



# **THE UNIVERSITY OF ZAMBIA**

## **SCHOOL OF LAW**

### **POST GRADUATE STUDIES**

#### **RESEARCH PAPER**

TOPIC:

**ECONOMIC, SOCIAL AND CULTURAL RIGHTS: PROSPECTS AND CHALLENGES  
FOR THEIR INCLUSION IN THE NEXT CONSTITUTION OF ZAMBIA**

**Submitted in partial fulfillment of a Masters of Laws (LL.M) Degree**

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## ABSTRACT

This study examines the prospects and challenges for the inclusion of economic, social and cultural rights in the Constitution of Zambia. The argument put forward is that the most effective way of ensuring that citizens enjoy their basic rights to food, housing, safe and clean water, sanitation, education, health services, culture, tradition, custom and language is by guaranteeing the protection of these rights through the Constitution. The rationale behind the study is that, where economic, social and cultural rights are enshrined in the Bill of Rights of the Constitution, citizens can hold the State and public bodies accountable in courts of law for violations or threatened violations, or denial of their rights by the State and public bodies. The study proceeds from the premise that having these rights in the Constitution would result in a transparent, accountable and equitable distribution of wealth. This would in turn result in a rise of the standard of living of the majority poor Zambians. The study thus employs a socio-legal approach, which is inter-disciplinary. The study starts with the history of constitution-making in Zambia, and later examines the place of economic, social and cultural rights in the reports of successive constitutional review commissions.

The study establishes that, despite the majority of petitioners to the constitutional review commissions submitting in favour of constitutionalization of economic, social and cultural rights, these rights have not been put in the Bill of Rights of the Constitution of Zambia. The 1996 Constitution of Zambia, which is the current Constitution, provides for Directive Principles of State Policy under Part IX of the Constitution, which are unenforceable against the State. The study further reveals that, despite the inclusion of economic, social and cultural rights in the current draft Constitution of Zambia, the draft Constitution has derogation clauses which bar the proposed Constitutional Court from passing a decision that is contrary to the position of the executive branch of government, in matters of resource allocations. Further, the study undertakes a comparative perspective of how other jurisdictions have dealt with the subject of constitutionalizing economic, social and cultural rights.

Accordingly, the study establishes that the executive, legislature and judiciary as arms of government cannot offer effective protection of citizens' economic, social and cultural rights in the absence of constitutional provisions on these rights. Hence the study's finding is that the answer lies in enshrining justiciable economic, social and cultural rights in the Bill of Rights as is the case in the South African and Kenyan Constitutions, among other jurisdictions. The study thus concludes by recommending that in order to reduce poverty and ensure equitable distribution of national resources, there is need for legislators and all stakeholders in the constitution-making process to provide for justiciable economic, social and cultural rights in the Bill of Rights, including enforcement and monitoring mechanisms of court judgments in the next Constitution of Zambia.

## DECLARATION

I, Sam Mwapela do hereby declare that, this is my original work and has not been presented for any study programme in any university or college or for any thesis. The ideas and views, except where expressly indicated are strictly my own, and I take responsibility for them.

Signature.....

Date.....

This research paper has been submitted for examination with my approval as a University of Zambia LL.M supervisor:

Signature.....

Honourable Dr. Justice Patrick Matibini, SC, MP.

**Date.....**

## **DEDICATION**

To my family and friends

For their understanding and support during my studies

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## ACRONYMS

ACHPR	African Charter on Human and People's Rights.
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women.
CPR	Civil and Political Rights.
CRC	Convention on the Rights of the Child.
CSOs	Civil Society Organizations.
DPSP	Directive Principles of State Policy.
ESCR	Economic, Social, and Cultural Rights.
HIV	Human Immuno-deficiency Virus.
ICESCR	International Covenant on Economic, Social and Cultural Rights.
ICCPR	International Covenant on Civil and Political Rights.
LAZ	Law Association of Zambia.
MDGs	Millennium Development Goals.
MMD	Movement for Multi-Party Democracy.
NCC	National Constitutional Conference.
NGO	Non-Governmental Organizations.
NGOCC	Non-Governmental Organization Coordinating Council.
PF	Patriotic Front.
SADC	Southern African Development Community.

TAC	Treatment Action Campaign.
UDHR	Universal Declaration of Human Rights.
UN	United Nations.
UNIP	United National Independence Party.

# **CHAPTER ONE**

## **1.0 INTRODUCTION**

### **1.1 BACKGROUND**

This study interrogates the subject of economic, social and cultural rights (abbreviated as ESCRs), and the prospects and challenges for their inclusion in the Bill of Rights in the next Republican Constitution. In putting the study into perspective, chapter one introduces the study, and discusses the background of the topic; statement of the problem; objectives of the study; research questions which the study is endeavouring to answer; significance of the study; literature review; methodology employed in the study, and; the research lay out.

According to the United Nations Development Programme (UNDP) 2011 Human Development Reports, many Zambians are jobless, homeless, hungry, illiterate, failing to access proper medical care, and without safe water and sanitation. The 2010 Census for Population and Housing shows that Zambia has a population of 13,092,666 people.<sup>1</sup> Out of this number, only 500,000 Zambians are in formal employment. Consequently, many Zambians do not have adequate resources to meet basic rights such as food, housing, safe and clean water, sanitation, education, health services, culture, tradition, custom or language. According to the 2011 Human Development Index Report,<sup>2</sup> out of 187 countries of the world, Zambia is ranked as number 164. Zambia is the largest copper producer in Africa, but more than 68 percent of Zambians live in inhuman conditions that are below the poverty datum line, with 63.7 percent of its citizens living on less than one dollar a day.<sup>3</sup>

Could this be as a result of governmental authorities' dereliction of their duties to the citizenry, or is it citizens' laziness, or unequal distribution of available resources? It has been asserted that the foregoing situation is as a result of Government not paying enough attention to citizens' access to ESCRs. But what are these ESCRs? Why are these rights important to Zambians? Are there adequate resources in Zambia to meet basic rights such as food, housing, clean water, education and health services? Can these rights be achieved in the current economic and political situation in Zambia? How could ESCRs be enshrined and

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<sup>1</sup> Zambia 2010 Census of Population and Housing (Population Summary Report), Lusaka: Central Statistical Office 2012: 3.

<sup>2</sup> UNDP, 2011 Human Development Report, 2011, 129.

<sup>3</sup> Central Statistical Office (Zambia). [www.zamstats.gov.zm](http://www.zamstats.gov.zm); accessed 24 August 2012.

claimed under Zambian laws? Can we learn from other countries on how they have dealt with the issue of ESCRs?

The importance of the foregoing questions has necessitated the undertaking of this research, in order to examine in depth the issue of inclusion of justiciable ESCRs in the Republican Constitution. This study will examine what ESCRs are; the prospects and challenges of enacting them into Zambian domestic legislation; and how these rights can effectively be implemented and enforced.

## **1.2 STATEMENT OF THE PROBLEM**

The percentage of Zambians living below the poverty datum line is estimated at 68% of the population.<sup>4</sup> Despite Zambia being the biggest copper producer in Africa, respective Governments have not been able to provide basic necessities for the impoverished majority citizens. And since the ESCRs are not enshrined in the Bill of Rights, citizens are not able to enforce their rights to food, housing, safe and clean water, sanitation, education, health services, culture, tradition, custom or language, against the State, through courts of law. The four successive Constitutions which Zambia has had since independence from Britain in 1964, have focused on providing civil and political rights (CPRs) of citizens.

Both the 1964 and the 1973 Constitutions did not have ESCRs. In the 1991 Constitution, ESCRs were mentioned in the preamble of the Constitution as mere aspirations of the State. In the 1996 Constitution, non-justiciable Directive Principles of State Policy (DPSPs) are outlined under Part IX of the Constitution. The DPSPs cover a wide range of ESCRs, which cannot be enforced against the State.

The effect of non-inclusion of ESCRs in the Bill of Rights was acknowledged by Women for Change [2003], a civil society organization, when they stated as follows:

The absence of ESCRs in our Constitution has contributed to the majority of Zambians wallowing in abject poverty, disease and hunger because Government is not obligated by the Constitution to provide for an adequate standard of living for her citizens. The real issues that affect the lives of Zambians include the lack of social security, hunger, unsafe water...lack of hospitals, lack of schools and teachers, and many others.<sup>5</sup>

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<sup>4</sup> Central Statistical Office (Zambia). [www.zamstats.gov.zm](http://www.zamstats.gov.zm); accessed 24 August 2012.

<sup>5</sup> Simon Mwale, *Zambia's Economic, Social and Cultural Rights: Why Should they be in the New Constitution*. (Lusaka: Jesuit Centre for Theological Reflection). [www.jctr.org.zm](http://www.jctr.org.zm); accessed 2 February 2013.

The problem which has been identified in this study is that, despite justiciable ESCRs being cardinal in facilitating citizens' access to basic necessities of life, successive Governments in Zambia have resisted incorporating ESCRs in the Bill of Rights. This state of affairs has resulted in deepening poverty of the majority of Zambians as they cannot hold Government accountable, and claim their ESCRs when threatened to be violated or actually violated by the State. As discussed in this study, DPSPs cannot be made justiciable through judicial activism since Article 111 of the Constitution categorically states that the DPSPs shall neither be justiciable nor legally enforceable in any court, tribunal or administrative institution. This study therefore examines the prospects and challenges for the inclusion of ESCRs in the Bill of Rights for the Constitution of Zambia.

### **1.3 OBJECTIVES OF THE STUDY**

In this study, the following objectives have been identified as the purpose of the study:

- a) To investigate and analyze the prospects and challenges for the inclusion of ESCRs in the Bill of Rights of the Constitution of Zambia;
- b) To examine the nature of ESCRs in order to enhance clarity and proper understanding of these rights in the Zambian context, with a view to stimulating debate on the issue of ESCRs in the Bill of Rights among stakeholders in the constitution-making process;
- c) To ascertain the importance and indivisibility of ESCRs from CPRs;
- d) To offer a well-researched and balanced opinion, from a comparative perspective with other jurisdictions in order to ascertain the necessity of ESCRs;
- e) To identify and recommend the best ways of implementing and enforcing ESCRs in the Bill of Rights;
- f) To add to the body of knowledge in the area of ESCRs and their constitutionalization.

### **1.4 RESEARCH QUESTIONS**

In order to investigate the prospects and challenges of including ESCRs in the Constitution, and to effectively meet the objectives of the study, this study has to answer the following research questions:

- i. What are ESCRs, and how different are they from CPRs?

- ii. Despite recommendations of the Mwanakatwe and Mung'omba Constitutional Review Commissions to constitutionalize ESCRs, why has Zambia not included these rights in the Bill of Rights?
- iii. Would the constitutional inclusion of ESCRs be too costly to be required of a State like Zambia?
- iv. What do other jurisdictions have to say about ESCRs?
- v. Does inclusion of ESCRs in the Bill of Rights result in excessive judicial interference upon the political processes, thereby violating the principle of separation of powers?
- vi. Would the inclusion of ESCRs in the Bill of Rights result in providing a mechanism by which citizens can enforce their ESCRs and better their standard of living?

## **1.5 SIGNIFICANCE OF THE STUDY**

There are many scholarly works on the subject of constitutionalization of ESCRs. The majority of literature on this subject in Zambia and outside that I have reviewed, have focused on the pros and cons of constitutionalizing ESCRs. This study has taken a multi-disciplinary approach, which brings out the chronology and attempts to constitutionalize these rights, from a legal, economic and social perspective. This is done by studying the international and regional human rights instruments in respect of Zambia's obligations to domesticate and constitutionalize the ESCRs, and studying how other jurisdictions have fared in this regard. In doing so, an attempt is made at understanding how the inclusion of ESCRs in the Bill of Rights could be utilized to raise the standard of living of an average Zambian, and to give them a legal right of claim for the basic necessities of life from the State, and enhance prudent utilization of the country's resources by those in authority.

