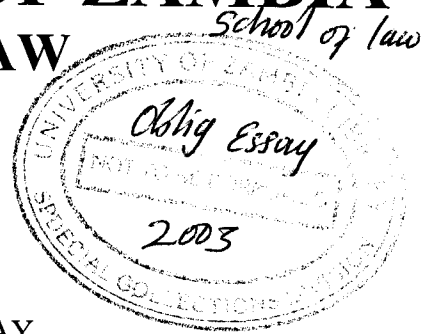




# THE UNIVERSITY OF ZAMBIA

## SCHOOL OF LAW



L410 OBLIGATORY ESSAY

The Justiciability of the Rights to Education: A challenge to the Zambian Legal System

By  
Moses Chitambala  
97184144

This thesis is submitted in partial fulfillment of the award of a Bachelor of Laws Degree (LLB) in the School of Law at the University of Zambia.

October 2003



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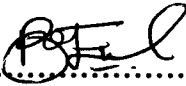
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## DECLARATION

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Date: 20/11/03.....

## **DEDICATIONS**

I dedicate every part of this work to my parents **MARY LUMBONGO ZHINGA** and **PICKSON SINKANKA CHITAMBALA**. The difficulties under which I was brought up and the endless hurdles my mother had to face to send me to school have inspired my desire in this area of the law and instilled in me a feeling of duty to contribute to a just Zambian society in which all people, rich and poor, will have equal access to education.

I also dedicate this work to my father (1934-2002) who in the last days of his life was my main source of strength. Unfortunately, he never lived long enough to see this work completed. May His Soul Rest In Eternal Peace.

## ACKNOWLEDGEMENTS

First and foremost, I wish to express my profound and heartfelt gratitude to my Supervisor, **Mr. Enock Mulembe** whose cherished guidance has been crucial to the whole process of producing this work. May it be stated here that I feel greatly privileged to have selected him as my Supervisor. I would like to express my sincere gratitude for his invaluable support. May the Almighty God abundantly bless him.

My sincere thanks go to my friends, **Joseph Milner Katolo** and **Chewe Katongo Bwalya** whose support has been of great assistance in the production of this work.

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Finally I would like to express my appreciation to the Ministry of Education especially **Mr. J. Mumbula**, friends and relatives whose support has been my pillar throughout the production of this work.

## TABLE OF ACRONYMS

ACRWC	African Charter for Rights and Welfare of the Child.
Afronet	Inter- African Network of Human Rights and Development
ECOSOC	Economic and Social Council
GDP	Gross Domestic Product
HIV/AIDS	Human Immuno-deficiency Virus / Acquired Immuno-deficiency Syndrome
ICESCR	International covenant on Economic, Social and Cultural Rights
IMF	International Monetary Fund
MAPODE	Movement of Community Action for the Prevention and Protection of Young People Against Poverty, Destitution Disease and Exploitation
MMD	Movement for Multi-Party Democracy
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations International Children` s Emergency Fund
UNIP	United National Independence Party
UNZA	University of Zambia

## **TABLE OF STATUTES**

African Charter on African and People's Rights

African Charter on the Rights and Welfare of the Child

Constitution of Zambia

Convention on the Rights of the Child

Education Act

Education Bill (2000).

International Covenant on Economic Social and Cultural Rights

The Juveniles Act

The Universal Declaration of Human Rights



2.4.1	Under International Law	13
2.4.2	Under Municipal Law	14
<b>CHAPTER 3</b>		<b>16</b>
<b>3.0</b>	<b>JUSTICIABILITY OF THE RIGHT TO EDUCATION</b>	<b>16</b>
3.1	Extent of enjoyment of the Right to Education in Zambia	17
3.2	The Role of Education in Society	20
3.3	Is there need for the ‘Justiciability’ of the Right to Education in Zambia	23
3.4	Justification for the Justiciability of the Right to Education	25
3.4.1	Obligations under International Law	25
3.4.2	Need for Justiciability Under Domestic Law	28
<b>CHAPTER 4</b>		<b>31</b>
<b>4.0</b>	<b>THE PRACTICABILITY OF THE ENFORCEABLE GUARANTEE OF THE RIGHT TO EDUCATION</b>	<b>31</b>
4.1	Elements of a Guaranteed Right to Education	31
4.1.1	Free Basic Education	31
4.1.2	Language Instruction	32
4.1.3	Academic Freedom	34
4.1.4	Civil and Political Rights	34
4.1.5	Economic, Social and Cultural Rights	38
4.2	State Obligations	38
4.2.1	Provision of School Places	39
4.2.2	Provision of Learning Materials	42
4.3	Fiscal Factors Affecting the Right to Education	44

4.3.1	Budgeting Allocations	45
4.3.2	Problems of Intra Sectoral Expenditure	48
4.4	Practicability of Constitutional Guarantee of the Right to Education	50
<b>CHAPTER 5</b>		<b>53</b>
<b>5.0</b>	<b>RECOMMENDATIONS AND CONCLUSION</b>	<b>53</b>
5.1	Recommendations	53
5.2	Changes Under International Law	54
5.3	Constitutional Guarantees	54
5.4	Legislative Changes	55
5.5	Administrative and Policy Adjustments	57
5.6	Conclusion	58
Bibliography		60
Appendix A		62

# CHAPTER I

## 1.0 INTRODUCTION

### 1.1 General Background to the Right to Education

The level of the education socialisation of its citizens can to a large extent measure the extent of a country's level of development. Education raises awareness of an individual's human nature and acts as a driving force for its complete realisation. In this view, the vital role of education as a factor of socialisation need not be underestimated.

The realisation of a country's economic, socio-cultural and political objectives is crucially influenced by education. Relationships between individuals in a country as well as international intercourse between and among different countries of the world based on the enjoyment of rights of states thrive mostly in instances where the citizens of a country are able to benefit from the state's provision of certain basic social services like education. In return such individuals are then able to contribute towards the fulfilment of state obligations towards other countries.

Though fundamental in importance, the provision of education has not been prioritised in most developing countries. A Colombian peasant mother expressing her hopes for her children and her belief in education as a way to a better life once said:

'I would have liked the children to study a lot so that they wouldn't have to live a life as hard as ours, but the economic situation makes it impossible; they have to go to work.'<sup>1</sup>

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<sup>1</sup> Sarah Graham-Brown; **Education in the Developing World**, New York. Addison Wesley Longman; p.1, (1991).

This is the plight of many people in developing or third world countries. According to World Bank and United Nations Educational, Scientific and Cultural Organization (UNESCO) estimates there are over 150 million children worldwide between the ages of six and eleven who are not at school. Over 90% of these children live in the poorest countries, and 60% of them are girls.<sup>2</sup> UNESCO further estimates literacy levels in Zambia to be at about 33.1% of the total population.<sup>3</sup> This implies that about 66.9% of the Zambian people are illiterate.

In view of the illiteracy levels in third world countries Sarah Graham-Brown observes that:

'In many of the villages, refugee camps and shantytowns of Africa, Latin America and Asia, children are not at school. Significant numbers have to work to survive, as farm labourers, as street vendors, as prostitutes. For many, there is no school to go to.'<sup>4</sup>

## **1.2 Arrangement of Chapters**

Against this background, this thesis provides a critical analysis of the provision of education by the Zambian government and its enjoyment as a human right by the people of Zambia. In this direction, the dissertation will provide an illustration and assess the factors that constitute the right to education in Zambia. This background consideration will mainly focus on the period since the re-introduction of multi-party politics in Zambia in 1991.

In view of advocating for change in legislation and policy factors that govern the enjoyment of the right to education, the thesis will provide justification for the

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<sup>2</sup> Ibid

<sup>3</sup> UNESCO Data; 2002

<sup>4</sup> Op-cit.

constitutional guarantee of the right to education. While intricately assessing the law governing the enjoyment of the right to education both at international and domestic levels, the discourse shall endeavour to provide case study illustration of the protection of the right to education in other developing countries.

In justifying the practicability of the justiciable guarantee of the right to education, this thesis will show how this goal can be attained through the budgetary prioritisation of the right and allocation of realistic resources in that regard. This can be made possible by the reduction of resource allocation to unnecessary expenditures of government.

In the final analysis, progressive recommendations in view of legislative and policy changes will be made in order to help promote the guarantee of the right to education, a necessity for sustainable economic development and the creation of a viable and potentially practical human rights culture.

The issues raised above will be analysed one after another proceeding with the definition of the right to education as a mode of socialisation and also placing it in its human rights context.

## CHAPTER 2

### 2.0 DEFINITION OF EDUCATION

#### 2.1 GENERAL

The parameters covered by education as a discipline are so wide that it is difficult for scholars to provide a single and comprehensive definition. However, attempts have been made by some of the scholars to define or at least describe education. Thus, Carter V. Good defines 'education' as, "the aggregate of all the processes by means of which a person develops abilities, attitudes, and other forms of behaviour of positive value in the society in which he lives."<sup>5</sup>

In this view, education is perceived as including all communication of knowledge and the shaping of values, an aspect that makes it synonymous with socialisation. Quiet apart from the aggregate factors constituting socialisation, education has been understood to refer to the acquisition of formal skills necessary for the exploitation of human potentials.

In this context, Good provides the definition of education as:

'The social process by which people are subjected to the influence of a selected and controlled environment (especially that of the school) so that they may attain social competence and optimum individual development.'<sup>6</sup>

Taken as such, formal education prepares an individual for the transition from the confined but diffuse relationships of the family to the more impersonal and diversified relationship of the larger society. In a more broader context, education whether formal or informal appeals to the holistic aspects of an individual human being. In view of this

Henry Campbell Black asserts that:

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<sup>5</sup> Carter V. Good (ed.); **Dictionary of Education** (3<sup>rd</sup> ed.); New York. McGraw-Hill Books Co. p.203 (1973);

<sup>6</sup> Ibid

‘Education comprehends not merely the instruction received at school or college, but the whole course of training, moral, intellectual, and physical. It may be particularly directed to either the mental, moral or physical powers and faculties, but in its broadest and best sense it relates to them all.’<sup>7</sup>

From a social perspective, education attends to the more complex demands of individuals comprehensively. Arguably, the social nature of education accounts for its fundamental role and indispensability as a human right.

## 2.2 Education as a Human Right

Human rights by their very nature are inherent in human beings. They are not given to human beings by any law but are possessed by virtue of the human nature. Scholars have defined the term ‘human rights’ variably. According to F.E. Dowrick:

‘Human rights are those claims made by men, for themselves or on behalf of other men, supported by some theory which concentrates on the humanity of man, on man as a human being, a member of the human kind...’

