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OBLIGATORY ESSAY

ON

TOPIC: Are economic social and cultural rights key in improving the lives of the Zambian people and if so what basis should they be included in the Bill of Rights to be contained in the new Constitution under debate in the National Constitutional Conference (NCC) to ensure maximum protection of human rights or achievement of human development.

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Submitted to the University of Zambia in Partial Fulfillment of the requirement of the Bachelor of Law (LLB) Degree Programme.

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UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

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Entitled: Are Economic, Social and Cultural Rights key in improving the lives of the Zambian people and if so what basis should they be included in the Bill of Rights to be contained in the new Constitution under debate in the National Constitutional Conference (NCC) to ensure maximum protection of human rights or achievement of human development.

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Date

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DECLARATION

I, Kabwe Maybin , Identity Number 25039059 do hereby declare that I am the author of this Directed Research Paper entitled: “Are Economic, Social and Cultural Rights key in improving the lives of the Zambian people and if so what basis should they be included in the Bill of Rights to be contained in the new Constitution under debate in the National Constitutional Conference (NCC) to ensure maximum protection of human rights or achievement of human development.” I further declare that this is a work of my own ingenuity and that due acknowledgement has been made where other people’s works have been referred to. I truly believe that this research has not been previously presented to the school of law for such academic works.

I therefore bear the absolute responsibility for the contents, errors, defects and any omissions herein.

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DEDICATION

To my family Mum and Dad and more especially my to my brothers Mr. Chongo and Mr. Enock Mponda, who despite having other responsibilities sacrificed financially, encouraged and supported me with School requirements.

To God my father for the unfaltering support encouragement and for lightening the burden of my school work.

To my Nephews Joshua and Mponda let this be an inspiration to them for greater academic achievements and successes.

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Special thanks to Mr. Simon Kabanda for the opportunity he gave me in understanding this area of my research as he made it possible for me to see the prevailing state of human conditions in Zambia especially in rural areas, when he took me on a National Sensitization programme tour on Social economic and cultural rights and the Constitution.

I am also indebted to all the people too numerous to mention, who helped in the process of data collection.

Thanks be to God the Almighty for his unconditional love in everything and he made it possible and provided every time.

FOREWORD

The goal of development is to increase people's choices. However, for example to exercise freedom of choice, they must first enjoy political, economic social and cultural freedom. In civilized countries, these freedoms are enshrined in the Constitution. The Zambian Constitution like those in many countries grants the people of Zambia the right to enjoy these freedoms.

Having said this, it is also true to say the capricious nature of governments, especially in developing countries, sometimes connives to subvert the enjoyment of these freedoms and Zambia is no exception. Human rights protection and promotion is integral to the country's governance and development efforts. This is because from a rights point of view a government is obliged to provide for its population. Inherently, therefore, a country's policy, legal and institutional framework either directly or indirectly define human rights protection and promotion.

In Zambia social economic and cultural rights are provided for in part IX of the Constitution. They include the right to work, water, proper sanitation, education, health and housing. It is this part of the Constitution which outlines aspects of what is meant by development. It gives guidelines on what government should endeavour to do in areas of national development. Accordingly article 111 of the Constitution provides for the non justiciability of these rights. In addition desirable though they are, social economic and cultural rights are not given much priority under the Zambian Constitution as they are put in an area which is non justiciable and hence the result has been untold misery for the majority of the people, homelessness, illiteracy, poor, health, poverty and poor sanitation, which always result in annual cholera outbreaks even in the capital Lusaka which is supposed to have proper sanitation but it is very poor.

Because of the area of the constitution where these rights are put and also because of article 111 which takes away the power of the people to take government to court, the government is not compelled to satisfy the development needs of the people. It allows

government to take a casual approach towards development and the peoples power to compel government to fulfill these needs is taken away hence the need to change the status quo.

This works addresses these and other related issues, to try to redress and satisfy why it is important that a change in the Constitutional order will help lift the majority populace out of poverty and take our country forward both in terms of human and economic development.

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- The International Covenant on Economic Social and Cultural Rights (1966)
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- The Convention on the Rights of a Child
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1.0. INTRODUCTION

The demand to incorporate the economic, social and cultural rights is noted on the respect for the dignity of the human person. That is, the worth of being human is not constituted by any human declaration or institution but rather given by God, a universally shared reality. The inalienable dignity becomes the norm against which all social institutions and state activities must be measured. In the absence of constitution guarantee of the rights to livelihood and employment, clean and safe water, medical and health facilities, decent shelter, education and social benefits to the disabled, the aged and other disadvantaged persons, government does not feel obliged or compelled to fulfill them. Consequently, the development of the country is affected, and the poverty levels of the people keep on rising.

It is thus imperative that social, economic and cultural rights should be encouraged in any country for sustainable economic growth. The republican constitution needs to be categorical in guaranteeing human rights and compel government to promote them, in order to attain the desired human development.

1.1. STATEMENT OF THE PROBLEM

In all the constitutions that have been enacted in Zambia since independence, economic, social and cultural rights have not been accorded the same status as other rights and are just put in the directive principles of state policy and hence the current constitution places development issues under the directive principles of state policy which does not oblige the government to do anything to promote rights under this part. To this effect this research will adopt an explanatory approach to the problems caused by not having economic, social and cultural rights in the part three of the constitution and whether it is justified that these rights should be put in the constitution to enhance

sustainable growth and development in Zambia. Further this research will also look at how the incorporation of social, economic and cultural rights will impact on the poor and poverty alleviation. The research will attempt to show whether economic, social and cultural rights are key in improving the lives of the Zambian people. Furthermore, being alive to the fact that the current constitution does not guarantee these rights in part three, the bill of rights, the research will try to address this problem by advancing the importance of having these rights in the hope of showing their importance in achieving sustainable growth and development in Zambia. The research will also consider what place the economic, social and cultural rights will have in the new Constitution and what form they will take.

1.2. OBJECTIVE OF THE RESEARCH.

The main objective of this research is to evaluate whether economic, social and cultural rights are key in improving the lives of the Zambians and if so on what basis should they be included in the bill of rights to be contained in the new constitution to ensure maximum protection of human rights or achievement of human development.

The specific objective of the study will be to;

Explain what social, economic and cultural rights are and their rationale; give a brief synopsis of the protection recognition of economic, social and cultural rights under international instruments; explain the importance of human rights in development more specifically social, economic and cultural rights; explain how indispensable and inseparable economic, social and cultural rights are in achieving development and poverty eradication; explain how the inclusion of these rights in the Bill of Rights would impact on the lives of the people; consider how the constitution in its current form fails to protect social, economic and cultural rights in Zambia; analyze how the realization of economic, social and cultural rights will have a direct impact on the ability to meet development goals.

1.3. RATIONALE

Despite having a constitution in Zambia, which is supposed to safeguard the rights of the people and ensure that a decent standard of living is reached, the levels of poverty in the country are drastic and keep on rising at a rampant pace. Hence it is necessary to examine whether the constitution in its current state does not offer enough protection to safeguard the people rights to a decent standard of living. Further more, having in mind the current impotence of the constitution, whether inclusion of economic, social and cultural rights in the Part III of the Constitution will lift the poor Zambians out of poverty and which is why this paper will put more emphasis on the need to have economic, social and cultural rights incorporated in the Bill of Rights.

1.4. RESEARCH METHODOLOGY

The major method of data collection to be employed will be desk research. Where necessary, this will be supplemented by interviews with various sectors mandated with constitutional development and human rights. The data for this research will be sourced from books, statutes, bills (were available), draft legislation, international conventions, charters and treaties. The internet, journal articles, paper presentations, student obligatory cases, reports by mandated bodies and a few necessary cases and news articles.

1.5. BACKGROUND

In the preamble of the United Nations Charter, the people of the United Nations declared their determination “to serve succeeding generations from the scourge of war, to reaffirm faith in fundamental human rights, and to promote social progress and better standards of life in larger freedom.” Accordingly, Article 1 of the Charter proclaims “that one of the purposes of the United

Nations is to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”¹

Human beings are rational beings. They by virtue of their being human possess certain basic and inalienable rights which are commonly known as human rights. Those rights which are essential for all the individuals as they are consonant with their freedom and dignity and are conducive to physical, moral, social and spiritual welfare. They are also necessary as they provide suitable conditions for the material and moral uplift of the people. Because of their immense significance to human beings, human rights are also sometimes referred to as fundamental rights, basic rights, inherent rights, natural rights and birth rights.²

Human rights are indivisible and interdependent and therefore precisely there cannot be different kinds of human rights and hence all rights are equal in importance and are inherent in all human beings. The Universal Declaration of Human Rights therefore did not categorise the different kinds of human rights. It simply enumerated them in different kinds of human rights. However, the subsequent developments made in the human rights field under the United Nations system make it clear that human rights are of two kinds, viz.; (i) Civil and Political Rights and (2) Economic, Social and Cultural Rights.³

Civil and Political Rights (also sometimes called Freedom From) are rights which may be termed as negative rights in the sense that a government is required to abstain from doing those activities that would violate them. specifically, these rights protects citizens from murder, torture, cruel and unusual punishment, ex post facto legislation, the denial of habeas corpus and imprisonment

¹ The United Nations Charter.

² Dr. Agarwal, H.O. (2006) International Law and Human Rights P.705.

³ Ibid P.707.

without due legal process. Notable point in these rights is that they are capable of immediate and full realization without significant cost incurred.⁴

This chapter will look at what Economic, Social and cultural rights are and the various protocols and conventions that govern human rights at international level. Against this background, it discusses the nature of the subject matter of the research and the statement of the problem. Finally, it indicates what the next chapter will deal with.

There is an increasing demand from diverse of Zambian society today to incorporate Economic, Social and Cultural Rights into the Constitution currently under review in the National Constitutional Conference (NCC). This raises very important questions, both ethical and constitutional. How the new Constitution deals with economic, social and cultural Rights will have direct effects on human dignity and capacity of every Zambian to grow in a healthy community. The demand to incorporate economic, Social and Cultural Rights (ESCR) is rooted on the respect for dignity of the human person. That is, the worth of being human is not constituted by any human declaration or institution, but rather given by God, a universally shared reality. The inalienable dignity of every person and the rights that flow from that dignity – in the first place, the right to life and the defence of life – as well as the well being and full development of individuals, are core to this message. Hence human dignity, realized in community with others, becomes the norm against which all social institutions and state activities including, the review of the constitution must be measured.⁵

But what are these rights? Why are they important for Zambia? What implications and obligations result from Zambia's previous ratifications of international regional covenants?