Further, the majority of petitioners to the Mwanakatwe and the Mung'omba Constitutional Review Commissions<sup>6</sup> submitted in favour of constitutionalization of ESCRs. However, these rights have not been incorporated in the Bill of Rights. This research thus investigates underlying circumstances which have led to the omission of these rights in successive Constitutions. Since Zambia is in the process of reviewing her Constitution, the findings of this research are envisaged to feed into the debate for and against the inclusion of ESCRs in the Bill of Rights, and bridge the dearth of knowledge and understanding of these rights and their implementation.

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<sup>6</sup> Final Report of the Mung'omba Constitutional Review Commission (2005): 186 para 3.2.3.1



## 1.6 LITERATURE REVIEW

The inclusion or non-inclusion of ESCRs in the Bill of Rights of national Constitutions has been discussed by many researchers and commentators, locally and internationally. The question of whether or not national Constitutions should contain justiciable ESCRs has been under discussion for a long time, dating as far back to the adoption of the Universal Declaration of Human Rights (UDHR), as steps to translate the UDHR into binding treaty obligations were being undertaken after 1948. States were sharply divided on whether CPRs on one hand, and ESCRs on the other, should be afforded equal status. This resulted in the adoption of two separate instruments, namely, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic Social and Cultural Rights (ICESCR).<sup>7</sup> It was agreed that, the ICESCR provisions should be realized progressively by member States.<sup>8</sup> However, worth noting is the fact that, CPRs and ESCRs are interdependent and indivisible.<sup>9</sup> It is in light of the foregoing (progressive realization of ESCRs) that State parties, including Zambia have tended to adopt CPRs into their Bill of Rights at the expense of ESCRs, despite their being interdependent and indivisible.

The current Constitution<sup>10</sup> does not have justiciable ESCRs. These rights are mentioned in Part IX of the Constitution as DPSP.<sup>11</sup> Thus they cannot be claimed as a matter of right or be enforced against the State by citizens.

The Mung'omba Constitutional Review Report which was appointed by the late President of Zambia, Levy Patrick Mwanawasa argues that, in order to fulfill a person's dignity, both CPRs and ESCRs must be given equal prominence and protection in the Constitution.<sup>12</sup>

The foregoing disposition notwithstanding, the Mung'omba Report was focused on formulating recommendations for a new Constitution. It dealt with so many matters. Hence the Report did not provide a very detailed account on the justification to have ESCRs in the Bill of Rights in its recommendations, and how these rights (ESCRs) can be properly implemented in the face of limited national resources, among other explanations. Thus this

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<sup>7</sup> Eide Asbjorn et al (eds.), *Economic, Social and Cultural Rights*, (The Netherlands: Martinus Nijhoff Publishers, 1995), 15.

<sup>8</sup> Article 2(1) of the ICESCR.

<sup>9</sup> Preamble of the ICESCR.

<sup>10</sup> Chapter One of the Laws of Zambia.

<sup>11</sup> Article 110 of the Constitution of Zambia.

<sup>12</sup> Final Report of the Mung'omba Constitutional Review Commission (2005): 192.

study endeavours to provide as much clarity as possible, on the pros and cons, prospects and challenges for the inclusion of ESCRs in the Bill of Rights in the next Constitution.

In the constitution-making debate in Zambia, among the stakeholders who discussed the inclusion or non-inclusion of ESCRs in the Constitution of Zambia are the Oasis Forum, an alliance of non-governmental, civil society and faith-based organizations. One constituent member of the Forum, namely the church, arguing the case for inclusion of ESCRs in the Bill of Rights is quoted as having stated as follows:

...as a church, we are implementing development programmes. We are running schools. We have health institutions; we have hospitals that are under us. We have agricultural programmes. We have various development programme in addition to skills development. So what we were saying is, yes, this is just a supplementation to government programmes, but we feel that we cannot continue. We rely on donor money to run these programmes. But what we were saying is that, Government can have that responsibility; if those issues, the basic human rights can be enshrined in the Constitution, then even the issues we are talking about will be sustained. Because there was no any guarantee with the donor funding that it will always be there for us to do that work, so what we are telling them is what we want to see is for Government to assume the role of ensuring that the basic human rights are enshrined in the Constitution and are offered as services to the people of Zambia.<sup>13</sup>

The foregoing disposition in making the case for constitutionalization of ESCRs is premised on the fact that, Government is abdicating its responsibility of providing the basic human needs for its citizens, i.e., health, educational and other basic services, and it cannot be compelled to do so, as long as the Constitution does not provide for ESCRs in the Bill of Rights. The thrust of the argument made is that, since the church is covering up for Government, there is the lack of sustainability as the church is dependent on donor support in providing the service. Hence in this study, an attempt is made to investigate whether or not the State has a legal duty to provide the basic human needs of its citizens, namely the right to food, housing, safe and clean water, sanitation, education, health services, culture, tradition, custom or language. The study has gone further to draw a comparison with some jurisdictions where the State has provided for ESCRs in the Bill of Rights, to assess if citizens in those jurisdictions have been able to hold their governments accountable when their ESCRs are threatened or actually violated by public officials.

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<sup>13</sup> Synoden, *Personal Communication*, October 29, 2009.

Writing on ESCRs, Linda Kasonde<sup>14</sup> observed that the Poverty Reduction Strategy Paper which the Zambian Government adopted to address poverty in the country has not worked because there is no legal obligation upon Government to do so. She notes that, for millions of Zambians who languish in poverty, enshrining ESCRs in the Bill of Rights provides the hope that the State will be forced to consider these rights in creating legislation and implementing policies, particularly those related to poverty reduction.

The foregoing observations by Linda Kasonde responds to one of the research questions which this study is endeavouring to answer, i.e., whether or not enshrining ESCRs in the Bill of Rights of the Constitution can provide a mechanism by which citizens can enforce their ESCRs against the State, and thereby better their standard of living. This study therefore explores how a human rights approach can be used to reduce poverty by enshrining justiciable ESCRs in the Constitution, in the face of limited resources amongst many competing needs on the Zambian treasury.

A review of the Constitutions of South Africa<sup>15</sup> and Kenya<sup>16</sup> shows that, the two countries are among other countries that have enshrined ESCRs in the Bill of Rights of their Constitutions. The two Constitutions, as discussed under chapter four of this study have extensive ESCRs provisions which endeavour to bridge the gap in accessing basic economic, social and cultural needs by the majority poor.

The writings of a South African author called D.M. Davies<sup>17</sup> have been reviewed in this study. Davies argued against the inclusion of ESCRs in the Bill of Rights in the run-up to the South African Constitution of 1996. Davies argued that the fact that ESCRs are to be progressively implemented by State parties as espoused in the ICESCR (unlike CPRs), shows that they are inferior rights as compared to the CPRs. Davies further argues that, inclusion of ESCRs in the Bill of Rights would amount to excessive judicial interference upon the political processes. To him, a Bill of Rights must not do more than promote equality, and if it does not, then it destroys autonomy and places politics in the hands of the judiciary.

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<sup>14</sup> Linda Kasonde, *"The Need For Socio-Economic Rights In The Bill Of Rights In The Zambian Constitution."* (as part of fulfillment of LLM)(Cape Town: University of Cape Town, 2008), 32.

<sup>15</sup> Eric Christiansen, *Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court*(2001). <http://www.ssrn.com/Abstract=999700.pdf>; accessed 31 January 2013, 373.

<sup>16</sup> <http://www.kenyaplex.com>; accessed 11 April 2013.

<sup>17</sup> Alston R. Goodman & R. Steiner, *International Human Rights in Context* (3<sup>rd</sup> Ed) (Oxford: Oxford University Press, 2008), 471.

The foregoing disposition by Davies only gives one-sided arguments, against constitutionalization of ESCRs. He (Davies) made no attempt at analyzing the other side of the argument, that is, whether or not the inclusion of justiciable ESCRs in the Constitution would improve the livelihood of the many South Africans living in poverty. Against the foregoing background, this study has taken a balanced approach in assessing views on both sides of the debate, in order to ascertain the prospects of enshrining ESCRs in the Bill of Rights of Zambia's next Constitution. And within the South African context, in the subsequent jurisprudence that emerged after the enactment of the 1996 South African Constitution, the constitutional court confirmed that the State's obligations stemmed from the constitutional right to access to housing, health care, food, water, and social security, and were dependent upon the availability of resources, and also limited by the lack of resources and the relevant demand.<sup>18</sup> Thus unlike Davies' view that enshrining ESCRs in the Bill of Rights would result in excessive judicial interference upon the political processes, it is apparent from the foregoing position of the court in South Africa that, courts are alive to the fact that provision of ESCRs to citizens is dependent upon the availability of resources, and also limited by the lack of resources and the relevant demand.

On the issue of *locus standi*, the Constitutions of South Africa and Kenya as discussed in chapter four of this study have broadened provisions for *locus standi*, which enable other categories of persons to commence actions before courts of law, on behalf of the indigent for instance, alleging that a right has been infringed upon or threatened with infringement. The Court may grant appropriate relief. The foregoing provisions on *locus standi* in the two countries have gone a long way in ensuring that ESCRs of economically disadvantaged citizens are guaranteed, protected and made justiciable.

Also reviewed in this study is the Constitution of India, discussed in full in chapter four of this study. The ESCRs in the Indian Constitution are not enshrined in the Bill of Rights. They are provided for under Part IV of the Constitution, as DPSPs. Despite these rights not being in the Bill of Rights, through judicial activism, Indian courts have given effect to ESCRs by expanding their interpretative power to give content to the right to life. The Indian example gives an indirect way of enforcing ESCRs, through judicial activism. Thus in this study, an examination of judicial activism in Zambia is undertaken in chapter five, to ascertain if the

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<sup>18</sup> *Soobramoney v Minister of Health (Kwazulu Natal)* Case CCT32/97.

judiciary are able to interpret the protection of ESCRs from the right to life, despite the ESCRs not being provided for in the Bill of Rights of the Republican Constitution.

Also reviewed in this study is the debate on the inclusion of ESCRs in the Bill of Rights of the Constitution of Israel. In arguing against the inclusion of the rights in the Bill of Rights, the American Jewish Council<sup>19</sup> in a memorandum, stated that, in a democracy, a court, particularly an un-elected court should not make policy decisions that will bind citizens. Economic rights should be a political decision, not a legal one. The Council argues that States have limited resources which are best directed by policy makers, who are democratically elected legislators. Courts should not be responsible for allocating funding. They argue that the courts are not in the best position and do not have the authority to make controversial policy decisions, especially when State funding decisions are at issue.

Notwithstanding the position of the American Jewish Council on ESCRs, it is trite that a State cannot guarantee CPRs such as the right to life if it cannot guarantee access to health care and a minimum income. Further, in order to create real opportunities for citizens to fully participate in the political process, citizens must have the opportunity to basic education, health and shelter. For instance, equality of education is a basis for equality later. Hence in this study, an attempt is made to go further and ascertain if indeed enshrining of ESCRs in the Bill of Rights with the view to holding the State accountable for resource allocation would result in violation of the principle of separation of powers.

Another author whose work has been reviewed in this study is Frank Cross.<sup>20</sup> Cross sees no need to enshrine ESCRs in the Bill of Rights for the reason that litigants are needed in order for rights to be enforced, and yet potential litigants are poor with little or no resources to access the courts and employ qualified and competent counsel. Be that as it may, Cross' assertion that ESCRs need not be put in the Bill of Rights because indigent litigants wont afford the cost of litigation to enforce them is explored further in this study. This is because, where there are legal aid services, litigants can claim their ESCRs if threatened or violated. Further, that where the rules on *locus standi* are liberalised, public interest litigation and class action can be undertaken for and on behalf of the affected persons.

In conclusion, the literature reviewed in this study shows a skewed approach in analyzing the constitutionalization of ESCRs. In other words most writings do not offer a balanced view on

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<sup>19</sup> <http://www.cfisrael.org//a61.html?rsID=26>; accessed 20<sup>th</sup> April 2012.