Henkin succinctly defines human rights as, those liberties, immunities, and benefits which by acceptable contemporary values, all human beings should be able to claim as of right of the society in which they live.’<sup>8</sup>

In their recognition, human rights have been stratified into three categories consisting of the first generation in which are found civil and political rights, the second generation consisting economic, social and cultural rights. The third generation, consists of rights also referred to as group rights. Rights found in this category include, the right to development, self-determination. The right to education is considered an economic, social and cultural right. These are rights to which both the international community as

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<sup>7</sup> Henry Campbell; **Black Black’s law Dictionary** (4<sup>th</sup> ed.) St. Paul Minnesota. West Publishing Co.; p.604 (1968);

<sup>8</sup> Oji Umzurike **The African Charter**; pp: 3-4 (1997);

well as states have developed an attitude of non-immediate guarantee. Phillip Alston and Gerard Quinn put their view that:

‘The concept of economic, social and cultural rights has long generated controversy among philosophers, as indeed has the very notion of human rights itself. From a legal perspective however, this controversy should have been laid to rest by the adoption in 1966 of the ICESCR by the UN General Assembly. ... Nevertheless, the debate remains as it ever was in the days when the international community had yet to recognize formally the legitimacy of economic, social and cultural rights....’<sup>9</sup>

It is therefore the human rights context of education that has generated concerns regarding its non-protection. When referring to the vitality of education in society, it is the human right aspect of it that is being appealed to.

### **2.3 THE LEGAL FRAMEWORK OF THE RIGHT TO EDUCATION**

The right to education is recognised both at international and municipal levels. To this effect it is contained in various conventions, statutes and policy documents.

#### **2.3.1 The International Legal Framework of the Right**

The right to education, which is widely recognised at the international level, is contained in a number of binding and non-binding instruments. Essentially, the instruments originate from two sources. The first of these is the United Nations treaty system and the second one is the bundle of instruments adopted by UNESCO, a specialised agency of the United Nations.

Pursuant to the United Nations treaty system a number of treaties have been adopted which provide for the right to education, either generally or more specifically with regard to the rights of vulnerable groups to education or the right to non-discrimination with

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<sup>9</sup> F. Newman and D. Weissbrodt (eds.); **International Human Rights: Law, Policy and Process**. P. 51 (1958)

regard to education. These treaties by their nature create bodies called committees, which have the responsibility of monitoring the implementation of rights in the treaties that create them. Arguably, the importance of the right to education has assumed new levels in the international community. Lawrence V. Mashava thus observes:

‘In addition to the monitoring bodies, an important development with regard to the right to education took place in 1998 with the appointment of the United Nations special Rapporteur on the Right to Education.’<sup>10</sup>

The role of the rapporteur is, *inter alia*, to report on the current status throughout the world of the progressive realisation of the right to education, including access to primary education as well as the problems encountered in the implementation of this right.

Since its establishment in 1945, the role of UNESCO in promoting the right to education can be deduced from one of its most fundamental tenets. In view of this, its constitution provides that UNESCO aims, ‘to contribute to peace and security by promoting collaboration among nations through education, science and culture.’<sup>11</sup>

UNESCO focuses mainly on programmes that endeavour to eliminate illiteracy and has to this effect organised a number of regional educational conferences in addition to the adoption of several instruments dealing with the right to education.

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<sup>10</sup> L.V. Mashava (edt.); **A Compilation of Essential Documents on the Rights to Education**, Vol. 2; p.2 (2000).

<sup>11</sup> Article 1(1) of UNESCO Constitution

### 2.3.1.1 Specific International Instruments Recognising the Right Education Generally

Imre Szabo asserts that, 'the 1948, December 10, Universal Declaration of Human Rights (UDHR) was the first international instrument to lay down the right to education.'<sup>12</sup>

Article 26 of the UDHR is therefore the first provision to assert international recognition of the right to education. It provides that:

'Everyone has the right to education. Education shall be free at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be accessible to all on the basis of merit.'<sup>13</sup>

Unlike the UDHR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), which was adopted in 1966, provides for a more comprehensive and detailed content of the right to education. In particular, the guarantee provisions of the right to education are under Articles 13 and 14 of the covenant. Article 13 of the ICESCR is essentially similar to the provisions relating to the right to education under the UDHR. It provides a structure as regards state responsibility in view of the different levels of education. Article 14 of the Covenant applies only to those states, which do not provide free and compulsory education within their territorial jurisdiction. In essence the provisions of Article 14 provide an undertaking that within two years of becoming a party, the state will adopt a detailed plan of action for the progressive implementation of the principle of compulsory education free of charge for all.

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<sup>12</sup> Imre Szabo; **Cultural Rights**; p.35 (1974).

<sup>13</sup> Universal Declaration of Human Rights, 1948

The most recent international instrument dealing with the right to education is the United Nations World Declaration on Education for All (1990). This declaration concerns itself with issues that are intricate and more basic to the right to education. The Economic and Social Council (ECOSOC) created a Committee on Economic Social and Cultural Rights whose primary responsibility is to monitor state obligations under the ICESCR. This Committee was created under an ECOSOC resolution in 1985. It is not established by the Covenant. Therefore, in addition to the general international statutes, the committee has issued a number of general comments, which attempt to explicitly elaborate state obligations as regards the rights contained in the covenant.

One of the most important general comments issued by the Committee on Economic Social and Cultural Rights is “General comment No. 3.” In this comment the general terms defining the obligation of state parties as espoused under Article 2(1) of the covenant are given their contextual meaning. Thus, such terms used as “to the maximum of available resources”, “achieving progressively the full realisation of the rights” and “all appropriate means” are explained to clearly spell out state responsibilities. Further to this, the Committee issued General Comment No. 11 of 1999 which was a comment on substantive issues arising in the implementation of the ICESCR: Plans of action for primary education (Article 14). The main purpose of the General Comment is expressed in Article 8 of the comment. It provides:

‘The state party is required to adopt a plan of action within two years. This must be interpreted as meaning within two years of the covenant’s entry into force of the state concerned, or within two years of a subsequent change in circumstances has led to the non-observance of the relevant obligation. This obligation is a continuing one and states parties to which the provision is relevant by virtue of the prevailing situation are not absolved from obligation as a result of their past failure to act within the two-year limit....’<sup>14</sup>

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<sup>14</sup> 10<sup>th</sup> May 1999

General Comment No. 11 requires states parties, which have not secured compulsory primary education to draw up a detailed plan of action to achieve this goal within a reasonable number of years. More recently, the Committee on Economic, Social and Cultural Rights issued General Comment No. 13 which deals in detail with the fundamental issues arising from Article 13 of the ICESCR. Substantially, General Comment No. 13 lays out the intricate factors that should govern the realisation of the right to education under Article 13(2) of the convention.

Arguably, the ICESCR provides the main framework within which the people of Zambia can assert their right to education at the international level.

The right to education for children is also contained in the Convention on the Rights of the Child. Particularly, Article 28 of this convention contains rigorous and very extensive provisions with regard to the progressive realisation of the right of a child to education.

The right to education is also enumerated in various human rights instruments within Africa. Article 17(1) of the African Charter on Human and People's Rights expressly guarantees every individual's right to education. As regards children, Article 11 of the African Charter on the Rights and Welfare of the Child provides for the right to education of the child. The ACRWC clearly spells out the purpose of education, guidelines to as well as duties of states parties with regard to the effective realisation of the child's right to education.

### **2.3.2 The National Legal Framework of the Right to Education**

The extent to which education could be argued to be a right enjoyed in Zambia is provided by a tripartite legal structure. Flowing from its obligations under international law, the Zambian government 'recognises' the right to education under the constitution, under an Act of Parliament and as government policy.

#### **2.3.2.1 The Right to Education Under the Zambian Constitution**

Under the Zambian Constitution, the fundamental rights and freedoms that are justiciably guaranteed are contained in the 'Bill of Rights'.<sup>15</sup> All the rights and freedoms in this part of the Constitution are civil and political rights. The attitude of non-constitutional guarantee of economic, social and cultural rights characteristic of the international community seems entrenched in the Zambian human rights system. The analogy of the right to education in Zambia is contained under Article 112(e) of Part IX of the Constitution of Zambia. It provides, "(e) the state shall endeavour to provide equal and adequate educational opportunities in all fields and at all levels for all."<sup>16</sup>

In view of the above constitutional provision, the obligation of the Zambian government to provide education is not one, which is binding on the state.

#### **2.3.2.2 The Policy Framework of Education in Zambia**

To this effect the provision of education in Zambia has been based on education policy programmes designed by the government in power at a particular time.

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<sup>15</sup> Part III of the Constitution of Zambia

<sup>16</sup> Cap 1 of the Laws of Zambia

The first major educational policy document to have been created by the Zambian government was the Education Reforms of 1977, the second such document was Focus on Learning in 1992. Educating our Future, which is the national policy programme currently in operation, was produced in 1996. Accordingly:

“Education Reform emphasised on education as an instrument for personal and national development, while Focus on Learning stressed the mobilization on resources for the development of school education.”<sup>17</sup>

Educating Our Future on the other hand:

‘addresses the entire field of formal institutional education, paying particular attention to democratisation, decentralization and productivity on one hand, and curriculum relevance, diversification, efficient and cost-effective management, capacity building, cost-sharing and revitalization partnership on the other.’<sup>18</sup>

These policy documents are an expression of intent and have no force of law. They are only guidelines to government. The above educational policies cannot therefore enable an individual to claim the right to education against the state.

### **2.3.2.3 The Right to Education under the Education Act**

The right to education is also enumerated in a number of Acts of Parliament. Other than statutes stipulating the provision of education to vulnerable categories of people such as the Juveniles Act, Chapter 53 of the Laws of Zambia, the Education Act, Chapter 134 deals mainly with education management structures, creates school Boards and provides for discipline mechanisms and does not in any way deal with the substantive issues relating to the right to education.

Currently there is “*the Education Bill*” of 2000 which is intended to repeal and replace the Education Act. This bill attempts to expressly recognise education as a fundamental human right. To this effect, it provides that:

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<sup>17</sup> National Policy on Education, p.ix, (1996).

<sup>18</sup> Ibid

‘Notwithstanding anything to the contrary, contained in any other law, but subject to the provisions of this Act and the constitution, every child in Zambia shall have the right to school education without discrimination on any grounds.’<sup>19</sup>

The Education Bill also endeavours to reaffirm the commitment of the Zambian government in promoting the progressive realisation of the right to education through legislative measures. A clear manifestation of the intention of government in this regard is expressed within the provisions of the Bill to the effect that, ‘every child of school going age in Zambia shall have access to nine years of universal basic education free of tuition in a basic school of parental choice.’<sup>20</sup>

## **2.4 The Effectiveness of Guarantees for the Right to Education at International and National Levels**

### **2.4.1 Under International Law**

On the international plane, the right to education, like other economic, social and cultural rights, is a product of progressive realisation. The ICESCR thus provides that:

‘Each state party to the present covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present covenant...’<sup>21</sup>

There is in effect no obligation on the part of the government to provide constitutional guarantee for the right to education. One of the binding obligation under the United Nations treaty system states parties have is that pursuant to Article 13(2)(a) of the ICESCR. It provides that:

‘The state parties to the present covenant recognise that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all...’