⁴ Anyangwe, C. (2004) International Law and Human Rights. P. 36

⁵ Social Condition Research Project : Jesuit Centre For Theological Reflection. P.1.

1.6. WHAT ARE ECONOMIC SOCIAL AND CULTURAL RIGHTS

1.6.1. INTRODUCTION

In light of the foregoing questions, this part of the Chapter will proceed by answering the above questions and also state the various protocols and conventions governing Human Rights at both national and international level.

Economic, social and cultural rights are those rights which mandate that social conditions be adequate for meeting physical, moral and biological requirements for every category of people, or relate to the guarantee of minimum necessities of the life to human being.⁶ In the absence of these rights, the existence of human beings is likely to be endangered. They aim at ensuring everyone's access to resources, opportunities and essentials for an adequate standard of living. Right to adequate food, clothing, housing and adequate standard of living and freedom from hunger, right to work, right to social security, right to physical and mental health and right to education are included in this category of rights. These rights are included in the International Covenant on Economic Social and Cultural Rights (ICESCR)⁷, in part 111.

These rights sometimes called positive rights require active intervention, not abstention on the part of states. These rights are therefore counter point to the first generation of civil and political rights, with human rights conceived more in positive (right to) than negative freedom from) terms. The enjoyment of these rights requires a major commitment of resources and therefore their realization cannot be immediate as in the case of civil and political rights.⁸

Economic, social and cultural rights are based fundamentally on the concept of social equality. Realization of these rights, which is generally called the rights of second generation, has been

⁶ Dr. Agarwal, H.O. (2006) International Law and Human Rights. P. 707.

⁷ Adopted by General Assembly Resolution 2200 A (XXI) of December 1996.

⁸ Ibid P. 708.

somewhat slow in coming or progressive realization (time, resources). Realization of Economic, Social and Cultural Rights depend on the available resources and full implementation is gradual. However, two extremes must be avoided in the realization of these rights. On the other hand indifference – that because of the meager resources nothing should legally compel government to take deliberate steps to their realization. And on the other hand, overnight realization – that every Zambian shall automatically have access to these rights in their fullest status.¹⁰

Although the United Nations has recognized the above two sets of rights in two separate covenants, there is a close relationship between them. It has been rightly realized especially by the developing countries that civil and political rights can have no meaning unless they are accompanied by social, economic and cultural rights and vice versa. The relationship of the two categories or rights was recognized by the International Human Rights Conference held in 1968 which declared in the final proclamation that:

“Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.”¹¹

1.7. THE VARIOUS INTERNATIONAL INSTRUMENTS AND PROTOCOLS ON HUMAN RIGHTS

The laws for respecting, protecting and fulfilling human rights in Zambia exists in the Laws of Zambia and International Conventions (that is agreements) that Zambia has agreed to through institutions like the United Nations (UN), African Union (AU) or the Southern African Development Community (SADC).¹²

⁹ Ibid

¹⁰ Dr. Agarwal, H.O. (2006) International Law and Human Rights. P. 710.

¹¹ International Human Rights Conference 1968.

¹² Human Rights Report on the State of Human Rights in Zambia (2007).

In Zambia, human rights in international conventions are not necessarily automatically protected by the law, even though the government has to ensure that they are protected. The responsibilities of the government under international human rights conventions can only be locally effective if they are incorporated in the Laws of Zambia.¹³ However, this does not mean that the government is not supposed to ensure that human rights provisions in international conventions are respected, protected and fulfilled. Simply by agreeing to the international conventions, the government of Zambia still has a responsibility to ensure that rights in international conventions are respected, protected and fulfilled.¹⁴

The Constitution of Zambia¹⁵ is the Supreme Law of the land. The preamble of the Constitution pledges to ensure the respect of the rights and dignity of the human family, uphold the laws of the state and conduct the affairs of the state in such a manner as to preserve, develop and utilize its resources for this generation and for future generations. In addition, Part IX of the Constitution,¹⁶ the directive principles of state policy, ensures that economic, social and cultural rights are protected and fulfilled in the development and implementation of national policies and, the making and application of any laws.

Other Laws relating to social-economic rights in Zambia are Employment Act¹⁷ and the Lands Act.¹⁸ Other Laws relate more specifically to women and children such as the Adoption Act, the Intestate Succession Act, the Wills and Administration of Testate Estates Act, the Marriage Act¹⁹, the Affiliation and Maintenance of Children Act, the Persons with Disabilities Act, the Education

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Chapter 1 of the Laws of Zambia.

¹⁶ Chapter 1 of the Laws of Zambia.

¹⁷ Chapter 268 of the Laws of Zambia.

¹⁸ Chapter 184 of the Laws of Zambia.

¹⁹ Chapter 50 of Laws of Zambia.

Act²⁰ and other laws generally relating to the regulation of institutions of higher learning such as the University of Zambia Act.

On International Conventions, the main international convention that deals with civil and political rights is the United Nations International Covenant on Civil and Political Rights (ICCPR).²¹ Part 1 of the ICCPR in Article 1(i) states that “all people have the right of self-determination. By virtue of that right they freely determine their economic, social and cultural development.”²² Zambia agreed to the United Nations International Covenant on Civil and Political Rights (ICCPR) in 1984. This means that Zambia has the responsibility to abide by its provisions.

Other International Conventions that call for respect, protection and fulfillment of civil and political rights and which Zambia has agreed to are; the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment (CAT), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the convention on the Elimination of All Forms of Racial Discrimination (CERD).²³

At the regional level, Zambia has agreed to the African Charter on Human and Peoples Rights (popularly known as the ‘Banjul Charter’²⁴ 1981. The African Charter contains both civil and political and social-economic rights.

International conventions on economic, social and cultural rights that Zambia has agreed to are the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁵ convention on the

²⁰ Chapter 134 of the Laws of Zambia.

²¹ Adopted by General Assembly Resolution 2200 A (XXI) of 16th December 1996.

²² International Covenant on Civil and Political Rights 1966.

²³ Human Rights Commission : State of Human Rights in Zambia, 2007.

²⁴ The African Charter on Human and Peoples Rights 1981.

²⁵ Adopted by General Assembly resolution 2200 A (XXI) or 16 December 1966.

Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the child (CRC).

Agreeing to, for instance the International Covenant on Economic, Social and Cultural Rights (ICESCR) means that Government should make an effort to ensure that more individuals enjoy the rights even when resources are not enough. That is, the Government should make sure that the available resources are effectively and equitably utilized to at least protect and fulfill the rights.²⁶

In any case, even though the government under the Laws of Zambia does not have direct legal responsibility to for example feed its people or provide employment, it has a legal responsibility, through for instance the right to life, to provide an environment that should make an individual or groups of individuals be able to lead sustainable livelihoods.²⁷

Documents that make up the International Bills of Rights are: Pertinent provisions in the charter of the UN; the Universal declaration of Human Rights; the International Covenant on Civil and Political Rights together with the two optional protocols thereto; and the International Covenant on Economic, Social and Cultural Rights.²⁸

How well human rights are protected in any particular country depends in the first place on the laws, and the administrative and other practices, of the country concerned and the government that has authority there. Therefore, human rights are, in the first, international human rights law sets the global standards with which each state's domestic laws and practice should conform, and

²⁶ Part II article 2(2) of the (ICESCR) 1966.

²⁷ Human Rights Commission Report on : The State of Human Rights in Zambia 2007.

²⁸ Anyangwe, C. (2006) Human Rights and Humanitarian Law. P.81.

against which their conformity can be assessed. It also supplies procedures for making such assessments and also for remedying and established deficiencies.²⁹

The major institutions for the protection and promotion of human rights in Zambia are the Human Rights Commission, Police Public Complaints Authority, Judicial Complaints Authority and Gender in Development Division, and also the Law Association of Zambia, just to mention a few.

This work therefore seeks to thoroughly examine how the inclusion of social, economic and cultural rights in the Bill of Rights of the Zambian Constitution will impact and promote both economic, social and human development and also the indispensable nature of human rights to development.

In line with this, Chapter two will bring out or discuss the indispensable nature of Human rights and more specifically economic, social and cultural rights to National Development and as a point of reference on how human rights are protected in other jurisdictions, the European Social charter and its implementation mechanisms will be looked at.

²⁹ Ibid.

CHAPTER TWO

Chapter two brings out or discusses the indispensable nature of human rights and more specifically economic, social and cultural rights to national development and as a point of reference on how human rights are protected in other jurisdictions and in particular the European Social Charter and the implementation mechanism will be looked at in this chapter.

2.0 THE INTERDEPENDENCE, AND INTER-RELATED NATURE OF HUMAN RIGHTS AND DEVELOPMENT

The 1982 report of the Parliamentary Assembly of Europe on development and human rights starts off with the following quotation: "It is the common lot of development policy and human rights to receive more honour in rhetoric than in reality".³⁰

Mindful of this sobering observation and having in view a United Nations perspective, we may put to ourselves some questions which deserve reflection. These questions are:

- Where are we now in human rights and development?
- What kind of development do we have in mind?
- Are human rights and development separate or integrated notions?

2.1 INTRODUCTION

The question of the relationship between human rights and development has been under discussion in United Nations for many years. The World Conference on Human Rights, organised by the United Nations in Teheran in 1969 on the occasion of the 20th anniversary of the Universal

³⁰ Document 4997, Parliamentary Assembly of the Council of Europe, Report on development cooperation and human Rights (1982) (Rapporteur Mr. Hertz)

Declaration of Human Rights,³¹ adopted an interesting document, the proclamation of Teheran, which linked human rights to major global issues. The proclamation referred to human rights denials as a result of racist policies, to the refusal to recognise the right of peoples to self determination, to violations of human rights as a result of armed conflicts. It also referred to 700 million illiterates as a human rights issue, and to the inferior status of women prevailing in many parts of the world. For the present purposes paragraphs 12 of the proclamation is most relevant:

“The widening gap between the economically developed and developing countries impedes the realization of human rights in the international community. Failure of the Development Decade to reach its modest objectives makes it all the more imperative for every nation, according to its capacities, to make the maximum possible efforts to close this gap³².”