<sup>20</sup> Frank Cross, "The Error of Positive Rights," UCLA L.Rev. 48 (2001): 21.

the pros and cons of the process. This study attempts to carry out a detailed investigation on the challenges and prospects of constitutionalizing ESCRs in the Bill of Rights, and thereafter draw well informed conclusions and make appropriate recommendations, for consideration in Zambia's next Constitution.

## **1.6 METHODOLOGY**

In researching on the prospects and challenges of including ESCRs in the Bill of Rights of the next Constitution of Zambia, this study has adopted a socio-legal approach. As a methodological approach, socio-legal research is an approach to the study of legal phenomena which is multi, or inter-disciplinary.<sup>21</sup> The reason for adopting this approach is that, the research will be examining the law and other socio-economic trends, i.e., Constitutions of Zambia, South Africa, Kenya and India, including other statutes and literature on scholarly works, journals, commentaries, text books, and internet sources. The socio-legal approach will thus be the core methodological approach that will be used in this research.

Further, this study will be informed by the legal positivism school of thought. Legal positivism as espoused by theorists like Jeremy Bentham, John Austin, and H.L.A. Hart,<sup>22</sup> who posit that law is a social construction. Positivism focuses on what the law ought to be, as compared to naturalists who view the law as it is. Since the study takes an insight into prospects and challenges of constitutionalizing justiciable ESCRs, the legal positivism framework will be very instrumental in undertaking this study.

The study will also be informed by human rights considerations. The human rights discourse will be instrumental in guiding the study as the international and regional human rights will provide reference and comparison standards and principles of practice. The prospects and challenges of constitutionalizing ESCRs will be investigated against provisions of human rights instruments like the ICESCR.

## **1.7 RESEARCH LAY OUT**

In addressing the prospects and challenges for the inclusion of economic, social and cultural rights in the next Constitution, this study is divided into six chapters. Chapter one is the

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<sup>21</sup> <http://sociolegaldcu.worldpress.com/>; accessed 8 May 2012.

<sup>22</sup> <http://ssrn.com/abstract=1568333>; accessed 8 May 2012.

introduction. It gives the background of the study, statement of the problem, significance of study, objectives of the study, research questions, literature review, methodology and research lay out. The next chapter, which is chapter two, discusses economic social and cultural rights in the Zambian context. Chapter three discusses the challenges and prospects of enshrining economic, social and cultural rights in the Constitution of Zambia, from a historical prospective. Chapter four gives a comparative perspective on economic, social and cultural rights, by discussing the Indian, South African and Kenyan jurisdictions. Chapter five analyses the need for justiciable economic, social and cultural rights in the Constitution of Zambia. The last chapter of this study, chapter six gives the conclusions and recommendations of the study.

## **CHAPTER TWO**

### **2.0 HUMAN RIGHTS IN THE ZAMBIAN CONTEXT**

In interrogating the prospects and challenges for the inclusion of ESCRs in the next Constitution, the first research question of the study is examined, i.e., what are ESCRs and how different are they from CPRs. Thus ESCRs as human rights are analyzed in the Zambian context, *vis-à-vis* Zambia's obligations in international and regional human rights instruments. Further, the position of the Zambian Constitution on ESCRs, and citizens' access to these rights in Zambia is investigated.

### **2.1 ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS HUMAN RIGHTS**

As understood in contemporary international usage, human rights are benefits, immunities, entitlements and respect that belong to every human being, for which the State as well as individuals must ensure are accessible to each and every category of people.<sup>1</sup> Human rights serve many purposes, such as the protection of human dignity, promotion of the person's well-being, and the preservation of peace and justice. In international instruments, the Universal Declaration Human Rights (UDHR) recognizes two sets of human rights, namely the CPRs and the ESCRs. In order to transform provisions of the UDHR into legally binding obligations, the United Nations adopted two international covenants, namely, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>2</sup> The CPRs as contained in the ICCPR are referred to as first generation rights, or negative rights. The ESCRs contained in the ICESCR are referred to as second generation rights or positive rights which mandate that, social conditions are adequate for meeting physical, moral and biological requirements. Fairly new on the international scene of human rights is the

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<sup>1</sup> Alfred W. Chanda, "The Role of the Lower Courts in the Domestic Implementation of Human Rights." *Zambia Law Journal*, Vol. 33 (2001): 6. [http://www.unza.zm/zamlii/comment/lowercourts\\_humanrights.html](http://www.unza.zm/zamlii/comment/lowercourts_humanrights.html); accessed 24 August 2012.

<sup>2</sup> Goodman & Steiner, 263.



right to development.<sup>3</sup> This study focuses on ESCRs and the prospects of their inclusion in the next Constitution.

ESCRs are also espoused in many international and regional human rights instruments. At the continental level, ESCRs are defined and promulgated in the African Charter on Human and People's Rights (ACHPR).<sup>4</sup> Among the ESCRs covered in these human rights instruments are;

- (a) social security;
- (b) fair and safe working conditions for workers;
- (c) equal marriage rights for women and men;
- (d) adequate standard of living for everyone, involving adequate clothing, housing, food, safe water, and sanitation;
- (e) adequate standard of health care for all;
- (f) participation in the cultural life of the community; and
- (g) satisfactory primary education for all and increased opportunities for further education.

ESCRs aim to ensure that everyone has access to resources, opportunities, and services essential for an adequate standard of living. In this regard, governments have obligations to create an enabling environment within which people can gain access to these rights and improve their quality of life and well-being. Further, governments have an obligation to remove barriers and limitations that prevent citizens from accessing and claiming these rights and to adopt special measures to assist the disadvantaged and vulnerable to gain access to these rights. One of the ways in which such access and claims may be achieved by citizens is if governments provide domestic legislation that mandate governmental authorities to cater for economic, social and cultural needs of citizens. The United Nations has decided that no country is too poor as not to respect, protect and fulfill human rights obligations.<sup>5</sup> Thus no country should avoid striving to ensure that its citizens enjoy adequate food, education, health care and so on, on account of being poor. However, a poor country is not expected to attain the same level of ESCRs benefits that a

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<sup>3</sup>Asbjorn, *Economic Social and Cultural Rights*, 15.

<sup>4</sup> ACHPR is commonly referred to as the Banjul Charter.

<sup>5</sup> Allan McChesney, *Promoting and Defending Economic & Cultural Rights: A Handbook*, (New York: HURIDOCs, 2000), 12.

rich nation can afford. The poorest State Party is required by the ICESCR to ensure that its people receive the highest level of covenant rights that the country's resources can permit.

In practice this entails that all State Parties have an obligation to use all appropriate means at the legislative, administrative, and judicial level to ensure full realization of ESCRs. This would make ESCRs accessible to citizens and be "justiciable." In this study "justiciable" means "the ability to judicially determine whether or not a person's right has been violated or whether the State has failed to meet a constitutionally recognised obligation to respect, protect or fulfil a person's right."<sup>6</sup> This means that ESCRs should be accorded equal status as CPRs in national legislation. The reason for that is, all human rights are "universal, indivisible, interdependent, and interrelated."<sup>7</sup>

## **2.2 THE ZAMBIAN CONTEXT**

Zambia is a signatory to the UDHR. Further, Zambia ratified the ICESCR in 1984, and is legally bound to implement the treaty through domestic laws and policies. Among its provisions, the treaty requires the government to take steps to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the ICESCR by all appropriate means, including particularly the adoption of legislative measures. ESCRs in Zambia such as the rights to health, housing, food, education, water and sanitation are treated as "second class" rights. The UDHR and the Vienna Declaration<sup>8</sup> give equal importance to ESCRs and CPRs. These rights have not been domesticated in this country, and currently, they are not part of the Bill of Rights of the Zambian Constitution. Therefore, no successful claim or litigation in relation to the denial or violation of ESCRs can be brought before the courts in Zambia against the State. Hence the rights espoused in the ICESCR cannot be claimed as a matter of right by citizens in Zambia.

Zambia is also a State Party to a number of human rights instruments which articulate ESCRs. These include the Convention on the Elimination of all forms of Discrimination Against Women

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<sup>6</sup>Craig Scott and Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution," *U. Pa. L. Rev.* 1 (1992): 141.

<sup>7</sup>Second World Conference on Human Rights (Vienna Declaration & Program of Action), paragraph 5. [www.ohchr.org/english/bodies/cescr/comments.htm](http://www.ohchr.org/english/bodies/cescr/comments.htm); accessed 24 January 2013.

<sup>8</sup>Second World Conference on Human Rights.

(CEDAW) ratified in 1985, and the United Nations Convention on the Rights of the Child (CRC), ratified in 1990. The country is also a signatory to a number of global declarations, including Education for All Declaration (World Education Forum Dakar 2000); the ten commitments of the World Summit on Social Development in Copenhagen (Copenhagen Declaration, 1995). The ten commitments include among others, the eradication of poverty and the promotion of full employment, social integration, human rights, gender equality and equity, adequate education for all and access to universal primary health care. Despite Zambia being a State Party to the foregoing human rights instruments, the instruments do not have automatic application in the local jurisdiction. They have to be domesticated into local legislation before they can take effect. Thus in order to understand the prospects and challenges for the inclusion of ESCRs in the Constitution, as part of this study, this chapter takes a look at Zambia's obligations in international agreements, and thereafter examines the position of the current Constitution on ESCRs.

### **2.3 ZAMBIA'S OBLIGATIONS UNDER INTERNATIONAL AGREEMENTS**

In the quest to understand the prospects and challenges for the inclusion of justiciable ESCRs in the Constitution of Zambia, the question that begs an answer at this stage is whether or not Zambia has any legal obligation under the international instruments that it has signed. In addressing this question, there are two responses that may be referred to in this regard. The first one is that, "although these instruments do not constitute hard law and are, therefore, not directly binding in a legal sense, they nevertheless establish broadly recognised standards and are frequently invoked in connection with human rights issues."<sup>9</sup> For example, the UDHR provides a framework for the development of human rights policies. The ICESCR under Article 2(1) enjoins State Parties to take steps to progressively achieve ESCRs through the adoption of legislative measures. The Banjul Charter invites member States to recognise people's right to their socio-economic development with due regard to their freedom and identity and in equal enjoyment of the common heritage of mankind.<sup>10</sup>

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<sup>9</sup>Chanda, *The Role of the Lower Courts in the Domestic Implementation of Human Rights*, 6.

<sup>10</sup>African Charter on Human and People's Rights, Article 22(1).

The second strand to the question of whether or not Zambia has any legal obligation to the international instruments it has signed is that every nation is expected to obey international law.<sup>11</sup> Regardless of Zambia's legislative position on ESCRs, it cannot use domestic law as an excuse to breach provisions of international human rights instruments. Subscribing to international human rights instruments places a political commitment on the part of government to the instruments, even if it places no legal obligation on the Government until such commitments are domesticated, i.e., incorporated into the country's laws. Therefore, having ratified the ICESCR, CEDAW, CRC, among other human rights instruments, Zambia has pledged to recognise, observe and fulfill their provisions. The Zambian Government has a duty to work towards the common good and general welfare of all citizens, to ensure that everyone is treated fairly. Further, government has a responsibility to uphold human rights, to be committed to the promotion of basic human needs, and given the available resources, to make them accessible by all. Thus in order to ensure the fulfilment of enjoyment of ESCRs, there is need for these rights to be enshrined in the Bill of Rights. Hence it becomes imperative at this stage in the study to examine the current situation in Zambia as regards ESCRs before assessing the prospects and challenges of constitutionalizing these rights.

#### **2.4 THE ZAMBIAN CONSTITUTION ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

In the Constitution of Zambia, the Bill of Rights which is contained in Part III guarantees fundamental rights and freedoms of the individual. It contains CPRs of citizens. ESCRs are not provided for in the Bill of Rights. Some principles of ESCRs are mentioned in Part IX of the Constitution as DPSPs. Under Article 112 of Part IX, the Constitution stipulates among other principles that Government shall endeavour to provide clean and safe water; equitable educational opportunities in all fields and at all levels; adequate medical and health facilities; decent shelter for all persons; and development of a person's culture, tradition, custom or language that is not inconsistent with the Constitution. However, Article 111 of the Constitution provides as follows:

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<sup>11</sup>McChesney, *Promoting and Defending Economic & Cultural Rights*, 16.