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<sup>19</sup> Paragraph 10(1), **Education Bill**, 2000

<sup>20</sup> Paragraph 11, **Education Bill**, 2000

<sup>21</sup> Article 2(1) of ICESCR, 1966

Having entered a reservation against Article 13(2)(a) of the ICESCR, the Zambian government is not bound by the requirements of its provision. When acceding to the ICESCR on 10<sup>th</sup> April 1984, the Zambian government entered a reservation against Article 13(2)(a) which reads as follows:

‘The government of the Republic of Zambia states that it reserves the right to postpone the application of Article 13(2)(a) of the Covenant, in so far as it relates to primary education; since, while the Government of the Republic of Zambia fully accepts the principles embodied in the same Article and undertakes to take the necessary steps to apply them in their entirety, the problems of implementation and particularly the financial implications, are such that full application, an of the principles in question cannot be guaranteed at this stage.’<sup>22</sup>

The Zambian government is therefore under no obligation to draw up a programme of action to provide even basic education with consequent sanctions. Thus far, the enjoyment of the right to education by the people of Zambia under international instruments is subject to the political will of government.

#### **2.4.2 Under Municipal Law**

Under municipal law, the right to education is not a guaranteed right at all. The Constitution as regards the ‘Directive Principles of State Policy’ provides that:

‘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.’<sup>23</sup>

The features that characterise the right to education in Zambia stem from its status in the constitution. There is, therefore, no law in Zambia that affirms the international acclaim that education has and continues to be received as a matter of right. The Education Act, which was supposed to define the parameters of government responsibility in providing education, concerns itself largely with education management and administration. The

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<sup>22</sup> United Nations Treaties - Zambia

<sup>23</sup> Article 111 of the Constitution Cap 1 of the Laws of Zambia

Education Bill (2000), which is proposed to repeal and replace the existing Act, remains to be seen if it will be able to assert the right to education as one of the most fundamental human rights. The Bill moreover has two hurdles to surmount.

First, there is the question of whether or not it will be adopted by Parliament before it can become law. Secondly, there remains the issue of how its 'right recognising' provisions would be reconciled with the constitutional position of non-justiciability.

Like the other mechanisms, the system of state policy programmes relating to the right to education have not enhanced the enjoyment of the right to education. The failure of the policy system is evident from the high illiteracy levels in Zambia which currently stand at 69.9% of the national population.<sup>24</sup>

## **CONCLUSION**

The compounding effect of the problems presented by the legal framework of the right to education necessitates the need to completely transform the statutory framework within which the right is to be enjoyed by the people of Zambia. Thus, it could be argued that the most effective means of ensuring enjoyment of rights in the country is through legal enforceability or justiciability.

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<sup>24</sup> Supra, Note 3

## CHAPTER 3

### 3.0 JUSTICIABILITY OF THE RIGHT TO EDUCATION

L.B. Curzon defines 'justiciability' as the appropriateness of a subject for examination by the state.<sup>25</sup>

A subject is therefore justiciable if there is a legal provision empowering a court of law or any other judicial body to conduct a legal investigation thereby establishing liability. Geoffrey Marshall stressing the role of judicial inquiry in the application of the concept of 'justiciability' opined that, 'when openly used in its appraising sense, then justiciability refers to the aptness of a question for judicial solution.'<sup>26</sup>

Justiciability presupposes the existence of a law according powers of judicial inquiry. Defining a judicial inquiry Justice Holmes said it is, 'one which investigates declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.'<sup>27</sup>

As stated in the previous chapter, the right to education, as a social right is non-justiciable. Thus as observed in the Zambia Human Rights Report:

'All these provisions notwithstanding, the right to education under these international human rights instruments is not justiciable, that is, one cannot bring a suit against the government or local authority or even a parent or guardian for failing to place a child in school.'<sup>28</sup>

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<sup>25</sup> L.B. Curzon; **Dictionary of Law** (5<sup>th</sup> ed.); Financial Times Professional Limited; p.210, (1998);

<sup>26</sup> Geoffrey Marshall; "Justiciability" in **Oxford Essays in Jurisprudence** by A.G. Guest (ed.) . Oxford University Press, p.269 (1961)

<sup>27</sup> **Prentis V. Atlantic Coastlines Co**

<sup>28</sup> **Zambia Human Rights Report**; p.70 (2002)

The constitution, which is the supreme law of the land, makes the right to education, a non-justiciable right. This is against a background of high illiteracy levels in the country since independence. It is prudent to analyse the extent of enjoyment of the right to education in Zambia under the above mentioned policy documents.

### 3.1 Extent of Enjoyment of the Right to Education in Zambia

Before independence education facilities were not readily and widely available for the large native population compared with their white counterparts. Andrew Roberts thus observes:

‘Education, indeed, was one field in which Federal policies affected all Africans, whether villagers, mine workers, or other wage earners. Where as European education was a Federal responsibility, African education was a territorial responsibility, and it duly suffered from Northern Rhodesia’s unequal share in Federal wealth. There was certainly a real effort at progress; between 1953 and 1960, the proportion of government revenue devoted to African education was doubled, and the financial gulf between the European and African systems was much reduced. But even in the latter year ten times as much was spent on education for each white child in school’<sup>29</sup>.

Owing to the above situation, there were very few educated Zambians at independence in 1964 to fill important positions of responsibility in government. John M. Mwanakatwe, asserts that Kenneth Kaunda said:

‘Less than a thousand young men and women with school certificate, less than a hundred who had been to university that was the extent of our supply of educated Zambian man power at mid-night October 23<sup>rd</sup> (1964), the moment of our independence.’<sup>30</sup>

After independence, there was a vigorous education policy by the government of the First Republic. There was a political necessity as most indigenous Zambians demanded for employment opportunities they were promised as a benefit of independence. In view of this, there was a massive investment in the education sector, which resulted in the

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<sup>29</sup> A. Roberts; **A History of Zambia**; Suffolk. The Chanser Press, p.218, (1976).

<sup>30</sup> J.M. Mwanakatwe; **End of Kaunda Era**: Lusaka. Multi Media, Zambia. P.15 (1994).

\* See Appendix A

construction of several schools at all levels of the education system. There was, however, no legal framework to govern such educational programmes. This contributed to the inconsistencies in government expenditure for the education sector. Sarah Graham-Brown provides a graphical representation of the inconsistent and continuously reduced expenditure to the education sector for teachers' salaries, general expenses and teaching materials. \*

The 1991 constitutional amendments only made the right to education as one of the Directive Principles of State Policy. Providing a summary of the recommendations of the Mvunga Constitutional Review Commission, Mwanakatwe says:

'The Commission was of the view that the new Zambian constitution should introduce directive principles of state policy to deal with matters relating to issues such as rights to, and provision of facilities in areas such as economic, social security and welfare, a living wage for workers, right to education and recognition of the family unit.'<sup>31</sup>

The Mvunga Commission was determined to advise the government to ensure that when the new constitution came into existence, these economic, social and cultural rights including, the right to education, were non-justiciable. Mwanakatwe states:

'The Commission was emphatic that these rights or Directive Principles of State Policy should not be justiciable i.e. they should not be enforceable in a court of law. These Directive Principles would be there to serve as a constant reminder to the government of its wider obligation to its people.'<sup>32</sup>

The activities of the Mvunga Constitutional Review Commission, therefore, act as the entry point of the right to education into the Zambian constitution.

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<sup>31</sup> J.M. Mwanakatwe; **End of Kaunda Era**; Lusaka. Multimedia Zambia; p.211. (1994).

<sup>32</sup> Ibid

Thus far, the provision of education by the government during the Third Republic relied more on policy programmes than on legal provision. This inadequate legal arrangement coupled with the increasing cost of education led to the continuous deplorableness of educational standards in the country. The problems that arose range from low enrolment levels, inadequate or lack of facilities and low staffing levels in schools. The effects of non-constitutional guarantee of the right to education are well captured by the Inter-African Network for Human Rights and Development (Afronet) in its annual publication:

‘Education, like health has suffered from reductions in public spending. Primary school enrolment declined from 96% in 1996 to 86% in 1997 and only a third of primary school leavers enter secondary education. The introduction of user fees has turned away many children of school going age because their guardians cannot afford to pay. Figures from the 1990 Census show that about 55% of children of school-going age in rural areas were not in school, while the corresponding figures for urban areas stood at 28%.<sup>33</sup>

The problems associated with the right to education in Zambia run through the whole structure of the education systems that is, from elementary school to university level. In this line, Afronet reports that:

‘In 2002 a total of 410,521 children applied to be enrolled in grade 1. Of these 211,130 were boys and 199,391 were girls. Only 302,242 actually found places and enrolled leaving out a total of 108,279 applicants.<sup>34</sup>

Afronet further reports that:

‘Roughly, 1.77million children are enrolled in grades 1 to 7. It is estimated that 30% of children in the school going age (7) are not in school. It is estimated that in 2001 about 620,000 school-going age children were not in school. In 2001 only 152,132 were enrolled out of a total population 342,355 aged 7, which meant that 55.6% were not enrolled.<sup>35</sup>

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<sup>33</sup> **Zambia Human Rights Report**; p.38; (1997).

<sup>34</sup> **Zambia Human Rights Report**; p.71 (2002)

<sup>35</sup> Ibid

Besides problems of enrolment, there seem to be perennial issues of dilapidated or unavailable infrastructure and poor conditions members of staff in the sector. In view of this, it has been argued that:

‘For those who are fortunate to be in school, the quality of education they are getting is compromised by overcrowding, dilapidated infrastructure and low morale among teachers due to poor conditions of service.’<sup>36</sup>

The introduction of community schools has helped reduce the problems of inadequate places. Afronet asserts that, ‘Community schools have grown in numbers considerably from 28 in 1996 to 1,149 in 2001 and enrolment has increased from 6,600 in 1996 to 140,000 in 2001.’<sup>37</sup>

Due to their nature and capacity these community schools can only play a complementary role. The government education system, which is supposed to be the main provider of education, does not seem to live up to its increasing demands.

The attention given to education by the government and the legal framework within which the right is being enjoyed does not reflect the importance attached to education and the fundamental role it plays in fostering a human rights culture and catalysing comprehensive development.

### **3.2 The Role of Education in Society**

Education has various roles to play in society. It forms the bedrock upon which all other human rights are based. Imre Szabo also observes that:

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<sup>36</sup> **Zambia Human Rights Report**, p.39 (1997)

<sup>37</sup> **Zambia Human Rights Report**, p.72 (2002)

'Among the tasks and purposes a reference to furthering the enforcement of human rights, peace and friendship among all nations bears out the extra ordinary importance attributable to education with regard to the world's future.'<sup>38</sup>

Arguably education is fundamental to all the facets of human activity. Gould asserts that:

'In each of Mabogunje's four conceptualizations of development' as economic growth, as modernization, as distributive justice, as socio-economic transformation – education has a role.'<sup>39</sup>

Education is an indispensable factor in the realization of an individual's potentials and necessary for the attainment of the societal goal of development. In view of this role of education Gould points out that, 'it is seen by governments and individuals as a key vehicle to increase national and individual incomes and bring economic growth.'<sup>40</sup>

In order that development could be attained the factors influencing development should be considered as interdependent and as making a collective effort to bring about economic development. Moses Moskowitz argues:

'The theoretical and practical error of regarding development in exclusively economic terms was the subject of a series of studies prepared by UN bodies and independent experts. The studies emphasizes that economic development, industrialization and scientific and technological progress could be efficiently undertaken in an anachronistic social structure amid an antiquated system of agricultural and industrial production, and a society where workers and their families were illiterate, ill-fed, ill-housed and afflicted with disease; also that economic growth required a favourable social, psychological and cultural atmosphere, which could be brought about only by social reforms, measures to improve health, education and training and institutional and structural changes, aimed at social equity and the full development of the human potential.'<sup>41</sup>

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<sup>38</sup> I. Szabo **Cultural Rights**; Budapest. Akademic Kaido, p.36 (1974).