But the great landmark of this tendency, strongly advocated by nations of the third world, was General Assembly Resolution 32/130, adopted in 1977, a year before the thirtieth anniversary of the Universal Declaration of Human Rights, under the heading ‘alternative approaches and ways and means within the UN system for improving the effective enjoyment of human rights and fundamental freedoms’. This resolution, frequently referred to in later resolutions, was perceived as a suitable tool for an overall analysis of existing problems in the field of human rights.³³ It stressed in particular the indivisibility and interdependence of all human rights. It stated that human rights questions should be examined globally, taking into account the overall context of the various societies in which the present themselves. The resolution accorded priority to combating mass flagrant violations of human rights of peoples and persons. And it is not surprising that in an era when the new international economic order was written prominently on the agenda of the United Nations, the resolution considered the realization of the new international economic order

³¹ Adopted by General Assembly resolution 217 A (III) of 10 December 1948.

³² A compilation of International Instruments’ (New York: United Nations, 1983) ST/HR/1/Rev.2, pp. 18-19.

³³ Forsyth D.P. (1989) Human Rights and Development: International Views P. 122

an essential element for the effective promotion of human rights which should therefore be accorded priority.³⁴

On 4th December, 1986, the United Nations General Assembly adopted the Declaration on the Right to Development.³⁵ The Declaration is undoubtedly a document oriented to human rights, placing due emphasis on the central position of the human person in the development process. In this respect a key provision reads: “The human person is central subject of development and should be the active participant and beneficiary of the right to development”³⁶. The Declaration, which is the outcome of many years’ arduous work on human rights and development but also, if taken seriously, to national and international policies in this area. Again, if taken seriously, the Declaration would:

- (1) Strengthen the relevance of human rights in the development process.
- (2) Serve the recognition of the human person and the human factor as central in development efforts,
- (3) Provide a sound political, legal, social and moral basis for development co-operation,
- (4) Lend itself to effective use and be a suitable yard stick in the development and human rights dialogue between developed and developing nations.

2.2 WHAT KIND OF DEVELOPMENT?

In a remarkable United Nations study on the International Dimension of the Right to Development,³⁷ presented to the Commission on Human Rights at its 35th session (1979), it was recalled that for a long time the terms “developments, ‘economic development’ and ‘growth’ were generally considered to be synonymous and were used interchangeably³⁸. However it was already

³⁴ Ibid p. 123

³⁵ General Assembly resolution 41/128

³⁶ Article 2. para. 1

³⁷ UN document. E/CN.4/1334

³⁸ Ibid, para 15

recognized in a review and appraisal report of the first United Nations Development Decade (1961-70) that human rights and welfare would constitute an integral part of development policy.

The report stated:

“One of the greatest dangers in development policy lies in the tendency to give the more material aspects of growth an overriding and disproportionate emphasis. The end may be forgotten with the means. Human rights may be submerged and human beings seen only as instruments of production rather than as free entities for whose welfare and cultural advance the increased production is intended.”³⁹

The recent Declaration on the Right to Development also indicates the type of development we have in mind when we try to conceive a sound development process. According to its second preambular paragraph ‘development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development in the fair distribution of benefits resulting there from’⁴⁰.

Quite correctly development is seen as a process not limited to economic factors, aimed at the well-being of the entire population and of individuals on the basis of participatory relationships. It should also be kept in mind that no uniform and universally applicable model exists as regards the process of development.

In analyzing the kind of development which does justice to the human person as the bearer and the beneficiary of human rights, we cannot be better guided than by the elements which the United

³⁹ Un Document. E/3447/Rev. para. 90

⁴⁰ Forsythe. D.P. (1989) Human Rights and Development: International Views. P. 126-27

Nations Study on the International Dimensions on the Right to Development⁴¹ identified as forming part of the concept of development:

- (1) The realization of the potentialities of the human person in harmony with the community should be seen as the central purpose of development;
- (2) The human person should be regarded as the subject and not the object of the development process;
- (3) Respect for human rights is fundamental to the development process;
- (4) The human person must be able to participate fully in shaping his or her own reality;
- (5) The achievement of a degree of individual and collective self reliance must be an integral part of the process.

2.3 HUMAN RIGHTS DEVELOPMENT AND THE CONSTITUTION: SEPARATE OR INTEGRATED CONCEPTS

There is now international consensus that human rights and development are inter-related and self-reinforcing. Development is simply a process that aims at promoting and protecting sustainable livelihoods for all individuals. Human rights, on the other hand, are social-economic and political guarantees necessary to protect individuals from threats to human dignity.⁴²

Sustainable livelihoods can only be attained where human rights are protected and promoted. This is because respect for human rights demand that the government strives to anything to ensure that its people are protected against threats to their life, health, economic well being, social, stability, and indeed political stability and participation. This therefore, means that a country's development

⁴¹ United Nations Document. E/CN.4/1500, PARA. 131

⁴² Human Rights on the state of Human Rights in Zambia (2007) p. 13

process should secure and enhance human rights, if its development strides are not only to be successful, but mostly if the development strides are to be meaningful to its people.⁴³

Human rights protection and promotion is integral to the country's governance and development efforts. This is because from a rights point of view a government is obligated to provide for its population. Inherently, therefore, a country's policy, legal and institutional frameworks either directly or indirectly define human rights protection and promotion.

It is generally accepted that human rights is an ingredient of the development process and that the human person should be the subject of development. This philosophy belongs explicitly or implicitly to the essence of a series of documents which all base themselves on the structural approach to human rights, notably the proclamation of Teheran, the United Nations Declaration on Social Progress and Development, General Assembly resolution 32/130 adopted in 1977, and numerous resolutions on the Right to Development. A similar philosophy can be found in the African Charter on Human and Peoples Rights which was adopted in 1981 in the framework of the organisation of African Unity now the African Union and entered into force on 21 October 1986.⁴⁴

In 2006, Zambia's population was estimated at 11.7 million, with 65 percent of the population living in rural areas and 35 percent in urban areas.⁴⁵

The livelihoods of the majority of the population are relatively unsustainable as 64 percent of the population is relatively poor. Fifty-one (51) percent of these are extremely poor, to the extent that they cannot afford the minimum basic food requirements. And whilst 14 percent of the poor persons can afford the minimum basic requirements, they cannot afford the basic non-food

⁴³ Ibid p. 13

⁴⁴ The text of the African Charter is reproduced in the Human Rights Law Journal, vol. 7 (1986)pp. 403-10

⁴⁵ Central Statistics Office (2006), Living Conditions Monitoring Survey, Lusaka Zambia.

requirements.⁴⁶ The high level of poverty can undermine enjoyment of human rights, as the poor are often marginalised from decision making, and can have limited access to public services like health and education. It is for this reason that the respect of human rights within the development process is critical, as human rights demand that it is the responsibility of a government to ensure that all individuals in the population are treated equally and have equal access to opportunities that can uplift their livelihoods.

The development vision of Zambia is defined in the Vision 2030. Vision 2030 is a national long term planning instrument, which defines the population's aspirations. Vision 2030 necessitates that the government reduces poverty, provides secure access to safe drinking water, ensures improved sanitation, and improves access to information in order to promote participation in social economic development.⁴⁷

The Fifth National Development Plan (FNDP) is a medium term planning instrument intended to focus government's policy and programming by developing mechanism with adequate capacity to allocate resources to human development efficiently, in the period 2006 to 2010. The process of developing the FNDP was participatory and there were consultative meetings even within districts.⁴⁸

The social sectors in the FNDP through which the Government of the Republic of Zambia endeavours to prioritise fiscal resources and henceforth protecting and fulfilling human rights for its population are principally education and skills development; health; arts and culture; disability and development; social protection; youth and development! and employment and labour. Human

⁴⁶ Ibid

⁴⁷ Human Rights Reports on the state of Human Rights in Zambia (2007) p.14

⁴⁸ Ibid p. 14

rights are also protected and fulfilled in the sectors of information services, public safety and other governance, gender and development, and food nutrition.

Noteworthy on human rights and development process in Zambia, is that the country also has human rights obligations under the Millennium Development Goals (MDGs). Millennium Development Goals are eight (8) goals that Zambia as a United Nations (UN) member state has agreed to strive to achieve by 2015.

The Millennium Development Goals (MDGs) provide the government with an opportunity to promote and protect the enjoyment of human rights in the country. Human Rights promotion and protection is inherent in the MDGs mostly because they provide a framework for doing something about the situation of the poor, marginalised individuals or those socially excluded due to their vulnerabilities. In short, MDGs contribute to the promotion and protection of economic and social rights.⁴⁹

The Universal Declaration of Human Rights recognises economic social and cultural rights which the Millennium Development Goals as stated above seeks to promote and protect in development and hence showing their importance and the inter-relation and dependency nature of these rights in the development process. Articles 22 to 27 of the Universal Declaration of Human Rights sets out these rights. Articles 22, 23, 25 and 26 in particular, characterises these rights as indispensable for maintenance of human dignity and for development of personality. It is worth noting that realization of these indispensable rights places an obligation on or through national and international cooperation.

⁴⁹ JCTR Policy brief: (2007) Promotion of social Justice and concern for the poor. P. 3

Article 23 states that: “Everyone has the right to work, to just conditions of work, to protection against unemployment, to equal pay for equal work, to sufficient pay, to ensure a dignified existence for one’s self and one’s family and the right to join a trade union; Article 25 states: Everyone has the right to a standard of living, adequate for health and wellbeing, including food, clothing, housing, medical care and necessary social services Article 26: Everyone has the right to education”⁵⁰

2.4 SOCIAL, ECONOMIC, CULTURAL RIGHTS AND DEVELOPMENT IN ZAMBIA

The Republican Constitution is the document that guarantees the human rights of its citizens. Zambia’s constitution has not guaranteed some aspects of human rights in the Bill of Rights, namely social economic and cultural rights. These have been listed in Part IX of the Constitution⁵¹ the Directive Principles of State Policy, where it clearly states that these rights are rights only “in certain instances”, and that they are not justifiable. This means that these rights although they are rights provided for in the constitution the government cannot be taken to task for failure to provide what is provided for in this part of the Constitution as the government is under no obligation to provide for these rights but only take measures it thinks are necessary according to its judgment.