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.

Article 111 of the Constitution means that a citizen cannot claim or enforce the DPSPs stated under Part IX of Constitution, against the State where the State does not provide ESCRs. The State is expected to consider these DPSPs in formulating and implementing its policies relating to development, law reform, and application of law “only in so far as State resources are able to sustain their application, or if the general welfare of the public so unavoidably demands, as may be determined by Cabinet.”<sup>12</sup>

## **2.5 ACCESS TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ZAMBIA**

In a survey undertaken in 2009, the *State of Governance Report-Zambia*<sup>13</sup> discusses the status of access to ESCRs in Zambia. The survey indicates that, at the national level, 21.4 percent of the population had gone without shelter. Further, that 46.9 percent of the national population had gone without sufficient fuel to cook their food. Further, 50.3 percent of the population at national level reported that they and their families are doing without sanitation. On the right to food, the survey indicates that 58.6 percent of the national population reported that they and their families have gone without food before. The survey further indicates that 63 percent of the population has gone without safe water at national level. Regarding access to medication and medicine at the national level, 74.1 percent of the population indicated that they have gone without medication or medicines when they were sick. And on the enjoyment of cultural rights, 25.2 percent of the population reported that they participated in their respective cultural activities.

On the right to work, the survey shows that in urban areas, 29.2 percent of the population described their working conditions to be good, with 8.2 percent reporting their conditions to be very good. In rural areas 24 percent of the population described their working conditions as being good, and 5.2 percent as very good. And according to the 2010 Census of Population and Housing, only 500,000 Zambians in a population of 13.092 million are in formal employment.<sup>14</sup>

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<sup>12</sup>Article 110(2) of the Constitution of Zambia.

<sup>13</sup>Zambia, (2009): State of Governance Report-Zambia, lxxix.

<sup>14</sup>Central Statistical Office (Zambia), [www.zamstats.gov.zm](http://www.zamstats.gov.zm); accessed on 24 August 2012.

Out of a population of 13.092 million, the foregoing statistics on access to ESCRs in Zambia are very low.

The question then is: Would the inclusion of justiciable ESCRs in the Constitution improve access to these rights by citizens? To answer this question, a comparison is drawn with the statistics on CPRs which are enshrined in the Bill of Rights as contained in the *2009 State of Governance Report-Zambia*.<sup>15</sup> The report indicates high proportion distribution of enjoyment of CPRs. Regarding the freedom of expression, 88.1 percent of the population reported that they were free to express themselves in public. On freedom of assembly, 84.4 percent reported that they freely participated in public gatherings at national level. On freedom of movement, 95.4 percent of the population reported that they had never been restricted in their freedom of movement by the State. As regards freedom of religion, the report indicates that 95.9 percent of the population reported that they enjoyed their freedom of religion.

In conclusion, when drawing a comparison between levels of access to ESCRs on one hand and CPRs on the other hand, it is apparent that Zambian citizens have higher access to the latter rights compared to the former. This is because, CPRs are enshrined and protected in the Bill of Rights, and are thereby justiciable. It follows that ESCRs can best be accessed by most Zambians if these rights are enshrined in the Constitution. Thus it is the purpose of this study to ascertain the prospects and challenges for the inclusion of these rights in the Zambian Constitution. In this study therefore, the point advanced is that, ESCRs hold the key to facilitating access to basic services by the people of Zambia, by way of empowering them and restoring their dignity. It appears that constitutionalizing ESCRs has the effect of improving citizens' standards of living.

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<sup>15</sup>Zambia, (2009): State of Governance Report-Zambia, lxxx.

## **CHAPTER THREE**

### **3.0 CHALLENGES AND PROSPECTS OF ENSHRINING ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE ZAMBIAN CONSTITUTION**

In this chapter, an attempt is made at answering the second research question of this study, which reads that, despite recommendations of the Mwanakatwe and Mung'omba Constitutional Review Commissions to constitutionalize ESCRs, why has Zambia not included these rights in the Bill of Rights? As acknowledged in the previous chapter, Zambia is a signatory to major UN and regional treaties protecting human rights, including the ICCPR, ICESCR and the Banjul Charter. Thus as a country, Zambia has an obligation to respect, protect and fulfill provisions of these human rights instruments. The issue therefore is that of whether or not these human rights instruments can be effective if not incorporated into domestic legislation. This chapter therefore endeavors to examine challenges and prospects for the inclusion of justiciable ESCRs in the Constitutions that Zambia has had since independence, beginning with the independence Constitution.

#### **3.1 THE INDEPENDENCE CONSTITUTION OF 1964**

Zambia got its political independence from Britain in 1964. This followed the enactment of the Zambia Independence Order of 1964. The first Constitution of Zambia was contained in Schedule II to the Order. This Constitution had an extensive Bill of Rights in Chapter III of the Constitution, ranging from Article 13 to 25. The Bill of Rights contained CPRs only. It did not contain ESCRs. The 1964 Constitution was not a creation of the people of Zambia as they were not involved in its making. It was based on the Westminster Model designed for the emerging nations of former British colonies and protectorates.<sup>1</sup>

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<sup>1</sup>Muna Ndulo & Robert Kent, "Constitutionalism in Zambia: Past, Present and Future." Cornell Law Faculty Publications 40:2 (1996): 256. <http://scholarship.law.cornell.edu/facpub/64>; accessed 2 September 2012.

### 3.2 THE 1973 CONSTITUTION

In order to introduce the one-party system of government, President Kaunda appointed a constitutional commission pursuant to powers vested in him under the Inquiries Act.<sup>2</sup> The commission was tasked to recommend the form and details of the single party system of government. The commission, known as the Chona Commission was chaired by Mr. Mainza Chona, who was Vice-President at the time. It travelled widely throughout Zambia, holding hearings and taking evidence on the framework and features that people wished to see in the new type of government. The Commission was not to consult citizens on whether or not they wanted the change. Cabinet had already decided for them. And the decision was to have a One Party Participatory Democracy.<sup>3</sup> The Commission received overwhelming written and oral submissions, deliberated the same and presented its report in October 1972.<sup>4</sup> The report of the Chona Commission did not have recommendations on introduction of ESCRs in the Constitution. The Government White Paper No. 1 of 1972, accepted the introduction of One-Party State, and through the Constitution of Zambia Bill of 1973, the Second Republic came into being on 25<sup>th</sup> August, 1973, via the Constitution of Zambia Act of 1973. The Zambian Independence Act, 1964 and the Zambia Independence Order, 1964, were repealed. The new Constitution thus became the first indigenous Constitution, since the earlier ones were legislated by the British Parliament as part of the Act which severed Zambia's connection to the British crown and granted it independence.

A scrutiny of the 1973 Constitution reveals that, despite its humanist-socialist inclination, the 1973 Constitution did not provide for ESCRs. As observed by commentators on this Constitution, the function of the Chona Commission was a political one, which was to involve people in the implementation of the decision taken by the party and government.<sup>5</sup> Further, the One-Party State Constitution was not very different from the independence Constitution. The power relations among the three arms of government remained the same, other than the provisions that gave prominence to the role of the party, the United National Independence Party (UNIP). Zambia remained a One-Party Participatory Democracy up to 1991. The Second

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<sup>2</sup> Chapter 131 of the Laws of Zambia.

<sup>3</sup> Patrick Matibini, "Constitution Making Process: The Case of Zambia." Zambia Law Journal.Special Edition. (Lusaka: Unza Press, 2008): 5

<sup>4</sup> Zambia, *Report of the National Commission on the Establishment of the One-Party Participatory Democracy in Zambia*. (Lusaka: Government Printer, 1972.)

<sup>5</sup>Matibini, "Constitution Making Process," 5



Republic years later became very difficult in Zambia as they were characterized by economic and social instability arising from economic stagnation. Democratic governance and constitutionalism were at their lowest ebb. “The Party and Its Government” of UNIP became very unpopular.<sup>6</sup> All these demanded an end to the One-Party State. With the influence of the “winds of change” in Eastern Europe, pro-democracy groups in Zambia formed the Movement for Multi-party Democracy (MMD). And two years before the scheduled end of its five-year mandate, government in 1991 yielded to pressure and committed to amend the Constitution to return to multi-party politics.

### 3.3 THE 1991 CONSTITUTION

As the decades of the 1980s drew to a close, people became more and more disillusioned about the One Party system of government. Pro-democracy groups led by the trade union formed the MMD.<sup>7</sup> The fall of communism in Eastern Europe provided a catalyst for change. The demand to revert to multi-party democracy grew and became difficult for the UNIP Government to contain. The President then Dr. Kenneth Kaunda announced that the country would go to a referendum to decide whether or not the country had to return to multi-party politics. Afterwards, he abandoned the referendum route as a result of pressure from MMD, and civil society organizations. Hence, he decided to succumb to pressure. In order to return the country to multi-partism, the government of President Kaunda appointed a constitutional commission which was chaired by the then Solicitor-General, Professor Patrick Mvunga on 8<sup>th</sup> October 1990.<sup>8</sup> The Commission was later known as the Mvunga Commission. Like the Chona Commission, the Mvunga Commission toured the country extensively, and obtained views of the Zambian people on what they wanted to be contained in the new Constitution for Zambia. The Commission received oral and written submissions. Apart from individual submissions, UNIP, MMD, House of Chiefs, the Law Association of Zambia (LAZ), churches and trade union movement, all made

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<sup>6</sup><http://www.zambian.com/zambia/directory/business/business-admin-info/html/zambia-socioeconomic-snapshot.html>; accessed 3 September 2012.

<sup>7</sup>Matibini, “*Constitution Making Process*,” 7.

<sup>8</sup>Ndulo & Kent, *Constitutionalism in Zambia*, 257.

their submissions.<sup>9</sup> The Commission went ahead with its work and formulated recommendations, some of which were accepted by both the government and the opposition.

Government received the Report of the Mvunga Constitutional Review Commission in April 1991, and selected the recommendations it preferred, rejected the others, and prepared a Constitution for adoption by Parliament which provided for multi-party elections. The 1991 Constitution was enacted by Parliament on 2<sup>nd</sup> August, 1991, and assented to by the President on 29<sup>th</sup> August 1991. The reference to the “Philosophy of Humanism” in the preamble was removed. Like its predecessor, the 1991 Constitution provided for the protection of fundamental rights and freedoms of the individual.<sup>10</sup> These rights which were enshrined in the Bill of Rights provided for CPRs. ESCRs were included in the preamble as mere aspirations of the State, and thus they were not enshrined as human rights in the real sense of being justiciable. The MMD rejected the outcome of the Mvunga Commission on the grounds that the Commission was dominated by UNIP members, and more so that the ensuing Constitution would be enacted by a Parliament overwhelmingly controlled by UNIP. There was an impasse which was only resolved by the intervention of the churches. This led to the reformulation of the 1973 Constitution to provide for re-introduction of multi-partism.<sup>11</sup> After the passing of the 1991 Constitution by Parliament, on 29<sup>th</sup> August 1991, elections were held two months thereafter and MMD was ushered into office.

### **3.4 THE 1996 CONSTITUTION**

In line with the 1991 election promise of the MMD to replace the 1991 Constitution with one that would be non-partisan, and strengthen democracy and the protection of human rights, two years after coming into power, the MMD government appointed a constitutional review commission<sup>12</sup> chaired by Mr. John Mwanakatwe, a lawyer. The Mwanakatwe Commission received terms of reference wider than those accorded previous constitutional commissions. It was directed to recommend a system that will “ensure that Zambia is governed in a manner that will promote the democratic principles of regular and fair elections, transparency and

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<sup>9</sup>Matibini, “Constitution Making Process,”7.

<sup>10</sup> Constitution of Zambia 1991, Article 79(3).

<sup>11</sup>Matibini, “*Constitution Making Process*,” 8.

