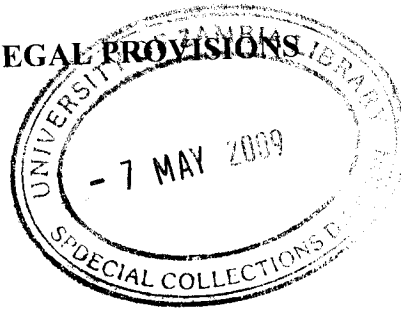


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**THE RIGHT TO EDUCATION: AN ANALYSIS OF THE LEGAL PROVISIONS
IN ZAMBIA.**



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FEBRUARY, 2009

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**A DISSERTATION SUBMITTED TO THE UNIVERSITY OF ZAMBIA IN
PARTIAL FULFILLMENT FOR THE AWARD OF BACHELOR OF LAWS
DEGREE.**

THE UNIVERSITY OF ZAMBIA

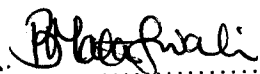
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I **Beatrice Matafwali**, (Computer. No. 94115125) do hereby declare that this dissertation is my own work which has not been submitted for a degree at this or any other University.

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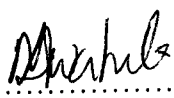
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DEDICATION

To Bwalya, your love and support carries me through everything I do.

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International Convention on Civil and Political Rights

Universal Declaration of Human Rights

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S. Tengur Plaintiff vs. The Minister of Education [1993] 1 SCC 645.

ACRONYMS

CRC	Convention on the Rights of the Child
DPSP	Directive Principle of State Policy
ICESCR	International Convention on Economic, Social and Cultural Rights
ICCPR	International Convention on Civil and Political Rights
MDGs	Millennium Development Goals
UDHR	Universal Declaration of Human Rights

ABSTRACT

The importance of education, not only in its own right, but also as a foundation for the realization of all other rights is acknowledged in the reference to education in every key human rights instrument. For instance, the right to education is set out in a number of international agreements. The most significant is the International Convention on Economic, Social and Cultural Rights which recognizes the right of everyone to education in terms similar but in greater detail to those in the Universal Declaration of Human Rights. Other more specific agreements referring to the right to education and which are of particular relevance to the present study include the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights.

The international framework of human rights offers a set of minimum standards for protecting human dignity. However, the international framework does not offer a standard formula for human rights implementation in any given country. Notwithstanding this, the significance of international agreements cannot be underscored. Being a party to these international treaties, Zambia undertakes to comply with these international agreements by ensuring that education is made available and accessible to all citizens. While the resources available will determine the rate at which this is done, the government must take progressive steps towards achieving the relevant standards. This entails that, the international obligations that make the right to education are reflected locally in education policy, legislation and administrative practice.

The primary aim of this study was to analyse the nature of states obligation to fulfill the right to education with special focus on Zambia, under national and international law. The study has demonstrated that, children have the right to education under international law. However, its enforcement and applicability is not apparent in the Zambian jurisdiction as education is not considered as a fundamental right under the current constitutional provision. Currently, the Zambian child has no means of claiming the right to education under national law. The present study therefore has called for legislative reform to ensure that the right to education is given legal force.

CHAPTER ONE

1.0 Introduction

Education is an act or process of imparting or acquiring general knowledge, developing the powers of reasoning and judgment, and generally of preparing oneself or others for mature life. In Campbell and Cosans judgment, the European Court of Human Rights defined “education” and “teaching” as: Education of children is the whole process whereby, in any society adults endeavour to transmit their beliefs, culture and other values to the young¹. It is therefore, a well established fact that, education is an important private and social good, critical, to individual and societal well- being, and it has increasingly helped define democracy².

It is in this spirit that the present study focuses on the right to education, both as a right in itself and as a means of promoting respect for human rights generally. The primary focus of this study is the analysis of the Zambian legislative framework in relation with the right to education. The first chapter of this paper will therefore attempt to trace the normative basis of the right to education under international law, within the perspective of a ‘second generation’ human right. The realization of the right to education and its justiciability will be discussed in the light of counterpart articles of the International Convention on Economic Social and Cultural Rights; Convention on the Rights of the Child and the General Comments provided by the Committee on Economic Social and Cultural Rights. In the second chapter of this thesis, the implementation of the right to

¹ E. Reilly (2000), Symposium: Education and the Constitution , Shaping each other and the next century: Education and the Constitution: in (Akron Law Review), vol 34, p. 1.

² Kishore S (2007), Emerging Understanding of the Right to Education. Paper Commissioned for the EFA Global Monitoring Report 2008, Education for All by 2015. Paris: UNESCO.

education under national and international law will be discussed and argued in the context of Zambia. Secondly, the obligation of states parties to fulfill the right to education at all levels will be discussed, with special emphasis on the provision which refers to free and compulsory primary education. The enforcement of such a requirement will be analysed in the context of Zambian legislation and the legal system. Subsequently, chapter three will take a comparative approach in the implementation of the right to education by drawing reference from selected developing countries. Lastly, upon the analyses of the above mentioned chapters, chapter four will attempt to provide a conclusion and recommendations.

1.1. Education as a Human Right

The right to education is entrenched at the international and regional level as a fundamental human right. The importance of entrenching the right to education is based on certain premises. Firstly, it is a precondition for the exercise and understanding of other human rights. The enjoyment of many civil and political human rights, such as freedom of information and expression as well as the right to vote require a minimum level of education which includes literacy³. Secondly, many economic, social and cultural rights, such as the right to choose work, to receive equal pay for equal work and the right to have equal access to public representation, can only be exercised in a meaningful way once a basic education has been achieved. The right to education is then characterised as an 'empowerment right' which provides the individual with control over his or her life

³ Pierre du Plessis, Lloyd Conley and Coert Look [2007], The right to education: are we facing the challenges? Educational Research and Review Vol. 2(8), pp. 198-208.

and the power to interact meaningfully in his or her community⁴. Furthermore, the right to education is of fundamental importance in any well developed democratic society owing to its centrality in peoples' lives, lifelong learning in empowering individuals and transforming societies⁵. It is thus clear from the foregoing that education can be used as a tool to strengthen a culture of human rights amongst nations.

1.2 International Obligations and the right to education

As alluded to earlier, the right to education is recognized in several universal and regional instruments. For instance, the Universal Declaration of Human Rights (UDHR, 1948) provides the foundation for the right to education. Article 26 of the UDHR states inter alia that, "everyone has the right to education. Education should be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be equally available and higher education "shall be accessible to all on the basis of merit". The right to education finds even more specific expression in the International Covenant on Civil and Political Rights (ICCPR) and in the International Covenant on Economic, Social and Cultural Rights (ICESCR both which Zambia has ratified. Article 18(4) of the ICCPR (1966) and articles 13(3) and 14 of the ICESCR (1966) recognise the fundamental role of parents in directing their children's education. States Parties undertake to have respect for the liberty of parents and legal guardians "to ensure the religious and moral education of their children in conformity with their own convictions". Article 13 of the ICESCR in particular

⁴ Coomans Fons [1998], Identifying Violations of the Right to Education. Centre for Human Rights, Maastricht University, the Netherlands.

⁵ Yves Daudet and Kishore Singh [2001] 'The right to Education: An analysis of the UNESCO's standard-setting Instruments', UNESCO, Paris.

recognises the right of everyone to education, which "shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms." Education "shall enable all persons to participate effectively in a free society. Further, the right to education is widely recognized in regional instruments. The right is included in the European Convention for the protection of Human Rights and Fundamental Freedoms (European Convention, 1953). It is also included in the American Declaration of the Rights and Duties of Man (1948) and the Protocol of San Salvador to the American Convention on Human Rights (1988). For instance, the Protocol of San Salvador to the American Convention on Human Rights proclaims among other things, "education ought to enable everyone to participate effectively in a democratic and pluralist society and achieve a decent existence"⁶. In the African region, the right to education is an integral part of the rights, duties and freedoms enshrined in the African Charter on Human and Peoples' Rights (1981). In its Article 17, the Charter provides that "Every individual shall have the right to education". Article 11 of the African Charter on the Rights and Welfare of the Child (1990) also provides for the right to education.