In the absence of Constitutional guarantee of the rights to livelihood and employment, clean and safe water, medical and health facilities, decent shelter, education, and social benefits to the disabled, the aged and other disadvantaged persons, government does not feel obliged or compelled to fulfill them. Consequently, the development of the country is affected, and poverty levels of the people keep on rising.

⁵⁰ Universal Declaration of Human Rights (1948).

⁵¹ Chapter one of the Laws of Zambia

Social and economic rights are not there, and yet they are the ones that constitute the basic needs of the people, the prerequisites to life, the basis for living, the basic necessities for a full normal and dignified life. They constitute what are known as development issues.⁵² If one goes to townships or the rural areas and ask the ordinary people what constitutes development, the responses one would get include the following:

- Good roads;
- Adequate food
- Hospitals/clinics with adequate staff, equipment and drugs
- Schools
- Proper habitable shelter
- Safe clean water
- Employment with adequate wages;

All these are the parameters by which development is measured. The emerging perspectives of “development” are people oriented. For example, the Human Development Report of the United Nations Development Programme (UNDP) in its Human Development Index presents a picture of what is happening to people, not in terms of economic growth, but in terms of life expectancy, adult literacy and access to the basic resources needed for a decent standard of living.⁵³

Realization of economic social and cultural rights have thus direct implication for Zambia’s ability to meet the Millenium Development Goals (MDGs) by 2015 of halving extreme poverty and hunger; achieving universal primary education; promoting gender equality and empowering women; reducing child mortality; improving maternal health; combating HIV and AIDS, malaria

⁵² Kabanda, S (2007) Know Your Constitution. P. 122

⁵³ Ibid p. 122

and other diseases; and ensuring environmental sustainability. These basic human requirements are central to meaningful development and poverty eradication. One appropriate legal mechanism to ensure that 100% of all budgeted resources for poverty reduction programmes do in fact reach the intended beneficiaries will be to enshrine basic ESCR in the Bill of Rights.

2.5. THE EUROPEAN HUMAN RIGHTS SYSTEM: EUROPEAN SOCIAL CHARTER

The European human rights system was established within the framework and under the auspices of the Council of Europe, a regional inter-governmental political organisation created in 1949. The Council of Europe, makes it mandatory for members to accept the principle of enjoying of human rights by all persons within their jurisdiction. The Council makes respect for human rights an imperative condition of membership, so that a nation's non-respect of those rights could lead to loss of membership in the organisation.⁵⁴

Looking at the above aims of the European human rights system, it is evident and clear that they place big or great emphasis on the respect of human rights in development also. They do not only look at economic growth of member states but also place emphasis on the respect of human rights as part of development. Members who do not respect human rights of people can be expelled by Council of Europe which makes respect for human rights mandatory. Some countries wishing to join the European Union have been told to first reform their National laws which do not conform to the standards of the system and hence showing the importance of putting human rights at the center of development.

2.6. THE EUROPEAN SOCIAL CHARTER

This treaty was adopted in 1961 and entered into force in 1965. It complements the European Convention for the protection of Human Rights by establishing a regional European system for the

⁵⁴ Anyangwe, C (2004) International law and Human Rights p. 142.

protection of economic and social rights. An additional protocol to the charter, expanding its catalogue of rights, was concluded in 1988 and entered into force in 1992. the charter (as supplemented by the additional protocol) proclaims categories of rights and ‘principles’ amongst which are: the right to work, right of family to social, legal and economic protection, health, benefit from social welfare, right to social security just to mention a few.⁵⁵

The European human rights system puts also great emphasis on social and economic rights which a state should strive to provide to its citizens as shown by the above provision.

Lastly, the system is not only the oldest but also the most advanced and effective currently in existence. Operating under a relatively stable political environment the system has been able to develop a well-defined jurisprudence on the reach of the rights guaranteed under the European Convention on Human Rights. Furthermore, the effectiveness of the system can also be attributed to the fact that most of the states that are parties to the Convention respect the rule of law and possess Constitutional guarantee of human rights. What is more, the states parties have willingly and readily complied with decisions of the enforcement machinery and cooperated with the Convention’s organs in ensuring the effective enjoyment of human rights in their countries.

2.7 CONCLUSION

In sum, Economic Social and Cultural rights are indispensable to human and national development. There is simply no integral development without provision of economic social and cultural rights and the allied rights of women, children and the differently abled. Indeed, the implementation of the economic, social and cultural rights is necessary also for the implementation of civil and political rights already included in the current Bill of Rights. For how can a person

⁵⁵ Anyangwe, C 2004 International law and Human Rights p. 145

effectively vote in an election if not equipped with some education, or a person participate in local community activities if hungry, or a woman protect her children if not healthy.

The author firmly believes that it is obvious, then, that economic social and cultural rights must play a necessary role in the holistic thinking about development in Zambia and in any other country. For that matter, there simply is no integral and sustainable development without the provision of these rights.

CHAPTER THREE

Chapter three discusses the scope of protection offered by the current *Zambian* constitution, its weakness and giving a detailed explanation of how the inclusion economic, social and cultural rights will impact on the lives of the *Zambian* people.

3.0 SCOPE OF PROTECTION OFFERED BY THE CURRENT CONSTITUTION AND WEAKNESSES

As to be expected in an election year, 2008 saw heightened debate on the situation of economic, social and cultural rights in *Zambia*. Political parties, ruling and opposition, all stressed the need for government commitment to the realization of economic social and cultural rights. Particularly noteworthy were the pronouncements regarding provision of free social services, such as health and education, to the country's impoverished population. Job creation also featured prominently in the manifestos of many political parties. The on-going process of the preparation of the poverty reduction strategy paper by Ministry of Finance and Economic Development kept the worsening plight of economic, social and cultural rights in the public limelight. Civil society organisations, dedicated to the realization of specific aspects of these rights, also continued to press government and conscientise society on these issues. The stakeholder organisation in the forefront of this struggle included the Women for Change, Transparency International *Zambia* (TIZ), the Catholic Commission for Justice and Peace (CCJP), Jesuit Center for Theological Reflection (JCTR) and the *Zambia* Association for Research and Development (ZARD).

The above efforts notwithstanding, however, the government of *Zambia* took no serious steps towards domestication of about ten International instruments dealing with various aspects of economic, social and cultural rights which it has ratified or acceded to. This means that, when all is

said and done, economic social and cultural rights in Zambia remains unjusticiable. This is to say, the state cannot be sued by its citizens for failing to provide any of these rights. In essence, the debate on these rights still stands on an academic pedestal and it is not surprising, therefore, that against the above background of a stagnant economy, the realization of economic, social and cultural rights remains elusive.

3.1 INTRODUCTION

The current Zambian Constitution does not specifically mention economic social and cultural rights (ESCR) in Part III, the Bill of Rights, which refers to the fundamental rights and freedoms of an individual. They are contained within **Part IX, “Directive Principles of State Policy”**,⁵⁶ which states that government shall endeavour to provide, inter alia, clean and safe water, equitable education opportunities in all fields and at all levels, adequate medical and health facilities, decent shelter for all persons and development of a person’s culture, tradition, custom or language and this is as set out in article 112 of the Constitution⁵⁷ of Zambia.

However, article 111 of the same part IX clearly states that:

“Directive principles of state policy set out in this part shall not be justiciable and shall not thereby, by themselves, despite being referred to as right in certain instances, be legally enforceable in any court, tribunal or administrative institution or entity”.⁵⁸

Part of the Directive principles of state policy further reads as follows:

(d) “The state shall endeavour to provide water, adequate medical and

⁵⁶ Chapter 1 of the Laws of Zambia the Constitution.

⁵⁷ The Constitution of Zambia, Chapter 1 of the laws.

⁵⁸ Ibid

health facilities and decent shelter for all persons, and take measures to constantly improve such facilities and amenities.”⁵⁹

Here, the Constitution clearly demonstrates that it is not on the side of the citizens and does not adequately protect them. The constitution clearly demonstrates that it is up to government to decide whether to take care of its people or not and it is not surprising that the health, education and other living standards in the country are going down everyday. As the constitution stands, the state is expected only to consider these rights in formulating and implementing its policies relating to development, law reform and application of law – but only in so far as state resources are able to sustain their application unavoidably demands, as may be determined by cabinet. Cabinet comes up with annual government programmes that it considers appropriate and beneficial in its own judgment and is not compelled by the constitution

Therefore, basic rights such as adequate food, clean water and sanitation, proper health care, basic education, adequate housing, are simply not constitutional priorities. This is why there is need to move (ESCR) economic social and cultural rights from the weak category of “guiding principles” in Part IX to the justiciable category of “Fundamental Rights” found in the Bill of Rights, Part III of the Constitution.

But the question still remain: For how long shall Zambia excuse itself from achieving these basic rights for its citizens? Is the status given to “Directive Principles of State Policy” a permanent solution? Several civil society organisations (CSOs), the general public and faith based organisations have challenged the inadequacies in the Constitution with regard to protection of economic social and cultural rights. A few examples can illustrate this point.