<sup>12</sup> The Commission was appointed on 22 November 1993, under Statutory Instrument No. 151 of 1993.

accountability, and that will guard against the re-emergence of a dictatorial form of government; make appropriate arrangements for the entrenchment and protection of human rights, the rule of law and good governance, the competence, impartiality and independence of the judiciary.”<sup>13</sup>

In its draft Constitution, the Mwanakatwe Commission included a chapter just after the Preamble on DPSPs to guide all branches of government in law making, administration and adjudication. The principles covered a wide range of ESCRs. These DPSPs were proposed to be non-enforceable. In a white paper,<sup>14</sup> government rejected most of the recommendations of the Mwanakatwe Report. Through the Constitution of Zambia (Amendment) Act No. 18 of 1996, the 1991 Constitution was repealed and replaced by the 1996 Constitution. The preference for DPSPs to ESCRs was up-held as it was considered that the State did not have adequate resources to implement ESCRs.<sup>15</sup>

The 1996 Constitution is the one in force to-date. The Bill of Rights embodied in Part III of the current Constitution provides for the protection of fundamental rights and freedoms relating to CPRs. ESCRs have not been included in the Bill of Rights. They appear under Part IX of the Constitution as DPSPs. Article 112 of the current Constitution lists the DPSPs which are actually ESCRs as espoused under the ICESCR. Article 111 of the 1996 Constitution of Zambia expressly states that the DPSPs shall not be justiciable. Hence where DPSPs of citizens are denied, violated, or threatened with violation, citizens cannot hold the State accountable through the courts of law.

### **3.5 THE CURRENT CONSTITUTION MAKING PROCESS AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

Following the enactment of the 1996 Constitution of Zambia, there were concerns among citizens expressing dissatisfaction at contents of the Constitution and the mode of its adoption.<sup>16</sup> It became apparent and imperative that Zambia needed a new constitutional order that would be in line with the democratic principles that had taken root in society. Thus Zambians

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<sup>13</sup> Terms of Reference of the Commission (1), (2), (3), (4), as contained in Statutory Instrument No. 151 of 1993.

<sup>14</sup> Republic of Zambia, Government White Paper No.1 of 1995.

<sup>15</sup> Mwanakatwe Report. Chapter 4 para 4.0 to 4.3.

<sup>16</sup> Ndulo & Kent, *Constitutionalism in Zambia*, 276.

desire a Constitution that would stand the test of time. On 18<sup>th</sup> April 2003,<sup>17</sup> the late President Levy Mwanawasa appointed a Constitutional Review Commission which was to be chaired by a renowned Lusaka lawyer, Willa Mung’omba, pursuant to powers vested in the President under the Inquiries Act.<sup>18</sup> The Mung’omba Commission went round the country and received submissions, including some on ESCRs. A large number of petitioners made submissions in general terms that, ESCRs, such as the right to free education, health care, employment, shelter, food, clean environment, water and sanitation, should be enshrined in the Constitution and should be made justiciable. A total of 404 petitioners submitted on the need to include these rights in the Bill of Rights.<sup>19</sup> Petitioners argued that, including these rights in the Bill of Rights will oblige the government to treat socio-economic development as a priority. The majority of those who commented on the subject were concerned about the inability of most Zambians to access health care, education, employment, shelter, food and clean water. In agreeing with petitioners on the need for justiciable ESCRs, Commissioners observed as follows:

The Commission concurs with petitioners regarding the importance of economic, social and cultural rights... These rights are essential for the development of the individual and the nation. They should therefore be reflected in the Bill of Rights so that the Government is obligated to ensure their progressive realization. The Commission does not agree with the argument that financial constraints should be a factor in determining whether these rights should be justiciable or not.<sup>20</sup>

Further, under the Mung’omba Commission’s recommendations on ESCRs, the Commissioners stated as follows:

The Commission therefore recommends that economic, social and cultural rights should be enshrined in the Constitution and should be justiciable.<sup>21</sup>

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<sup>17</sup> The Post Newspaper: *Mwanawasa Appoints a Constitution Commission*. 19 April 2003, 1.

<sup>18</sup> Chapter 181 of the Laws of Zambia.

<sup>19</sup> Final Report of the Mung’omba Constitutional Review Commission 2005, 186 para 3.2.3.1.

<sup>20</sup> *Mung’omba Report*, 194.

<sup>21</sup> *Mung’omba Report*, 196.

Further, the Mung’omba Commission recommended the road-map of adopting the new Constitution. They stated that the new Constitution should be adopted through a constituent assembly which would be representative of all sectors of the Zambian society. However, the government of late President Mwanawasa did not follow this recommendation. Parliament enacted the National Constitutional Conference Act, creating the National Constitutional Conference (NCC) to adopt the new Constitution.

### **3.6 THE NATIONAL CONSTITUTIONAL CONFERENCE (NCC)**

Government decided that the mode of adopting the Constitution was going to be through the National Constitutional Conference (NCC).<sup>22</sup> As stated earlier, this was contrary to the recommendation in the Mung’omba Report. The Mung’omba Commission recommended that the Constitution be adopted by a Constituent Assembly and approved via a national referendum.<sup>23</sup> After President Mwanawasa announced the list of names of members of the NCC, contrary to the Mung’omba recommendation mode of adopting the Constitution, the opposition Patriotic Front party (PF) and other civil society organizations boycotted the NCC, and directed its members of Parliament not to attend the NCC. The NCC nonetheless proceeded with its business of attempting to adopt the Constitution. The recommendations of the Mung’omba Commission on ESCRs were tabled before the NCC for debate. Commissioners who were towing the pro-government (MMD) line in the house are quoted to have made scornful laughter of these rights, and some made the following comments against inclusion of these rights in the Bill of Rights:

...proposals to include within the new Constitution the rights to food, water and shelter are utopian. (Utopian means something that is admirable but impracticable)...the proposed ESCRs are too costly and simply unaffordable for Zambia. Why, even a mad person might demand housing, said one commissioner, and the Government’s ability to pay for these rights just doesn’t exist...<sup>24</sup>

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<sup>22</sup> National Constitutional Conference Act.

<sup>23</sup> *Mung’omba Report*, 186 para 26.2.

<sup>24</sup> *The Post Newspapers: Justice Deputy Minister Todd Chilemba Opposes Socio-Economic Rights in the Mung’omba Report*, 20<sup>th</sup> April 2010 edition, 4.

Further, the pro-Government Commissioners argued that, incorporation of ESCRs into the new Zambian Constitution was rejected because a number of the clauses were borrowed or derived from international instruments, and "you cannot import international instruments and put them in the Constitution." There were also arguments to the effect that enshrining ESCRs in the Bill of Rights would make people lazy.<sup>25</sup>

However, within the NCC and outside, there were many voices that spoke in favour of inclusion of these rights. The civil society was largely in favour of the Mung'omba Report's recommendation of enshrining these rights into the Bill of Rights as justiciable rights. They argued that financial constraints were not excuse for depriving the Zambian people of ESCRs.<sup>26</sup> The Commission recognized that CPRs on one hand and ESCRs on the other, were indivisible and interdependent, stating for example that, freedom of expression could not be adequately exercised without the right to education.<sup>27</sup>

The NCC ultimately produced a draft Constitution on 18<sup>th</sup> June 2010. In Article 64 of the NCC draft Constitution, these rights were placed in the Bill of Rights, albeit not justiciable. Article 64(1) read as follows:

Parliament shall enact legislation which provides measures which are reasonable in order to achieve progressive realization of economic, social and cultural rights under this Bill of Rights.

On the justiciability of ESCRs in the foregoing Bill of Rights, Article 64(3) of the NCC draft Constitution read as follows:

Where a claim is made by the State, that the State does not have the resources to implement a particular right or freedom-

- (a) it is the responsibility of the State to show that the resources are not available; and
- (b) a court, tribunal or the Human Rights Commission shall not interfere with a decision by the State organ or State institution concerning the allocation of available resources solely on the basis that the court, tribunal or Human Rights Commission would have reached a different conclusion.

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<sup>25</sup>*The Post Newspapers: Justice Deputy Minister, 4.*

<sup>26</sup>*Mung'omba Report, 193.*

<sup>27</sup>*Mung'omba Report, 192.*

It is worth noting here that, government attempted to pass the new Constitution of Zambia Bill in March, 2011. The motion could not pass the second reading stage for lack of majority vote in support. Consequently, it was withdrawn, pending another attempt six months down the road, in accordance with Standing Orders of Parliament. Unfortunately for the ruling party then, the MMD, Parliament was due to be dissolved in time for elections which were held on 20<sup>th</sup> September 2011. The MMD President Rupiah Bwezani Banda lost elections to Michael Chilufya Sata of the PF. During the run-up to the 2011 elections, one of the PF campaign promises was to deliver a new Constitution to Zambians within 90 days of being elected into office. Barely over 30 days of being ushered into office, the new President, Michael Chilufya Sata announced a twenty-member Technical Committee to look at all the reports of the Constitution review commissions and recommend a draft Constitution within a period of 12 months.

### **3.7 THE FIRST DRAFT CONSTITUTION BY THE TECHNICAL COMMITTEE**

The Technical Committee on Drafting the Zambian Constitution which was constituted by President Michael Sata published its first Draft Constitution on 30<sup>th</sup> April 2012. The draft Constitution formed the basis for further consultations with the general public. On ESCRs, the draft Constitution provides as follows:

A person has the right to-

- (a) The highest attainable standard of health, which includes the right to health care services and reproductive health care;
- (b) Accessible and adequate housing;
- (c) Be free from hunger, and to have access to adequate food of acceptable quality;
- (d) Clean and safe water in adequate quantities and to reasonable standards of sanitation;
- (e) Social security and protection; and
- (f) Education.<sup>28</sup>

Citizens' right to use language and participate in the cultural life of their choice is provided under Article 63 of the draft Constitution.

In Article 61, whereas it obligates the State to provide for citizens' ESCRs, it subjects the provision of these rights to availability of resources, and stipulates that, where the constitutional

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<sup>28</sup>Article 62 of the first draft Constitution.

court is faced with such a claim, the State merely has to show that the resources are not available. In its current form, the draft Constitution falls short of providing for justiciable ESCRs.

In conclusion, this chapter has explored the long road to enshrining ESCRs in the Bill of Rights of the Constitution. Whereas the ESCRs were not considered in the independence and the 1973 Constitutions, the 1991 Constitution included ESCRs in its preamble, albeit still unenforceable. The 1996 Constitution merely provided for unenforceable DPSP under Part IX of the Constitution. Much as the attempt of moving these rights to the Bill of Rights in the NCC draft and the first draft Constitution of the Technical Committee is commendable, there is still need to provide for justiciable ESCRs by removing the clause which stipulates that “where the constitutional court is faced with such a claim, the State merely has to show that the resources are not available.” This chapter has therefore shown that ESCRs have been given scanty protection in the various Constitutions adopted in Zambia, to-date. These rights hold the key to facilitating access to basic services by poor people, empowering them and restoring their dignity. It is the aim of this study to consider the case for justiciable ESCRs in the next Constitution. Thus in this regard, chapter four of this study surveys how other countries have dealt with the issue of justiciable ESCRs so that lessons may be drawn from there.



## CHAPTER FOUR

### **4.0 ECONOMIC, SOCIAL AND CULTURAL RIGHTS - A COMPARATIVE PERSPECTIVE**

In studying and investigating the prospects and challenges for the inclusion of ESCRs in the next Constitution, a comparative study of Constitutions of three countries is undertaken in this chapter. This is in an attempt to provide answers to the research questions in this study, that; what do other jurisdictions have to say about ESCRs? What lessons are drawn from these jurisdictions on how they have dealt with the subject of ESCR? The countries whose Constitutions will be examined in this chapter are India, South Africa, and Kenya. The Indian Constitution will be examined for its alternative approach to the enforcement of ESCRs and the courts' activism in the adjudication of these rights, despite their not being in the Bill of Rights. The South African model will be examined as it provides for ESCRs in the Bill of Rights, and for its rich jurisprudence in ESCRs adjudication. The Constitution of Kenya, 2010 has also entrenched ESCRs in the Bill of Rights and has a developing jurisprudence out of which valuable lessons may be lent, especially for countries considering constitutionalizing ESCRs.

