;

⁹ Black Economic Empowerment www.co.za/bee_rep.htm. 16th December 2009

¹⁰ Ibid

4. achieving equitable representation in all occupational categories and levels in the work force

1.2 DEFINITION OF CITIZEN ECONOMIC EMPOWERMENT

What is Citizen Economic Empowerment (CEE)?

According to the CEE Act the word "citizen" means a citizen of Zambia and "empowerment" means an integrated broad based and multi-faceted strategy aimed at substantially increasing meaningful participation of targeted citizens, citizen empowerment companies, citizen influenced companies and citizen owned companies in the economy and decrease income inequalities¹¹.

Accordingly, the Zambian government defines CEE as an integrated and coherent socio-economic process that directly contributes to the economic transformation of Zambia and brings about significant increases in the numbers of citizens that manage, own and control the country's economy, as well as significant decreases in income inequalities

1.3 BACKGROUND INFORMATION

Increased inequality and uneven development poses a real danger for all economies, both developing and industrialized. In South Africa, however, inequality and unequal development have strong racial characteristics, which represent a threat to young democracy. When Africa National Congress inherited the economy in 1994, they inherited an economy that was massively distorted by apartheid's political and economic policies and the economy at the time was in long-term decline.¹² Although South Africa's per capita gross domestic product (GDP) ranked as a middle-income country, living standards for the majority resembled those of much poorer

¹¹ Citizen Economic Empowerment Act, s.3

¹² The world factbook. Economy overview of South Africa. 2005

countries.¹³ Inequalities of income, wealth, and skills existed between race groups, men and women and between rural and urban areas.¹⁴

Studies at the time showed that South Africa had the most unequal economy in the world because the black majority had effectively been excluded from economic ownership and control, deliberately undermining black people's ability to accumulate capital. Therefore an economic transformation strategy must form part of government's strategic approach to globalization to ensure that South Africans benefit from these processes and not suffer deleterious effects. The BEE is already an unfolding process to the economy in South Africa.¹⁵

In the decades before South Africa democracy in 1994 the apartheid government systematically excluded Africans, Indians and colored people collectively known as black people from meaningful participation in the country's economy. This inevitably caused much poverty and suffering and a profoundly sick economy¹⁶.

When it comes to Zambia we find that unlike South Africa it did not suffer apartheid legislation and the repression of its black population. Even though this is so, causes of poverty are too numerous to mention. The major cause of the down fall in the economy was the fact that Zambia was formerly colonized by Britain and during the colonial error the citizens had been effectively excluded from economic ownership and control deliberately. It was because of this that after independence it became difficult to maintain a good economy as our leaders had no previous experience of such matters.

There was almost no social contact between the Zambians and the Europeans. Main contact was in working relationships in which the Europeans hold all the top positions and the Africans

¹³ Ibid

¹⁴ The crisis of Apartheid Economy www.anc.org.za 12th September 2009

¹⁵ (2005) Black economic empowerment Report. p.6

¹⁶ Black Economic Empowerment (2005). www.southafrica.info

provide all the manual and menial labor.¹⁷ Transition from colonialism to independence especially the year or so preceding the hauling down of the old imperial flag and the two succeeding years is a time for particular hazard for all newly independent states.¹⁸ The pattern seldom varies.

The causes of poverty can be categorized into two groups: a) internal factors and b) external factors. Internal factor include cultural factors, the failure of Structural Adjustment Programs to generate the desired growth, high inequality, over dependency of the economy on copper and diseases like HIV/ AIDS. The collapse of the copper industry during the United Nations Independence Party (UNIP) government automatically translated into lack of sustainability¹⁹. External factors include droughts and copper prices on the international market.

Corruptions in government and lack of proper measures to monitor public resources have been cited as other major causes of poverty. Over the last 20 years Transparency International Zambia reported that only 16% of national expenditure went on agriculture, health, education and local government-the very areas supposed to serve the poor.²⁰

In 1975, following on the fall in copper prices and a rise in oil prices, president Kaunda issued the Water Shade Speech, an edict which over night restructured the economy and lost Zambia a critical mass of private enterprise and government expertise, consigning its power to a permanently impoverished state. This only caused poverty and suffering.

Looking at the above, we can see that when an economy excludes any part of its people it is a problem and thus such an economy cannot grow, and an economy that is not growing can not integrate all of its citizens in a meaningful way and so the central issue at hand is the inclusion of citizens in economic development.

¹⁷ J. Barber. Rhodesia Road to Rebellion. (oxford university press 1967) p.1

¹⁸ C. Legum. Zambia, Independence and Beyond. (London, Thomas Nelson ltd) p.21

¹⁹ P.Rowland . Falling Economies, (Baldwin and sons publisher 1982) p.17

²⁰ Zambia Gamefields Investment Journal (2006) Citizen Economic Empowerment Act p.3

www.zambiagamefieldsjournal.com

As I mentioned earlier both Zambia and South Africa have put Acts in place to empower their citizens so as to enhance economic growth. This strategy stresses an empowerment process that is associated with growth, development and not merely redistribution of existing wealth. The CEE Act that was passed in September 2006 aims to provide opportunities for disadvantaged citizens to participate in business activities, but the way in which this empowerment will be carried out is not clearly defined and much decision making authority is vested in the presidency²¹

1.4 STATEMENT OF PROBLEM

In recent years Zambia and South Africa have enacted Acts to help empower their citizens. The issue at hand is whether the provisions of both Acts have practical effects for economic empowerment. Black or citizen economic empowerment is already an unfolding process in both Zambia and South Africa's economies. The major problem is that the way in which empowerment will be carried out in both Acts is not clearly defined and much decision making authority is vested in the presidency. Due to this lack of clarity it is possible for both Acts to not be used for the advantage of those who are marginalized. Thus the writer will try to establish whether these Acts are being implemented in good faith.

The assignment to be undertaken will include an analysis of some provisions in the BEE and CEE the writer will look at how the governments of the two countries will utilize the two Acts to achieve economic empowerment for the targeted citizens. Further the writer will look at the implications that these Acts may have for investors in terms of employment of both Zambians and South Africans. This is in relation to certain provisions in the Act such as section 21 in the CEE Act which talks about investment opportunities

Some writers such as Manning seem to think that it is true that provided the CEE Act is implemented in good faith and truly targets the supposed citizens it can do some good. On the

²¹A. White. Investment Climate-Zambia,(Washington D.C: 2007) p.3

other hand he seems to think that apart from this, the legislation is overtly racist. He further states that if Zambians are being marginalized and disadvantaged, then it is their own government which is at fault, something that can and should be put upright. Due to this fact he does not see the necessity for making legislation which specifically targets citizens²². This being the case, the writer will look into some of the provisions and objectives of the CEE and see whether they are discriminatory or not. This is against the fact that Zambia has committed herself to international standards on the prohibition on the elimination off all forms of discrimination.

It should be noted that article 23(1) of the Zambian Constitution states subject to clause (4), (5) and (7) a law shall not make any provision that is discriminatory either of itself or in its effect.²³ Further article 23(4) (b) states clause (1) shall not apply to any law so far as the law makes provision with respect to persons who are not citizens of Zambia.²⁴ Therefore article 23(4) (b) gives the legal basis of the CEE Act making discrimination of foreigners legal, in this case it is positive discrimination.

In relation to the above I will look at the provisions of section14 of the CEE Act which talks about prohibition against discrimination. However this research will outline the most comprehensive strategy that is now needed and adds value to the process of economic empowerment by providing greater clarity and certainty of the Acts.

1.5 STUDY OBJECTIVES

(I) General Objectives

This research seeks to give a full analysis as to the efficacy of legislation as a tool for economic empowerment.