⁵⁹ Ibid, Article 112

In September, 2004, the Human Rights Commission in its submission to the Mung'omba Constitution Review Commission (CRC) highlighted the pressing need to strengthen the scope of fundamental rights and freedoms in the next constitution. It argued that the provision be made to include social and economic rights that have not been previously explicitly guaranteed by the Constitution. Furthermore, it observed that the current enforcement mechanisms are inadequate or inefficient.⁶⁰

The Women in Law and Development in Africa WILDAF draft report on "Minimum Standards Relating to Women and children's Rights" (April 2004) observes in a similar fashion that the current constitution does not recognise social and economic rights. WILDAF sees the exclusion of economic social and cultural rights from the Bill of Rights to be an anomaly because rights are inter-related and indivisible and their inclusion would enable most women to gain economic independence.⁶¹

Similarly, the OASIS Forum's submission to the Mung'omba CRC in September 2004 recommended that the economic, social and cultural rights should be incorporated in the Bill of Rights. It also noted that women should have a right to equal treatment and opportunity to participate in the political, economic, social and cultural life of the nation.⁶²

Similar positions are being championed by the umbrella group of women's organisations in Zambia, the Non-Governmental Organisations' Coordinating Committee (NGOCC) in their nation-wide campaign to educate the general public in both urban and rural areas on the importance of economic, social and cultural rights in the fight against poverty. Members of the NGOCC express their belief that enshrining in Zambia's Bill of Rights the (ESC) rights to health,

⁶⁰ JCTR policy brief (2004) Zambia's economic, social and cultural rights. P.4

⁶¹ Ibid p.4

⁶²

education and employment will contribute to the development of the nation and is crucial to fighting poverty. For these women's organisation, education is both a human right and a development necessity, for this ensures the elimination of gender disparities in primary and secondary education and consequently helps achieve gender equity and quality for all levels of education. Therefore, they demand the inclusion of economic, social and cultural rights within the Bill of Rights.⁶³

It is clear, then, that the current state of affairs in which the Zambian constitution has only "Directive Principles of state policy" means that successful achievement of economic, social and cultural rights is quite elusive because they are not enshrined in the constitution in an enforceable character. Hence strong demands arise that stress a moral obligation for the government to consider enshrining economic social and cultural rights into the Bill of Rights. This means of course, that the government must facilitate a referendum process to allow for the amendment of Part III (Bill of Rights) of the constitution as demanded by Article 79(3) which states as follows:

"A bill for the alteration of Part III of this constitution or of this Article shall not be passed unless before the first reading of the bill in the National Assembly it has been put to a National referendum with or without amendment by not less than fifty percent of persons entitled to be registered as voters for the purpose of Presidential and Parliamentary elections".⁶⁴

3.2. HOW THE INCLUSION OF ECONOMIC SOCIAL AND CULTURAL RIGHTS WILL IMPACT THE ZAMBIANS

⁶³ JCTR, policy brief (2004) Zambia's economic social and cultural rights. P.5

⁶⁴ The Constitution, Chapter 1 of the laws of Zambia.

Efforts have been made in previous constitutional reviews (1991, 1996) to incorporate economic social and cultural rights into the Bill of Rights. But these efforts have been politically blocked. However, the current Mung'omb Draft Constitution (2005) that is being deliberated by the National Constitutional Conference (NCC) does explicitly include ESCR in the new Bill of Rights. It is very important to note that this inclusion occurred after widespread national consultation and serious study of the best practices from other countries such as South Africa.

3.3 WHAT IS CONTAINED IN THE PROPOSED BILL OF RIGHTS

The Mung'omba draft legally provides for the right to education, health care, adequate housing, clean water and sanitation, a clean environment, workers rights, cultural rights.

But this provision for legal guarantees has raised some debate, much of it due to confusion about what the bill of rights actually says. In 2006, very high Government officials sharply criticized the constitutional guarantees expressed in the Draft:

“Nowhere in the world has any government provided 100 percent entitlement to these rights, and when you make justiciable in your constitution, it means every law-abiding president must offer to resign a failing to defend and uphold a constitution each time a citizen cried that he has no employment or that he has no employment or that he has no education or that he has no shelter.”⁶⁵

It is very unfortunate that such a criticism might demonstrate that the actual text of the Mung'omba draft has not been carefully read and intelligently read and understood. For the text clearly emphasises that such rights do not come about “overnight” or with immediate judicial relief.

⁶⁵ The Challenge (2006) Volume 9. Number 2. p.7

Part IV of the Draft Constitution, Article 33 (2), explicitly states:

“The Government shall take reasonable measures within its available resources, to achieve the progressive realization of the rights guaranteed in this part.”⁶⁶

Progressive realization” means that Government must show it is serious in trying to achieve these important rights as soon as possible. Thus **article 67** plainly states:

“Parliament shall enact legislation which provides measures which are reasonable in order to achieve the progressive realization of economic social and cultural rights under the Bill of Rights referred to in articles 65, 66, 67, 68, 69, 70 and 71”.

The good experience of South Africa (which includes these rights in its constitution) shows the wisdom of such “progressive” language. And if it is important to note that the Draft Constitution uses very careful legal language to ensure that these economic, social and cultural rights can really be part of every Zambian’s heritage.⁶⁷

Undoubtedly, realization of economic, social and cultural rights (ESCR) does have monetary implication in the face of competing needs. But their implementation always depends on “progressive realization”. Moreover, implementation is about the right priorities and the maximum utilization of available resources. Thus it is simply not accurate – legally and morally – to claim that economic, social and cultural rights (ESCR) in the Bill of Rights is dangerous to the stability of the Government. Political leaders who reject economic, social and cultural rights (ESCR) on the ground of instant bankruptcy for the government either have not accurately read the

⁶⁶ Draft Constitution (2005)

⁶⁷ The challenge, (2006) volume No. 2. p.7.

full text and explanation for the Mung'omba Draft or are deceitfully running away from conscientious engagement with the demand for integral development supported by economic, social and cultural rights (ESCR).

The other objection to including economic, social and cultural rights (ESCR) in the new Constitution is that this revision of the current Bill of Rights will require a national referendum to approve the new Constitution as provided for under article 79 (3).⁶⁸ But surely, this is not a reasonable objection. The Constitution in the preamble begins with the sacred words “We the people” – so let the people endorse the new Bill of Rights and the entire new, constitution so that it truly is a people’s document, not a product of political manipulations which ends up denying the Zambian people of the much desired good life they deserve 44 years after independence.

Given the strong impact that economic, social and cultural rights have on integral human development, their inclusion in the new Bill of Rights in our new Zambian Constitution is necessary and indispensable step along the “path to development” in Zambia today.

The various scenarios highlighted in this chapter illustrate how human rights in Zambia have continued to be undermined. The human rights situation especially economic, social and cultural rights in the country still remains unsatisfactory despite Zambia being party to other international instruments providing for the same.

Some of the limiting factors to the enjoyment of both civil and political rights and social, economic rights include the high and increasing level of poverty in the country; limiting knowledge and awareness by the general public about specific rights, lack of domestication of major covenants, the cost and slow pace of judicial proceedings, disregard of citizens rights by law enforcement

⁶⁸ The Constitution, chapter 1 of the Laws of Zambia.

officials, especially the police in trying to get confessions and economic social and cultural factors. Being a state party to the major international and regional conventions, treaties and commitment; the onus is on the government to domesticate them into domestic law.⁶⁹ This would require political will. The government would do well to commit increased financial resources to the social sector to address challenges in health, employment and education. Human rights in their entirety form the bedrock of a democratic society and Zambia should not be seen to lag behind because, if human rights are not respected in any society, development cannot be achieved due to the fact that human rights contained in the Constitution form the basis upon which any government drives its developmental issues, and more especially the social, economic and cultural rights.

2.2 CONCLUSION

Despite having a Constitution in Zambia, which is supposed to safeguard the rights of the people and ensure that a decent standard of living is reached, the levels of poverty in the country are drastic and keep on rising at a rampant rate, hence it is necessary to examine whether the Constitution in its current state does not offer enough protection to safe guard the peoples rights to a decent standard of living. Furthermore, having in mind the current impotence of the constitution, the inclusion of economic, social and cultural rights in Part III of the constitution will definitely have a positive impact in uplifting the standards of living amongst the majority poor. Zambians who are continually being denied access to their share of national resources because of the constitutional order which has important rights, namely economic, social and cultural rights in a part which is weak and government cannot be taken to task for failure to fulfill rights contained in this weak part of the constitution.

⁶⁹ Saccord, Human Rights Report (2007) p.33

The foregoing discussion has endeavoured to show that the demand for the inclusion of economic, social and cultural rights in the Bill of Rights of the Zambian constitution is not a new experience. Efforts to have these rights in our constitution have in the past until now been part of the lobbying and advocating campaign as witnessed by peoples' submissions to the Mvunga Commission, and more extensively during the Mwanakatwe Commission and the current Mung'omba Commission under consideration in the National Constitutional Conference.

There must be willingness to change the status quo which continues to deny many Zambians an opportunity to fully develop in an environment that legally recognises respects, protects and assures a standard of living worthy of human dignity. There is simply no development without provision of economic, social and cultural rights.

In line with the above discussion, Chapter four will discuss the justification for the need to include economic, social and cultural rights and ways of enhancing them to ensure that they achieve the intended purpose and this will be done by looking at how these rights have been enforced and protected in other countries where they are enshrined in the Constitution under the Bill of Rights.

CHAPTER FOUR

Chapter four discusses the justification for the need to include economic social and cultural rights and ways of enhancing them to ensure that they achieve the intended purpose will be done by looking at how these rights have been enforced in other countries were they are enshrined in the constitution.

4.0 THE JUSTIFICATION FOR THE NEED TO INCLUDE SOCIAL ECONOMIC AND CULTURAL RIGHTS IN PART III OF THE CONSTITUTION

Incisive academic scholarship on the nature of human rights generally, and economic, social and cultural rights in particular, has effectively dispelled the fundamental misconceptions which informed the division of the rights contained in the Universal Declaration of Human Rights. It has been demonstrated that all rights, irrespective of their 'category' generate at least three levels of obligations, namely the duty to respect, protect and fulfill⁷⁰. Analysis of economic social and cultural Rights on the basis of this typology has served to elevate them from a precarious existence as 'social aspiration' into fully-fledged rights capable of adjudication by Judicial forums.

Similarly, the Limburg principles which were developed by experts, academics and practitioners in the field of human rights served to provide more clarity on the Covenant and are believed to reflect the present state of international law on the conception of economic, social and cultural rights.⁷¹

In a manner similar to the tri-partite typology of duties, the principles have confirmed that economic, social and cultural rights were not merely benevolent social programmes but rather

⁷⁰ EIDE A. (1987) The new Economic order and promotion of human Rights 39th session, UN DOC, E/CN.4/sub 2/1987/2

⁷¹ UN Commission on Human Rights, Limburg Principles, UN DOC. E/CN.4/1987/17 (1987).

justiciable rights,⁷² which states were required to ensure and protect, just like civil and political rights. Principle 8 declared that although the full realisation of the rights recognised in the covenant were to be attained progressively, the application of some rights can be made justiciable immediately while other rights become justiciable over time.