Further in this chapter, the related issue of how the three countries have dealt with the challenge of limited access to justice for parties who cannot otherwise afford the cost of litigation is discussed. This refers to situations where constitutionally protected rights, including ESCRs are denied, violated, infringed or threatened, and the common law rules of standing or joinder would not suffice. This is the issue of *locus standi*. *Locus standi* at common law entails that the right to obtain legal relief generally only accrues to those who have personally suffered or would suffer harm through the violation or threatened violation of their legally enforceable rights.<sup>1</sup> Hence in order to cater for impoverished citizens without means of claiming their rights or defending violations of their rights, this chapter takes an insight into how the three jurisdictions have endeavored to uphold and guarantee the ESCRs of their indigent citizens by allowing class action and public interest litigation.

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<sup>1</sup>A.Beck, "*Locus standi in iudicio or ubi ius remedium.*" South African Law Journal,(1983): 281.

## 4.1 INDIA

### 4.1.1 Constitutional Framework

The current Constitution of India was enacted in 1947. It is the world's lengthiest Constitution with more than 370 articles, replete with multiple schedules and more than ninety amendments.<sup>2</sup> It provides for civil and political rights in its Bill of Rights. Whereas the civil and political rights are enshrined under Part III of the Constitution as fundamental rights and freedoms that are enforceable through the courts, ESCRs on the other hand are provided for under Part IV of the Constitution as DPSPs and are a non-enforceable set of rights.<sup>3</sup> Since the ESCRs are not enshrined in the Bill of Rights, this model provides for a weaker form of protecting and guaranteeing ESCRs as compared to having them under the Bill of Rights. The DPSPs provided for under this Constitution include the rights to a minimum living wage, free and compulsory education for all children up to the age of fourteen, and the right to nutrition and public health.<sup>4</sup> These provisions are further strengthened by Article 38 of the Indian Constitution which goes to establish the aspirational goals of economic justice and social transformation to be applied uniformly within the State.<sup>5</sup> However, it is worth noting that the Indian Constitution makes no express reference to the right to adequate and accessible housing, clean and safe water, and the right to social security. Article 37, under Part IV of the Indian Constitution provides that "the provisions contained in this part shall not be enforceable by any court, but the principles

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<sup>2</sup>Rajat Rana, *Could domestic courts enforce International Human Rights Norms? An empirical Study of the enforcement of Human Rights norms by the Indian Supreme Court since 1997*, 11 <<http://www.ssrn.com>; accessed on 24/02/2013.

<sup>3</sup> Article 37, Part .IV of The Indian Constitution "*The provisions contained in this part 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 the duty of the State to apply these principles in making laws...*"

<sup>4</sup>Article 47 of the Indian Constitution: *The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.*

<sup>5</sup>Article 38 of the Indian Constitution: (1) *The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.*

therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws...” Zambia, like India, has provided for DPSPs in Part IV of the Constitution, and not in the Bill of Rights. The corresponding provision in the Zambian Constitution expressly states that the DPSPs shall not be justiciable and shall not be legally enforceable in any court, tribunal or administrative institution or entity.<sup>6</sup>

#### **4.1.2 Interpretation of Economic, Social and Cultural Rights**

Although the ESCRs in the Indian Constitution are a non-enforceable set of rights,<sup>7</sup> the Indian courts have nonetheless adjudicated on ESCRs cases. This is an activist approach in which the courts have given a wider interpretation to the right to life as contained in Part III of the Constitution under Article 21. The courts have interpreted this Article as to encompass ESCRs thereby making them (ESCRs) justiciable. This approach embraces a core minimum content where the court expands its interpretative power to give content to the right to life, whereby that content is taken to be the core minimum which is non-negotiable.

To illustrate how the Indian courts have been innovative to expand the interpretation of the right to life in order to adjudicate on ESCRs claims, the following two cases are discussed. In *Olga Tellis v. Bombay Municipal Corporation*,<sup>8</sup> a group of pavement and slum dwellers petitioned the court against their arbitrary eviction from the pavement and slum dwellings by the Municipal Councils of Bombay and Maharashtra in accordance with an 1888 Act. The petitioners claimed that in being evicted, they were being deprived of their livelihood under Article 39 of the DPSPs, and subsequently their right to life under Article 21 in the Bill of Rights. The Supreme Court was of the opinion that the right to life encompassed the means of livelihood as supported by the directive principle of adequate means of livelihood and work.

The court held that such an eviction would be fair only where a just and fair procedure was undertaken in accordance with the law. In that case, the court found that these procedural safeguards were fulfilled and there was no right to an alternative site. However, the court went

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<sup>6</sup> Article 111 of the Constitution of Zambia.

<sup>7</sup> Article 37 of the Constitution of India.

<sup>8</sup> (1985) 2 SUPP SCR51.

on to grant a one month temporary reprieve before any eviction was undertaken. From the foregoing case, the fundamental right to life was used to give effect to petitioners' socio-economic needs under a DPSP. Although the petitioners in this case did not obtain substantial relief, it signals the courts' willingness to give a broader interpretation to the right to life under Article 21 of the Indian Constitution. In Zambia, whereas the courts have demonstrated a degree of judicial activism in civil and political rights cases,<sup>9</sup> the activism has so far not been extended to protect and construe ESCRs from the right to life.

In *Paschim Banga Khet Mazdoor Samity & Others v. State of West Bengal & Another*,<sup>10</sup> the petitioner, a resident of West Bengal, was severely injured after falling off a train and thereafter was refused treatment at six successive State hospitals because the hospitals either had inadequate medical facilities or did not have a vacant bed. The court declared that the right to life articulated in the Indian Constitution under Article 21 imposed an obligation on the State to safeguard the right to life of every person. Declaring the right to health as being incorporated under the right to life, the court asserted that denial of timely medical treatment which is necessary to preserve human life in government-owned hospitals is a violation of this right. The petitioner was awarded compensation, and the court ordered the Government of West Bengal to pay the petitioner compensation for the loss suffered, and to formulate a blue print for primary health care with particular reference to treatment of patients during an emergency.

In this case, the court construed the right to emergency medical care for accident victims as a core minimum to the right to health. This decision stood to obligate the State to provide for this right regardless of whether or not it had funds. This case thus highlights the innovativeness of the courts in the interpretation or enforcement of ESCRs. Also revealed in these cases is the fact that, the litigation brought before the courts for adjudication was not done by the actual victims or would be victims of ESCRs violations. Other persons brought the cases on behalf of the petitioners. This brings out the issue of standing, i.e., *locus standi*, and how it can be used to alleviate the suffering of indigent citizens.

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<sup>9</sup> In the case of *Mulundika & Others v The People* (1995-1997) ZR 20, the Supreme Court of Zambia found section 4(5) of the Public Order Act to be in violation of the freedom speech and assembly in Articles 20 & 21 of the Constitution of Zambia.

<sup>10</sup> (1996) A.I.R. SC 2426.

On *locus standi*, the Constitution of India provides that, “the right to move the Supreme Court by appropriate proceedings for the enforcement of the right conferred by this part is guaranteed”.<sup>11</sup> And in line with the strict common law interpretation of *locus standi*, only the aggrieved party has the right to seek legal redress under Article 32. However, through judicial activism, in 1981 Justice P. N. Bhagwati (as he then was) in *S.P.Gupta v. Union of India*,<sup>12</sup> articulated the concept of public interest litigation as follows; “Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons by reasons of poverty, helplessness or disability or socially or economically disadvantaged position unable to approach the court for relief, any member of public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226, and in case of any breach of fundamental rights of such persons or determinate class of persons, in this court under Article 32 seeking judicial redress for the legal wrong or legal injury caused to such person or determinate class of persons.”

The rationale behind the relaxation of the rules of standing is that, making ESCRs justiciable achieves no benefit whatsoever where the neediest, and most vulnerable persons to human rights violations do not become actual beneficiaries of these rights as they cannot afford the cost of litigation. In the Indian jurisdiction, it is clear that their approach brings justice to the poorest classes of victims of human rights violations. However, the relaxation of the rules of standing does not necessarily mean that just about everybody has standing. It is intended to enable persons acting in a *bona fide* manner, albeit without sufficient interest in the proceedings, but motivated by the desire to redress violations of human rights and genuine infraction of statutory provisions, and not for personal gain or private profit or political motive or any oblique consideration.

In subsequent cases, public interest litigation and class action on ESCRs cases were adjudicated in Indian courts. For example, in *People’s Union for Democratic Rights v. Union of India*,<sup>13</sup> a

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<sup>11</sup>Article 32 of the Constitution of India.

<sup>12</sup> (1982) A.I.R. SC 149.

<sup>13</sup> (1982)A.I.R. S.C. at 1475.

workers' advocacy group wrote a letter to the Supreme Court on behalf of a group of construction workers who were being paid less than the minimum wage. The court admitted the letter under its "epistolary jurisdiction," and held that the workers' group had standing on behalf of the construction workers. The court found that, payment of less than the minimum wage amounted to a violation of Article 23 of the Indian Constitution, which prohibits human trafficking and forced labour. It went further to protect the workers and ensure that the minimum wage was enforced.

Despite the foregoing provisions in the Indian jurisdiction on judicial enforcement of ESCRs, and *locus standi*, there is the often cited criticism of constitutionalizing ESCRs that the judiciary lacks in the skills and information to adjudicate on matters that have budgetary implications. To take care of this concern, the Indian jurisdiction has developed another innovation, of setting up commissions of inquiry or socio-legal commissions of inquiry to provide the judiciary with the relevant information required to adjudicate disputes with budgetary implications. This approach was articulated in the case, *Bandhua Mukti Marcha v. Union of India*.<sup>14</sup> This case institutionalized the practice of appointing socio-legal commissions of inquiry for the purpose of gathering relevant materials in public interest litigation. This approach helps to circumvent one of the possible challenges facing the justiciability of ESCRs, that of lack of relevant information to adjudicate ESCRs. Thus by obtaining information in this way (through commissions of inquiry), the courts drift away from the overly adversarial litigation to more collaborative litigation, in determining the outcome of ESCRs cases. This approach enables courts to ensure that the Constitution is upheld, and that other branches of Government respect and fulfill their constitutional obligations, including ESCRs, to the citizens. This is because the courts preside on cases from a well-informed point of view.

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<sup>14</sup>(1884)A.I.R SC 802.

## 4.2 SOUTH AFRICA

### 4.2.1 Constitutional Framework

The South African Constitution before independence in 1994, did not provide for ESCRs. It only had civil and political rights in its Bill of Rights. After extensive consultations and debates in the constitution-making process that followed, ESCRs were entrenched in the Bill of Rights of the first democratically enacted Constitution of 1996.<sup>15</sup> The Constitution of South Africa endeavors to bridge the gap in accessing basic economic, social and cultural needs by the majority poor black population, after decades of racial discrimination. It has an extensive Bill of Rights which provides for justiciable ESCRs in chapter II of the Constitution. Specifically, the ESCRs are provided for in sections 22 to 30. These rights include the right to housing, health care, food, water, social security, education, language and culture. In order to realize these rights, the Constitution states that the “*State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.*”<sup>16</sup>

In section 26, the South African Constitution provides for citizens’ right to have access to adequate housing, and enjoins the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right. It further provides for the protection of citizens from arbitrary evictions from their homes or demolition of their homes without an order of the court.

The rights to health care, food, water, and social security are guaranteed in section 27 of the Constitution. This section provides for everyone’s right to have access to health care services, including reproductive health care, sufficient food and water, social security, including appropriate social assistance where the citizens are unable to support themselves and their dependants.

The right to education is guaranteed under section 29 in the Bill of Rights. It guarantees everyone’s right to a basic education and further education, which the State must make progressively available and accessible. The section further guarantees everyone’s right to receive

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<sup>15</sup> Christiansen, *Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court*, 373.

<sup>16</sup> Section 28 of the Constitution of South Africa, 1996.

education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable.