The right to education is also recognized in a number of international instruments dealing with the rights of specific vulnerable groups. In particular, the Convention on the Rights of the Child (1989) explicitly codifies the child's right to education in articles 28 and 29. Article 28 in particular emphasises the child's right to education on the basis of equal opportunity, and the State's duty to ensure that at least primary education is made free

⁶ Paula Clarice Da Silva (2003), Poverty Reduction within the Perspective of the Child's Right to Education. European Masters' Degree in Human Rights and Democratisation. Galway: National University of Ireland, Irish Centre for Human Rights.

and compulsory for every child. Suffice to mention that, implementation and monitoring mechanisms of these instruments will be discussed in further detail.

It is important to note that, all the international instruments aforementioned elucidate the scope and nature of the right to education. The right to education is thus considered as overarching right and an indispensable means of realizing other human rights⁷. It is argued that, the principles and norms for the right to education laid down by international instruments provide normative basis for action to that end⁸. In implementing the right to education in law and in fact therefore, an analysis of the constitutional provisions for the right to education is of paramount importance. This requires national level reaction in line with international normative framework and it's the only plausible way of transforming the right to education from an idea into a living reality. In fact, there is an emphasis upon international legal obligations for the right to education to be incorporated into domestic legal order by reflecting it in the constitution and other laws⁹. The CESCR has actually stated that, the nature of this requirement is unequivocal.

While the precise and appropriate application of the terms of the ESCR will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels shall exhibit the following interrelated and essential features such as:

(a) Availability, this implies that functioning education institutions and programmes have to be available in sufficient quantity within the jurisdiction of the state party; (b)

⁷ Pierre du Plessis, Lloyd Conley and Coert Loock (2007), The Right to Education: are we facing the challenges? Educational Research and Review Vol.2(8), pp. 198-208.

⁸ Halvorsen Kate [1990] Notes on the Realisation of the Human Right to Education. Human Rights Quarterly 12 [1990] 341-364.

⁹ Eastman C. John [2005] Education and the 20th Century's Rights Revolution: Have we Overlooked Government by Consent?, paper presented at a conference on 'adequacy Lawsuits: Their Growing Impact on American Education' Kennedy School of Government, Harvard University, October 13-14, 2005.

Accessibility, educational institutions and programmes have to be accessible to everyone, without discrimination; (c) Acceptability, the form and substance of education have to be acceptable; (d) Adaptability, education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings. It is further stated that, when considering the appropriate application of these “interrelated and essential features” the best interests of the child shall be a primary consideration¹⁰.

Furthermore, the right to education like all human rights imposes three levels of obligations on states parties: the obligations to respect; protect and fulfill. The obligation to fulfill incorporates both an obligation to facilitate and an obligation to provide. The obligation to respect requires the state to avoid measures that hinder or prevent the enjoyment of the right to education. The most fundamental question in this respect is how the obligations relating to the right to education undertaken by Member States under international and regional instruments are incorporated into national legal systems. It must be stated from the outset that, whereas issues of availability, accessibility, acceptability, and adaptability forms the very basis of the right to education, a discussion of these important elements is simply beyond the scope of this paper. This paper is however concerned with the legal provisions that Zambia has put in place with a view of achieving the right to education.

¹⁰ Alen A and Pas W (1996) The UN Convention in the Rights of the Child Self-executing Character, in Eugeen Verhellen, (ed) “ Monitoring Children’s Rights”, The Hague, Kluwer Law International, pp. 164-186.

1.3 Statement of the problem.

Obligations undertaken by states relating to the right to education under various international and regional instruments make it incumbent upon governments to take necessary legal and policy measures. Governments must fulfill their minimum core obligations with respect to the right to education and ensure that their obligations are reflected in constitutional provisions, are translated into educational laws, and are fully applied. Zambia being a party to international and regional instruments aforementioned: UDHR; ICESCR; ICCPR; CRC and the African Charter on Human and Peoples' Rights, is subject to the moral suasion of these instruments. Though strictly speaking not enforceable against member states, the UDHR for instance, clearly has a considerable moral force among member states and the inclusion of education among its enumerated social, cultural and economical rights only supports arguments in favour of implying guarantees to education within the Zambian Constitution.

The present study therefore, seeks to determine the extent to which the Zambian government has translated these minimum core obligations pertaining to the right to education into domestic legal framework such as the constitution and other laws and the adequacy of the current provisions. It is also imperative to identify the implementation as well as the monitoring mechanisms that have been put in place in the realization of the right to education.

1.4 Purpose of the study

The purpose of the study is to examine the legal provisions on the right to education in Zambia. The study further attempt to determine the implementation and monitoring mechanisms that have been put in place to ensure protection of the right to education.

1.5 Objectives of the Study

The study was guided by the following objectives:

- Establish the extent to which Zambia has translated the obligations undertaken under ICESCR, ICCPR, CRC and the African Charter on Human and Peoples' Rights into domestic legislation.
- Determine whether the right to education is considered as a fundamental right in Zambia.
- Identify the implementation and monitoring mechanisms that have been put in place towards the realization of the right to education.

1.6 Research Questions.

The study was guided by the following questions.

- Is the right to education considered as a fundamental right in relation to other rights in terms of enforceability?
- To what extent has the Zambian government translated the right to education into the constitution and other laws?

- What implementation and monitoring mechanisms have been put in place to ensure protection of the right to education?

1.7 Significance of the study

This study is an attempt to show the indivisibility and interdependence of the right to education not only at the conceptual level, but also in enhancing the justiciability of the right. Such an approach would help understand the right to education in its fullest sense. Additionally, the justiciable indivisibility approach to the right to education is an approach which would render more insight in the analysis of the implementation and monitoring mechanisms for the right at the national level and thus help the scope of application of international instruments.

1.8 Research Methodology

Qualitative research paradigm was utilized to collect data. Essentially, the research was intended to focus on the right to education and the analysis therefore concentrated on the legislative provisions in Zambia. Data collection primarily involved desk review of the pertinent documents with respect to the right to education at the national level; i.e. the Constitution, Education Act and the Education policies and other relevant documents. But, still, a comparative approach was employed. To that end, literature pertaining to international and regional human rights systems was used as important fodder to enrich the scope of research. Further, decisions of national jurisdictions of selected developing countries were used depending on their relevance and availability. These are of crucial importance not only for the purpose of analysis, but also because they are of persuasive

nature from which Zambia can draw inspiration in implementing the international obligations into domestic legislation thereby rendering the said right justiciable. Data was analysed qualitatively using thematic categorization procedures.

1.9 Definition of Terms

Education: This is the process of acquiring knowledge, information and skills during the course of life.

Enforceability: This implies to obligate someone to do something.

Justiciability: It concerns the limits upon legal issues over which a court can exercise its judicial authority.

Normative: this relates to the ideal standard or model.

CHAPTER TWO

2.0. Scope of Application of the Right to Education in Zambia

It is clearly demonstrated that states parties to the CESCRC, CRC, UDHR and the African Charter on Human and Peoples' Rights have the obligation under international and regional law to adopt measures to ensure that the child fully enjoys his or her right to education. Zambia being a party to the aforementioned international human rights documents therefore, undertakes to fulfill this obligation. In this respect, the present work sought to establish, among others the duty imposed on the Zambian government to provide the right to education to all children, on the basis of equality and non-discrimination, with special emphasis on the right to compulsory and free of charge primary education. Thus it will examine questions related to the foundations of the right to education in the Zambian legal system, the effective enforcement and justiciability of the right to education, which might entail seeking justice and remedies by judicial or quasi-judicial mechanisms in cases of denial of this right. An analysis to specific provisions in the Education Act and the Republican Constitution would be undertaken in this section. An attempt will further be made to outline the challenges and prospects in the implementation of the right to education in Zambia.