<sup>39</sup> W.T.S. Gould; **People and Education in the Third World**; Essex, Longman Group; p.3 (1993).

<sup>40</sup> Ibid

<sup>41</sup> M. Moskowitz; **International Concern with Human Rights**; New York. Oceania Publications Inc. p.150, (1974)

Human society is dynamic. As society progresses the norms and values change so as to cope with the changing trends. Zambia being a third world country is striving to stimulate economic growth. Education provides a reliable channel through which economic growth of a country can be achieved. Gould asserts that, 'It is a major force for social change and modernization of attitudes, values and economic and social behaviour.'<sup>42</sup>

Education influences the quality of a country's population. The term 'quality' is used in economic terms to imply better standards of living and increases in life opportunities.

Gould's view is that:

'Throughout the third world an individual's level of education is a major criterion for his or her life style, career opportunity and life chances generally. Those who are wealthy and have secure and well-paid careers and a high 'quality of life', by most objective measures tend to be those with some education.'<sup>43</sup>

Those who are poor, in low paid or insecure jobs, inadequate housing and poor health tend to be those with little education. It has however been argued that in most underdeveloped countries education does not usually provide the benefits that result from its acquisition. Gould asserts:

'Yet even there, with the balance of opportunity heavily loaded against the urban poor and rural people in general, the demand for an education that can facilitate but cannot guarantee escape from the economic struggles and social indignities of the javela and the rural slum is all too evident.'<sup>44</sup>

Education thus provides an individual with economic, social and political emancipation; it should therefore be viewed as an investment and not merely an expenditure of national resources. Gould argues that:

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<sup>42</sup> W.T.S. Gould; **People and Education in the Third World**; Essex, Longman Group, p.13. (1993)

<sup>43</sup> Ibid, p.15

<sup>44</sup> Ibid; p.18

With the growth of the human resources school, after Schultz (1981) amongst others, education has been taken very much as an instrument in human capital with long term benefits both to the individual who is educated and to the public at large.<sup>45</sup>

The advancement of science and technology therefore makes it necessary for a country to have an educated population in order to enjoy the benefits of human evolution. The position has been that:

‘An education population is necessary for an increasingly complex technology, with more specialized and highly trained man power needed to undertake a widening range of increasingly sophisticated tasks.’<sup>46</sup>

Moses Moskowitz further points out that:

‘To survive and compete in the competitive world in the 21<sup>st</sup> century, Africa will require not only literate and numerous citizens, but also highly qualified and trained people to perform top quality research, formulate policies, and implement programmes essential to economic growth and development.’<sup>47</sup>

Government expenditure on education is critical to the achievement of the much-needed supply of skilled manpower; therefore this expenditure is premised on the benefits to the economy and the increased potential for modern production brought by education.

To this effect education is vital for the realization of an individual’s potentials as well as those of the greater society. However, in order to activate the benefits flowing from education, it is submitted that it is imperative for the legal system to provide a suitable legal framework for the assertion of the right to education. This therefore raises the issue of justiciability.

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<sup>45</sup>Op-cit.

<sup>46</sup>Ibid, p.20

<sup>47</sup>M. Moskowitz; **International Concern with Human Rights**; New York. Oceania Pub. Inc.p.187 (1974)

### 3.3 Is there need for ‘Justiciability’ of the right to education in Zambia?

Arguably, individuals in a particular jurisdiction can only be said to enjoy rights if the legal system operating at a particular time provides an environment within which people are able to effectively claim those rights. Philip Alston and Gerald Quinn assert the view that; ‘... the formal justiciability of a right is an indispensable element.’<sup>48</sup>

The above position is premised on the principle that there has to be a remedy available to a person who suffers injury or harm or whose position is negatively altered as a consequence of another person’s violation of his or her right. A legal system is therefore expected to provide legal remedies for violation of human rights. In view of this Alston and Quinn argue that:

‘Thus for Kelsen “the essential element (of a right) is the legal power bestowed upon the individual by the legal order, to bring about, by a law suit, the execution of a sanction as a reaction against the non-fulfillment of the obligation.”<sup>49</sup>

In Zambia, like many other countries, the right to education stems from a background of non-justiciability. This is mainly due to the view taken from the inception of economic, social and cultural rights generally. It is important to analyse whether or not there is any justification for the justiciability of the right to education in Zambia.

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<sup>48</sup> P. Alston and G. Quinn: The Nature and Scope of states parties’ Obligations Under the International Convention on Economic Social and Cultural Rights’, in F. Newman and D. Weissbrodt; **International Human Right Law, Policy and Process**; Cincinnati. Anderson Publishing Co., p. 54(1996)

<sup>49</sup> Ibid

### 3.4. Justification for the Justiciability of the Right to Education

#### 3.4.1 Obligations under International Law

Zambia, like other members of the international community has an obligation to honour rights, which fall under international instruments, which it has ratified or acceded to. Being a state party to the ICESCR, Zambia has an obligation to ensure protection of the right to education, which is guaranteed under Articles 13 and 14 of the covenant.

Manfred Nowak asserts:

‘According to contemporary human rights theory, these provisions create corresponding state obligations to fulfil the right to education by means of positive action. As required by Articles 2(1) of ICESCR, Article 28 f the CRC and Article 1 of the Protocol to San Salvador these obligations are defined only as ‘progressive obligations’, that is each state party undertakes to take steps ‘to the maximum of its available resources, with a view to achieving progressively the full realization of the rights concerned.’<sup>50</sup>

While Zambia is bound by its obligations under the ICESCR pursuant to international law, it is difficult to establish its liability as it has made certain a reservation applying to Article 13(2) of the ICESCR.

Additionally the enforcement mechanisms under international law are not by themselves effective in providing remedies for breach of the right to education.

For countries that have not attained the stage of providing free and compulsory primary education, Article 14 of the ICESCR makes it obligatory for such countries to adopt a plan of action in view of a progressive realization of the right to education. It is difficult

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<sup>50</sup>M.Nowak, The Right to Education, in A.Eide et.al.(eds);**Economic, Social and Cultural Rights**; Dordrecht.Martinus Nijhoff;p.199(1995)

to assess the level of state party compliance with obligations under international law.

Nowak observes:

‘At first glance a state with a high illiteracy rate or a low primary enrolment ratio or which maintains a system of fees for primary education does not seem to comply with its obligations to fulfill the required minimum standards of the right to education.’<sup>51</sup>

Under such circumstances, there is a clear proof of violation if the state concerned has not taken steps to the maximum available resources to provide free and compulsory education. Problems arising out of the non-fulfilment of state obligations under international instruments require the use of reliable indicators to resolve. As regards the right to education, Katarina Tomatsevski argues convincingly that, ‘one important objective or indicators is to dissociate unwillingness, that is lack of commitment, from incapacity.’<sup>52</sup>

In considering whether Zambia as a state party to ICESCR has fulfilled its obligations under the covenant, it is pertinent to analyse documented trends indicating measures taken by the government in promoting the realization of the right to education. Manfred

Nowak asserts that:

‘In the field of education typical indicators to be applied in a cross temporal perspective are for example, literacy rates, primary, secondary and tertiary enrolment ratios, completion and drop-outs rates, primary pupil ratio or public expenditures for example, for military purposes.’<sup>53</sup>

Within the Zambian context, the decline in the provision of education can be descended from statistics provided by the Ministry of Education. It is for instance asserted that:

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<sup>51</sup> Ibid; p.200

<sup>52</sup> Ibid

<sup>53</sup> Op.cit.

'Indicative of the decline in demand is the growing number who leave school voluntarily before completing lower and middle basic education. Overall, only 79% of those who entered Grade 1 in 1988 reached Grade 7 in 1994.'<sup>54</sup>

This trend, which mostly affects girls than boys, is a clear manifestation of the non-fulfilment of obligations under international law by the Zambian government.

Among the main shortcoming of state obligations with regard to the right to education under international law, relate to enforcement and availability of remedies.

It is therefore been pointed out that:

'International human rights law is not directly applicable in most human rights treaties (with the exception of those guaranteed within the International Labour Organisation) have been adopted without procedural mechanisms for International litigation of economic, social and cultural rights or the rights of a child.'<sup>55</sup>

Arguably, the existence of an effective domestic legal environment is a pre-condition to the effective realization of the right to education.

It is submitted that international monitoring mechanisms have a very peripheral role to play in the actual realization of the right to education like many other economic, social and cultural rights. It has therefore been stated that, 'international monitoring including reporting and complaints procedure are always complementary in relation to the domestic protection of human rights.'<sup>56</sup>

More importantly, the status of human rights in a country is determined by the mechanism used by that country to adopt international law. Zambia being dualistic, the

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<sup>54</sup> **National Policy on Education**; p.17 (1996)

<sup>55</sup> Annual Report of the Special Rapporteur on the Rights to Education. UNESCO  
[www.right-to-education.org](http://www.right-to-education.org)

<sup>56</sup> Ibid

measures under this system could be applied to further the protection of the right to education. This is not however reflective of the current position as there is no specific legislation domesticating international law provisions regarding the right to education.

To this effect, Nowak opines that:

‘The monistic obligations of a state as part of domestic law or the system of incorporation through a specific Act of parliament establishing domestic legal validity and applicability greatly assist in making a treaty provision justiciable on the domestic plane.’<sup>57</sup>

An effective domestic legal system is therefore an indispensable component of the enjoyment of the right to education.

### **3.4.2 Need for Justiciability under domestic law**

Arguably the most effective form of protecting individual rights and freedoms is through constitutional guarantee. Where rights and freedoms are constitutionally guaranteed, such rights can be asserted against the state if violated. It has been asserted that,

‘One component emphasizing the role of international instruments and international monitoring mechanisms in relation to economic, social and cultural rights is the fact that in some countries the constitutional protection of these rights remains underdeveloped in relation to the many other rights also covered by international human rights treaties.’<sup>58</sup>

The case of Zambia is reflective of the above position. The right to education in Zambia can only be enjoyed in its context as a ‘Directive Principle of State Policy.’ This therefore implies that if a child of school going age is denied a school place, neither the school nor the local authority is under an obligation to give reasons for their refusal.

The argument advanced for non-constitutional guarantee of the right to education among other economic social and cultural rights in Zambia is the non-availability of resources.

Contrary to this, Nowak argues that,

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<sup>57</sup> Supra, Note 50 at p.379

<sup>58</sup> Ibid.