Limburg principles served as a point of departure for the Maastricht Guidelines on the Violation of Economic, Social and Cultural Rights.⁷³ The guidelines affirm the Justiciability of economic social and cultural rights and are designed to be of use to all who are concerned with understanding and determining violations of economic social and cultural rights and providing remedies thereto, in particular monitoring and adjudicating bodies at the national, regional and international level.

Thus the theoretical basis for according a weak supervision system to economic, social and cultural rights has been demonstrated as fallacious and that, consequently, economic, social and cultural rights require supervision mechanisms that are at least as effective as those accorded to civil and political rights since they too are justiciable rights.⁷⁴

4.1 INTRODUCTION

In the past years and up to now (2009) increasing deterioration in the economic, social and cultural infrastructure has been seen in Zambia. Due to this, the economic, social and cultural right had been almost non-existent as year in year out peoples living standards keep on going down. The economic climate leaves much to be desired. Unemployment levels have been on the increase. In addition, the few that have been lucky to be employed by foreign Investors have been subjected to

⁷² Limburg Principles, Ibid, at 122

⁷³ Maastricht Guidelines, adopted 26 January 1997.

⁷⁴ Zambia law Journal (2004). Critical Analysis of the International Supervision Mechanism of ESCR
Article by Tholes Kalme. P.11

ridicule and abuse by their employers and the global financial crisis has also made a number of people employed by the mines to lose jobs as for example, the closure of the Luanshya Copper Mines on the Copperbelt has seen more than one thousand five hundred (1500) workers lost their jobs. Food security has continued to dwindle and this situation has led to the rising of food prices beyond poor peoples reach. Government health and education institutions got no or little funding from government and this compromised the quality of services provided, for example the University of Zambia and Copperbelt University due to under funding were closed because Lecturers went on strike demanding better conditions of service. There has been an increase in the number of street children living on the streets, most of whom are orphans due to the HIV/AIDS pandemic. In a nutshell, it remains to be seen what development and improvement has been achieved during the past yeas in the economic, social and cultural arena.

In the absence of constitutional guarantee of the rights to livelihood and employment, clean and safe water, medical and health facilities, decent shelter, education and social benefits to the disabled, the aged and other disadvantaged persons, government does not feel obliged or compelled to fulfill them. Consequently, the development of the country is affected, and the poverty levels of the people keep on rising.⁷⁵

Government and other politicians argue that guaranteeing the social and economic rights in the constitution, making them justiciable, would make it expensive to run government. The argument is that government would become unpopular among its citizens. But Zambia is endowed with a lot of resources. What is lacking is the ability to translate those resources into national wealth, which would benefit the people of Zambia.

⁷⁵ Kabanda, S. (2007) Know Your Constitution. P. 119

The Republic Constitution needs to be categorical in guaranteeing human rights and compel government to promote them.

The above listed problems affecting the Zambian people require that the root causes are addressed. Should the constitution be divorced from being one of the root causes? Is it correct to state that government's priority is addressing poverty rather than addressing the constitution. The purpose of the government is to ensure that its citizens have what they need to live as human beings. This is what is meant by governance. And how is government supposed to govern? The government is supposed to be given guidelines on how it should govern and these are supposed to be reflected in the Constitution. The current constitution is disastrous in that it states that the rights to livelihood, employment, health, education, clean and safe water, decent shelter which are economic social and cultural rights are only rights in certain instances. The Constitution further states in article 111⁷⁶ that government cannot be held accountable if these are not fulfilled. For this reason government does not feel compelled to address them. It is therefore in the author's view that government's priority is not to address poverty when poverty has not been addressed in the context of the Constitution, which is supposed to reflect their aspirations.

4.2 DIRECTIVE PRINCIPLES OF STATE POLICY

The current Constitution places development issues under the Directive Principles of State policy. This is part IX of the Constitution, which contains Articles 110 to 113. It begins by stating that:

- (1) *“The Directive principles of state policy set out in this part guide the Executive, the Legislature and the Judiciary, as the case may be, in the:-*
- (a) development of national policies;*

⁷⁶ Chapter 1 of the Laws of Zambia or Zambia the Constitution.

- (b) *implementation of national policies;*
- (c) *making and enactment of laws; and*
- (d) *application of the Constitution and any other law”.*⁷⁷

It is this part of the Constitution which outlines aspects of what is meant by development. It gives guidelines on what government should endeavour to do in areas of national development. It states in part of article 112 as follows:

- (c) *The state shall endeavour to create conditions which all citizens shall be able to secure adequate means of livelihood and opportunity to obtain employment.*
- (d) *the state shall endeavour 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;*
- (e) *the state shall endeavour to provide equal and adequate educational opportunities in all fields and at all levels for all;*
- (f) *The state shall endeavour to provide to persons with disabilities, the aged and other disadvantaged persons such social benefits and amenities as are suitable to their needs and are just and equitable.*⁷⁸

The catchword in this provision is **endeavour**. To endeavour means to try, to attempt, to make an effort, to strive. And this is the inadequacy of the current constitution. It does not oblige government to implement or fulfill development programmes or projects. It does not compel government to satisfy the development needs of its people. It allows government to take a casual approach towards development. In fact, article 111 takes away from government the obligation to

⁷⁷ Article 110, Cap 1 of the Laws of Zambia

⁷⁸ Article 112 of the Constitution of Zambia.

fulfill the above. It takes away from people the means they can use to compel government to promote their development needs. It states as follows:

“The Directive principles of state policy set out in this part shall not be justiciable and shall not thereby, by themselves, despite being referred to as rights in certain instances, be legally enforceable in any court, tribunal or administrative institution or entity.”⁷⁹

It is now understandable in the authors view why government takes development issues casually. Government knows that the constitution has made the people powerless.

For our nation to attain the needed development, there is need for a Constitution that addresses the developmental issues outlined above in its Bill of Rights. There is need for a Constitution that does not refer to development issues as “**rights in certain instances**”. Zambia needs a constitution that recognises development issues as human rights at all times. When the development issues are outlined in the Bill of Rights, the government will be compelled to promote and fulfill them. A Bill of rights empowers people with measures to take when government is being casual about development, as provided in the following provision:

“If any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court”.⁸⁰

⁷⁹ Article 11 of the Constitution of Zambia.

⁸⁰ Article 28(1) of the Constitution of Zambia, Cap 1

What this provision means is that if the development issues of employment, health, water, education and other means of livelihood such as decent shelter and other social amenities for persons with disabilities, the aged and other disadvantaged people were part of the Bill of Rights, then people would have power to take government to court for its failure to fulfill them. It is therefore in the authors views that there is need for a constitution that would compel government to respond to the needs of its citizens. There is need for a constitution that would facilitate all round development. This is why the new constitution under debate in the National Constitutional Conference should come in place sooner than later with a broadened Bill of Rights encompassing economic social and cultural rights which are indispensable to sustainable development which is pro-poor oriented.

4.3 EFFECTIVE AND EQUITABLE IMPLEMENTTION OF ECONOMIC SOCIAL AND CULTURAL RIGHTS

Four things are provided for in the Draft Constitution so that economic, social and cultural rights may be effectively and equitably implemented.

- First, economic, social and cultural rights must be justiciable or legally enforceable (legal guarantees). That is they must be incorporated into the Bill of Rights so that citizens can actually claim them once denied or if state policies and/or actions do not show any indicators of progressive realization of these rights. Otherwise, why put rights in the Constitution that citizens are in effect denied the right to seek legal redress.
- Second, economic, social and cultural rights depend on progressive realization. Article 63 states that parliament shall enact legislation which provides measures which are reasonable in order to achieve the progressive realization of the economic social and cultural rights

referred to in Articles 65, 66, 67, 68, 69, 70 and 71.⁸¹ This means that two extremes should be avoided in the realisation of these rights. On one hand, indifference – that meagre resources are used as an excuse for the Government not taking any deliberate steps of their realization. On the other hand, **overnight realization** – that every Zambian shall automatically have immediate access to these rights in their fullest status simply by petitioning the courts for redress. From the provisions of the Draft Constitution the language is carefully used to emphasise that government must come up with measures to ensure enjoyment of these rights by the people and not to just excuse itself by saying that there is no money.

Thirdly, extend locus standi which determines the ability to go to court with a complainant. Article 86 of the Draft Constitution under economic, social and cultural rights states that:

“Where a person alleges that a provision of this part has been, is being or is likely to be contravened in relation to that person, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the constitutional court.”⁸²

Article 205 of the Draft Constitution also provides for the jurisdiction of the Constitutional court and states that:

- (i) *‘The Supreme and Constitutional Court, when sitting as the Constitutional Court, has original and final jurisdiction-*
 - (a) *In all matters of interpretation of this constitution;*

⁸¹ Mung’omba Draft Constitution (2005).

⁸² Mung’omba Draft Constitution (2005)

4.4 PRECEDENTS ZAMBIA CAN LEARN FROM

Serious comparative study of what is contained in various constitutions is vital in any Constitutional-making process. What kinds of economic social and cultural rights do the people have? How should they be formulated? What categories of rights need to be included and excluded. Since rights are not really for writing but for claiming, what kind of enforcement mechanism is needed.

Zambia can learn from precedents set by countries like South Africa. The South African Constitution contains economic social and cultural rights in the Bill of Rights and allows citizens to have legal redress for the protection of these rights. That is, it gives aggrieved citizen access to recourse through the courts of law.

Social, economic and cultural rights are justiciable under the South African Constitution just like civil and political rights. An application can, therefore, be made directly on one of the rights in question for instance the right to health, as was the case in **B and Others v Minister of Correctional Services**.⁸⁶ In this case, HIV positive prisoners claimed that they had a right to receive certain anti-viral medication at State expense. The court found that the Prison Department had not proved its inability to provide the anti-viral treatment due to lack of funds. The application was consequently granted with regard to two of the four applicants who had been prescribed the anti-viral treatment.