Section 30 of the Constitution guarantees everyone's right to use the language and to participate in the cultural life of their choice. It suffices to mention that this section has a derogation clause which states that, no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights. The rights of persons belonging to a cultural, religious or linguistic community are guaranteed in section 31 of the Constitution. This section specifically provides for members of such communities to enjoy their culture, practice their religion, and use their language; and to form, join and maintain cultural, religious, and linguistic associations and other organs of civil society.

The Constitution of South Africa takes cognizance of the inability of the majority poor to bring actions before the courts of law on alleged violations or threatened violations, or denial of their constitutional rights by the State and public bodies. Accordingly, prior to the 1996 Constitution, litigants seeking judicial intervention had to be personally adversely affected by the alleged wrong, and no entity without legal capacity could have legal standing in a case. It suffices to mention that intermittent provisions were incorporated into the rules of procedure to cater for persons who were unable to enforce their rights or defend legal claims.<sup>17</sup> However, with the advent of the 1996 Constitution of South Africa, the scope of *locus standi* in the Bill of Rights was widened. The Constitution<sup>18</sup> outlines the categories of persons who are entitled to bring actions before courts of law, alleging that a right in the Bill of Rights has been infringed or threatened, (and the court may grant appropriate relief, including a declaration of rights) as follows:

- a. Any one acting in their own interest;
- b. Any one acting on behalf of another person who cannot act in their own name;
- c. Any one acting as a member of, or in the interest of, a group or class of persons;

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<sup>17</sup>Theophilous et al, *Fundamental Principles of Civil Procedure* 89 to 90, (Durban: Lexis Nexis Butterworths, 2006), 137.

<sup>18</sup> Section 38 of the Constitution of South Africa.



- d. Any one acting in the public interest; and,
- e. An association acting in the interest of its members.

The foregoing provision in the South African Constitution has gone a long way in ensuring that ESCRs of the economically disadvantaged citizens are guaranteed, protected, and made justiciable. Hence section 38 (widening the scope of *locus standi*) of the Constitution has given rise to class action, test case, and public interest litigation on citizens' justiciable ESCRs. In interpreting these rights, arising from litigation brought before the courts, a wealth of precedents and jurisprudence on the role of ESCRs in improving citizens' standard of living has been generated.

#### **4.2.2 Interpretation of Economic, Social and Cultural Rights**

In interpreting ESCRs cases, courts in South Africa have elaborated the nature of these rights. One outstanding and often cited example is the case of *Government of South Africa v. Grootboom*,<sup>19</sup> popularly known as the *Grootboom* case. The brief facts of the *Grootboom* case were that; 900 adults and children moved onto a piece of land *Wallacedene* ear-marked for low-income housing. The families were evicted, their homes bulldozed, and their possessions destroyed. The affected community approached the court on the basis that their constitutional right to have access to adequate housing as provided under section 26 of the South African Constitution had been violated. In its decision, the constitutional court held that the Constitution does not oblige the State to go beyond its available resources or to realize the socio-economic rights contained in the Constitution immediately. However, the failure of the State housing programme to provide any form of temporary relief to those in desperate need or living in crisis conditions, meant that the programme was not reasonable and failed to satisfy the State's obligation to achieve the progressive realization of these rights. The court issued a declaratory order that required the State to devise and implement a programme that included measures to provide relief for those desperate people who had not been catered for in the State housing programme.

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<sup>19</sup> (2000) (11) BCLR 1169 (CC).

The *Grootboom* case demonstrates that, citizens or parties that are aggrieved by a decision or action of the State or a public body can fall on their ESCRs in the Constitution to redress the alleged injustice. And since this case was a public interest litigation matter whose outcome was uncertain, it went a long way in demonstrating how section 38 of the South African Constitution which has widened the scope of *locus standi* could be utilized to protect the rights of indigent people. This case further goes to dispel the often cited argument that enshrining ESCRs in the Constitution would over-burden Government which does not have sufficient resources to meet the ESCRs of all citizens at once. The decision in *Grootboom* case demonstrates how courts are alive to the principle of progressive realization of ESCRs. Further, by ruling as it did, the constitutional court also demonstrated that, where ESCRs are enshrined in the Bill of Rights, the State has an obligation to protect and uphold ESCRs of citizens. It suffices to mention however that, several years after the constitutional court ruled in the *Grootboom* case, the judgment of the court had not been implemented.

In a 2001 case, residents of *Bon Vista Mansions*,<sup>20</sup> sued their local council (SMLC) for disconnecting water supply to a block of flats in Johannesburg. The High Court found that the disconnection was a *prima facie* breach of the constitutional and legislative right to access water. The court stated that the council must demonstrate that the disconnection is “fair and equitable,” and this includes taking into account the ability to pay. Since the council had not discharged this onus, an interim order for reconnection of the water supply was made. The *Bon Vista Mansions* case goes to confirm the importance of constitutionalizing ESCRs, and broadening the scope of *locus standi* in matters of alleged violation of rights contained in the Bill of Rights. It further shows how Government or public bodies are obligated to meet the basic economic, social and cultural needs of citizens. And that, through judicial review of decisions of public bodies, courts render expert interpretation of implementation of ESCRs, and thus lend appropriate content to social rights and the standards of compliance they impose. Ultimately, the ESCRs of citizens are guaranteed and protected, with the net effect of a rise in the standard of living for citizens.

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<sup>20</sup> *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (2002) 5 SA 721 (CC).

Further, in 2002, the case of *Minister of Health v. Treatment Action Campaign*,<sup>21</sup> dealing with the right to health was brought before the constitutional court. Treatment Action Campaign (TAC) was a coalition of NGOs involved in the treatment and care of people infected and living with HIV. Their grievance before the court was that the South African Government had refused to roll out a national programme for distribution of the drug *Nevirapine* which was used to prevent mother-to-child transmission of HIV. The Government restricted the distribution of this drug only to pilot study areas. This was despite the manufacturers offering free supplies of the drug to developing countries, including South Africa, and other sub-Saharan countries. TAC filed a suit in court on the basis that the decision of the South African Government contravened Article 27 of the South African Constitution guaranteeing the right to have access to health care services, including reproductive health care. The court ordered the Government to take reasonable measures to remove restrictions on administering the drug in instances where this was medically indicated, and where the capacity to do so existed. It also ordered the Government to devise and implement, within its available resources, a comprehensive and coordinated programme that would extend HIV testing and counselling facilities to public hospitals which still lacked the capacity to administer the drug.

The court's decision in the *TAC* case was significant as it first acknowledged that ESCRs, as enshrined in the Constitution of South Africa are justiciable. Secondly, the court applied the reasonableness test to hold that the Government's goals did not justify the heavy impact the programme had on the ninety percent of poor pregnant women and their children for whom the treatment was functionally prohibited. The programme's inflexibility and its failure to account for the needs of a particularly vulnerable group made it thus unreasonable. This shows the advancement of the reasonableness test by the South African courts in dismissing Government policies that are not considered to be reasonable in the opinion of the court. The decision also demonstrates that through justiciable ESCRs, Government can be obliged to satisfy the needs of the economically disadvantaged citizens, and whose ability to enjoy all rights is most in peril. It also contextualizes the issue of standing, i.e., public interest litigation and/or class action matters can be taken up on behalf of disadvantaged citizens to protect or enforce their rights against the State.

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<sup>21</sup> 2002 (10) BCLR 1033 (CC).

In another case, *Soobramoney v. Minister of Health (Kwazulu Natal)*,<sup>22</sup> the appellant sought the court order directing Addington Hospital to provide dialysis treatment to him (for chronic renal failure). It was brought to the court's attention that the hospital could not do so due to lack of resources, and that the hospital had a policy in place which set out the criteria for the use of the dialysis resources. And the appellant did not qualify under those guidelines. When handing down its decision, the court confirmed that the State's obligations that stemmed from the constitutional right to access to housing, health care, food, water, and social security were dependent upon the availability of resources, and limited by the lack of resources and the relevant demand. The court went on to indicate that the South African Constitution, specifically in the Bill of Rights, imposes certain obligations on the State. In such cases, it is the court's duty to enforce the obligations as they are, and not to 'draw inferences that would be inconsistent therewith.'

This case rebuts the often cited argument that, inclusion of ESCRs in the Constitution results in judiciary interfering with the political process of resource allocation.<sup>23</sup> In fact, the courts are reluctant to interfere with rational decisions made in good faith by political organs and relevant authorities whose mandate is to administer such matters. This case also shows that inclusion of ESCRs in the Bill of Rights provides a direct way by which citizens can claim their rights from the State. Further, the case demonstrates that, where ESCRs are enshrined in the Bill of Rights, the courts are given legitimacy to decide on ESCRs claims. This approach leaves Government with limited room to raise the legitimacy question when courts find it wanting in its obligations. It also compels Government to manage its resources prudently to raise the standard of living of its citizens. Hence Zambia can learn several lessons from the South African Constitution and precedents. This is in respect of the place of ESCRs in the Bill of Rights, and broadening of *locus standi*, among other provisions.

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<sup>22</sup> Constitutional Court of South Africa, Case CCT 32/97, 27 November 1997.

<sup>23</sup> Goodman & Steiner, *International Human Rights in Context*, 486.

## 4.3 KENYA

### 4.3.1 Constitutional Framework

Kenya ratified the ICESCR on 3<sup>rd</sup> January 1976, but has yet to domesticate this treaty. The ICESCR enjoins States Parties to take constitutional and legislative measures to realize ESCRs. After attempts in previous draft Constitutions of Kenya to incorporate ESCRs, it was not until the promulgation of the Constitution of Kenya, 2010, that marked a new beginning for human rights protection as it enshrines ESCRs in the Bill of Rights. Scholars have acknowledged this Constitution as being one of the most ambitious and progressive in Africa. Chapter four of the Constitution contains the Bill of Rights. All laws, State organs, and all persons are bound by provisions of the Constitution and in particular the Bill of Rights.<sup>24</sup> The ESCRs are enshrined in the Bill of Rights, meaning that they can be claimed and enforced by citizens against the State. The entrenchment of ESCRs in the Constitution of Kenya 2010, signifies the State's willingness to fulfill its obligations under international law by enhancing the realization of ESCRs through a constitutional machinery. The ESCRs are contained in Article 43 the Constitution.

Article 43 (1) provides that;

Every person has the right:

- (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
  - (b) to accessible and adequate housing, and to reasonable standards of sanitation;
  - (c) to be free from hunger, and to have adequate food of acceptable quality;
  - (d) to clean and safe water in adequate quantities;
  - (e) to social security; and
  - (f) to education.
- (2) A person shall not be denied emergency medical treatment.
- (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.

The right of every person to use the language of their choice and to participate in the cultural life of their choice is also guaranteed in the Constitution of Kenya.<sup>25</sup> And in light of resource constraints that Kenya is faced with, Article 22 (2) obliges the State to take legislative measures, including the setting of standards to achieve “progressive realization” of the rights guaranteed under Article 43.

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<sup>24</sup> Article 20 of the Constitution of Kenya, 2010.

<sup>25</sup> Article 44(1) of the Constitution of Kenya.

It is the basic argument of this study that, non-inclusion of justiciable ESCRs in a Constitution contributes to high poverty levels and lack of access to basic human needs in a country. In order to address high levels of poverty, the Kenyan Constitution<sup>26</sup> obligates all State organs, and all public officers to address the needs of vulnerable groups within society, including women, older members of society, persons with disability, children, youths, members of minority or marginalized communities. Thus, where citizens' basic rights to shelter, food, water, health facilities, among other rights, are not provided for by the State, citizens have a constitutional right to claim them (rights) from the State through the courts of law. The net result is alleviation of poverty and a rise in the standard of living, through the law.

Further, Article 22 (1) of the Kenyan Constitution provides the right of every person to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. And Article 23 (1) of the Kenyan Constitution gives the High Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Article 23 (2) obligates Parliament to enact legislation to give original jurisdiction in appropriate cases to Subordinate Courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. This provision is meant to increase access to justice particularly in areas where there is no High Court. Thus, just like the South African jurisdiction, the Constitution of Kenya offers direct protection of ESCRs. Hence through courts of law, aggrieved citizens can petition the State and public bodies to provide for their rights. This gives meaning to ESCRs as contained in the Constitution.