2.1 Constitutional provision of the Right to Education

It is only logical that this discussion begins with the constitutional protection of the right to education in the Zambian Constitution. This is simply because the constitution is the supreme law of the land and as such it provides the overall legal framework for the

protection of individual rights. It must also be stated from the outset that, international law does not have direct application unless domesticated. This entails that Zambia cannot be held liable for non compliance to international norms despite being a party to the CDESCR, CRC and UDHR.

It is worthy noting that the current Zambian Constitution does not have a specific provision within Part III, “the Bill of Rights” dealing with the right to Education. Rather, the right to education is provided for under Part IX, “Directive Principles of State Policy”. Part III of the Constitution which guarantees “fundamental rights” to all citizens. The fundamental rights are enforceable in the Courts of law, and thus, a citizen can seek enforcement of fundamental rights and redress for their breach. Judicial review of Executive actions is also recognized as part of the basic structure of the Constitution which cannot be taken away. The Supreme Court has the final word in the interpretation of the Constitution, and its orders, being law, are binding and enforceable.

The Directive Principles of State Policy are contained in part IX articles (110-113) of the Zambian Constitution. Many of these provisions correspond to the provisions of the ICESCR. Article 112 (e) in particular provides that,

the government shall endeavour to provide equal and adequate educational opportunities in all fields and at all levels for all¹¹.

This provision corresponds more or less to article 13 of the ICESCR, and Article 28 of the Convention on the Rights of the Child. The question that might be raised therefore is that of effectiveness of this constitutional provision in translating the right to education

¹¹ Constitution of Zambia, Cap 1 of Laws of Zambia.

into reality. As already alluded to, the right to education fall within the category of Social, Economic and Cultural rights and these rights are provided for within Part IX of the Zambian Constitution, Directive Principles of State Policy. Directive Principles of State Policy are guidelines for governance that the state uses in the framing and passing of laws.

As regards to justiciability and enforceability of these rights, article 111 is very instructive. It declares that the DPSP “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 entity¹². It is not a mere coincidence therefore, that the apparent distinction that is drawn by scholars between the ICCPR and ICESCR holds good for the distinction that is drawn in the Zambian context between fundamental rights and DPSP. Thus the bar to justiciability of the DPSP, the right to education inclusive is spelled out in some sense in the Constitution itself. To be precise, the right to education has been asserted in a negative way in the Constitution so as to avoid an imposition of a positive duty on the government to provide education to all eligible children. As can be seen, article 112(e) merely calls upon the state to endeavour to provide equal and adequate educational opportunities.

This in principle implies that non-provision of education cannot be challenged in the courts of law. The practical implication of this provision is that, the Zambian government is not obliged by law to provide education to its citizenry. Strictly speaking, the right to education cannot be described as a constitutional right in the current constitutional

¹² [ibid] supra note 9.

provision; rather, it can be described as merely a policy or societal goal that has no force of law. This indeed is a major limitation of the *Zambian Constitution*. Consequently, the people of Zambia cannot seek redress in an event that their right to education is infringed because the *Zambian constitution* does not hold the state liable for the non-compliance of the provision. Thus a determinant factor in achieving the right to education is whether such a right has its foundation in a constitution which is not presently the case in Zambia.

2.2 The Education Act -1966

The Education Act (herein referred to as the Act) is an enabling Act of Parliament which guides the development and operation of education in Zambia. The Act was enacted in 1966 and the following are some of the pertinent objectives of relevance to the present study;

- the establishment and operation of a National Council of Education for the Republic and of Regional and Local Councils of education,
- the promotion, development and control of schools, educational institutions and services¹³.

It must be noted that the Act has been amended several times since 1966. One of the amendments was the School (Compulsory Attendance) Regulations No. 118 of 1970. The regulation imposed a duty on the parent of a child that is enrolled at a school to ensure that the child attended the school regularly and if that child fails to attend school, the

¹³ Education Act, Cap 134 of the Laws of Zambia.

parent of that child commits an offence. Interestingly, this amendment did not necessarily deal with compulsory enrolment in school, of a child of a certain age.

Further, the amendment on Education (Primary and Secondary Schools) Regulations No. 254 of 1973 dealt with among other things the general conditions for enrolment at schools. For instance, the regulation restricted enrolment to grade one to a child who had attained the age of seven years but not have attained the age of nine years, with a proviso to enroll children who exceed the age of nine years if the class is not fully enrolled with children of appropriate age. This provision somehow appeared to be discriminatory in that it gave enrolment priority to children of appropriate age. In a country like Zambia, the number of over-age children may be so large that it might be impossible to have only children of appropriate age to be enrolled in schools. Further, the Act is silent on education as a basic right.

2.3 The Education Policy 1996

The National Policy on Education 1996 is in many respects in line with International Instruments. The policy promotes equality in access to, participation in, and successful completion of, education at all levels irrespective of gender, social class or disability. It is clear that, the policy advocates for equality and equity, by recognizing that every child in Zambia has a right to education¹⁴. It further suggests that, where access, participation and benefit in, the education system is impeded by gender, physical, mental, economic or social factors, the Government should seek to eliminate sources of educational disadvantage in order to enhance equity. This is the core element of the right to education

¹⁴ Ministry of Education (1996), *Educating Our Future*, MoE: Lusaka.

as may be inferred from article 13 of the ICESCR and it constitutes the very essence of the right to education as a human right. It implies that access to the existing public educational institutions shall be provided in a non discriminatory way. Important though these provisions might be, the policy has no legal force; rather, it is merely used as a guideline for governance that the state uses in the implementation of the education system in the country. Unless these provisions are in consonance with the provisions in the Constitution, it is difficult to translate them into reality. One can therefore conclude that, the Zambian child holds the right to education under the National Policy, but has no means to claim for it because the Zambian Constitution fails to recognize education as a fundamental right.

2.4 Challenges and Prospects.

The Constitution, Subsidiary laws and Policies collectively provide a legal and regulatory frame work for the development of the educational system in any country. What then are the implications of the lack of a legal framework to direct development of education in Zambia?

The Zambian government is committed to providing education to every Zambian citizen. The fundamental goal of the Ministry of Education is to ensure that every eligible child has access to education of good quality¹⁵. Real advancements have been made following the 1990 World Conference on Education For All (EFA). It was at this summit that countries were urged to put up measures aimed at ensuring accessibility of quality basic education for all. Basic education consists of nine years of schooling i.e. from grades one

¹⁵ Ministry of Education (1996), *Educating our future*, Lusaka: MoE.

to nine¹⁶. These pronouncements have since been translated into the Millennium Development Goals (MDGs) as a means of meeting the 21st Century demands of quality education for all. The MDGs state among other things that, Universal Basic Education should be made available to all eligible children by 2015¹⁷. In a recent mandate to deliver basic education of good quality, Zambia along with other Countries in the World has formulated a number of strategies which encompass provision basic education to eligible children¹⁸. Working from the base year of 1994, the targets were:

100% of 7 year-olds to be in grade 1 by the year 2000.

100% of 7-13 year olds to be in grades 1-7 by the year 2000.

50% of grade 7 pupils (14 year olds) to progress to grade 8 by the year 2015¹⁹.

Following the introduction of free primary education in 2002, attempts have been made to enroll 100% of 7 year olds in grade one and 100% of 7-13 year-olds in grades one to seven by 2005²⁰.

However, primary level education for all target still remains an illusion for many Zambian children. There are a number of reasons that can be advanced for this. Firstly, the introduction of free primary education in 2002 has given an increase in the demand

¹⁶ Ministry of Education (1996), *Educating our future*. Lusaka: MoE.

¹⁷ United Nations Millennium Development Goals: Zambia Status Report, 2005.

<http://www.undp.org.zm/undp-test/docs/MDGR2005>

¹⁸ Fifth National Development Plan.