²² Zambia Gamefields investment journal (2006)Citizen Economic Empowerment Act. p.4
www.zambiagamefieldsjournal.com

²³ Chapter 1 of the Laws of Zambia

²⁴ Ibid

(II) Specific objectives

1. To explain the concept of the Black and Citizen Economic empowerment and the law behind it.
2. To explain briefly what Economic Empowerment is all about.
3. To find out whether the CEE and BEE Acts are effective tools for economic empowerment.
4. Depending on whether the research will find the above statutes effective or not, the writer will consider the way forward of these statutes as to their bearing on economic empowerment.
5. To highlight the provisions of the CEE and BEE Acts that are discriminatory to people not targeted by them.
6. To compare the achievements of the Acts in Zambia, South Africa and other countries that have had economically disadvantaged citizens.
7. To highlight the recommendations of the Black and Citizen Economic Empowerment Commissions and the practical effects of their applications.

1.6 RESEARCH QUESTIONS

1. Can legislation be a tool for economic empowerment?
2. What is economic empowerment?
3. Are the Acts discriminatory towards people they do not target?
4. Are there any lessons that Zambia and South Africa can learn from other countries which have had similar Acts in place for a longer time than them?

1.7 SIGNIFICANCE OF STUDY

This study is important to planners as it will provide a baseline of information on the efficacy of legislation as a tool for economic empowerment in both Zambia and South Africa. It will try to ascertain whether the exclusion of blacks in South Africa and citizens in Zambia has contributed

to the high poverty levels and profoundly sick economies in both countries. It will also enable government and other stake holders especially the empowerment commissions employ a range of strategies in order to enhance the welfare of the marginalized people.

1.8 RESEARCH METHODOLOGY

The major method of data collection to be employed will be desk research. This will be supplemented by interviews with various personnel in the relevant institutions such as the Citizen Economic Empowerment Commission. Further we will look at specific provisions in the CEE Act, these being;

1. Section 4 which deals with the establishment Citizen Economic Empowerment Commission and section 6 which deals with the functions of the commission.
2. Sections 13, 14 and 16 under part 3 of the Act which deal with economic empowerment measures and,
3. Sections 21 and 34 under part 5 of the Act which deals with investment opportunities and undertakings of state institutions or companies.
4. Under the BEE Act we will look at section 2 which deals with objectives of the Act and section 4 and section 5 which establishes the Black Economic Empowerment Advisory Council and its functions.

The data for this research will be sourced from books, statutes draft legislation, reports and journals from relevant institutions, news paper articles will also be used and the internet.

CHAPTER TWO

THE BLACK AND CITIZEN ECONOMIC EMPOWERMENT COMMISSIONS

Under this chapter we will look at the functions of the Commissions, see how helpful they are in the process of economic empowerment and what challenges they are facing in the performance of their functions

3.0 BLACK ECONOMIC EMPOWERMENT COMMISSION (BEEC)

The BEEC was formally established in May 1998 and initially started as a contribution to the debate of the fundamental transformation in South Africa.²⁵ The idea of BEEC as mentioned earlier arose out of a resolution taken at the BMF, a conference held in Stellenbosch, from 14 to 15 November 1997.²⁶ When BEE is discussed occasionally reference is made to the BEEC and the research that has been done by them in the field of BEE.

3.1 FUNCTIONS

At the BMF conference the forum what issues the BEEC was to address and these included the following;

1. The lack of national vision of BEE
2. The failure of government and black business to provide leadership and a vision for BEE
3. Empowerment versus enrichment.
4. The lack of a coherent definition for BEE.²⁷

²⁵ Business map (2005) BEE Commission Report www.businessmap.org.za

²⁶ BEE Commission Report www.businessmap.org.za

²⁷ *ibid*

The BEEC argues that BEE should be viewed and include job creation, rural development, urban renewal, poverty alleviation, specific measures to empower black women, skills and management development and education.²⁸

3.2 CHALLENGES FACED BY BLACK ECONOMIC EMPOWERMENT COMMISSION

Apartheid and colonial policies led to significant structural distortion in the South African economy.²⁹ There are various problems that the democratic economy inherited from the apartheid economy and these problems even many years into democracy, still leaves the economy with many challenges. The challenge of disempowerment was addressed by the BEEC and they presented it in the BEEC report.³⁰

The BEEC refers to addressing the challenge of disempowerment. With this statement the BEEC justifies a national BEE strategy is needed.³¹ Therefore they proposed an integrated national BEE strategy and it was under this that they suggested that a BEE Act should be formed aimed at enabling legislation to create uniformity in policy and establish the necessary institutional support and instruments with which to drive BEE strategy.³² The act was then established in 2003.

3.3 TARGETS

In order to guide the BEEC national strategy, targets were proposed by the BEEC, over a period of ten years. The targets include some of the following:

1. 30% productive land in black hands. This includes black individuals as well as enterprise;
2. 25% participation by blacks in all the sectors of the economy;

²⁸ Black Economic Empowerment department of Law School of Economics and Commercial Law. (Gothenburgh University. Sweden 2001) p.16

²⁹ Ibid

³⁰ BEE Commission report www.businessmap.org.za 20th February 2010

³¹ Ibid

³² Ibid

3. 40% of senior and executive management in the private sector companies with more than 50% black employees;
4. 40% of government incentives should go to black companies. This will typically include tax deductions and subsidies.³³

Above we can see that the BEEC and the government gave a good indication of what these targets ought to be, although these targets were not finalized at the time of the report.

3.4 CITIZEN ECONOMIC EMPOWERMENT COMMISSION (CEEC)

Chapter 2 of the CEE Act has every thing you need to know about the CEEC. Section 4(1) states “there is hereby established the Citizen Economic Empowerment Commission which shall be a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name and with power, subject to this Act, to do all such things as a body corporate may by law do or perform.”³⁴ This section establishes the commission. The commission has nine empowerment pillars; these will be looked at later in this chapter.

3.5 FUNCTIONS

The functions of the commission are laid under s.6 of the CEE Act. Under this chapter we will only look at some of the functions. Section 6(1) states the functions of the commission shall be to promote the empowerment of citizens that are or have been marginalized or disadvantaged and whose access to economic resources and development capacity has been constrained due to various factors including race, sex, educational background, status and disability. Under s.6(2)(a) advising on the necessary changes to various types of legislation for the effective delivery of

³³ De Wet. Opportunities in Black Economic Empowerment. Unpublished paper.2005

³⁴ Act No. 9 of 2006

economic empowerment initiatives is also a function of the commission.³⁵ Other functions include the following:

1. Promoting gender equality in accessing, owning, controlling, managing and exploiting economic resources;³⁶
2. Ensure equal opportunities for, and where necessary, ensure preferential treatment to, targeted citizens, citizen empowered companies, citizen influenced companies and citizen owned companies in accessing procurement contracts and other services of any state institutions;³⁷
3. Mobilize resources for economic empowerment programmes;
4. Propose change to Zambia's education curricula in order to inculcate an entrepreneurial culture amongst citizens;³⁸
5. Encourage public and private institutions to provide opportunities to targeted citizens to acquire necessary skills training and work experience;³⁹
6. Monitor and evaluate economic empowerment initiatives.

In the performance of the commission's functions under the Act, they have to effectively liaise and consult appropriate state institutions and shall have the power to give such instructions or directions to any state institution or a company for the purposes of fulfilling its mandate under the Act.