'In general, however, the lack of economic resources alone cannot be invoked as a justification if the actual minimum core content of the right to education is not guaranteed for a continuing period of time.'<sup>59</sup>

Although Zambia stands among the poorest countries of the world, this fact should not be used as a buffer against the responsibility of the state to secure the minimum contents of the right to education, which is a requisite to the actual realization of other human rights, individual as well as national development. Viewed from a country perspective, certain countries whose economic position is similar to that of Zambia have made efforts to provide constitutional safeguards for the right to education. A proximate instance is Malawi. The constitution of the Republic of Malawi provides that,

'The state shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals:

- (f) Education: To provide adequate resources to the education sector and devise programmes in order to
  - (i) Eliminate illiteracy in Malawi
  - (ii) Made primary education compulsory and free to all citizens of Malawi
  - (iii) Offer greater access to higher learning and continuing education,'<sup>60</sup>

Though not exhaustive, the above constitutional provision enables the people of Malawi to claim education as a matter of right. In Zambia however the high poverty levels, unemployment and the impact of the HIV/AIDS pandemic makes it difficult for ordinary Zambians to afford taking their children to school at a fee. In addition, the free basic education policy being championed by the Movement for Multi-party Democracy (MMD) government is not backed by any legislation and therefore cannot be relied on as a source of guarantee of the right to education. As earlier stated, the current Education Act does not recognize education as a right. Nowak asserts that,

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<sup>59</sup> Ibid, p.200

<sup>60</sup> Article 13 of the Malawian Constitution

'Ordinary Acts of Parliament regularly include provisions on these rights, often formulated as individual or 'subjective' rights and supported by the availability of remedies.'<sup>61</sup>

In view of the above, there seem to be need for the justiciability of the right to education. Education plays a pivotal role in the realization of other human rights and the individual potential of all human beings. It is therefore desirable that the right to education be provided with the status of a guaranteed right. With constitutional and legislative safeguards in place, the levels of illiteracy identified with poor education systems will be greatly reduced. On a national scale, such changes will enhance economic development. It is further argued that constitutional and legislative guarantee of the right to education need to be clearly defined so as to make certain the parameters of state responsibility.

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<sup>61</sup> M. Nowak; 'The Right to Education', in A. Eide et.al. (eds.); **Economic, social and cultural Rights**; Dordrecht; Martinus Nijhoff; p.379 (1995)

## CHAPTER 4

### 4.0 THE PRACTICABILITY OF ENFORCEABLE GUARANTEE OF THE RIGHT TO EDUCATION

In developed as well as developing countries, investment in education can be very costly. The provision of the minimum requirements of the right to education by a country should be considered within the economic abilities of the country under consideration.

#### 4.1 Elements of a guaranteed right to education

Arguably, there are certain requisites necessary for the justiciable guarantee of the right to education. These include the following:

##### 4.1.1 Free basic education

Most countries in the world, both rich and poor, have taken effective legal steps to guarantee basic education. It is therefore universally acknowledged that elementary education is a fundamental human right, which is supposed to be enjoyed by all deserving citizens of a country. The definition of free education has been a subject of consideration of many domestic courts. As observed by the Special Rapporteur on the Right to Education,

'The meaning of free education was examined by the constitutional court of the Czech Republic upon a demand upon the state to provide text books and teaching materials free of charge. The court has clarified that "free" means that in primary education the state bears the cost of establishing schools, their operation and maintenance, and should not demand tuition, adding; the state bears the essential part of these costs, however, it is not obliged to bear all of them.'<sup>62</sup>

The above judicial interpretation of the right to education means it is to be enjoyed without having to pay for the cost of tuition. By implication, the responsibilities of the

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<sup>62</sup> [www.right-to-education.org](http://www.right-to-education.org)

beneficiaries of a free education system are limited to provision of facilities incidental to the learning process. These would include such requirements as school uniforms and shoes. In a depressed economic environment like Zambia there is need to even allow children to attend school without uniform when it is established that such children cannot afford the cost of school requirements.

Free primary education is therefore the bedrock of a sustainable right to education. In view of this Imire Szabo asserts that; 'the safeguard of the right to education is basically effected through the introduction of free, compulsory, unified elementary schooling.'<sup>63</sup>

A legally protected right to basic education is thus an indispensable element of a guaranteed right to education in Zambia.

#### **4.1.2 Language instruction**

Language is one of the crucial aspects of socialization. Since education is a socialization process, language plays a valuable role as a medium of transmitting ideas from one generation to another. Without reservation, language is one of the factors that have to be taken into account when ensuring a constitutional guarantee of the right to education.

Zambia like many other countries in sub-Saharan Africa has many tribes. The number of tribes in Zambia has been estimated to be 73. None of these languages could be considered to have attained the status of a national language. In order to ease communication in business and government activity, it was decided that English be the

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<sup>63</sup> Imire Szabo; **Cultural Rights**; Budapest. Akademiai Kiado; p. 222(1972)

official language of Zambia. In this regard, the constitution of Zambia expressly provides that, 'The official language of Zambia shall be English.'<sup>64</sup>

In terms of language, the Zambian education system is based on a dual system of language instruction. English and one of the seven main local languages are used as media of instruction. This implies that most of the children in schools have these main local languages imposed on them. This deprives them of an opportunity to learn and advance their knowledge in their mother languages. Arguably this would constitute a fundamental violation of the group rights of certain individuals. Szabo thus argues that,

'The unified nature of this schooling means that children belonging to nationalities study in their mother tongues (these mean in the main, the appearances of the citizens' right to equality.'<sup>65</sup>

Some international organizations have defended the idea of reduced instruction in local languages for economic reasons. Katarina Tomasevski says that,

World Bank guidance has emphasized a profitable trade in textbooks and need to carefully assess the cost of providing materials in minority languages. The yardstick for such assessment could and should in the special rapporteur's view be a commitment to preserve the linguistic richness (not to say wealth) of humanity, or to promote minority and indigenous rights, not merely profitability.'<sup>66</sup>

It is therefore imperative that learning in local languages is promoted as this may also help in reducing the very high failure rates at all levels of the education system. The Ministry of Education has thus observed that,

'The fact that initial reading skills are taught in and through a language that is unfamiliar to the majority of children is believed to be a major contributory factor to the backwardness in reading shown by many Zambian children. It is also a major factor in fostering rote learning, since from the outset the child has difficulties in associating the printed forms of words with their real, underlying meaning.

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<sup>64</sup> Article I (5) of Chapter 1 of the Laws of Zambia

<sup>65</sup> Ibid

<sup>66</sup> Report of the Special Rapporteur, Katarina Tomasevski, 2003

On the other hand, there is strong evidence that children learn literacy skills more easily and successfully through their mother-tongue, and subsequently they are able to transfer these skills quickly and with ease to English or another language.<sup>67</sup>

There is need for more emphasis of local language learning especially at the elementary level of education as this enhances comprehension in the second language.

#### **4.1.3 Academic Freedom**

There is need for teachers and pupils, lecturers and students to operate in an environment that promotes academic freedom. This is the only way in which these members of the educational system will be able to realize their potentials in society. The creation of a viable academic environment entails the full recognition of the human rights and fundamental freedoms that characterize a learning environment. Tomasevski observes that,

'The global commitment to the quality of education entails the elimination of obstacles to teaching and learning and this in turn requires the full recognition of the rights of other learners and their teachers.'<sup>68</sup>

civil and political rights as well Academic freedom thrives in an atmosphere where individuals' economic, social and cultural rights are respected.

#### **4.1.4 Civil and Political Rights**

In the Zambian context, the civil and political rights enjoyable by teachers and their students are those within Part III of the Constitution of Zambia. These fundamental rights and freedoms include, inter alia, freedom of assembly and association, freedom of conscience, freedom of speech, right to legal representation, freedom from discrimination. The above rights and freedoms are indispensable to the assertion of an

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<sup>67</sup> National Education Policy; p.49 (1996)

<sup>68</sup> Op.cit

individual's potentialities in society. Objectively, they enable teachers to adequately discharge their duties and also provide a suitable learning environment for students.

Practically the group realization of fundamental rights and freedoms of teachers and students alike seems far-fetched. Particular instance include refusal by the law enforcement authorities to allow teachers and students alike to air their grievances over issues that affect their activities in the education system. In Zambia the desire by teachers to assemble for purposes of advancing their cause has been thwarted mainly due to the maladministration of Public Order law by the law enforcement officers. This has resulted in forceful responses by the law enforcement agencies to any attempt by teachers to express their grievances. As observed by Afronet,

'Attempts to protest poor conditions of service were met with force by the state. A case in point is the teachers' demonstrations, which were twice broken up in riot police using tear gas. First on 15<sup>th</sup> October, over 500 striking teachers stormed the Ministry of Education headquarters in support of demands to review their conditions of service. They demanded to be addressed by the Minister and his Permanent Secretary, who both refused, and took off. Riot police were called in to disperse the angry teachers. Tear gas was used even though the teachers were not violent.'<sup>69</sup>

This is a manifestation of the extent to which teachers can claim to enjoy civil and political rights by virtue of their profession.

The case is worse for pupils and students who are mostly on the receiving end of any dispute between teachers and lecturers on one hand and the government on the other. Most attempts by pupils and students to express themselves or to assert their guaranteed freedom of assembly and association has been met by forceful responses by law enforcing agents. A situation in point is case No. 8 of the Zambia Human Rights Report, 1998. It is reported that, in June 1998, 100 Chinsali Girls' secondary school pupils were

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<sup>69</sup> **Zambia Human Rights Report**; p.82(1998)

held in police custody for close to a week. Their detention followed a protest by pupils over the teachers' strike.<sup>70</sup>

At higher learning institutions problems arising from non-observance of students' civil and political rights have been persistent. In one instance, it is reported that,

'In October 1998, students at the Ukwimi Trades Training Institute in Petauke staged a peaceful demonstration over poor school management, poor diet and lack of teachers, learning resources and water supply.'<sup>71</sup>

At higher institution of learning, disrespect for fundamental rights and freedoms has had retrogressive effects on the academic calendars of these institutions. An instance in this regard is the University of Zambia which has been closed down on several occasions and over long periods of time due to issues arising from non-observance of civil and political rights of the members of the university community especially students. A case in particular was the massive torture, subjection of several students to inhuman, degrading, and any like treatment, which occurred on 29<sup>th</sup> August 2000 at the Great East Road Campus of the University of Zambia. The event of the above date even led to the closure of the university.<sup>72</sup> In 1997, the University of Zambia was closed for almost a year as a result of demands by students for the payment of K280, 000.00 promised by government as book allowance.<sup>73</sup> Such kind of situations make the learning process very difficult. The African Commission on Human and People's Rights has adjudicated upon a similar

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<sup>70</sup> **Zambia Human Rights Report** (1998); p.82

<sup>71</sup> Op. cit

<sup>72</sup> **Post News Paper**, 30<sup>th</sup> August, 2000

<sup>73</sup> **Post News Paper**, 13<sup>th</sup> March, 1997

case from the Democratic Republic of Congo (the Zaire). In the case of the **World Organisation Against Torture, Lawyers Committee for Human Rights, Jehovah Witnesses of Zaire, Union Interafricaine des Droits de l'Homme et des Libertés v. Zaire**,<sup>74</sup>

'The African Commission found that the closure of universities violated the right to education as recognized in Article 17 of the African Charter on Human and People's Rights.'