¹⁹ Ministry of Education (2005), *A Glance at Primary Education in Zambia 2005. Progress towards achieving the Millennium Development Goals*. Lusaka: UNICEF.

²⁰ UNESCO (2000), *EFA 2000 Assessment Country Reports: Zambia*.

<http://www.unesco.org/wet/countryreports/zambia/rapport>

for school places. For instance, the numbers of over age children in school and those yet to enter are so large that it will be impossible to have all the children enrolled in schools due to inadequate infrastructure. Nonetheless, it is important to emphasize that, primary education is not still compulsory. This implies that, parents are not compellable and moreover, cannot be blamed for not placing their child in school if there are not, in fact, available educational facilities within the child's surroundings, as it is commonly the case in the rural settings of Zambia. Thus while Zambia has made strides by introducing free primary education policy, it is necessary that primary education becomes compulsory so as to ensure accessibility to all eligible children.

The other reason is inadequacy of funds. There is no doubt that the level of realization of any socio-economic rights in any country is indirectly influenced by the level of its development. For instance, the right to education has various economic dimensions making its realization progressive. The Zambian Government like other governments in the developing world is so constrained with financial and material resources required to meet the educational targets. Since the early 1980s, the education sector has suffered from insufficient and declining levels of funding²¹. In recent years, education has accounted for about 2.5% of the GDP, compared with 5-6% in mid 1980s. On the other hand, the proportion of the national budget on education annually since 1990 stood at 11%. Other countries within the SADC region were spending an average of 25% of their national budgets on education. In the case of Namibia the budgetary allocation to

²¹ Ministry of Education (1996), *Educating our Future*. Lusaka: MoE.

education was 40%²². The decline in support for educational development has been taking place against a background of real challenge for increased provision of educational services. Zambia has a relatively young population with the 7 – 17 year age group constituting 29.7% (2004) and the 18 – 25 years age group accounting for 16.3% (2004) of the population²³. This gives a potential demand for education both at the basic and tertiary levels.

Additionally, poverty can and does exert a strong pressure on parents to limit the education their children receive. This brings us to the question of ‘how free is primary education in Zambia’. Despite the introduction of free primary education policy, parents are still required to buy school uniforms and books for their children. Parents are also required to pay other indirect fees such as Parent Teacher Association (PTA) fund and in some cases user fees. These requirements impose additional financial costs parents have to incur or rather supplement to enable their children access education which might result in *de facto* discrimination where parents cannot afford. As the Committee on Economic, Social and Cultural Rights has rightly observed in General Comment No. 11 that, “.... Even where primary education has been declared free of charge, the indirect costs imposed by the local authorities constitute disincentives to the enjoyment of the right and may jeopardize its realization”²⁴. Thus, the effects of an impoverished household coupled with a financially constrained government may have serious negative ramifications on the quality of and access to education for all. It must be stated that the Committee on

²² Harris A (2007) Spotlight on development. Towards the Millennium development goals. Windhoek: The NANGOT Trust.

²³ Mwale S (2004) Zambia’s Economic, Social and Cultural Rights: Why should they be in the new Constitution? Lusaka: Jesuit Centre for Theological Reflection.

²⁴ General Comment No. 11, pp. 656-658.

Economic, Social and Cultural Rights attaches great value to the guarantee of compulsory and free primary education. When discussing for example, the report of Zaire (now Democratic Republic of Congo), the Committee made it clear that charging fee for primary education is contrary to Article 13(2)(a) of the ICESCR. A State Party cannot justify such a measure by referring to severe economic circumstances²⁵.

2.5 2006 Education Bill and Mungo'mba draft Constitution 2005.

Notwithstanding these challenges however, the future is promising as regards the interpretation of the right to education in Zambia. It is therefore, important to mention that, the Education Act is currently under review. The objectives as laid down in the Education Bill, 2006 are among others, to give legal backing to changes introduced in education administration over the years. Clause 16 of the Education Bill, 2006 for instance provides that, "every child has a right to nine years of universal basic education"²⁶. Thus despite the deficiency in the constitution, the Education Bill has attempted to incorporate human rights provisions on the right to education from international conventions such as the CRC. These pertain to the right to basic education which should be free and compulsory.

However for the right to education to have a legal force, it must draw its validity from the constitution. This inadequacy has to some extent been addressed in the draft Mungo'mba Constitution. Stake holders that submitted to the Mungo'mba Commission called for the right to education to be enshrined in the Constitution and that basic education should be

²⁵ UN Doc. E/C.12/1988/SR.19, paragraph 10.

²⁶ Education Bill, 2006.

compulsory and free²⁷. The Constitutional Review Commission (CRC) concurred with the stakeholders and various dimensions of the right to education have since been incorporated in the Mungómba draft Constitution. Notable among them is article 72 which provides that every person has a right to education. And that the state shall ensure the right of every child to free and compulsory basic education, and make secondary and post secondary education progressively available and accessible. This provision in itself sets the foundation for the realization of the right to education in Zambia and a prospect in addressing all Constitutional aspects relating to the right. It is prospective in as far as justiciability and forceability of the right to education is concerned. Such a provision once upheld will give individuals the possibility to access the judiciary to claim the right to education in case of denial.

Although the Mungómba draft Constitution seems to offer a lot of promise with respect to the realization of the right to education however, it has failed to address one fundamental issue, that of funding. As already alluded to, Zambia is a signatory to various international instruments dealing with the right to education. Efforts to guarantee free and compulsory education to all children are usually eroded due to under-funding of the education sector. It is for this reason that the Committee on Economic, Social and Cultural Rights not only expects the fulfillment of the right to education by all states, whether immediately or progressively by demonstrating the intention of fulfillment

²⁷ Mungo'mba Constitutional Review Commission Report, 2005.

through a plan of action, but also calls for a full review of the states financial expenditure²⁸.

It is therefore unfortunate to note that the Mungómba draft Constitution has failed to include a clause in the Constitution that obliges the government to allocate to education a determinant minimum proportion of its national budget. Countries such as Malawi have a specific provision in its Constitution which provides for a minimum determinant expenditure on education in the national budget. Further, the Brazilian Federal Constitution determines that the Federal Union should never apply less than 18% of its tax budget in the maintenance and development of education, while the Federal States, Federal district and the Municipalities should apply the minimum of 25%²⁹. Strictly speaking, this is a commendable provision and would obligate the government to adequately fund education so as to meet its millennium development goals. In the absence of such a constitutional guarantee, the tendency will still continue to do “what can”and not do “what must”. It is necessary to outline that, although the Mungo`mba draft Constitution guarantee the right to education, moreover, provides for the realization of free compulsory primary education, it is possible to say that, the realization of such a right might still remain a political issue in the absence of a clause on funding. Giving individuals or groups access to ‘justice’ may not entail the fulfillment of the right. The Executive has the discretionary power to apply the national budget on different sectors,

²⁸ Alston P.H and Quinn. G (1987), The nature and Scope of States Parties’ Obligations under International Covenant on Economic, Social and Cultural Rights’, Human Rights Quarterly, Vol. 9, pp.156-229.

²⁹ Article 212 of the 1988 Federal Constitution of Brazil.

with their margin of appreciation. To have the Judiciary determine the Executive to reallocate resources to a particular public sector, such as education for example (in case of non fulfillment), would not seem logical or, moreover, feasible.

It can clearly be noted that, the current legal provisions in Zambia pertaining to the right to education leaves much to be desired. Currently, education is not considered as a fundamental right in Zambia and as such, it cannot be invoked against the State in any court of law or by any quasi judicial body such as Human Rights Commission. Additionally, there is no other forum for the aggrieved parties to seek redress. It is precisely the non-justiciability character of the DPSP, which is seen as a major hindrance to the full realization of the right to education in Zambia. Unless the issue of justiciability is addressed, the right to education will remain in the legal limbo. This partly explains the perpetual constraints facing the education sector which mainly revolve around under-funding of the sector among other factors. It is for this reason that the present study seeks to take a comparative approach in the next section to determine how other countries in the developing world have approached the issue.