3.6 TARGETS

The CEEC has nine empowerment pillars and these provide for their targets these are as follows;

³⁵ Act No.9 of 2006

³⁶ CEE Act S.6(2)(b)

³⁷ CEE Act s.6(2)(e)

³⁸ CEE Act s.6(2)(q)

³⁹ CEE Act s.6(2)(u)

1. Equity/ Ownership, Management and Control (direct empowerment): citizen Influence (5-25%), Citizen Empowerment (25%), Citizen Owned (50.1).
2. Preferential Procurement (Indirect Empowerment : at least 50% of Government expenditure should go to empowered companies and that at least 30% of these supplier companies be controlled by women, youth disabled and people living with HIV/AIDS status.
3. Skills Development: Improve education and enhances ability to adopt modern business practices.
4. Access to Finance: Establish special purpose vehicle (Citizens Economic Empowerment Fund) to finance citizens Economic Empowerment (CEE)
5. Transformation of Society: to inculcate supportive culture, entrepreneurship for sustainable CEE.
6. Corporate and Social Responsibility: encourage companies and communities to partner in uplifting communities.
7. Good Political and Corporate Governance: creation of predictable legislation and regulatory framework thus ensuring transparency and accountability.
8. Greenfield Investment: promote investment and partnerships between local and foreign investors
9. Foreign Direct Investment: encourage foreign and local partnership in ensuring FDI plays its role in achieving Citizen Economic Empowerment.⁴⁰

3.7 CHALLENGES FACED BY THE CITIZEN ECONOMIC EMPOWERMENT COMMISSION.

In an interview with the CEEC corporate director the writer found that greatest challenge that the CEEC is facing is the fact that majority of the citizens seem to think that the CEEC is another

⁴⁰ Citizen economic empowerment commission. Guidelines. p.4

LIMA bank where money is being given out for free. There is a misconception that the fund is a social fund. The citizens are also not so much interested in the other empowerment programmes that the commission is supposed to be offering, all they are interested in is the funding. This is making it very difficult for the commission to implement their nine empowerment pillars.

Critics seem to think that the Act will only make the rich richer as to be given funding you need to make a business proposal and the whole procedure is too complex therefore poor people who are illiterate can never be able to meet the standards. This takes us back to the problem that all people want is the funding. There are other programmes that would help the illiterate.

The requirement of a business proposal actually works to our advantage as it guides you on how to use the money if you do not have a plan the money is likely to be misused and the loan will never be paid. It should also be noted that when business minded people are given loans and when the business is successful there will be more jobs for citizens and as the business grows more taxes will be paid to the Zambia Revenue Authority. This will benefit the citizens in so many ways.

Empowerment is part of the growth strategy therefore BEE and CEE should be seen as an agreement or contract between government, the private sector, black entrepreneurs in the case of South Africa and citizen entrepreneurs in the case of Zambia that will lead to effective transformation of the economy. The role of the entrepreneurs is quite clear and this is to take advantage of the many opportunities that are being created by the empowerment programmes. By taking advantage of these opportunities, starting new enterprises and creating new wealth, the entrepreneurs will not only become empowered, but will also contribute to the growth of the economy, to greater equality in the society and the creation of new jobs.⁴¹

⁴¹ J. Hendricks (Johannesburg 2004) p.67

Another challenge faced by the commission is the fact that they are also acting as the fund. Section 9 of the Act establishes the Citizen Economic Fund aimed at supporting the development of broad based empowerment programmes. The Fund will be vested in the Commission but shall be managed and administered by various financial institutions and fund managers.⁴² Section 4 establishes the commission; clearly they are supposed to be two independent organs which currently is not the case.

One of the functions of the commission is advising on the necessary changes to various types of legislation for the effective delivery of economic empowerment initiatives is also a function of the commission. As we mentioned in the previous chapter the commission has written to various institutions regarding the harmonization of legislation but to this date there have had no response. This makes it very difficult for the commission to perform its functions effectively.

Another function of the commission is to monitor and evaluate economic empowerment in initiatives but this is challenging as they have no capacity to do so because they have limited staff and funding

These challenges make it difficult for the CEEC to perform its functions effectively. In order to see quick changes in the empowerment process something needs to be done about these problems.

⁴² Act No.9 of 2006

CHAPTER THREE

ECONOMIC EMPOWERMENT IN DETAIL- THE IMPLEMENTATION AND ENFORCEMENT OF THE LAW

This chapter looks at whether the BEE and CEE Acts are effective tools for economic empowerment. It will also highlight (if any) the provisions of the Acts that are discriminatory to people not targeted by the Acts and other related matters. Further I will make a comparative analysis of the BEE and CEE Acts.

The previous chapter has clearly defined citizen and black economic empowerment. It has established the fact that both Zambia and South Africa have got economically disadvantaged citizens.

2.0 EFFECTIVENESS OF THE BLACK AND CITIZEN ECONOMIC EMPOWERMENT ACTS

To establish whether these Acts are effective the writer will look at the main problem which is poverty and unemployment. Further the we will look at what the CEE and BEE Acts provide for these problems.

2.1 POVERTY

Poverty can be defined as the state of being extremely poor or the state of being insufficient in amount.⁴³ Poverty can be further defined as the inability to attain minimal standard of living, measured in terms of basic consumption needs or the income required to satisfy them.⁴⁴

Apartheid remains the primary source of poverty in South Africa. Apartheid legislation, policies and repressive practices created poverty in the previously disadvantaged communities of South

⁴³ South Africa Concise Dictionary. 2002. p 915

⁴⁴ Poverty and inequality in South Africa- summary report. 13 may 1998. The extend and distribution of poverty

Africa.⁴⁵ Apartheid caused people to have minimal rights if any, and this contributed to people living in appalling conditions. People were subjected to poor housing, inferior education, unfair and discriminatory labor practices, a biased judicial system and restriction of movement, economic and political exclusion, racial and ethnic hostility and spiritual repression all of which affected many of the South Africans⁴⁶.

Poverty levels in Zambia are estimated at 86%.⁴⁷ Zambia did not experience apartheid like South Africa did, but there was some form of discrimination during the colonial period, this will be elaborated further in the chapters to come. Instead poor economic governance and the continued plundering of the national purse is what has lead to poverty.⁴⁸ At independence, Zambia's per capita income was the same as the Asian Tiger nations; now Hong Kong is 75 times richer,⁴⁹ external factors such as fluctuation in oil prices have also contributed to the poverty levels.

2.2 POVERTY RELIEF AND JOB CREATION

The CEE Act provides for citizen economic empowerment (CEE) which is defined by the Act as an integrated broad based and multifaceted strategy aimed at substantially increasing the meaningful participation of targeted citizens and companies in the economy and decrease income inequalities. Its aim is to increase meaningful participation of targeted citizens and companies in the economy and decrease income inequalities.⁵⁰

The Citizens Economic Empowerment initiative represents one of the most viable and realistic chances of effecting tangible income re-distribution in the economy and tackling poverty. This is

⁴⁵ E.M.K Mathole. The Christian Witness in the context of Poverty. South Africa,(University of Pretoria. 2005)p 18

⁴⁶ Ibid

⁴⁷ International Trade Centre UNCTAD/WTO report 1994 - 2006

⁴⁸ Zambia Gamefields investment journal. p.5

⁴⁹ Ibid

⁵⁰ Empowerment guidelines. Citizen Economic Empowerment Commission, June 2008

a wise idea being embarked on to enhance the individual and group economies of the people in the wake of the current economic down turn.

Section 4 of the CEE Act provides for the formation of the citizen economic empowerment commission (CEEC) which will have a special focus on national priority areas such as agriculture, tourism, infrastructure, health, mining, education/skills. Others are HIV/AIDS, physically challenged people, forestry, environment sustainability and rural areas. The commission and its functions will be discussed further at a later stage.

The main thrust of the Citizen Economic Empowerment campaign in Zambia revolves around a fund that has been set aside by government as a revolving fund which can be accessed by targeted citizens as credit facilities. The fund is established under s. 29.⁵¹ The problem being faced by the commission so far is that most people think that this is a social fund being given out for free which is not the case. Most people are focusing on the money alone when the Act has many other ways laid out to help the marginalized citizens such as skills development, sector education and training etc.