The above illustrations demonstrate that the various interest groups in the educational system are considered more as objects of the system rather than active subjects. The government does not seem to take into account the political capabilities of these interest groups and the potential influence they have on society. W.T.S. Gould observes,

'The political role of schools is greatest at secondary and higher levels, where not only are the institutions prestigious and command more resources, but the students are politically aware and politically active.'<sup>75</sup>

Promotion of the fundamental rights and freedoms of interest groups in the education system is a necessary step in achieving a universal human rights culture. In particular, the observance of the rights and freedoms of teachers is a catalyst for human rights education. The Special Rapporteur on the Right to Education thus asserts, 'it is a truism that teachers whose rights are denied cannot be expected to effectively teach human rights.'<sup>76</sup>

Civil and political rights are a fundamental necessity to the justiciable guarantee of the right to education in Zambia though their effectiveness can only be measured out in the context of economic, social and cultural rights.

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<sup>74</sup> 25/89, 47/90, 56/91 and 100/93

<sup>75</sup> Supra, Foot note No.45, at p.133.

<sup>76</sup> Report of the Special Rapporteur on Education submitted on 19/4/03

### 4.1.5 Economic, Social and Cultural Rights

In order for the right to education to be sustainably guaranteed, there is need for the protection of other economic, social and cultural rights whose guarantee is a pre-requisite to the effective enjoyment of the right to education. Under this generation of rights, one of concern to teachers and lecturers alike is that relating to their conditions of employment. In view of this Article 7 of the ICESCR provides that,

‘The state parties to the present covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) remuneration, which provides all workers, as a minimum, with:
  - (i) fair wages and equal remuneration for work of equal value without destruction of any kind,
  - (ii) a decent living for themselves and their families.’<sup>77</sup>

In Zambia, the continuous acts of protests and work stoppages by teachers and lecturers is a manifestation of the government’s disregard of the economic, social and cultural rights of lecturers and teachers. Afronet observes,

‘In June 1995, average earnings of government employees, including teachers, were about K72, 760 per month which is about a half of the estimated living wage for Lusaka. It is therefore, not surprising that the teaching service has and continues to experience a mass exodus of staff... At UNZA, over 2000 lecturers have also left for greener pastures.’<sup>78</sup>

This trend has continued into the 21<sup>st</sup> Century.

## 4.2 State Obligations

Under international human rights law, there is emphasis on the duties of the state as regards the right to education. Other than the duty to foster a human rights culture in learning institutions the state is duty bound to guarantee facilities fundamental to the realization of the right to education such as *inter alia* school places, learning materials and financial resources.

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<sup>77</sup> Article 7 (a)(i)(ii) of ICESCR, 1966

<sup>78</sup> **Zambia Human Rights Report**, p.39 (1997).

#### 4.2.1 Provision of school places

Arguably, the availability of school places for beneficiaries of a defined age forms the bedrock of the right to education. In **R v. Inner London Education Authority. Ex parte Ali**,<sup>79</sup> the duty of the local education authority to secure sufficient places at school for all children within the compulsory school age was not fully implemented and 300 children were deprived of primary education because of a shortage of teachers. The court held that, ‘the authority had done whatever was in its powers to rectify the situation and was thus not in breach of its statutory duty.’

The state therefore has the responsibility to provide school places to eligible children in doing so it has to be guided by the principle of gender equality. Ramadane Babadji asserts that,

‘It goes without saying that this obligation weighs as heavily on the states when they directly organize access to education in public schools as well demand as in minimum standards to be respected by the private schools...’<sup>80</sup>

In Zambia, the shortage of school places for school going children in the primary and secondary schools has largely contributed to the high level of school dropouts and even non-enrolment. As has been observed, ‘In 1994 there were 3,715 government schools in Zambia with a total enrolment of 1,507,660 pupils in lower and middle basic classes.’<sup>81</sup>

While this translated into statistics of an average 400 pupils for each school the differences in the population density of rural and urban areas meant that while there did

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<sup>79</sup> [1990]C.O.D. 317, [1990]2 A.L.R. 822 at 828

<sup>80</sup> J. Henaire and Babadji **The Right to Education**, EIP, 5-6 (2000);

<sup>81</sup> **National Policy on Education**; p.14 (1996);

not seem to be any pressure on schools in rural areas, the direct opposite was the case for urban areas faced with migration problems. In view of this, it has been pointed out that,

‘The number of classes stood at 40,671, giving a national average class size of 37. The national figure masks considerable regional variations, ranging from classes of 45 as the norm in Lusaka province to 30 in North-western Province.’<sup>82</sup>

The insufficiency of school places and their uneven distribution relative to the population has played a role in streetism in urban areas. It has thus been observed that,

‘In urban areas and in certain more developed parts of the country, there are not enough school places to meet all the demands. This unsatisfied is particularly serious in Lusaka and the Copperbelt. Lower and middle basic schools in Lusaka have rooms for less than two-thirds of the eligible children. This inability of the schools to absorb all the eligible children aggravates urban youth problems, especially those relating to street children.’<sup>83</sup>

The incomplete nature of most rural schools also presents problems. It has been noted that,

‘In rural areas, the supply of school places typically exceeds demand in Grades 1-4, but since some rural schools are ‘incomplete,’ ending at Grade 4, there are not always enough places for rural children to proceed into Grades 5-7.’<sup>84</sup>

The government of the Republic of Zambia has made some effort in the direction of resolving this problem. In the Budget Address of 2003, the former Minister of Finance, Emmanuel Kasonde said, ‘regarding secondary schools, I am proposing K9billion to build new schools at Itezhi-tezhi, Kaputa and Mufumbwe.’<sup>85</sup>

In 1999, the then Minister of Finance and Economic Development, Edith Z, Nawakwi said,

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<sup>82</sup> Ibid; at p.15

<sup>83</sup> Ibid; p.15

<sup>84</sup> Ibid

<sup>85</sup> **Zambia Daily Mail**, Saturday, February 1, 2003, Vol. No. 28, p.11

'The MMD government recognizes that improving the quality of education and training, and ensuring access to educational facilities are vital preconditions for raising productivity reducing poverty and achieving sustainable growth. In this regard, the government will vigorously pursue the Basic Education sub-sector Investment Programme (BESSIP). The two key targets of BESSIP are to increase enrolment in lower and middle basic education by 4% annually...'<sup>86</sup>

However, even if the government seems to show concern, the solutions are only peace meal in nature in that they do not significantly address the problems of enrolment. As observed by Mr. Mizinga,

'In most of the classes, there are about 50 pupils because our school caters for many areas which include, Dambwa North, Dambwa Central, Dambwa Site and Services... All these areas are overpopulated.'<sup>87</sup>

The case is the same for community schools, which are donor funded. As earlier stated, these schools only play a complementary role and cannot therefore take a centre stage responsibility. Thus the Director of The Movement of Community Action for the Prevention and Protection of Young People Against Poverty, Destination, Diseases and Exploitation (MAPODE),

'Argues referring to street kids taking informal lessons at the MAPODE center in Mtendere that such children can not claim education as a matter of right as the infrastructure was either non-existent or inadequate.'<sup>88</sup>

It is therefore indispensable to the realization of the right to education for government to make marked investments in school infrastructure. The status of school infrastructure in Zambia is below the minimum levels necessary for the ordinary enjoyment of the right to education. This and many other problems affecting the right to education is mainly due to the inadequate resources allocated to the education sector. Availability of classroom

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<sup>86</sup> **Budget Address**, 29<sup>th</sup> January, 1999

<sup>87</sup> Acting Deputy Head Teacher of Mulwani Basic School, Livingstone.

Interview dated 14<sup>th</sup> September, 2003

<sup>88</sup> Interview dated 30<sup>th</sup> July, 2003

facilities cannot sustain the right to education in isolation. There is need for other facilities such as *inter alia*.text books, laboratory apparatus, and furniture.

#### 4.2.2 Provision of Learning Materials

The availability of education materials makes the realization of the right to education possible. These facilities determine the extent to which educational goals and objectives can be realized. The provision of learning materials varies from one country to another and is influenced by a country's level of economic development. In **Unnikrishnan J.P.V State of Andhra Pradesh**,<sup>89</sup> the occasion was the challenge by private medical and engineering colleges, to state legislation regulating the charging of "Capitation" fees from students seeking admission. The college management was seeking enforcement of their right to business. The court expressly denied this claim and proceeded to examine the nature of the right to education. The court then proceeded to examine how this right would be enforceable and to what extent. It clarified the issue and held that:

'The right to education further means that a citizen has a right to call upon the state to provide educational facilities to him within the limits of its economic capacity and development.'<sup>90</sup>

This however should not be understood as providing a buffer against a state's responsibility to provide educational facilities. In the **Unnikrishnan case**, the court further said that, 'we cannot believe that any state would say that it need not provide education to its people even within the limits of its economic capacity and development.'<sup>91</sup>

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<sup>89</sup> [1993]SCC 645

<sup>90</sup> Ibid at 737

<sup>91</sup> Ibid

Despite the influential role of the level of economic development, every state is expected to provide the minimum requirements in terms of learning materials. It has therefore been asserted that

‘Quality education requires the availability of textbooks and other educational materials. Without these aids to the learning process, effective teaching and learning in the modern sense cannot take place.’<sup>92</sup>

The necessity for suitable educational materials enables pupils and students alike to learn at their own pace and to assess their own progress. In Zambia, schools, colleges and universities are characterized by acute shortages of educational materials ranging from furniture to school textbooks and chalkboards. As has been argued, ‘although considerable improvements have been made in recent years in the provision of educational materials, these still remain critically short in many schools.’<sup>93</sup>

Arguably there seems to be intent on the part of government to concern itself with the demand for educational utilities and materials in learning institutions. Budgetary addresses are a manifestation of this intent. In view of this, the then Minister of Finance and Economic Development said, ‘i have also increased the allocation for school desks for K1.5 billion in 1998 to K4.4billion.’<sup>94</sup> During the 2003 Budgetary Address, the Minister stated that, ‘in education, the special emphasis this year is on the provision of school desks for which a sum of K12billion is being proposed.’<sup>95</sup>

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<sup>92</sup> **National Policy on Education** p.40; (1996)

<sup>93</sup> Ibid

<sup>94</sup> **Budget Address**; p.12 (1999)

<sup>95</sup> **Zambia Daily Mail**, Vol.28; Saturday, February 1, 2003; p.9

These allocations by government do not have the capacity to create a sustainable base for the provision of education materials. This accounts for the constant unavailability of such materials in learning institutions. It has also been observed that, ‘other classroom supplies and items of equipment, such as charts, maps and Chalkboard rulers, remain in short supply.’<sup>96</sup>

Non-availability of educational materials continues to hinder the delivery of quality education services to the beneficiaries. It is hereby stated that the presence of such facilities is essential to the attainment of educational goals as they facilitate the use of pupil or student centred methodologies promoting group work and guided discovery.

All the above-mentioned requisites of a guaranteed right to education are largely influenced by the availability of resources. Arguably, funding is one of the hallmarks of the sustainable enjoyment of the right to education.

### **4.3 Fiscal factors affecting the right to education**

The availability or non-availability of resources determines the extent to which a particular government is able to define the parameters of its responsibilities with regard to the right to education.

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<sup>96</sup> **National Policy on Education**; p.40 (1996)

Public budgetary allocations play a more fundamental role in providing fiscal guidelines of expenditure towards the education sector. Such allocations tend to influence the extent of enjoyment of education as a human right.