Another example is the case of **Despatch Municipality v Sunridge Estate and Development Corporation (Pty) Limited**.⁸⁷ This case was considered in the light of section 26(3) of the South

⁸⁶ (1997) 6 BCLR 789 (C) A SA 441

⁸⁷ (1997)8 BCLR 1023 (SA)

- (b) *To determine a question of violation of any provision of the Bill of Rights.*⁸³

Article 205(3) provides for public interest litigation and states that:

- (3) *“A person or group of persons who allege that:-*
- (a) *An Act of Parliament, a Bill of the National Assembly or any other law or anything done under the authority of any law: or*
- (b) *Any act of or omission by any person or group of persons or authority; is in consistence with or is in contravention of a provision of this constitution, may petition the Constitutional Court for a declaration to that effect, and for redress*⁸⁴

The current constitution lacks public interest litigation. This means that only a victim can legally petition the courts of law if their rights are infringed upon or denied. Extension of the **locus standi** will allow concerned citizens and/or associations who may not be individually or directly affected by the actions of the Government to nevertheless have the right to bring a complaint before the courts of law on behalf of those affected.

- Fourthly, establish a constitutional court (Legal redress). The most important instrument of vindication of human rights violations is the Judiciary. However, effective measures for vindication of such rights are lacking, human rights cannot be realistically enjoyed by individuals. The court must be ready to resolve human rights conflicts according to the law, whether this be through a special constitutional court or through the High Court.⁸⁵

⁸³ Ibid article 205.

⁸⁴ Article 205, Mung’omba Draft Constitution (2005)

⁸⁵ Mung’omba Draft Constitution (2005)

High court held that Section 3(b) of the Prevention of Illegal Squatting Act 1951 which permitted the summary demolition of unauthorized buildings or structures without a court order was in conflict with section 26(3) of the Constitution and accordingly, invalid. Using this enforcement mechanism, the courts therefore give 'hard protection' to the rights because their decisions are binding.

Economic, Social and Cultural Rights in the South African Constitution are regarded as rights of "**Progressive realization**", that is, they should be gradually realised. But different rights are formulated differently. For example, section 26 of the South African Constitution,⁸⁷ which provides for the right to housing and section 27, which provides for access to health care, food, water, and social security have been formulated in terms of the "**right of access**". This means that in order to realise these rights the "state must take reasonable legislative and other measures, within its available resources to achieve the progressive realization of each of these rights".⁸⁸ However, section 25 and 29, which provide for the right to property and the right to education respectively, are considered "**Full-blown**" unqualified rights.

From the provision above, especially the ones on the right to property and education, these rights are given an important status as it can be shown that they are called full-blown and unqualified rights due to their importance in the development of any country. They are supposed to be fulfilled no matter what by the government under the South African Constitution without any qualifications.

Julius Ihonubere, commenting on the importance of the right to education, links this right to the rights to "Freedom of Speech and Expression" and states that"

⁸⁷ Act Number 35 of 1997

⁸⁸ South African Constitution, Act No. 35 of 1997

“Freedom of speech and expression means nothing to a largely illiterate and ignorant society. The sure way to cure illiteracy and ignorance is by education. This then calls for good educational policies and physical infrastructure to ensure that as many people as possible get some formal education.”⁸⁹

The Zambian policy on education is theoretically impressive but practically, the situation leaves much to be desired. It acknowledges every persons right to education and beautiful commitment regarding the quality of education, accessibility and achievement of goals.⁹⁰ These well articulated policies means completely nothing given the numerous problems that the education sector is facing. Inadequate and heavily dilapidated school buildings, under staffing, inadequate budgetary allocation, over enrolment in the few schools available, poor conditions of service for teachers resulting in constant strikes and illegal stay away and many factors have all contributed to the falling standards in Zambia all because of the Constitutional order which does not take education as a priority but it is just a right in certain instances as stated in the Directive policies of state policies.

People who are well educated are enlightened and will have a better perception of issues; as a result, they are able to enjoy their rights. A case in point is where the Post Newspaper editor **Fred Mmembe and two others V the Speaker of the national Assembly and Attorney General**⁹¹. In this case the editor and the other journalists were sent to prison by Parliament. It is evident in this case that the plaintiffs were able to successfully challenge the decision of parliament to have them imprisoned because they had knowledge and therefore, power. Ultimately they were able to claim

⁸⁹ Julius Iholubere, “Undevelopment and human rights violations in Africa” In Shephard, G.W. and M. Anikpo (Eds) EMERGING HUMAN RIGHTS: The African Political and economy context (1972) p. 54.

⁹⁰ National policy on education. ‘Education for our Future,’ May 1996. pp(IX) and 2-5.

⁹¹ (1996) 1 LRC 584

their freedom of expression guaranteed in Article 20 of the Constitution. Had a similar thing happened to some illiterate persons, the freedom of expression would have been denied. The case of **Christine Mulundika and 7 others V the People**,⁹² involving unlawful assembly is another illustration of power of knowledge and its liberating effects. Section 5 of the public order Act⁹³ was successfully challenged as being unconstitutional because the people were enlightened and knew their rights.

Since 1996, when the new South African Constitution came into effect, at least four cases on social-economic rights have been brought before a specially established constitutional court. Out of these, the constitutional court has ruled in favour of the claimant of the rights, essentially ordering government to provide for these rights or to take “**reasonable measures**” towards realizing these rights. Two outstanding and frequently cited examples are: one, the October 2000 case of **Grootboom V Oosternberg Municipality and Others**⁹⁴. This dealt with housing and land rights as positive obligations. Homeless claimants argued that they had a right that the government was ignoring. As a remedy, the Constitutional Court ordered the state to provide relief for those desperate people who had not been catered for in the state housing programme.

The 2002 case of **Tac V the Minister of health**⁹⁵, dealing with health rights as positive obligations was brought before the Constitutional Court. The applicants sought to compel the South African government and its relevant agencies to provide anti-retroviral drugs, Nevira Pine or AZT to all - positive pregnant women in order to prevent mother to child HIV transmission. It was argued that confining the use of Nevirapine to research and training sites could not be regarded as reasonable and thus constituted a violation of the Constitutional right to access adequate health care. In its

⁹² (1996) 2 LRC 175.

⁹³ Cap 104 of the Laws of Zambia

⁹⁴ (2000) SA (CC)

⁹⁵ (2002) SA (CC)

judgement, the court noted that “while it is impossible to give everyone access to a “care” service immediately, the state’s policy not to make Nevirapine available at hospitals and clinics other than the research and training sites was unreasonable and therefore, fell short of meeting its obligation to devise and implement within its available resources a comprehensive and coordinated programme. As a remedy, the court ordered that the state act “without delay” to provide Nevirapine in public hospitals and clinics when this is medically indicated and to take reasonable measures for providing testing and counselling facilities”.

Another very important South African case on the provision of economic, social and cultural rights is the case of **South African V The Pharmaceutical Companies**⁹⁶ . In this case the respondents were ten in total namely: the President of the Republic of South Africa, Speaker of the National Assembly, chairperson of the National Council for Provinces, Minister of Health, Chairperson of the Select Committee on Social Services (Council of Provinces), Chairperson of Committee for Health of the Gauteng Province, and Registrar of Patents and the appellants were the Pharmaceutical Manufacturers Association of South Africa (PMA) and Forty-one Pharmaceutical companies, most of which were and still giant pharmaceutical players in the world.

Faced with an alarming increase of HIV cases among its population and prohibitive prices of life saving anti-retroviral drugs, the south African government tabled a Bill in Parliament in 1997 to amend the country’s Medicines and Related Substances Control Act of 1965 (hereinafter referred to as the Medicines Act)⁹⁷ with a view to giving the country a new drug policy which would facilitate availability of affordable medicines to the majority of South Africans. The government was looked at with concern not only by leading pharmaceutical companies within and outside South Africa but also by the US and European governments which saw the amendment bill as a

⁹⁶ (2001) SA 391 (CC)

⁹⁷ Act No. 1 of 1965

blatant violation of intellectual property rights under both domestic and international law. Enormous pressure was therefore exerted on the South African government to abandon the idea of amending the country's Medicines Act.

However, the South African government soldiered on with its Bill and on 31 October, 1997, parliament passed the Bill which was on 25 November 1997, assented to and signed by the then President Nelson Mandela. For the South African Parliament, passing the Bill was a Constitutional obligation. Article 27 of the Constitution of the Republic of South Africa of 1996 states that:

*“Everyone has the right to have access to health care services and no one may be refused emergency medical treatment. It obliges the state to take ‘reasonable legislative and other measures’ to achieve the progressive realization of the said right”.*⁹⁸

It is important to note that the Mandela government had in 1994 inherited a radically divided and unequal health sector. On the one hand, there was a private health sector catering, for only 20 per cent of the population but manned by highly paid medical personnel with advanced medical facilities and accounting for a staggering 80 percent of national spending on health. On the other hand, there was the public sector, where 80 percent of the national population sought care but accounted for only 20 percent of national spending.⁹⁹

It has been amply shown in the foregoing discussion that since the early 1990s, South Africa, like many other developing countries, has been facing a health crisis unprecedented in the country's

⁹⁸ Act No. 35 of 1997

⁹⁹ Zambia Law Journal volume 34 (2002) p. 131

long history. Thousands of its people, old and young, have been dying of AIDS. With this grim picture in mind, legislative measures taken by the South African government in order to save life through, inter alia use of affordable off-patent generic medicines, were both legitimate and rational. There is no trace of 'raw exercise of political power' but of a bona fide response to serve, in a legitimate governmental purpose:

The Constitutional Court in the case of **South Africa V Pharmaceutical Companies** further stated that the HIV/AIDS epidemic is a direct challenge to any serious government in office which has taken oath to uphold the Constitution with its concomitant guarantees of the people's entitlements. The South African Constitution under section 11 solemnly guarantees everyone right to life which the South African Constitutional Court has described as the most fundamental of all rights.