CHAPTER THREE

3.0 Implementation and Enforceability approaches of the right to education: A comparative approach.

The right to education is generally acknowledged to fall within the category of economic, social and cultural rights, as provided for under the ICESCR otherwise referred to as second generation rights. Unlike, civil and political rights (CPR) however, the rights enshrined in the ICESCR are programmatic and need to be realized progressively depending upon the availability of resources. Underpinning the dichotomy was the conception that the two sets of rights Economic, Social and Cultural rights on the one hand and Civil and Political rights on the other were of inherently different nature. Civil and political were thought to be of 'absolute' in nature and 'immediate' in application and were thought to imply 'negative' obligations on the part of the state³⁰. Whereas social and economic rights were thought to engender 'positive' state obligations wherein the states obligation to discharge its duties were to move towards a 'progressive' realization as opposed to immediacy of civil and political rights. Similarly, civil and political rights were thought to have a capacity to be justiciable, in the sense of suitability of the rights for enforcement by adjudicatory bodies, while socio-economic rights fall within the realm of political decisions and programmes, hence non-justiciable.

Notwithstanding the progressive nature of the economic, social and cultural rights however, there is growing international recognition of the universality, interdependence

³⁰ Alston P.H and Quinn G, 'The nature and scope of States Parties obligations under International Convention on Economic Social and Cultural Rights' Human Rights Quarterly, Vol. 19, 1987, pp. 156-229.

and indivisibility of human rights. Indeed the United Nations World Conference on Human Rights held in Vienna in June 1993 emphasised this recognition by proclaiming that “all human rights are universal indivisible and interdependent and interrelated³¹”. States parties are therefore under an obligation to reflect the international norms in the domestic legislation. In the case of **S. Tengur Plaintiff vs. The Minister of Education**³², the Supreme Court of Mauritius held that, it is a well recognized canon of construction that domestic legislation, including the Constitution, should if possible, be construed so as to conform to such international instruments.

What this means is that political, economic social and cultural differences cannot be an excuse for the denial or violation of human rights. In the African context, the African Charter on Human and Peoples Rights places special emphasis on the universality of rights and recognized in its preamble that the “ satisfaction of economic social and cultural rights is a guarantee for the enjoyment of civil and political rights”. Despite such recognition however, the implementation of social economic and cultural rights depends on a series of social, economic and cultural factors. For instance, although the CRC and the ESCR takes into account cultural and financial diversity of the states parties to a certain extent when referring to the realization of social economic rights, such as the right to education, the forms in which these norms are applied, as well as the outcomes of the states measures are bound to vary. The greatest difference in the enforcement of the right to education is found between the developed and developing countries, such as Zambia. In recent years however, certain jurisdictions within the developing world have

³¹ Vienna Declaration and Programme of Action (12 th July, 1993) UN Doc. A/CONF.157/23 Art.5.

³² [1997] Record No. 77387

incorporated the right to education in the constitutional framework making it possible for the right to be enforceable in the courts of law.

The main purpose of this section therefore, is to evaluate in a comparative way, the extent to which some selected developing countries have incorporated the right to education in their constitutions, the mechanisms through which such rights are realized and in some cases the approaches taken by the courts towards the enforcement of the right to education. An attempt shall be made to show how Zambia can learn from these countries in terms of institutional and constitutional mechanisms for the protection of the right to education. The countries chosen for this thesis include; India, South Africa, Namibia, Uganda and Ghana. These countries have been chosen because they are among a few developing countries that have included the right to education in the bill of rights and therefore making it justiciable. Although such a comparative approach will not in any way be used as a yardstick for the Zambian legal framework, it will definitely provide a persuasive value in understanding the scope and enforcement of the right to education.

3.1 India

India was chosen as part of this analysis because it provides a unique example in that although the right to education does not form part of the bill of rights of the Indian Constitution, it is enforceable in the courts of law. The right to Education is provided for under article 45 of the Indian Constitution which falls under the Directive Principles of State Policy as contained in part IV³³. This provision corresponds more or less to article 112 of the Zambian constitution. In fact article 37 of the Indian constitution like its

³³ Indian Constitution

Zambian counterpart (article 101) declares that, the Directive Principles of State Policy “shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be a duty of the state to apply these principles in making laws”³⁴. The apparent distinction that is drawn between the fundamental rights (Part III) and the Directive Principles of State Policy (Part IX) in the Zambian constitution is also seen in the Indian constitution.

However, unlike in the Zambian jurisprudence, the Indian judiciary has overcome this apparent limitation by a creative and interpretative exercise. When the Supreme Court of India first encountered the challenge with respect to the primacy between fundamental rights and Directive Principles of State Policy in the case of **State of Madras v. Champakam Dorairajan**³⁵, the court had the following to say; “the directive principles have to conform to and run subsidiary to the chapter on fundamental rights”. The majority of the opinions in this case reflected the view that, in building up a just social order, it is sometimes imperative that the fundamental rights should be subordinated to directive principles. This view that, the fundamental rights and Directive Principles of State Policy are complementary, “neither part being superior to the other,” has held the field to since. Subsequently, this position was upheld in a historical judgment in the case of **Mohini Jain v. State of Karnataka**³⁶, the Supreme court of India held that, the right to education flows from the right to life and that it is fundamental under the article 21 of Indian’s constitution and that the dignity of an individual cannot be assured unless it is

³⁴ Gauri V and Brinks D.M (2005) *Judicial enforcement of Social and economic Rights in the Developing World*. London: Cambridge University Press.

³⁵ [1951] SCR 525

³⁶ *Mohini Jain v. State of Karnataka*[1993] 3 SCC 666

accompanied by the right to education. This case was regarding the charging of capitation fees for professional colleges. It was further stated that, the Fundamental Rights guaranteed under Part III (Bill of Rights) of the Constitution of India, including the right to freedom of speech and expression and other rights under Article 19, cannot be appreciated and fully enjoyed unless a citizen is educated and conscious of his individualistic dignity. In looking at the interdependence of the rights guaranteed in part III and Part IV, the court held:

'The directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part III. These principles have to be read into the fundamental rights. Both are supplementary to each other ... Without making the 'right to education' under Article 41 of the constitution a reality, the fundamental rights under chapter III shall remain out of reach of a large majority which is illiterate'.

What is most significant in this case is that the Supreme Court held that the right to education is an integral part of the right to life because of its inherent fundamental importance³⁷.

The right to education was further upheld in another landmark case by the Supreme Court of India, **Unni Krishnan, J.P. v. State of Andhra Pradesh**³⁸. The case involved a challenge by certain private professional educational facilities to the constitutionality of

³⁷ Sathe S.P., "Supreme Court on the Right to Education" Economic and Political Weekly, 1992, Vol. 27, Issue 35 p. 187.

³⁸ [1993] 1 SCC 645.

state laws regulating capitation fees charged by such institutions. The Supreme Court held that the right to basic education is implied by the fundamental right to life (Article 21) when read in conjunction with the directive principle on education (Article 41). The Court held that the parameters of the right must be understood in the context of the Directive Principles of State Policy, including Article 45 which provides that the state is to endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children under the age of 14.

In the subsequent case of **M.C. Mehta v State of Tamil Nadu & Ors**³⁹ the Supreme Court stated that Article 45 had acquired the status of a fundamental right following the Constitutional Bench's decision in **Unni Krishnan**. In addition, the Court stated that, in order to treat a right as a fundamental right, it is not necessary that it should be expressly stated as one in Part III of the Constitution: "the provisions of Part III and Part IV (Directive Principles of State Policy) are supplementary and complementary to each other". The Court rejected that the rights reflected in the provisions of Part III are superior to the moral claims and aspirations reflected in the provisions of Part IV. Quoting Article 13 of the International Covenant on Economic, Social and Cultural Rights, the Court stated that the state's obligation to provide higher education requires it to take steps to the maximum of its available resources with a view to achieving progressively the full realization of the right of education by all appropriate means. In the case of State of **Kerala v. V.M Thomas**⁴⁰, the Supreme Court of India had gone further to de facto include a Directive Principle in a fundamental right.