The CEE Act is not the only means of empowering citizens and poverty relief in Zambia. There have been other programmes such as the Millennium Development Goals (MDG). One of the goal of the MDG's is to eradicate extreme hunger and poverty. Some of their targets include, reducing by half the proportion of people whose income is less than one dollar a day between 1990 and 2015. There have been marginal improvements in the incidences of extreme poverty from 58% in 1991 to 51% in 2006. There is still a long way from the MDG target of 29%. However Zambia has the potential to reach this target. Another target is to reduce by half the proportion of people who suffer from hunger between the years 1990 and 2015.⁵² The prevalence of underweight

⁵¹ CEE Act No 9 of 2006

⁵² Millennium Development Goals www.mdg.org.zm 25h April 2010

children declined from 22% in 1991 to 14% in 2007. From these results it is likely that the targets will be achieved.⁵³

Other goals include, achieving universal primary education, promoting gender equality and empowerment of women and also to reduce child mortality. As for education statistics show that net enrolment has increased from 80% in 1990 to 97% in 2006. This also shows the possibility of achieving universal primary education which will also result in the decline of illiteracy.⁵⁴

Another form of poverty relief being used in Zambia and South Africa are the Poverty Reduction Strategy Papers (PRSP). According to the World Bank and International Monetary Fund, PRSP's describe a countries macroeconomic, structural and social policies and programmes to promote growth and reduce poverty as well as associated external financing needs.

PRSP's are prepared by governments through a participatory process involving civil society and development partners for them to be classified as country driven. PRSP's have become the country level operational framework for progress towards the MDG's. Zambia is one of the countries that have completed PRSP's.

South Africa also has other poverty reduction strategies such as, Growth Employment and Redistribution (GEAR 1996) and Integrated Sustainable Rural Development Strategy (ISRDS 2000).

In South Africa the BEE Act establishes an enabling framework for the promotion of BEE. In particular the legislation allows the minister of trade and industry to issue guidelines and codes of good practice of BEE, as well as establish a BEE Advisory council to advise the president on the implementation of the BEE and related matters.⁵⁵ The South African government is using various regulatory means to achieve BEE objectives, these include using a balanced scorecard to

⁵³ Millennium Development Goals www.undp.org.zm 25th April 2010

⁵⁴ Ibid

⁵⁵ BEE Act No 53 of 2003. s.4

measure progress made in achieving BEE by the enterprise sectors.⁵⁶ The scorecard is issued as a code of good practice in terms of section 9 of the BEE Act.

Even though the BEE and the CEE deals are being done, some critics seem to think that they are being done only for the enrichment of a few oligarchs.⁵⁷ Oligarchs are a small group of people having control of the state. This might seem to have some truth to it but on the other side we find that even though people that have been given funding are not those that are extremely poor we find that if a business man with a proper business plan is given funding when his business grows he will employ more people and pay more tax which will benefit the rest of the citizens and contribute to growth of the economy.

On the 25th October the first two mining conversions were approved in South Africa, this demonstrated a very significant transformation deal in the mining industry.⁵⁸ The greatest challenge lay in the group's involvement in social investment and poverty relief programmes. At first the government returned the application for revision because they did not meet the requirement for poverty relief.

From the above we can see that the Acts are effective tools for economic development and empowerment if channeled correctly. When you look at the CEE Act you can see that the CEEC and the fund have successfully been established as provided for by the act. The commission has already started distributing funds. The most recent case being in Mongu where funds were released for the reopening of the cashew nut plant which will provide the people of Mongu with jobs. This is one way in which citizens can be empowered. In South Africa the approval of the

⁵⁶ South Africa's economic transformation: A strategy for Broad based Black Economic Empowerment. 2004. South Africa

⁵⁷ B. Ryan. More BEE deals are being done, but critics point to the enrichment of a few oligarchs. Financial Mail. 2004. 4th March. p. 21

⁵⁸ Ibid

two mining conversions meant more jobs for people. With the creation of jobs poverty is being reduced and this is a gradual process therefore it should not be expected to work over night. Further it can also be seen from the above that the CEE and BEE Acts are not the only means of poverty relief in both South Africa and Zambia.

2.3 IMPLEMENTATION OF THE ACTS

When it comes to implementation of the Acts we find that it involves a lot of players especially the governments. Further for the Acts to be more effective and implemented well there should be harmonization with the existing Acts. Meaning existing legislation must be changed so as to make it compatible with the empowerment Acts.

In South Africa there are many obstacles in the way of black economic empowerment not reaching its full potential. Laws are in place that make it very difficult for non empowered companies to be empowered.

2.4 CORPORATE LAW REFORMS IN SOUTH AFRICA

The government of South Africa has published guidelines for corporate law reforms and these include some of the following:

- a) The Companies Act has to be brought in line with the constitution and the King code with greater emphasis on corporate citizenship.⁵⁹
- b) Compliance requiring for disclosures of BEE is to be implemented as well as with labor and environmental legislation and the remuneration and bonuses of all directors and senior managers.⁶⁰

⁵⁹ Werkmens, South Africa Business Guide- The South African Economy. 12th November 2005

⁶⁰ Ibid

The King Code Report of good governance is the barometer of the sustainable business practice or the triple bottom line principles of environmental, social and financially sustainability.

Section 38 subsection 1 of the Companies Act of South Africa states that ‘no company shall give whether directly or indirectly and whether by means of a loan guarantee, the provisions of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares of the company, or where the company is a subsidiary company, or its holding company.’⁶¹

Corporate law reforms as looked at earlier are already under way to scrap s.38 of the Companies Act of South Africa.⁶² This section has interfered with empowerment deals by forbidding companies to lend parties money to buy into companies.

2.5 LEGISLATIVE CHANGES IN ZAMBIA

Section 6 subsection 2(a) of the CEE Act states one of the functions of the CEE Commission is to advise on the necessary changes to various types of legislation for the effective delivery of economic empowerment initiatives.⁶³

In an interview with the director- corporate affairs at the CEE commission he acknowledged that they have written to the ministry of justice and the ministry of commerce trade and industry asking for funding for consultancy to assess all necessary Acts such as the immigration Act, lands Act, mines Act etc so as to harmonize them with the CEE Act. Even though this has been done there has been no response from the various institutions written to. This takes us back to the problems being faced with implementation of the Acts. Further section 7 subsection 4 of the current Mines and Minerals Development Act of 2008 brought about confusion when ZDA chief executive officer, Andrew Chipwende made a submission to the parliament committee proposing

⁶¹ The Companies Act No.61 of 1973

⁶² R.Bonorchis. Business report- company law reforms to scrap section 38 www.busrep.co.za 13th October 2009

⁶³ Act No.9 of 2006

that it should be impugned. The clause in question states: "A mining right for industrial minerals shall only be granted to a person who is a citizen of Zambia or a citizen owned company."⁶⁴

Later, CEEC executive director, Mable Mung'omba submitted before the same committee that deleting the clause in the Act would be contrary to the provisions and intentions of her commission. Mrs. Mung'omba said the amendment was running contrary to the core spirit and life of the CEE Act number (9) of 2006.⁶⁵ It is because of such problems that all Acts should be made to harmonize with the CEE Act. If that is done then empowerment will be done more smoothly.