Arguably, a sustainable fiscal policy is a pre-requisite to the actual attainment of the basic safeguards of the right to education.

In Zambia, the different fiscal policies adopted by each of the political parties that have been in government have had an influence with far reaching consequences on the right to education.

#### **4.3.1 Budget Allocations**

Since independence from Britain in 1964, there was a marked increase in expenditure towards the education sector by the Republican government of Zambia. The high levels of illiteracy and the pressure on the government to provide employment opportunities to the mass of indigenous Zambians which were promised as a benefit of a successful liberation struggle provided a political framework for a vigorous education policy. The Post Newspaper acknowledges that,

‘There is no doubt that the United National Independence Party (UNIP) government treated education as a priority and invested in it heavily. And almost all that the educational establishment that we see in Zambia today are testimony of UNIP’s commitment to the development of the country’s education sector.’<sup>97</sup>

The government had to engage in capital projects such as construction of learning institutions throughout the country and provides resources for recurrent expenditure to the education sector. M.J. Kelly et.al. observe that, ‘over the period 1975-1984 spending

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<sup>97</sup> **Saturday Post**, February 22, 2003; p.8

on education amounted to 12.55% of all government spending and about the same proportion was spent in the years 1970-1980.<sup>98</sup>

From the mid 1980s, there seem to have been a consistent reduction in government expenditure towards the education sector. As has been observed,

‘While considerable progress has been made in ensuring the human and material resources required, the Ministry’s efforts to reach its goal have been inhibited for several years by the inadequacy of funds. Since the early 1980s the education sector has suffered from insufficient and declining levels of public funding.’<sup>99</sup>

The devaluation of the Zambian Kwacha coupled with stringent policies of the International Monetary Fund (IMF) and World Bank contributed to the reduction in government expenditure in the education sector. In view of this, the National Policy on Education asserts that,

‘During the period 1987-1991 real public spending on the sector fell to less than half of what it had been in 1981-1985, while in 1994 real spending per primary pupil was less than 60% of what it had been in 1985.’<sup>100</sup>

Additionally the Gross Domestic Product (GDP) expenditure towards education by the Zambian government has consistently been low. It has thus been pointed out that, ‘Barely 3% of the 1994 GDP arose from public expenditure on education; to this could be added a further 1.5% -2% arising from direct private spending in education related areas.’<sup>101</sup>

Since the ascent to power of the MMD government in 1991, the national fiscal policy was mostly characterized by the cash budget system. This implied further reduction in resource allocation towards education in Zambia. In 1996 it was argued that, ‘the sector

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<sup>98</sup> M.J. Kelly et.al, **The provision of Education for All: Towards the Implementation of Zambia’s Educational Reforms under Demographic and Economic Constraints** (1986-2000) UNZA, Lusaka; p.217. (1986).

<sup>99</sup> **National Education Policy**; p.163 (1996)

<sup>100</sup> Ibid

<sup>101</sup> Ibid

accounts for only 9% of the total public budget, although the government has made a commitment to raise this substantially.<sup>102</sup>

Despite the above assurance, budgetary allocation to the education sector has continued to reduce. In 1999 it was stated that, ‘the Ministries of Education and Health have been allocated budgets of over K310billion in 1999, compared to K262 billion in 1998.’<sup>103</sup>

An arithmetic analysis of the above figure reflects a less than 10% allocation to the education sector in a budget with a total expenditure of K2, 227.72 trillion. Further to this, Afronet has observed that, ‘the allocation for education of the total budget has increased to 14% in 2002.’<sup>104</sup>

Despite suggestions that there have been erratic increases in government expenditure towards the education sector the practical situation presents a contradiction. Since the 1970s public expenditure in education has been low in the region and the world. M.J. Kelly et.al. referring to government’s 12.55% allocation to the education sector said,

‘It was noted already that this is low in comparison with other countries in Eastern and Southern Africa. Thus in 1980 Tanzania devoted 17.7% of its total expenditure to education, Botswana 19.3%, Kenya 18.0% and Zimbabwe 19.5% in the same year.’<sup>105</sup>

Therefore Zambia’s expenditure in the education sector continues to be among the lowest in the region in the 21<sup>st</sup> century.

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<sup>102</sup> Ibid

<sup>103</sup> **Budget Address**; 29<sup>th</sup> January 1999

<sup>104</sup> **Zambia Human Rights Report** p.76 (2002).

<sup>105</sup> M.J. Kelly et.al; **The Provision of Education for All**; p.217 (1986).

Arguably more resources need to be allocated to the education sector in order to achieve any educational objectives the government may have. The United Nations International Children's Emergency Fund (UNICEF) country Representative for Zambia said, 'resources to the education sector have to be increased if we are to see any development and attainment of the globally agreed Millenium Development Goals.'<sup>106</sup>

While the constraints faced by the Zambian government as regards the availability of resources are appreciated it is submitted that public expenditure need to be increased generally. It has been argued that, 'a national approach to this problem is needed with the government collectively recognizing the need for a substantial increase in the budgetary resources made available to education.'<sup>107</sup>

In addition to increasing the overall expenditure on education there is also need to review resource allocation within the education sector.

#### **4.3.2 Problems arising from intra sectoral expenditure**

As stated above, there are various practical factors that need to exist in order to support a sustainable right to education. When allocating resources, all the components of the right to education need to be addressed. Analyzing the resources allocated to the education sector, Afronet finds that, 'financing problems are further constrained as, currently; over

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<sup>106</sup> **Saturday Post**, February 22, 2003, p.8

<sup>107</sup> **Zambia Declaration on the Education of the Girl Child**. Lusaka. P.12 (July, 1995).

80% of the budget to education is going to personal emoluments and recurrent department charges.<sup>108</sup>

This inevitably results in only 20% of the resources allocated being available for the rest of the requisites of the right to education.

The introduction of free primary education has helped enhance the enjoyment of the right to education. However this has increased pressure on the other aspects of the education sector. This declaration also has the potential of increasing the number of dropouts in learning institutions.

The other problem arising from education is the issue of loans or bursaries to students in higher institutions of learning. Imre Szabo argues that:

‘The next group of safeguards of the right to education is made up by regularly granted state scholarships, the expansion of students’ hostels, boarding schools and other means of financial assistance granted to students.’<sup>109</sup>

In Zambia, the government manages a bursaries scheme particularly for university students. By 1999 the cost sharing arrangement between students and the government was 10% for the student and 90% contribution by government. Non-remittance of the government share of the responsibility was the source of protests at the Great East Road Campus of the University of Zambia in 2001. This occurred when the student responsibility was increased to 25%.<sup>110</sup> With high poverty levels it was argued that the increase in the student contribution was unjustified. Afronet argues that, ‘the problems

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<sup>108</sup> **Zambia Human Rights Report**; p.77 (2002)

<sup>109</sup> I. Szabo; **Cultural Rights**; Budapest. Akademia Kaido; p.222 (1974).

<sup>110</sup> The Post, 30<sup>th</sup> August, 2000

<sup>111</sup> **Zambia Human Rights Report**; p.82 (2001)

affecting the provision of education in Zambia are complex. Cost-sharing schemes have driven the cost of education well beyond the reach of most poor people.<sup>111</sup>

The bursaries scheme is argued to consume much of the resources that remain to the education sector. It has to this effect been stated that, Government support for the majority of students in public higher level institutions has strained public resources.<sup>112</sup>

It is submitted that in order to reduce expenditure on students in higher institutions of learning, the government is supposed to implement a loan scheme in which students will be given education loans to be repaid back to the government when they start realizing the benefits of the education obtained. Alternatively, the government may bond all the students sponsored under the scheme for a certain period of time. While acknowledging the difficulty of implementing the loan scheme, the Ministry of Education argues that, ‘the introduction of this scheme will help to reduce the disparity between public spending per basic school pupil and per higher level student.’<sup>113</sup>

The provision of free basic education, effective high and tertiary education policy, protection of fundamental rights and freedoms and funding are factors, which are crucial to the sustainable guarantee of the right to education. In Zambia, the status of the right to education based on the above factors can be summed up in the following words:

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<sup>112</sup> **National Education Policy**; Lusaka. P.104 (1996).

<sup>113</sup> Ibid

‘... the challenge the state faces with respect to citizenry of Zambia being able to get educated is being the need to increase access and availability of education institutions; adequacy of staffing; and financing.’<sup>114</sup>

In order for educational goals to be attained the government is supposed to prioritise education in budget planning as well as in the actual implementation of the budget, involving the disbursement of resources.

Considering the nature of education as one of the main fabrics of society, factors constituting the right to education should be given paramount consideration in all activities of government expenditure. This will enhance the practical realization of the right to education.

#### **4.4 Practicability of Constitution guarantee of the Right to education**

According to Rhoda Howard, when considering the prioritization of human rights, ‘the aim is to identify the basic or irreducible minimum of rights which are the absolute minimum, so to speak, to maintain human dignity and human worth.’<sup>115</sup>

It is argued that the Zambian government has not been giving education the attention it deserves as one of the rights crucial to the establishment of human dignity. It is further submitted that prioritization of a vital sector like education need to have some legal force. The limitation of the priority status of the right can be left for consideration by the judiciary. For instance in **Guingona Jr. v. Cargue G.R.**,<sup>116</sup> a group of senators in the Philippines challenged in 1991 the constitutionality of the budgetary allocation of

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<sup>114</sup> **Zambia Human Rights Report**, p.77 (2000)

<sup>115</sup> G. Shivji; **The Concept of Human Rights in Africa**. London. Codesria Book Series p.27, (1989).

<sup>116</sup> Supreme Court of the Philippines No. 94571, 22<sup>nd</sup> April, 1991

P86billion for debt servicing, while P27billion was allocated for education. The issue to be decided was whether debt servicing exceeding three times the budgetary allocation for education, was unconstitutional. The court held that, ‘education had been the highest budgetary priority, whilst debt servicing was necessary to safeguard the credit worthiness of the country and the survival of its economy.’

While education remains indispensable to the survival of Zambia in the modern globalised economy, it does not occupy top priority position in budgetary allocations. As it has been observed in an editorial comment by the Post Newspaper:

‘While we appreciate the challenges the MMD government faces as a result of the greatly changed world economic order and the neoliberal policies imposed on the country by its creditors and their own naiveté, we think education as never been their top priority. The MMD government in priorities seem to lie in politics, in maintaining their hold on power and the well being of the leaders, financial or otherwise.’<sup>117</sup>

Further it has been argued in the Post Newspaper that:

‘Huge sums of money are wasted on activities which have nothing to do with the country’s key sectors that are critical to the country’s development. Schools have no teachers and other essential necessities, but when it comes to political activities, money is found.’<sup>118</sup>

Thus far, prioritisation of the education sector is a milestone in the practical realization of the right to education. However in order to avoid rhetoric, prioritisation of education should extend to the actual disbursement of resources. The Zambia Declaration on the Education of the Girl Child observed that:

‘Because of the long history of neglect from which it has suffered, the education sector should be given the highest priority in the actual disbursement of funds. It should therefore be able to depend on the regular and timely payment of all subventions that have been approved by parliament.’<sup>119</sup>

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<sup>117</sup> Saturday, **Post**, February 22, 2003, p.8

<sup>118</sup> Ibid

<sup>119</sup> **Zambia Declaration on the Education of the Girl Child**; Lusaka, Zambia; p.12, (1995).