³⁹ (1996) 6 SCC 756; AIR 1997 SC 699.

⁴⁰ [1976] 1 SCR 906

What this meant was that, the court had gone further than merely relying on the Directive Principles as a jurisprudential basis for defining the purview of the fundamental rights, what the court had done was to make a Directive Principle a fundamental right and thereby making it justiciable. This principle was further upheld in the case of **Mohd Hanif Quaresh v. State of Bihar**⁴¹.

It is clear therefore that while the right to education does not form part of the fundamental rights in the Indian constitution, the courts have used a pragmatic approach and have held the right to education to be implicit to the right to life because of its inherent importance. By so doing, the Indian Supreme Court had broken new ground in the matter of justiciability and enforceability of the right to education. A citizen has a right to call upon the State to provide educational facilities to him/her within the limits of its economic capacity and development.

3.2 South Africa

South Africa is seen as the benchmark in Sub-Sahara Africa in as far as constitutional protection and judicial enforcement of socio-economic rights is concerned. Unlike the Zambian constitution, the South African Constitution has incorporated social and cultural rights within the bill of rights. The arguments for the inclusion of socio-economic rights in the South African bill of rights were first considered in the landmark case of **Ex-parte Chairperson of the Constitution Assembly: in re Certification of the Constitution of South Africa**⁴² in which the Constitutional Court held that although socio-economic

⁴¹ [1958] AIR SC 731

⁴² [1996] [A] SA 744 (CC)

rights are not universally accepted as fundamental rights, they 'are, atleast to some extent justiciable; and at the very minimum can be negatively protected from the invasion'

In this case, the court conceded that socio-economic rights might result in courts making orders that have direct budgetary implications. Whereas the protection of such rights is dependent on the availability of resources, the constitutional court in the instance case rejected the State's argument of resource constraints. Thus, the Court's position was in tandem with the United Nations Committee on Economic, Social and Cultural Rights which stated that, In furthering the argument for the constitutional guarantee of socio-economic rights, Brand and Heyns contended that;

.... the constitution enables the enforcement of socio-economic rights, creating avenues of redress through which complaints that the state or others have failed in their constitutional duties can be determined and constitutional duties can be enforced. In this sense, constitutional economic rights operate proactively. They are translated into concrete legal entitlements that can be enforced against the state and society by the poor and otherwise marginalized to ensure that appropriate attention is given to their plight⁴³.

In order for the State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations⁴⁴

⁴³ Devenish G [1999] A Commentary on the South African Bill of Rights. London: Butterworths.

⁴⁴ See General Comment 3, The nature of States parties obligations (Article 2 para 1 of the CESR) 5th Session, 1990.

Another important feature of the South African Constitution is that, it does not provide for any hierarchy of the rights. This implies that, there is no particular order in which these rights are categorized. Mention must be made of section 29 which provides for everyone's right to basic education and further education.

With regards to implementation and enforcement of the right to education and other rights enshrined in the Bill of Rights, section 7(2) of the South African Constitution enjoins the State to 'respect, protect, promote and fulfill these rights⁴⁵'. This provision is sanctity in that, it commits the government not only to refrain from interfering with the enjoyment of the rights but also to act so as to protect, enhance and realize their enjoyment. This is done through the legislature by enacting relevant enabling legislation and through the executive and state administration by adopting the necessary policies and making appropriate administrative decisions. However, the most distinctive feature of the South African human rights jurisprudence is the judicial enforcement of socio-economic rights which is mainly done through the Constitutional court. The Constitutional Court as Mubangizi rightly observes⁴⁶ has been the torch-bearer to judicial enforcement of socio economic rights. Other mechanisms of enforcement include the Human Rights Commission and the Public Protector. Unlike Zambia therefore, South Africa has gone a milestone in implementing the right to education.

⁴⁵ Constitution of the Republic of South Africa.

⁴⁶ Mubangizi J.C, The Constitutional Protection of Socio-economic Rights in selected African Countries: A comparative Evaluation. African Journal of Legal Studies 1 [2006] 1-19.

3.3 Namibia

Like its South African counterpart, the Namibian constitution embodies within its bill of rights both Civil and Political Rights, as well as Socio-economic rights. It is however worth noting that, while the Namibian Bill of Rights pays very scant attention to socio-economic rights, great importance has been given to children's rights⁴⁷ and the right to education⁴⁸. Importantly as with the Zambian constitution, the framers of the Namibian constitution chose to handle economic and social rights outside the 'rights context' and specifically as policy goals. In fact, Article 101 of the Namibian constitution has a very similar provision as Article 101 of the Zambian constitution. It thus clear that, although some socio-economic rights have been incorporated in the Bill of Rights, the extent of this provision is of considerable interest. Commenting on the Namibian Bill of Rights, Gino Naldi had this to say:

Chapter 3 of the [Namibian) constitution is not solely concerned with civil and political rights but also seeks to protect certain economic, cultural and social rights, albeit in a somewhat limited and modest fashion⁴⁹.

The Namibian Constitution recognizes the right to education as a constitutional right. This provision is explicit in that the Constitution provides that all persons shall have the right to education⁵⁰ and that primary education should be compulsory and free of charge⁵¹. In principle therefore, Article 20 of the Namibian constitution is in concordance

⁴⁷ Article 15 of the Namibian Constitution

⁴⁸ Article 20 of the Namibian Constitution

⁴⁹ Naldi G.J.[1995] Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights, Ndabeni, South Africa, Juta and Co. Ltd.

⁵⁰ Article 20(1)

⁵¹ Article 20(2)

with Article 28 of the CRC. This provision is compellable in nature as it does not only place the obligation on the state to ensure realization of the right, but it also puts the onus on the parents to ensure that all children of school going age are enrolled in school. Therefore, the justiciability of the right may also be effected against the parents for failure to enroll the child in school. This indeed is an interesting feature of the constitutional recognition of the importance of the right to education as it carries with it a compulsive element.

As already observed, implementation and enforcement of human rights mainly takes place through three bodies, the legislature, executive and the judiciary. In the Namibian context, this position is reflected in article 5 of the constitution which provides inter alia that, the fundamental rights and freedoms enshrined in chapter 3 shall be respected and upheld by the Executive, Legislature and Judiciary.... and shall be enforceable by the courts. However, the provisions of article 101 of the Namibian constitution are very similar with article 101 of the Zambian constitution. It is also worth noting that, unlike South Africa, Namibia just like Zambia does not have a specialized Constitutional Court. Thus the absence of such socio-economic rights jurisprudence is in stark contrast with South Africa and an aspect that inevitably has a significant bearing on the nature and extent of the constitutional and human rights litigation.

Uganda

Uganda has taken a similar approach with that of Namibia in the enforcement of social economic rights. Just like its Namibian counterpart, education is one of a few socio-

economic rights that have been incorporated in the bill of rights. Similarly, with regards to enforcement the Ugandan courts have been less than adequate in the judicial enforcement of the right to education⁵². This was noted in the case of **Dimanche Sharon v. Makerere University**⁵³. In this case, the court was called upon to consider certain aspects of the right to education. The case concerned a claim by Seventh Day Adventist students that the University was violating their rights by holding classes and conducting other academic activities on Saturday (their Sabbath). Justice Kikinyogo held that, the respondents' policy did not prohibit the petitioners from practicing or participating in their religious activities and that their right to education had not been violated. It is noted that, although the court was called upon to interpret the scope of the right to education, the court did not elaborate on what the right to education. This unfortunately entailed an opportunity was lost to give content to the right to education which is rather couched in broader and general terms in the Ugandan Constitution.