Job creation is a world wide problem and we can only hope that with the implementation of the Acts and policies which is encouraged and which the government especially supports and assists with, especially with black and citizen economic empowerment, the job creation issue will come easier. When we look at the Acts we find that they are adequate and can be used as tools for economic empowerment if all sectors cooperate with the implementation. The Acts are also a source of guidance on how to go about with empowerment

2.6 DISCRIMINATION AND THE ACTS

Both the BEE and CEE Acts are directed towards the marginalized citizens of Zambia and South Africa. Some critics such as Manning seem to think that if citizen in a country are suffering then it is the government who needs to be blamed for its poor policies. He further states that creating

⁶⁴ Mines and Minerals Development Act No.7 of 2008

⁶⁵ Times of Zambia. 19th march 2009

the CEE Act which is largely based on the BEE Act is discriminatory towards the people that the Acts are not directed to.⁶⁶

Non-discrimination is a general principal underpinning laws and regulations governing investment. As a signatory to the World Trade Organization (WTO), Zambia is committed to the principal of non-discrimination.⁶⁷ The CEE Act does not discriminate. However the CEE Act provides for an empowerment fund which will be accessed only by the economically disadvantaged citizens of Zambia.

WTO is an international organization designed by its founders to supervise and liberalize international trade. WTO replaced the General Agreement on Tariffs and Trade (GATT) of 1947. It is true that human rights, trade rules and WTO rules are based on the same values which include non-discrimination. However the concept of non-discrimination under international human rights law does not imply that the same rules should always apply to all players in order to create a global playing field where fairness is the rule that WTO aims towards.

Full reciprocity and unequal players can institutionalize discrimination against the marginalized who in this case are the less developed countries. Affirmative action is then required to ensure substantive equality and protect the weakest and most vulnerable. In WTO the principal of special and differential treatment and the particular provisions of the most vulnerable are intended to serve as a form of affirmative action or positive discrimination. This is to facilitate a relatively level playing field among WTO economically unequal members.

Some of these special and differential rights provision include part IV of GATT which includes provisions of non reciprocal treatment for developing countries. Article IV of GATT/WTO aims at increasing the participation of developing countries in world trade. Article XII allows less

⁶⁶ I. P. Manning (2007) Zambia landsafe investmemt www.zambialandsafe.blogspot.com

⁶⁷ C. A. Mwitwa Policy Reform for Investment: the case of Zambia. (Zambia Investment centre 2006) p.16

developed countries in transition to restrict trade in services for reasons of balance of payment difficulties

Going beyond the legal provisions expressly stated in the WTO agreement, actions in favour of less developed countries individually or as a group may also be taken under waivers from the main WTO rules and the procedure is set out in article IX of WTO. An example of such a type of waiver is the Canadian tariff treatment for Commonwealth Caribbean countries. Having looked at the above it can be seen that the special and differential rights provisions of the WTO affect Zambia since it falls under the category of less developed countries. This gives legality to affirmative action or positive discrimination in Zambia

In South Africa the empowerment is only targeted to Blacks and favour is granted to black empowered companies. The term affirmative action refers to policies that take race, ethnicity, physical disabilities, military career, sex or a person's parent's social class into consideration in an attempt to promote equal opportunity or increase ethnic or other forms of diversity.⁶⁸

In the case of South Africa as already mentioned it suffered apartheid before it got its independence. Even though it has not ratified the Universal Declaration of Human Rights (UDHR) it is not legally binding on the government but has moral and political authority in international communities. Article 2 of the UDHR of 1948 states everyone is entitled to all rights and freedoms set forth in the declaration, without distinction of any kind, such as race, colour, sex, language, political or other opinion.

Article 2 of UDHR simply entails equality of all. The principal of equality may require public authorities to take affirmative action to eliminate conditions which cause or perpetuate discrimination and to ensure equal access to and enjoyment of basic human rights and freedoms.

⁶⁸ N. Sinmazdemir. (2009) "Positive Discrimination, Negative Consequences? Preferential Policies, Redistribution and Democratic Stability" Paper presented at the annual meeting of the Midwest Political Science Association 67th Annual National Conference, The Palmer House Hilton, Chicago.

Such affirmative action should not be more than appropriate and necessary as to achieve equality. This therefore legalizes affirmative action in South Africa in as far as it goes to reverse the effects of apartheid so as to cause equality.

Further both Zambia and South Africa have signed and ratified the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and article 2 of this convention obliges nations to pass laws to ensure equality of women and allows them to make temporary special measures aimed at accelerating de facto equality between men and women. This entails affirmative action until equality is achieved and clearly this is one of the aims of the CEE and BEE Acts.

If we give in to our critics we will only be giving foreigners an upper hand over our own people. Zambia and South Africa are not the first countries trying to empower their citizens. Ghana is doing the same and so has India and Malaysia this will further be discussed in the following chapter. Affirmative action is therefore legal.

2.7 COMPARATIVE ANALYSIS OF THE BEE AND CEE ACTS

The CEE Act is largely based on the BEE Act of South Africa but even though this is so the two Acts have similarities and differences. In order for us to make a comparative analysis of the two Acts we will look at both their similarities and differences.

2.8 SIMILARITIES

Looking at the similarities we find that they are both aimed at helping the marginalized citizen in Zambia and blacks in South Africa. Both countries have got disadvantaged citizens who are marginalized and poor. After the realization that no economy can grow by excluding any part of its people Acts to empower the citizen were formed. An economy that is not growing cannot integrate all of its citizens in a meaningful way. Other similar objectives include the fact that

both Acts encourage citizen or black owned companies these companies are given preferential treatment especially when accessing loans this can be seen in section 21 subsection 1 of the CEE Act and section 2 of the BEE Act.

Section 24 of the CEE Act and section 9 of the BEE Act provide for codes of good practice which may give a further interpretation of economic empowerment and set out targets that are consistent with the Acts. Further both Acts provide for skills training which happens to be one of the 9 pillars of the CEE commission in Zambia and is found under section 2 subsection d of the BEE Act.⁶⁹ There is also emphasis on breaking the barriers that prevent women and people infected with HIV/AIDS from getting certain jobs and being discriminated against.

Lastly both Acts have provisions for funds to be set up from money appropriated by parliament for the purpose of the fund. Under the BEE Act this is under section 13. Section 29 of the CEE Act establishes the fund; even though the fund is supposed to be an independent organ we find that the CEE Commission is also running the fund which is not supposed to be the case.

2.9 DIFFERENCES

Having looked at the similarities we can now look at the differences between the two Acts. When we look at the CEE Act we find that too much power is placed in the president. Under section 6 subsection 6 we find that it states that the president may give the commission such general or specific directions with respect to the discharge of its functions as the president considers necessary and the commission shall give effect to such directions.⁷⁰ Section 6 subsection 5 also states that the president is the one that prescribes the criteria to distinguish

⁶⁹ Act No.53 of 2003

⁷⁰ Act No.9 of 2006

targeted citizens from those that can sustain themselves.⁷¹ Further it is also the president that appoints the commissioner. Clearly this shows how too much power is vested in the president.

In South Africa there is not too much power vested in the president. The BEE Act under section 3 establishes an advisory council and under section 5 the functions of the council are set out and these involve advising government on BEE, review progress in achieving BEE and advice on draft codes of good practice.⁷² Further under section 6 subsection 3 when appointing members of the council the president is to follow an appropriate consultative process.⁷³ The president is also part of the council. As mentioned above both acts provide for codes of good practice the only difference is that under the BEE Act when targets are set out the period within which those targets are to be achieved is set out were as in Zambia it could go on for ever.

In Zambia section 4 of the CEE Act establishes the CEE Commission and s.6 sets out its function this is different from South Africa because the commission there existed even before the Act was made. The idea of BEE Commission arose out of a resolution taken by the Black Management Forum (BFM), a conference held in Stellenbosch, from 14 to 15 November 1997.⁷⁴

From the above findings we can safely conclude that the Acts are effective and adequate tools for economic empowerment and when it comes to implementation it involves a lot of player especially the government. If everybody works together and all the Acts are harmonized citizens will definitely get empowered. Further WTO, UDHR and CEDAW allow for positive discrimination, therefore it is legal.