To underscore the sanctity of human life the south African Constitution further guarantees everyone in the country "the rights to have access to health care services"¹⁰⁰ and every child the right to 'basic health care services'.¹⁰¹ The responsibility to breath life into these constitutional guarantees rest, as usual, on the state to respect, protect, promote and fulfill in the Bill of Rights.¹⁰² Section 27 of the Constitution which the author has referred to above with regard to the right to health care services, is much more explicit in underlining state responsibility in realizing constitutionally guaranteed rights. It reads

*"The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."*¹⁰³

¹⁰⁰ Section 27(1)(a) of the Constitution South African

¹⁰¹ Section 28(1)(c)

¹⁰² The South African Bill of Rights runs from section 7 to section 39 of the Constitution.

¹⁰³ Section 27(2) of the South African Constitution.

The Constitutional Court stated that “it is against this background that we find the Ministers power under section 15C of the amended Medicine Act to be in order or rather legitimate and in the public interest. In fact the Mandela government, which took over the rights of government in 1993, was in continuous breach of the country’s constitution for failing to take reasonable legislative and other measures for three years since taking office and when thousands of its people were already dying of HIV/AIDS and associated infections for lack of medical care, a service constitutionally guaranteed.”¹⁰⁴

Making health care more accessible to South Africa’s poor, that is making it more affordable was not only a Constitutional duty on the part of the south African government but also an international obligation created by international treaties such as the Universal Declaration of Human Rights of 1948,¹⁰⁵ International Covenant on Economic, Social and Cultural Rights of 1966,¹⁰⁶ and Convention on the Rights of the child of 1989.¹⁰⁷

It is therefore, not really a matter of discrimination but of balancing individuals or exclusive rights against the general interests of the community. As Justice Chaiskalsan remarked at the Third Bram Fischer Lecture:

“Ours is an equal society and the Constitution recognises that positive action necessary to establish conditions in which there is not only equality of rights but also equality of dignity. To this end the constitution provides that the state must take action to achieve the progressive realisation of social economic rights to housing, health care, food, water and social security - government has to consider

¹⁰⁴ South Africa V Pharmaceutical Companies (2001) SA (a)

¹⁰⁵ Article 25(1) right to standard of living adequate for the health and well-being including medical care.

¹⁰⁶ Article 12(2)(d)

¹⁰⁷ 24(1)

not only the rights of the individual to live with dignity, but also the general interests of the community concerning the application of resources. Individualized justice may have to give way here to the general interests of the community”¹⁰⁸

As noted earlier, the legislative measures under discussion were not taken without compelling reasons. The alarming fast increase in the number of HIV infections and deaths, created an urgent health crisis which placed the South African government under a constitutional and international obligation to take bold measures with a view to containing an already worse situation.

It is appreciated that what is appropriate and practically possible in one country may not be necessarily be so in another country with different historic and economic background. In the light of this, it would be unreasonable to literally ‘transplant’ the South African experiences into the Zambian situation. However, on the reasons warranting the justiciability of social economic and cultural rights, there seems to be more similarities than differences. For instance, the provision of social services like medical services and shelter is needed in both countries. On the issue of resources, the fact that South Africa has a strong economy than Zambia cannot stand because each country should work within its own budget by using the resources available in that particular country. Therefore, the comparative aspect in terms of economic strength falls off. The argument that ESCR are resources based is also not a valid one because there are also some civil and political rights that need resources, for example the building of court rooms, training of judicial officers and police officers require money.

The other argument is the Zambian government case against the inclusion of ESCR in the Bill of Rights as justiciable rights is that some of these rights are provided for already in other parts of the

¹⁰⁸ Human Dignity as a Foundation Value of our constitutional Order; 16 South African Journal of Human Rights, 193, at 203, 204 (2000).

Constitution (other than Part IX) and are therefore enforceable. It is also argued that some of these ESCR are legally enforceable under separate pieces of legislation e.g Employment Act, cap 268, The Food Reserve Agency Act, cap 225, the Education Act, cap 134 and the Public Health Act cap 295 of the Laws of Zambia. These arguments notwithstanding it is submitted that (ESC) rights should be made directly enforceable in their own right just like civil and political rights. This will provide a much more direct way of accessing these rights and other pieces of legislation that provide for them can be alternative means of redress. Even for civil and political rights there are some that are protected by the Constitution and also provided for in other pieces of legislation for example the right to property under section 16 of the Constitution is also provided for under the Lands Acquisition Act, cap 189 of the Laws of Zambia.

CONCLUSION

It is clear that Zambia can learn several things from the South African precedents. The first is to put economic social and cultural rights (ESCRs) and remedies clearly in the Constitution. Then there is the need to broaden the legal definition of "locus standi" to include these categories of claimants: anyone acting in their own interest: anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of or in the interest of, a group of class of persons; anyone acting in the public interest and an association acting in the interest of its members. Moreover, the enforcement mechanism for economic social and cultural rights must be established by including within the judiciary a special Constitutional Court as proposed by the Mung'omba Draft Constitution and also as it is under the South African Constitution. It should always be remembered that these economic social and cultural rights are not to be realised overnight but, government should come up with measures to ensure that people's needs are met atleast within its means and not just sit without taking any measures in the pretence of not having money to do that. If there is a constitutional guarantee on what government should prioritise then

politicians and other people with access to the state machinery will be under a constitutional obligation to come up with measures to ensure that peoples rights are respected and promoted within government's means and this can only be done when people's rights are guaranteed in the bill of rights as it is under the South African Constitution.

5.0 CONCLUSION

The objective of this work has been to make a case for the inclusion of social, economic and cultural rights in the Bill of Rights of the Zambian Constitution and to explain how indispensable and inseparable these rights are in achieving development and poverty eradication. This is to the effect that a holistic approach to human rights should be adopted because all human rights form a mutually dependent whole and therefore having meaning only when taken together and hence in this respect, there cannot be development when some rights are given precedence or priority over others when in the normal sense all rights are equal. For example, the right to life protected under **Article 12 of the Constitution**, can only have meaning if people have equitable access to adequate health services, water, food and sanitation. Therefore simply, guaranteeing rights in the Constitution without putting in place corresponding measures to enhance the enjoyment of these rights the way it is for economic, social and cultural rights in Zambia is meaningless.

The question of resources and the nature of state parties obligations like Zambia to International Covenants and other instruments have been analysed to see if Zambia has lived up to international expectations. Zambia's performance as regards the issue of maximum use of available resources has been examined and results show that the country has fared very badly in terms of provision of (ESCR) as it is evident by the annual cases of cholera, floods even in urban areas such as Lusaka due to poor drainage provision and maintenance or non availability of these facilities due to failure by the government. This is more of a question of unwillingness as distinguished from inability to deliver as government has been able to spend huge chunks of resources on things which are of little benefit to the general welfare of its citizens such as improvement of salaries for government officials at the expense of the provision of essential facilities need for the poor populace and all this attest to the failure to live up to international obligations of maximum utilization of available resources.

Economic and Cultural rights are part of the recommendations under review in the NCC and hence these rights can still be included in the Bill of Rights to redress the situation.

5.1 RECOMMENDATIONS

In this work, the author has provided an overview of the importance of human rights and more specifically social economic and cultural rights in the development process and the status of these rights in the Constitution of Zambia currently. Critical rights such as the right to health, education, proper sanitation, water and housing have not been prioritised and secured as to make acceptable strides to ensuring enjoyment of human rights for all.

In view of the above discussion, the author makes the following policy recommendations as major initiatives that can and should be immediately undertaken:

5.1.1. POLICY RECOMMENDATIONS

- The country's development process should secure and enhance human rights, if its development strides are not only to be successful, but mostly if the development strides are to be meaningful to people. It should not put in place laws, regulations that violate, infringe or threaten people's rights. For example a dam development that reduces an individual's access to water is an infringement on the right to water. In such cases alternatives have to be provided so that people continue to enjoy their rights.

- **PUBLIC SENSITISATION**

A coordinated Civic Education Campaign should be launched by the government, Civil Society and the Church groups to help Zambian citizens understand the meaning of Economic, Social and Cultural rights and the necessity and possibility of including these rights in the new Constitution.

5.1.2. INSTITUTIONAL RECOMMENDATIONS

- The Human Rights Commission should undertake a study of how the Constitution can effectively include Economic, Social and Cultural rights and how a Constitutional Court can be established following the precedent, for example of South Africa and it should also be strengthened as an institution so that it can act as a proper check effectively on human rights violations and also have the ability to sensitize more people on human rights issues by having more branches in all districts.

5.1.3. LEGAL RECOMMENDATIONS

- **AMENDMENT OF THE BILL OF RIGHTS**

One way of ensuring that the Government responds to Social economic problems is to oblige it to do so under the Constitution. This calls for the amendment of the current Bill of Rights to make sure that economic, social and cultural right are legally enforceable in the courts of law like the way these rights are protected under the South African Constitution. So the challenge lies both on the citizens and law makers to fight for these rights and this will be made easier considering the fact that the National Constitutional Conference is sitting and these rights are amongst the recommendations in the Mung'omba Draft Constitution being debated in the National Constitutional Conference.

- The National Constitutional Conference must intelligently debate the meaning and consequences of inclusion or non-inclusion of economic, social and cultural rights in the Bill of Rights.

- The Bill of Rights must clearly incorporate economic, social and cultural rights with all attendant clauses of justiciability, progressive realisation, locus standi and Constitutional court.

- **REFERUNDUM**

The Government should firmly commit itself to a referendum, in order to include economic, social and cultural rights in the Bill of Rights of the new Constitution as these rights are very important in that they directly affect or are everyday experiences of people and hence indispensable to development. And so a national Referendum must be mandated to give popular approval to this important improvement in the Bill of Rights.

- **NEED FOR THE GOVERNMENT TO BE PROACTIVE**

The full realisation of economic, social and cultural rights needs government participation and government has to be in full control of all development issues in form of providing an enabling environment for citizens to fully realise their potential. For these rights to work the government should take positive measures and should no longer confine itself to the duty not to interfere but should be at the center of making things work. The government should be under constitutional obligations to implement such programmes and policies which are beneficial to the general populace and citizens should also have a right to stop implementation of policies and laws that are not beneficial to them, and hence the inclusion of economic, social and cultural rights in the new Bill of Rights in the new Constitution must be a top priority for the Constitutional reform currently being undertaken by the National Constitutional Conference.

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