Notwithstanding this however, the Ugandan constitution cannot in any way be compared to the Zambian constitution in as far as protection and enforcement of the right to education is concerned. Uganda can be compared favourably with South Africa and Namibia in that the three jurisdictions have given the right to education its normative content. For instance, apart from judicial enforcement as exercised by the courts, other institutional mechanisms such as the Human Rights Commission. However, what is significant to note about the Ugandan situation is that over and above its institutional functions, the Commission has the powers of the court by exercising judicial functions

⁵² Oloko-Onyango J, 'Economic and Social Human Rights in the Aftermath of Uganda's Fourth Constitution' (Working Paper No. 88/2004, Centre for Basic Research, Kampala.

⁵³ Constitutional cause No. 01 of 2003.

regarding claims of human rights violations⁵⁴. This judicial power was demonstrated in the case of **Emmanuel Mpondi v. The Chairman, Board of Governors, Ngwana High School and Others**⁵⁵, the Commission dealt with the right to education. Mpondi, a student at the respondents' school had been severely punished by two teachers. After hospitalization and treatment, he returned to school only to be sent back home to collect school fees. His sponsors however refused to pay school fees until the school administration had either punished the teachers, or clearly indicated the specific action that would be taken against them. As a result, Mpondi had to leave school for good. In dealing with the issue of the right to education, the Commission held that the claimants'

right to education had been interfered with and, on a balance of probabilities; his right to education had been violated by the respondents.

This is definitely a positive feature which is clearly in sharp contrast with the jurisdiction of the *Zambian Human Rights Commission* that lacks judicial power and merely operates as a watchdog.

Ghana

Ghana unlike Zambia provides a positive example in the implementation and enforcement of the right of the right to education. Although the Ghanian constitution like the *Zambian* one makes a clear distinction between Fundamental Human Rights as

⁵⁴ Sewanyana L and Awori T[2003], 'Uganda: The Long and Uncertain Road to Democracy in Abd Allah Ahmed Naim (ed), *Human Rights Under African Constitutions*. Philadelphia: University of Pennsylvania Press.

⁵⁵ Complaint No. 210 of 1998

contained in Chapter 5 of its constitution and directive policy principles, the enforceability of social economic rights in Ghana is not limited to those that are contained in the bill of rights. It may in fact extend to those laid down in the Directive Principles of the State Policy. This was stated in the case of **New Patriotic Party v. Attorney General**⁵⁶ which held, inter alia, that although the Directive Principles of the State Policy are not in themselves legally enforceable by the courts, there are exceptions to this principle in that where the Directive Principles are read together with other enforceable parts of the constitution, they then in that sense become enforceable. Further, Ghana has an extensive provision of the right to which is incorporated in the bill of rights. Article 25 of the Ghanian constitution provides for the equal educational opportunities and facilitates with the view to achieving full realization of the right⁵⁷. Article 25 also provides for the availability of free and compulsory basic education and the general availability and accessibility of secondary and higher education. This provision flows well with the provision under article 24 of the CRC. In many respects, this constitutional provision is also similar to that of Namibia and South Africa in that there is an attempt to explain what is included in the right to education.

The courts just like in jurisdictions referred to in this section play an important role in the implementation and enforcement of human rights in Ghana. Additionally, Ghana has taken such an innovative approach by the establishment of the Commission on Human Rights and Administrative Justice (CHRAJ) which possesses quasi judicial powers in

⁵⁶ [1996-97] SCGLR 729.

⁵⁷ Article 25 of the Ugandan Constitution

entertaining human rights claims⁵⁸. However, unlike South Africa, Ghana does not have a specialized Constitutional court.

3.4 What lessons can Zambia learn from these approaches?

A comparative study of enforcement mechanisms of the right to education in other developing countries is very vital as it may provide a persuasive value for the Zambian legislative framework. Zambia has a lot to learn from the approaches other developing countries have taken in the implementation and enforcement of the right to education. Notwithstanding the fact that protection and enforcement of the right to education is always bound to be problematic particularly for poor countries like Zambia, one cannot ignore the pivotal role education plays in the development of the country.

One lesson that could be learned is the inclusion of the right to education in the bill of rights in countries such as Malawi, Namibia, Uganda, Ghana and South Africa. These countries have found ways of dealing with the application of the right to education as articulated in their Constitutions. For instance, the Malawian and South African Constitutions allow citizens to have legal redress to secure protection of the right to education. The Malawian Constitution further assures priority spending of government towards the realization of the right to education as enshrined in the Bill of Rights. It is also noted that, protection and enforcement of the right to education in these countries is not the sole responsibility of the judiciary, the legislature and executive, non state actors such as the Human Rights Commission have played an important role. A good example is

⁵⁸ Busia N. K. A [2003] Ghana: Competing Vision of Liberal Democracy and Socialism' in Abd Allah Ahmed Naim (ed) Human Rights Under African Constitutions. Philadelphia: University of Pennsylvania Press.

that of Uganda where the Human Rights Commission has been given judicial power. Another country of particular interest from which Zambia can draw a model is India. As already alluded to, the Indian Constitution just like the Zambian Constitution does not include the right to education in the bill of rights, but rather in the Directive Principles of State Policy. It is however interesting to note that, the courts have been creative in adjudicating the right to education and have since given it judicial effect. This is an approach which Zambia could emulate to give the right to education the force of law.

CHAPTER FOUR

4.0 Conclusions and Recommendations.

4.1 Conclusions

This paper has demonstrated that, education is a right of paramount importance. However, the effectiveness or rather achievement of any human rights implementation mechanism is directly proportional to its ability to ensure the protection of the rights concerned to individual rights holders. In this section, an attempt will be made to elucidate the nature of interpretation of the right to education and the monitoring mechanisms that have been put in place. This will help understand the reluctance by Zambia to give the right to education its legal character. Furthermore, conclusions and recommendations will be made on the Zambian legislative framework.

4.2 Conflicts of Interpretation.

The right to education has evolved along with the child's inherent rights. While recognizing the immense step taken towards the realization of the right to education by the international community, through the UDHR, ICESCR and the CRC, it is necessary to make some remarks concerning the legal character of the right to education. Despite its importance in achieving socio political justice however, the right to education has always been underexposed. One plausible reason could be the phrasing of the ICESCR which leaves room for differing interpretations in the implementation of the rights enshrined in this universal instrument. It has been argued that the ICESCR have formulation deficiencies in as far as implementation is concerned. Thoko Kaime (2004) has argued that, the formulation chosen i.e. that of using general phrases such as 'the States parties

undertake to ensure the right to...' was not only weak but also militated against the promotion and protection of economic, social and cultural rights⁵⁹. It bolstered and propped the argument that the normative content of these rights are vague and opaque and provided tangible justification for a weak supervisory system.

Further this weak formulation framework has to some extent served to provide support to the claim that economic, social and cultural rights were exclusively of a programmatic or directive nature, and consequently not immediately realizable leading to general ambivalence of many governments to ESC rights and the supervisory system itself. In fact, some western scholars have argued that ESC rights are indeed different from 'real' human rights; they are at best laudable aspirations, but they are not enforceable rights⁶⁰. In this respect, measuring a states performance in the implementation of the right to education is an onerous task in the absence of generally accepted criteria and benchmarks for evaluating the effectiveness of the steps taken towards its realization.

Additionally, the right to education like any other socio-economic right calls for a progressive realization and determines that the states parties should allocate the available resources to the maximum extent to comply with the obligation. . As clear as the right to fulfill the obligation may be, the ICESCR and the CRC does not have a powerful enforcement mechanism. For instance, the ICESCR only requires states incapable of the immediate realization of the right to education (among others) to submit a plan of action

⁵⁹ Thoko Kaime [2004] *Whose rights are they anyway?: A critical analysis of the International supervision mechanism for Economic Social, and Cultural Rights.*

⁶⁰ Martha Meijer [2001] *Dealing with human Rights: Asia and Western views on the value of Human Rights.* Bloomfield, CT: Kumarian Press.

for the progressive realization of such a right⁶¹. The enforcement of the rights contained in the CRC on the other hand, is left to the monitoring system of the Committee of the Rights of the Child. Its objectives are to verify if states are fulfilling their obligations under the Convention through official reports made by the Committee and periodic reports submitted by the states parties. Furthermore, the self executing nature of the right to education depends on the domestic enforceability of the right.