⁷¹ Ibid

⁷² Act No.53 of 2003

⁷³ Ibid

⁷⁴ Business map (2005) BEE Commission Report www.businessmap.org.za 18th January 2010

CHAPTER FOUR

ACHIEVEMENTS OF ECONOMIC EMPOWERMENT POLICIES-A COMPARISON WITH OTHER DEVELOPING COUNTRIES

Any democratic society faces the challenge of harmonizing two essentially contradictory political concepts; one, equality before the law irrespective of religion, caste, creed, race, and gender, and the other, social justice at the cost of the same commitment for equality before the law. Even a developed democracy like the United States is no exception to the rule and has taken recourse to affirmative action to ensure justice for the less privileged sections of the society at the cost of individual merit and equality of all citizens before the law.

This chapter will compare the achievements of economic empowerment policies not only in Zambia and South Africa but also other countries that have economically disadvantaged citizens. This is to try and establish where we are going with our empowerment policies. Oppression is not or was never exclusive to Zambia and South Africa alone. Various other countries had their own forms of oppression. In this chapter a look will be taken at countries such as India and Malaysia where citizens too were historically disadvantaged. Emphasis will be on the history that led to the oppression of India and Malaysia as well as the restructuring programs implemented by the respective governments which resulted in the development and growth of their economies, where they find themselves today.

4.0 OVERVIEW OF INDIA

Several European countries, including the Dutch, Portuguese, French and the British took advantages of fractured kingdoms fighting each other to establish colonies in India during the

middle of the second millennium.⁷⁵ In 1857 a failed insurrection against the British East India Company caused most of India to come under administrative control of the crown of the British Empire.⁷⁶

The Indian independence movement followed after a prolonged but non violent struggle for independence led by Mahatma Gandhi who is regarded officially as the father of modern India. India has had its share of sectarian violence and insurgencies in different parts of the country because of its multi-ethnic, and multi-religious make up.⁷⁷ Economic reforms that started in 1991 have transformed India into one of the fastest growing economies in the world notwithstanding the Chinese economy and added to global clout.

The greatest cause of diversity in India is the Caste system.⁷⁸ Caste is a word that is derived from the Portuguese word *casta* which means breed, race or kind.⁷⁹ In India large numbers of people have experienced social discrimination through centuries on account of its peculiar institution called the caste system, efforts have been made to provide redress for these underprivileged sections, through the policy of reservations or quotas for them in jobs, seats in educational institutions and legislatures, and in governmental aid, loans and other developmental assistance.⁸⁰ Many of the lower caste people lived in conditions of great poverty and social disadvantage similar to that of South Africa and Zambia's disadvantaged people.

The need to discriminate positively in favour of the socially underprivileged was felt for the first time during the nationalist movement. It was Mahatma Gandhi, himself a devout Hindu and a staunch believer in the caste system, who was the first leader to realize the importance of the

⁷⁵ History of India www.wikipedia.com 31st October 2009

⁷⁶ Ibid

⁷⁷ ibid

⁷⁸ Israel. S. Insight Guides India_1st ed.(APA Production (HK) Ltd. India 1985) p 67

⁷⁹ Ibid

⁸⁰ S. Partha. Gosh_Positive Discrimination in India: A Political analysis. Ethnic Studies report. Vol 15. NO 2. 1997 p.7

subject and to invoke the conscience of the upper castes to this age-old social malady of relegating whole communities to the degrading position of “untouchables”. He also understood the political logic of inducting this large body of people into the political mainstream in order to make the freedom movement more broad based. By renaming these untouchables as “Harijans” (people of God) he tried to give this policy a religious sanction so as not to disturb the traditional sensitivities of the caste Hindus more than was really necessary.⁸¹

4.1 POSITIVE DISCRIMINATION

Policy of positive discrimination to increase opportunities for certain social groups in employment, business, government, and other areas. The policy is designed to counter the effects of long-term discrimination against groups such as women, disabled people, and minority ethnic groups.

The Constitution of independent India which largely followed the pattern of the Government of India Act, 1935, made provisions for positive discrimination in favour of the Scheduled Castes and Scheduled Tribes (SCs & STs) which constituted about 23% of the divided India’s 138 Ghosh population.⁸² Besides reserving parliamentary seats for them they were given advantages in terms of admission to schools and colleges, jobs in the public sector, various pecuniary benefits for their overall development, and so on. The constitution indeed guaranteed the fundamental right of equality of all citizens before the law but it also categorically laid down that nothing in the constitution “shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Schedules

⁸¹ S. Chitnis. *The Politics of Backwardness: Reservation Policy in India*, (New Delhi, Konark 1997) p 104.

⁸² V. Chandra. *Constitutional Safeguards*, Seminar, No. 177. 1974. p.16

Castes and the Scheduled Tribes”.⁸³ Some of the constitutional provisions which aimed at positive discrimination are:

Article 17: Abolition of “untouchability” and making its practice in any form a punishable offence.

Article 46: Promotion of educational and economic interests.

Article 16 and 335: Preferential treatment in matters of employment in public services.

Article 330 and 332: Reservation of seats in the Lok Sabha and State Assemblies.⁸⁴

Later, the job-related positive discrimination was extended to government-supported autonomous bodies. A 1974 Government order laid down that all such bodies which employed more than 20 people, and where 50% of the recurring expenditure was met out of grants-in-aid from the Central Government, and which received annual grants-in-aid of at least Rs.200,000 should invariably provide for reservation of SCs and STs in posts and services.⁸⁵ The general rule which exempted the scientific and technical posts from the purview of positive discrimination was applicable to the autonomous bodies too.

4.2 COMMON MINIMUM PROGRAM

In 1971 a series of reform policies were implemented by the government, ruling India at the time and the Common Minimum Program (CMP) has extended and improved on those reform policies. India has a booming economy that is growing at a rapid speed and the CMP is the result of the Indian economy fairing so well.⁸⁶ The United Progressive Alliance (UPA)/ government released the CMP to assist the furtherance of India’s economy. They have six basic principles of governance and it is to:

⁸³ V. Chandra, Constitutional Safeguards. Seminar, No. 177. P. 18

⁸⁴ Constitution of India

⁸⁵ V. Chandra, Constitutional Safeguards, *Seminar*, No. 177. p 21

⁸⁶ United Progressive Alliance www.panjab.org 7 November 2009

1. To preserve, promote and protect social harmony,
2. To ensure that the economy grows at least 7-8% per year in a sustainable manner and to generate employment so that each family is assured of a safe and viable livelihood,
3. To enhance the welfare and well being of farmers, farm labor and workers and give the assurance of security for their families,
4. To empower women in all aspects such as politically, educationally, economically and legally and
5. To provide for full equality of opportunity and
6. To unleash the creative energies of the people.⁸⁷

The CMP is applied in each sector of India's economy. When it comes to employment UPA government enacted a National Employment Guarantee Act⁸⁸. This provides a legal guarantee of employment for at least 100 days.⁸⁹

The caste system in India still involves hundreds of millions of people although it has undergone significant changes. India's constitution forbids negative public discrimination on the basis of caste in its preamble.⁹⁰ Although India's constitution forbids caste as a form of discrimination, caste ranking and caste interaction which is still negative, have occurred for centuries and would in all probability continue to do so more in the countryside than the urban setting and more in the realms of kingship and marriage than in personal interactions.⁹¹

⁸⁷ Common Minimum Programme of UPA Government www.panjab.org 7th November 2009

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ T. E. Weisskopf . Affirmative Action in India and the U.S. (Routledge publishers, New York 2004) p.2