Prioritization of the education sector without legal guaranteed has not yielded any significant results. Thus far in order to make the attainment of the above factors practical, prioritization is critical. But in order to make it more effective prioritization has to be accompanied by legal safeguards at all levels of law making. It is hereby submitted that express recognition of education as a right is the foundation of its actual and practical realization. Without recognition, it is difficult to claim education as a right inherent in the individual citizens of Zambia.

## **CHAPTER5**

### **5.0 RECOMMENDATIONS AND FINAL CONCLUSION**

#### **5.1 RECOMMENDATIONS**

As already stated, the fundamental protection of the right to education requires that the Zambian government needs to make certain modifications as regards its legal obligations under international law and the domestic legal system. Additionally administrative and policy changes are also necessary to help with the practical implementation of the constitutional or legislative provisions guaranting and defining the right to education.

#### **5.2 Changes under International Law**

As with the other rights and fundamental freedoms, the obligations of the Zambian government towards the Zambian citizens regarding the right to education is primarily under international law. As has been stated these obligations are spelled out by the UDHR and provided for in binding form by the ICESCR to which Zambia acceded on 10<sup>th</sup> April 1984.

The obligations of the Zambian government under the ICESCR relating to the right to education are limited.

It is therefore recommended that the Zambian government should set aside its reservation against Article 13(2)(a). This will enable the Committee on Economic, Social and Cultural Rights to effectively monitor the progressive realization of the international educational objectives. This step would further provide justification for the guarantee of the right to education at the constitutional level.

### **5.3 Constitutional guarantee**

The constitution is the basic law containing norms that define the character of people in a modern society. It follows therefore that it is the effective guarantor of human rights and freedoms. Moreover, the constitution of Zambia states that the Constitution shall be the supreme law of the land.

Since the right to education is provided under the Directive Principles of State Policy pursuant to Article 112(e) of the Constitution which is made non-justiciable by the operation of Article 111, it is critical that the right to education be included in Part III of the Constitution to enable the Zambian citizens access remedies available to other guaranteed rights. It is therefore submitted that the provisions of Article 79(3) of the Constitution need to be invoked in order to facilitate the alterations of the composition of the Bill of Rights. This will facilitate the inclusion of the right to education in Part III, which should provide a general definition of the right.

It is further submitted that the contents of the right to education should include an unconditional, free and compulsory basic education up to grade 9 or free education to any child between the ages of 7-15 years whichever comes first. The guarantee should include a commitment to make resources available for the elimination of illiteracy in Zambia. In addition to offering greater access to higher education, the constitution should specifically guarantee academic freedom, as this is necessary for the effective utilization of academic potentials. More importantly the constitution should impose an obligation on the state to 'provide adequate resources' to the education sector. With

these constitutional safeguards, the Zambian people would be able to claim education as of right.

#### **5.4 Legislative Changes**

The legislative stage of protection of human rights plays a vital role in providing an effective framework for the operation of the rights concerned. In view of this it is recommended that the Education Act 1966 be repealed and replaced *in toto*. In its place should be enacted a new Education Act which will recognize education as a fundamental right. The new Act should address the inadequacies reflected in the Education Bill (2000). For instance, Section 63(10) of the Bill provides that, 'education boards and boards of management shall be responsible for the provision of adequate instructional materials approved and selected in accordance with the provisions of this section.'<sup>120</sup>

Contrary to the above, the Education Act should provide for and define the parameters of state responsibility in providing educational materials. As earlier stated, learning educational materials are critical to the effective realization of the right to education. The government should therefore take the primary responsibility to provide educational materials. It is further recommended that the new Act should provide an elaborate and widely consultative procedure for identifying the local language to be used as a complementary language of instruction. In order to uphold the freedom of choice, the Education Act should make the receiving of instructions in a local language elective to enable parents to decide whether or not their children should take instructions in a particular local language.

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<sup>120</sup> **Education Bill, 2000**

Though the Education Bill of 2000 provides for the development of a national curriculum, it does not go further to emphasise the need for a substantial human rights content in the national curriculum. It is hereby recommended that the Education Act should declare that the national curriculum to be developed should be guided by the duty to cultivate a human rights culture among the learners.

The idea of a tribunal proposed under Section 55(1) of the Education Bill (2000) is a necessary instrument in the delivery of remedies flowing from the right to education. However its mandate is very limited and does not at all address complaints, which may result from non-enrolment. It is recommended that the mandate of the tribunal suggested be extended to hear and determine complaints resulting from the violation of the provisions of the Education Act. This will render the tribunal meaningful as it will in this way guarantee legal remedies for breach of the right to education. Alternatively it is recommended that since the size of the interest groups within the education sector may be enormous for the tribunal to handle effectively, an Education Complaints Commission could be established by the Act to hear and determine any disputes that may arise under the Act. In view of this it could further be provided that such a Commission should be represented at a distinct level of the Ministry of Education. Like the tribunal the appeals from the Commission may lie before the High Court. It is submitted that this Commission would effectively address violations of the right to education.

Finally, Zambia is one of the countries that ratified the Convention Against Torture. Further to this, the Constitution pursuant to Article 15 prohibits torture. There has

however been a tendency by school authorities to invoke corporal punishment as a component of the school Disciplinary Code. The High Court has so far ruled against the use of corporal punishment in schools.<sup>121</sup> However lack of legislative enactment to provide backing to this decision has precipitated a dual attitude by teachers towards corporal punishment. In order to finally settle the matter, it is pertinent that the Education Act expressly defines disciplinary action to exclude corporal punishment.

Thus far, it is submitted that the above legislative changes accompanied by appropriate administrative and policy structures would be able to support a sustainable right to education.

## **5.5 Administrative and Policy adjustments**

The practical implementation of a guaranteed right to education requires an efficient and relevant administrative structure. Since the constitutional guarantee of the right to education will imply an increased allocation of resources to the Ministry of Education, it is submitted that there will be need to equip the organs responsible for the disbursement of resources with sufficient auditing facilities to enhance accountability. It is further submitted that the Education Act need to provide for the establishment of an ad-hoc technical Committee in every district to provide guidance to the Minister on the adoption of suitable local languages to complement the English language as languages of instruction during first years of elementary schooling.

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<sup>121</sup> **John Banda v. The People** HPA/6/1998

As regards policy, there is need for continuous review and monitoring of the education policy. This is necessary as it helps the government to guide its activities relating to the provision of education, which are not adequately addressed by legislative enactment. In overall terms it is recommended that the 'Education Policy'

Should be designed in such a manner as to provide short-term goals and benchmarks for the government. Such should for instance include a precise and detailed plan of action for every year of the periodical policy. This will enable the government to evaluate its performance in view of the Millennium Education for All by the Year 2015 Goals.

## **5.6 CONCLUSION**

From the foregoing, it has been demonstrated that the right to education is not only fundamental to the realization of the potentials of an individual but an indispensable component of a sustainable society.

In a world that is quickly converting into a global village, a country in order to survive would need to administer a very vigorous education system to provide the skilled human resource, which is key to overall development. Therefore the effective protection of the right to education is a pre-condition to the attainment of any development goals a country may have as well as the aspirations of the international community of nations.

Since justiciability of rights is the source of enforceable remedies, it is paramount that the right to education be accorded the status of justiciability in order to enable it play its role as a catalyst of development for both the individual and society.

The underdeveloped status of Zambia requires it to take bold steps like those taken by other countries in a similar economic position of granting fundamental status to the right to education. This is the only sure way through which the country will take control of the development process.

Finally, it is imperative that the Zambian government considers the education sector as one of the priority sectors for budgetary allocation and actual disbursement of resources. It is not justified in this day and age for any government to argue that it cannot constitutionally guarantee the right to education. Elements of this right such as free basic education have been universally accepted as being indispensable facets of human existence. It is therefore necessary that in ensuring a justiciable right to education, more resources have to be allocated to the education sector if the Millennium Education Goals are to be attained. This will consequently guarantee the right to education as a basic right.

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# APPENDIX A

## 94 Education in the developing world

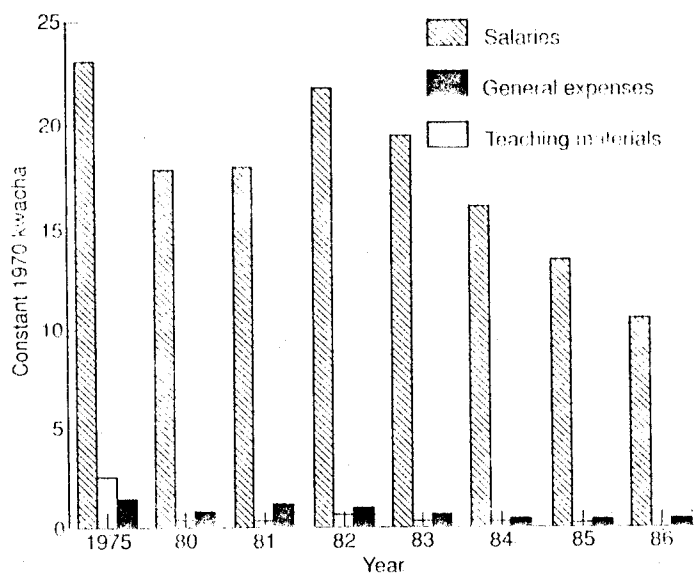


Figure 8.2a Zambia: unit current spending, primary education  
 Source: Derived from Kelly (1988) *Financing Education in Zambia*.

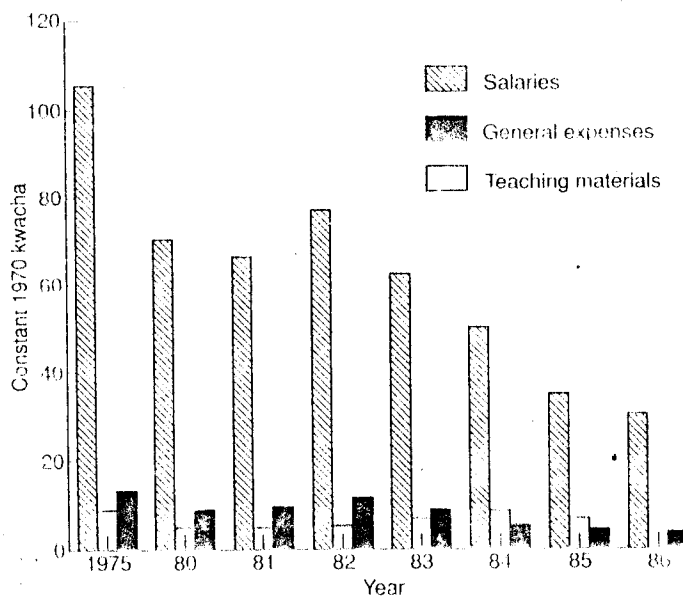


Figure 8.2b Zambia: unit current spending, secondary schools  
 Source: Derived from Kelly (1988) *Financing Education in Zambia*.