Whatever the case however, the aim to guarantee that all individuals enjoy their right to education has become great part of the international agenda, as well as it has been included in the policies of many states. Thus, education, as has been stated in this paper, embraces not only the development of the child and his or her preparation for participating in society, but also comprehends the respect for human rights and the importance of cultural values among others. It is a necessary condition for the enjoyment of the rights and freedoms of the Constitution. The right has even in countries such as India and the United States of America, where it has not been constitutionally entrenched, nevertheless been recognized as a legal right of fundamental importance. What then is crucial is the will of the state to implement this constitutional mandate. Thus, where the domestic legislation does not facilitate the enjoyment of the right to education, there is need for revision. International law and treaties can provide guidance in this regard.

⁶¹ [Ibid] supra note 46.

4.3. The Zambian Experience

In evaluating the implementation of the right to education, it is necessary to investigate whether the state takes responsibility for implementing the right through legislation, political policies and programmes. This would help determine whether education has been placed in a hierarchy of rights implementation.

As already stated, the obligation of the state to fulfill the right to education, although clearly expressed under international law, depends on a number of factors, such as the available resources of the state, the political will and commitments of governments, as well as the national legal system. Although it has been demonstrated that education is a right of fundamental importance, the reality of most of the states of the developing world- and this study has placed particular emphasis on Zambia- shows that the enforcement of the right to education is far from being applicable. As the present analysis has shown, the right to education still remains an illusion to many Zambian children. The question to be asked is why should this fundamental right remain a mere pious wish, even after 44 years of independence?

It has be argued that, under international law, Zambia, as a ratifying state of the CRC and ICESCR, has the obligation to fulfill the right to education under the terms and conditions set in article 28 of the CRC and articles 13 and 14 of the ICESCR respectively. It is relevant to note that, the present analysis has demonstrated that, currently, the Zambian legislative framework does not address education as a fundamental right. To illustrate the point, the right to education forms part of the Directive Principles of State Policy as contained in Part IX of the Constitution and these

provisions are not enforceable in any court of law. Simply put, the Zambian Constitution does not give the right to education a character of practical applicability. Under international law, the child has no power to claim for his or her enjoyment of the right to education as international law does not have directive legal force on national legislation. This implies that an aggrieved party cannot bring an action against the state for non-fulfillment of the right. It is clear from the foregoing that, the national legal system of Zambia does not give the right to education a character of direct applicability. This is in stark contrast with the South African, Namibian and Ugandan Constitutions where the right to education has been provided for in the constitution.

Furthermore, the 1966 Education Act is silent on education as a fundamental right. In practice therefore, education cannot be described as a constitutional right, it is merely a policy goal that has no force of law.

It is however worthy noting that, not all is lost for Zambia, the Mung'omba draft Constitution (2005) and the Education Bill (2006) seems to offer a lot of hope in this direction. There is a move in the Mung'omba draft Constitution to make education a fundamental right enunciated in Part III of the Constitution. This once upheld is likely to end all controversies on the issue of enforceability thereby ensuring that the right to education is guaranteed. It is also satisfying to note that there has been an attempt both in the Education Bill to address the goals and aims of education as determined by articles 29 of the CRC and 26 of the UDHR respectively by stating clearly that all eligible children must be enrolled in schools, getting good quality and relevant education and equal educational opportunities. It must therefore be emphasized that, the provisions in the

Mung'omba draft Constitution(2005) and the Education Bill (2006) should be upheld if the right to education has to be transformed into a living reality for the Zambian child. Although the Mungo'mba draft Constitution marks a significant milestone in the implementation of the right to education, however, it is not certain whether such a sound recommendation would be sustained in the Constitution considering that some stake holders are against the idea of including socio-economic rights in the Bill of Rights citing lack of resources.

4.3.0 Recommendations

Based on the findings of this study, the following recommendations were made.

4.3.1 The right to education as a legal right in Zambia

As already noted, the drafters of the Zambian Constitution bought into the idea that ESC rights, right to education inclusive were not true rights and that they relate instead to goals, policies and programmes. This approach downplays the undisputed fact that all human rights are indivisible, interdependent and interrelated and of equal importance for human dignity. It must be pointed out that the right to education being a right of fundamental importance cannot be at the mercy of government policies and programmes, but it should instead be given constitutional recognition. The Indian experience is of particular relevance to Zambia. Although in both the Zambian and Indian Constitutions, ESC are formulated as Directive Principles of State Policies as opposed to enforceable rights and both Constitutions contain draw-back clauses precluding their respective courts to enforce these rights. It is satisfying to note that, the India constitutional

jurisprudence has given the right to education its normative content through expansive interpretation of the right. It is therefore recommended that, the Zambian jurisprudence borrows the Indian approach by declaring education a constitutional right.

4.3.2. Compulsory and free primary education.

The duty to provide compulsory and free primary education is undoubtedly a prerequisite for the realization of the right to education. The CESCR in its General Comment 11 on article 14 of the ICESCR considers that states parties have a clear and unequivocal obligation to draw up a plan of action for ensuring compulsory and free primary education. The committee has stated that lack of educational opportunities for children often reinforces their subjection to various other human rights violations such as child labour among others. In line with this requirement, the Zambian government has introduced free primary education policy and a plan has been drawn up to ensure access to primary education to all children by 2015 as part of the Millennium Development Goals.

Conversely, it is found that although education is declared to be free, communities and families are encouraged to share costs through contributions for the construction of classrooms, supply of school stationery and running costs of the schools. It is therefore strongly recommended that, all these economic barriers should be completely removed so as to ensure access for all. Additionally, the progressive implementation of the right to education ought to be seen as an opportunity to step forward and not merely to be treated as a political agenda. The starting point should be to increase the number of schools to

truly give every child access to education at no cost. The state has to ensure that the schools are within a reasonable distance from the child's home, principally in rural areas.

Another point to be noted is that, primary education is not compulsory in Zambia. It must hence be recognized that, despite the fact that the Zambian government has declared primary education to be free which in itself is a major accomplishment, it does not fully assure children's right to education. Thus declaring primary education free and compulsory is an important requirement in that it puts the onus not only on the government alone but on the parents as well to ensure that every eligible child is in school. This entails that parents will be compelled to ensure that every eligible child is enrolled in school and failure to do may attract a penalty of either imprisonment or a fine. This is an important feature of the Namibian constitution from which Zambia can draw inspiration. The compulsory character of primary education, as the Committee explains serves to emphasise that parents are not entitled to undertake the decision whether the child should have primary education or not as optional.⁶²

4.3.3. Funding

Related to provision of compulsory and free primary education is the issue of funding. While the state is not the only investor in the education sector, international human rights law obliges it to be the investor of last resort so as to ensure that primary schools are available for all school- age children. Thus, without priority funding to the education sector, legal provisions on compulsory education will not be translated into practice and access to education will remain a need rather than being a right. Currently, there is no

⁶² General Comment No. 11.

law in Zambia compelling the government to ensure priority funding in the education sector. Unlike the Malawian Constitution which provides for priority funding in the education sector, the Zambian Constitution as well as the Education Act does not have a provision on funding. Adequate funding to the education sector is an indication of the state's commitment, and it confronts ambition and hope with resources, efficiency and equity. It is therefore strongly recommended that, the Mungo'mba Constitution addresses the issue by including a clause in the Constitution providing for minimum budgetary allocation to the education sector.

4.4.4 Monitoring and enforcement.

It is further recommended that other human rights bodies such as the Human Rights Commission should be given quasi judicial powers to broaden the scope of enforcement of the right. Additionally, the South African jurisprudence of the Constitutional Court is one such example to be embraced in the Zambian jurisprudence as this will allow expediency in the enforcement of right to education.

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