⁹¹ S. Israel. Insight Guides India, 1st ed. P.30

4.3 OVERVIEW OF MALAYSIA

The Chinese emigration to Malaya ended because of the depression of the 1930's and the outbreak of the Sino-Japanese war.⁹² This stabilized the demographic situation and ended the prospect of Malays becoming a minority in their own country.⁹³ It is generally considered that Malays are Bumiputra and vice versa. This is incorrect as there are non-Malays who are declared as Bumiputra and similarly non Muslims who are considered Bumiputra.⁹⁴

The term Bumiputra was probably created to collectively address the group described by in article 153 of the Malaysian constitution which stipulates the following, 'the yang di Pertuan Agnong (the king of Malaysia) this function ...in such a manner as may be necessary to safeguard the special position of the Malays...to ensure the reservation...of such proportion...in the public service...and of scholarships... and other similar educational... privileges or special facilities given... by the Federal Government.'⁹⁵

The Constitution defines Malays as being one who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay customs and is the child of at least one parent who was born within the federation of Malaysia before independence on the 31st August 1957.⁹⁶ It should be clear that those considered as Bumiputras were Malays who were the majority and who were oppressed, exploited and abused by the government at the time.⁹⁷

In 1970 the majority of Malays were still rural workers and largely excluded from the modern economy, with 75% of Malays still living below the poverty line. The government's response to this was a policy called the New Economic Policy (NEP) of 1971.⁹⁸ In 1970 there was a huge

⁹² Common Minimum Program of UPA Government www.panjab.org

⁹³ ibid

⁹⁴ Ibid

⁹⁵ The Constitution of Malaysia

⁹⁶ Bumiputra www.wikipedia.com 12th January 2010

⁹⁷ Ibid

⁹⁸ Malaysian new Economic and National Unity www.wikipedia.com 14th January 2010.

underclass of Bumiputras, whose economic had remained largely unchanged by the import substitution industrialization of 1960.

In 1970 the Malaysian government estimated that Bimutras held roughly 2.4% of Malaysia's economy, compared to 33% owned by other races and 63% in foreign hands. Malaysia experienced the worst ever racial rioting in 1969 and NEP was perceived as a means of preventing such outbreaks in the future.⁹⁹

4.4 THE NEW ECONOMIC POLICY

One policy that aroused considerable interest and later controversy is bumiputra-a programme of racial discrimination in favour of indigenous Malays so as to lift their economic status, particularly by turning them into owners and managers of businesses, to a level of equality with the country's Chinese and Indian business communities.¹⁰⁰ This was the NEP and as mentioned. In Malaysia, the bumiputra laws are a form of affirmative action meant to provide more opportunity for the majority ethnic Malay population versus the historical financial dominance of the Malaysian Chinese and Indian populations.

The NEP had two objectives. One of the objectives was to eliminate poverty, particularly rural poverty and the other objective was to eliminate the identification between race and economic function. An agriculture policy was used to tackle poverty, which resettled 250 000 Malays on newly cleared farms.¹⁰¹ The agriculture policy also caused investment in rural infrastructure as well as the creation of free trade zones in rural areas, used to create manufacturing jobs.

The second part of the government policy was to transfer economic power to Malays. The Prime Minister Mahathir expanded the number of secondary schools and universities throughout the

^{99 99} Malaysian new Economic and National Unity www.wikipedia.com

¹⁰⁰ Morzella (2007) Malaysia's Affirmative Action plan. Island Business Report p.15

¹⁰¹ Ibid

country, as education is seen as a way to transfer the economic power to the Malays. As far as the economic restructuring is concerned the initial target was move the ratio of economic ownership in Malaysia as follow:

1. Bumiputra from 2.4% to 30%
2. Other Malaysians from 33% to 40% and
3. Foreign ownership from 63% to 30%¹⁰²

Industries were targeted and policies were built around the government incentives created in 1975 to expand large scale manufacturing industries and energy-incentive industries. Bumiputra laws exist as a means of affirmative action for Bumiputras. These laws are established within the NEP and are known as pro-Bumiputra policies. These policies include quotas for admission to government, educational institutions, qualifications for public scholarship, positions in government and ownership in businesses.¹⁰³

South Africa and Zambia find themselves in a similar position as India and Malaysia. They all went through oppression where economies were in trouble, not beneficial to all and where the minority population is privileged. All four countries implemented policies to transform restructure and redevelop their respective economies

Just as BEE and CEE are not understood by most people of South Africa and Zambia and just as there are many challenges that both countries are going to face with the concept of BEE and CEE, so too the people believed and also the challenges seemed unreachable to India with its reform policies and the extension thereof known as the Common Minimum Policy (CMP) and in terms of Malaysia with its policy known as the New Economic Policy (NEP).

¹⁰² History of Malaysia www.wikipedia.com

¹⁰³ Bumiputra Policy www.bumiputra.biography.ms

The goal of the BEE and CEE is to empower all sectors of the economy, so too did the CMP of India empower all sectors of the economy as well as the NEP of Malaysia. This shows that it is not impossible as both India and Malaysia successfully applied an empowering concept to their economy. Poverty, oppression of women and children as well as education were tools utilized to oppress people. The same tools are used to uplift and develop the economy of the above mentioned countries by empowering and applying the various empowering policies successful. It is evident from the discussion in this chapter that the various policies implemented, have contributed to substantial change of the respective economies. One has to take the inference that BEE and CEE can do the same for the South African and Zambian economies. One has to accept that BEE and CEE are restructuring programs and it will take time before the people of Zambia and South Africa reap the benefits.

CHAPTER FIVE

CONCLUSION AND RECOMENDATIONS

In this final chapter the focus will be on whether indeed the BEE Act and the CEE Act are effective tools for economic empowerment in Zambia and South Africa as from the previous chapters it has already been established that affirmative action has been legalized by various international instrument such as CEDAW, UDHR and WTO . Criticisms will also be looked at and lastly the writer will give some recommendations as to what can be done to enhance economic growth in the mentioned countries.

5.0 CRITICISM

The legitimacy of the BEE Act and the CEE Act is unquestionable. In the case of South Africa there is no other practical and effective instrument for deracialisation for the economy within a reasonable time.¹⁰⁴ Although critics of BEE accept the need for deracialisation of the economy, some think that the process has elitist consequences.¹⁰⁵ In the case of Zambia even though the country did not suffer apartheid the majority of the citizens live below the poverty line as a result the economy is very poor.

Some critics suggest that BEE is not alleviating poverty, but enriching a few entrepreneurs. This was discussed in chapter three and this is not the case as the role of the entrepreneurs is quite clear and this is to take advantage of the many opportunities that are being created by the empowerment programmes. By taking advantage of these opportunities, starting new enterprises and creating new wealth, the entrepreneurs will not only become empowered, but will also

¹⁰⁴ Legitimacy of BEE www.anc.org.za 24th February 2010

¹⁰⁵ Ibid

contribute to the growth of the economy, to greater equality in the society and the creation of new jobs.¹⁰⁶

Other critics seem to think that the BEE and CEE Acts are discriminatory to those people they are not directed to. This takes us back to the issue of positive discrimination or affirmative action. As discussed earlier as the impetus towards affirmative action is twofold: to maximize diversity in all levels of society, along with its presumed benefits and to redress perceived disadvantages due to overt, institutional or involuntary discrimination.¹⁰⁷ This is justified in South Africa because of the apartheid they involuntarily suffered and in the case of Zambia they experienced colonial rule where they were never given a chance to take part in administrative issues, the blacks and colonial masters could not mingle with each other as the blacks were servants and went to bad schools. Therefore after independence it was difficult to manage the country.

Further critics state that the CEE Act is driving away foreign investment which is much needed as it provides for an economic empowerment fund which will only be accessed by economically disadvantaged Zambian citizens or citizen empowered companies.¹⁰⁸ When you look at s.20 of CEE Act it states that the commission shall, in liaison with state institutions responsible for investment, trade and development, tariff imposition and rebates, pension, securities and finance, promote and facilitate increased flow of local and foreign investment into the economy by amongst other measures, fostering the creation of an enabling macro economic and micro economic environment. Clearly this does not mean foreign investors are being discriminated against.

¹⁰⁶ J. Hendricks (Johannesburg 2004) p.67

¹⁰⁷ N. Sinmazdemir. (2009) "Positive Discrimination, Negative Consequences? Preferential Policies, Redistribution and Democratic Stability" Paper presented at the annual meeting of the Midwest Political Science Association 67th Annual National Conference, The Palmer House Hilton, Chicago

¹⁰⁸ A. C. Mwitwa. Policy Reform for Investment: the case of Zambia. P.7

Further s.21(2)(b) which provides that licenses to foreign investors will be granted on the basis of joint ventures and partnerships with citizens and citizen empowered companies.¹⁰⁹ This section simply means that it is voluntary for foreign investor to get a license as provided in the act as they can decide whether to have citizen as partners or not in order to get benefits and so they cannot say it is discriminatory. When you look at South Africa which has had its Act for a longer time you find that the rate of foreign investment has actually increased.¹¹⁰

5.1 EFFECTIVENESS OF THE ACTS

From what was discussed in chapter two we can see that the Acts are effective tools for economic development and empowerment if channeled correctly. They are effective tools in that they are used as a guideline in the empowerment process and without them there would be confusion and no legal basis for the empowerment commissions or the empowerment funds. In other words the Acts are aimed at enabling legislation to create uniformity in policy and establish the necessary institution support and instruments with which to drive the economic empowerment strategy.

When you look at the CEE Act you can see that the CEEC and the fund have successfully been established as provided for by the Act. The commission has already started distributing funds. The most recent case being in Mongu where funds were released for the reopening of the cashew nut plant which will provide the people of Mongu with jobs. With the creation of jobs poverty is being reduced.

¹⁰⁹ Citizen Economic Empowerment Act No.9 of 2006

¹¹⁰ J. Hendricks (Johannesburg 2004) p.135e

In South Africa there is ample economic justification for the BEE. The reason for this is that black middle class is burgeoning.¹¹¹ The rise of black South Africans entering higher income brackets has dramatically drive consumer spending, especially in the property sector where increasing demand is accompanied by rising prices.¹¹² In this lies the business and economic case for BEE. As the black middle class grows, the more disposable income there is in the South African economy. Also more is spent and demands for goods and services increases. The economy thus has to produce more and as a result will grow. More jobs are created.¹¹³

The BEE and CEE value is multi faceted and its trickle down effect impacts almost all sector of the mainstream economy.¹¹⁴ It is critical to improve the living standards of the blacks and citizens of South Africa and Zambia and their spending will then propel economic growth to greater heights while their demand for services such as domestic and hospitality services leads to job creation.

5.2 RECOMMENDATION

It is clear from this research that the citizens of Zambia and the blacks of South Africa were marginalized and hardly took part in the economy. So far funds have been dispersed to try and help people get on their two feet and contribute to the economy. However this is not the only means that can help empower citizens that have been marginalized for a long time or discriminated against. When we look at the case of Zambia we find that even though the CEEC has nine pillars as discussed earlier, they have not been put into effect as all people want is the funding.

¹¹¹ University of South Africa's Bureau of Market Research. 2005.p.6

¹¹² Ibid

¹¹³ BEE-global comparisons for South Africa, www.emps.co.za/newsletter 10th November 2009

One of the empowerment pillars concerns skills development and involves the improvement of education and enhancing the ability to adopt new business practices. Education is very important and should be the first thing to be done if an economy is to improve greatly. In Malaysia when the NEP was introduced the second part of the government policy was to transfer economic power to the Malays.¹¹⁵ The Prime Minister Mahathir expanded the number of secondary schools and universities through out the country, as education was seen as a way to transfer the economic power to the Malays.¹¹⁶ In South Africa between 1993 and 2003, the highest expenditure by black households was on education.¹¹⁷ This has increased by 21.4% per year and services from the domestic workers increased by 23.4% per year.¹¹⁸

In the case of Zambia the more needs to be done to ensure that the marginalized citizens get adequate education as they cannot do much if they remain illiterate. There is need to enhance the conversion of enrolled students to graduates in the higher education sector both in Zambia and South Africa. Opportunities for new graduates to acquire workplace experience and skills should also be provided. There is also need to teach them to adopt new business practices.

Further there is a misconception that the funds that are being given by the commission are free, people seem to think that it is a social fund. In order to bring this misconception to an end, there is need for awareness programmes to help these people understand that the money being given is actually a loan that needs to be paid back.

¹¹⁵ Malaysian New Economic and National Unity 2005 report

¹¹⁶ Ibid

¹¹⁷ BEE-global comparisons for South Africa, www.emps.co.za/newsletter 10th november 2009

¹¹⁸ Ibid

In South Africa, the empowerment commission is separate from the fund. This is also what the CEE Act provides as discussed earlier but even though this is so, the commission and the fund are one. This is not supposed to be the case therefore there is need to separate the two in order to enhance efficiency and avoid confusion.

In its current state the CEE Act can not achieve its ultimate effectiveness due to the fact that there has been no harmonization with other legislation which is much needed. If there is harmonization of legislation there will be no misunderstandings with other sectors as regards CEE. There is also need for political will to help fight against poverty if economic empowerment is to be achieved. Political leaders need to set a good example through public sector initiatives and legislative reforms.

In South Africa the apartheid policies forced removal of millions of black people caused over crowded and impoverished reserves in the rural areas.¹¹⁹ Zambia also has the majority of its citizens living in rural areas. These areas entirely lack access to markets, finance and information infrastructure and flow of information into these rural areas, prevents local entrepreneurs from making progress.¹²⁰ Millions of people in rural areas have been denied the opportunities to develop their human potential.

With all these problems being faced by people in rural areas it is recommended that an integrated sustainable rural development strategy be formed. This will be concerned with promoting community ownership, improving access to finance and investing in rural infrastructure. Penalties should also be imposed on those institutions that fail to meet targets. Both South Africa and Zambia can further learn from countries such as Malaysia and India which we discussed

¹¹⁹R. Parsons. the seven secrets of growth (APK Production 20055) p.45

¹²⁰ Ibid

earlier as they have succeeded in economic empowerment of the majority of their citizens that were marginalized.

5.3 CONCLUSION

When we ask ourselves about the efficacy of legislation as a tool for economic empowerment we find that indeed legislation can be an effective tool for economic empowerment as we can see from the research carried on in this paper. A further comparison has been made with countries like Malaysia and India to back this point. In Zambia article 23(4) (b) of the Zambian constitution which is the supreme law of the land gives the legal basis of the CEE Act making discrimination of foreigners legal, in this case it is positive discrimination.

However the greatest tragedy that faces society is that apartheid in the case of South Africa and poor Government policies in the case of Zambia have denuded the marginalized people of the basic capacities needed to take advantage of the BEE and CEE and help society move forward. More energy should be spent enabling people to take advantage of CEE and BEE opportunities.

A dangerous lie is propagated that every person in our society is a potential business leader. In societies such as the ones that exist in Zambia and South Africa not every one can be leaders and some will definitely be more successful than others. It should be noted that the BEE and CEE policies were never meant to cure all the ills of the two countries. They are simply one policy instrument among many others. One must accept that BEE and CEE debates are partly ideological, that they are emotional and that they will always be fraught with difficulties and challenges. Further these policies cannot be expected to work overnight.

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