Another key feature of the Constitution of Kenya 2010, is the relaxation of the rules of standing to allow for public interest litigation, and class action in the enforcement of the fundamental rights and freedoms. The rules of standing have been relaxed to allow claims for infringement or violation of constitutional rights in situations where the claimant may not be able to claim the rights himself or herself. Hitherto, the repealed Kenyan Constitution had a restrictive approach to the question of standing. In fact, it was silent on *locus standi*. This meant that the courts had to define standing as by common law, which required a person to be directly affected for him or her

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<sup>26</sup> Article 21(3) of the Constitution of Kenya.

to be able to bring a cause of action. In other words, an individual could only claim relief if he had a personal, sufficient, and direct interest in the matter. This position hindered access to justice to a greater majority Kenyans, who had no knowledge of their rights, or were indigent. Furthermore, the complexities and high cost of judicial processes hampered individuals who were ill-educated from instituting causes of action.<sup>27</sup> Taking into account the foregoing challenges, among many, the new Constitution of Kenya (2010) expanded *locus standi*. Accordingly, Article 22 of the Constitution of Kenya provides as follows on *locus standi*:

(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

The foregoing constitutional provisions allow access to justice for parties who cannot otherwise afford the cost of litigation. It also creates a mechanism to hold the Government accountable in the protection, promotion, and fulfillment of human rights, including ESCRs. Thus, since the promulgation of the new Constitution on August 27 2010, Kenyans have continued to make use of this provision, by filing numerous ESCRs claims in courts to protect themselves against violations of their ESCRs by the Government and its institutions. Countries considering constitutionalizing ESCRs can learn a lot from the wealth of jurisprudence that the courts in Kenya have generated in interpreting these rights.

#### **4.3.2 Interpretation of Economic, Social and Cultural Rights**

As discussed above, Article 23 (1) and (2) of the Constitution of Kenya 2010, gives original jurisdiction to the High Court and Subordinate Courts respectively, to interpret and enforce all the rights under the Bill of Rights, including ESCRs. This is in cases where there are denials,

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<sup>27</sup><http://wwwkenyaplex.com>, accessed 12 April 2013.

violations or infringements, or threats to a right or fundamental freedom in the Bill of Rights. The protection of the rights in the Bill of Rights has been enhanced further through the widening of the scope of *locus standi*.<sup>28</sup>

In interpreting ESCRs cases, courts in Kenya have given context to these rights. The first case in the Kenyan jurisdiction on ESCRs following the enactment of the 2010 Constitution was; *Susan Waithera Kariuki & Others v Town Clerk, Nairobi City Council & Others*.<sup>29</sup> In this case, the petitioners sought a conservatory order, pending the hearing and determination of their petition, to restrain the Nairobi City Council from evicting them and other scores of residents in informal settlements within Kaptagat village. They argued that the respondents owed them a duty of respect, protection, and fulfillment of their socio-economic rights under the Constitution. The High Court, relying on the South African Constitutional Court decision in *Grootboom*<sup>30</sup> case, held that, even though the city council was under duty to properly plan the city, it should have done so respecting constitutional rights of the people in the informal settlements. A conservatory order was granted as pleaded, pending the determination and hearing of their petition.

The foregoing decision of the Kenyan High Court was the first landmark ruling on ESCRs under the Constitution of Kenya, 2010. Apart from setting an important precedent on ESCRs, it also illustrates the court's willingness to give effect to ESCRs guarantees under the new Constitution. It also demonstrates how class action litigation can be undertaken on behalf of others who are incapacitated, through the widened scope of *locus standi*. Thus the entrenchment of ESCRs in the Bill of Rights, and the broadening of the scope of standing have been effectively relied upon to protect the affected citizens and guarantee their rights.

And in a 2013 decision of the Kenyan High Court in the case; *Amoni Thomas Amfry & Another v. Minister for Lands & 10 others Attorney General*,<sup>31</sup> the question of *locus standi* was one of the matters before court. Under consideration was the issue of whether a litigant who has brought proceedings to advance a legitimate public interest cause should be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. The court held that courts should not impose costs on a party who has brought a public interest case against the State but

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<sup>28</sup> Article 22 of the Constitution of Kenya.

<sup>29</sup> Petition no. 22 of 2012. [globalinitiative-escr.org/wp-content/uploads/](http://globalinitiative-escr.org/wp-content/uploads/); accessed on 12 June 2012.

<sup>30</sup> (2000) (11) BCLR 1169 (CC).

<sup>31</sup> Petition no. 6 of 2013. [www.the-star.co.ke/news/article-108251/](http://www.the-star.co.ke/news/article-108251/); accessed 12 June 2012.



loses. And still on *locus standi*, the Kenyan High Court interpreted the circumstances under which a person can file a constitutional petition on behalf of another. In *Joshua Karianjahi Waiganjo v. the Attorney General & others*,<sup>32</sup> the issue before court was whether an advocate can petition on behalf of an individual whose rights have been violated. In upholding provisions of Article 22 of the Constitution of Kenya on *locus standi*, the High Court ruled that the advocate had *locus standi* in the matter.

Therefore by constitutionalizing ESCRs, and broadening the scope of *locus standi*, the Constitution of Kenya 2010, has enhanced the protection and guarantee of ESCRs. Consequently, the courts in Kenya are readily able to hear and determine cases of alleged ESCRs violations of citizens. The cases are brought by the persons who have suffered the alleged violations themselves or other interest groups, who do not have ulterior motives in assisting the affected persons. This widens access to courts by citizens, and ultimately improves access to resources, opportunities, social services essential for an adequate standard of living, and general protection of their rights by law. Hence countries considering constitutionalizing ESCRs can learn a lot from the Constitution of Kenya 2010, and the emerging jurisprudence in that country.

In conclusion, this chapter has demonstrated through the Constitutions referred to and the case-law in the three jurisdictions that, the best way to guarantee citizens' ESCRs is by enshrining them in the Bill of Rights of the Constitution, as undertaken in South Africa and Kenya. By so doing, the State is held accountable for its management of financial resources, and can be brought to book where marginalized communities' have their ESCRs deprived.

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<sup>32</sup> Petition no. 42 of 2013.

## **CHAPTER FIVE**

### **5.0 THE NEED FOR JUSTICIABLE ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE ZAMBIAN CONSTITUTION**

The previous chapter discussed the application of ESCRs in the three selected countries, namely, India, South Africa, and Kenya. In the quest to understand the prospects and challenges of including ESCRs in the Constitution of Zambia, valuable lessons may be drawn from the three jurisdictions discussed in chapter four. This chapter now moves on to interrogate the two research questions of the study, which read as follows: Would ESCRs be too costly to be required of a State like Zambia? And does the inclusion of ESCRs in the Bill of Rights result in excessive judicial interference upon the political processes, thereby violating the principle of separation of powers? Would the inclusion of ESCRs in the Bill of Rights result in providing a mechanism by which citizens can enforce their ESCRs and better their standard of living. The starting point will be an examination of the adequacy or otherwise of the existing institutional framework in Zambia, i.e., the executive, the legislature, and the judiciary, in protecting ESCRs. The chapter will conclude by recapitulating on the affordability of ESCRs in the Zambian context, as well as the role of ESCRs in reducing poverty.

### **5.1 THE EXECUTIVE**

The Constitution of Zambia provides for the executive branch of Government under Part IV of the Constitution. The executive branch of Government comprises the office of the President, Vice-President, Cabinet Ministers, Provincial Deputy Ministers, Secretary to the Cabinet, Attorney General, Solicitor General, Director of Public Prosecutions, and the entire civil service. The powers of the executive are wide and are far reaching. As regards ESCRs and their implementation by the executive branch of Government, the current Constitution does not provide for ESCRs. In Part IX of the Constitution, there are DPSP.<sup>1</sup> These principles (DPSP) include provision of adequate means of livelihood and employment opportunities; provision of clean and safe water; adequate medical and health facilities; decent shelter for all persons; equal

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<sup>1</sup>Article 110 of the Constitution of Zambia.

and adequate educational opportunities; provision of social benefits and amenities to the disabled, aged and other disadvantaged persons; promotion of the practice, enjoyment and development by any person of that person's tradition, custom or language, among other principles.<sup>2</sup> In this regard, the Constitution provides that, these principles shall guide the three branches of Government in the development and implementation of national policies, making and enacting laws, and in the application of the Constitution and other laws.<sup>3</sup> The Constitution further provides that the DPSP may only be observed in so far as State resources are able to sustain their application.<sup>4</sup> The Constitution expressly excludes the DPSP from legal enforcement against the State in any court, tribunal, or administrative institution or entity.<sup>5</sup>

The executive uses its powers to try and give effect to the DPSPs in many ways, including moving of motions to amend laws to provide for these rights; issuance of national policies, statutory instruments, circulars and other administrative measures. For instance, the National Policy on Education<sup>6</sup> provides for free education up to grade nine. However, this policy has severe limitations in form of hidden costs such as uniforms, learning materials, and other fees like parent-teacher association (PTA) fees.<sup>7</sup> Although as a result of the policy on free basic education, there has been an increase in the enrollment from grades 1-7. However, the aforementioned limitations which include inadequate facilities and teaching staff have resulted in a decrease in the quality of education.<sup>8</sup>

Another example of an attempt by the executive to implement DPSPs is that on access to health care. In a report by the World Health Organization (WHO),<sup>9</sup> out of a number of 183,000 Zambians in need of free anti-retroviral drugs (ARVs), only 43,964 are accessing free ARVs. Further, long distances to health centres, shortage of essential drugs, and qualified health personnel make access to health a pipe dream.<sup>10</sup> And on the right to housing, schemes on housing

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<sup>2</sup> *Constitution of Zambia*, Art., 112.

<sup>3</sup> *Constitution of Zambia* Art., 112.

<sup>4</sup> *Constitution of Zambia*, Article 110(2).

<sup>5</sup> *Constitution of Zambia*, Article 111.

<sup>6</sup> Zambia, *National Policy on Education*. Lusaka: Zambia Educational Publishing House, (1996): 166.

<sup>7</sup> JCTR Press Release: 'JCTR Study on education reveals no free primary education in Zambia, calls for scaling up of bursaries and school feeding programmes', at <http://www.ictr.org.zm/bnb/prEDU06.html>; accessed January 2007.

<sup>8</sup> Kasonde, "The Need for Justiciable Socio-economic Rights", 48.

<sup>9</sup> WHO, "Summary Country Profile for HIV/AIDS treatment scale-up," (2005): paras 2 and 5.

<sup>10</sup> Kasonde, "The Need for Justiciable Socio-economic Rights," 48.

have been largely accessible to people in the middle, to higher income families, leaving 70% of the population in urban areas living in unplanned settlements.<sup>11</sup>

From the foregoing examples of attempts by the executive branch of Government to meet DPSPs of citizens, these are not being met adequately. However, since these DPSPs are not justiciable, citizens cannot claim or enforce them against the State. Further, there are executive institutions which are created by the Constitution like the Human Rights Commission,<sup>12</sup> and the Investigator General,<sup>13</sup> which have gone a long way in attempting to protect citizens' DPSPs. The Human Rights Commission's powers are contained in the Human Rights Commission Act.<sup>14</sup> Its functions are to investigate human rights abuses and to educate the public on human rights.<sup>15</sup> It has powers to investigate abuses, summon witnesses, and request the production of any document or record. Under section 13(2), it can make recommendations to the relevant authority, and which is expected to take action within thirty days. Any one who contravenes section 13(2) is guilty of an offence, and liable on conviction to a fine of up to ten thousand penalty units or to imprisonment for a term not exceeding three years. Unfortunately, the mandate of the Commission does not extend to DPSPs. This is because the supreme law of the land, namely, the Constitution provides that DPSPs shall not be justiciable and legally enforceable in any court, tribunal or administrative body.<sup>16</sup> Therefore, the Human Rights Commission cannot protect ESCRs effectively.

As regards the office of the Investigator General, the position in respect of protection of DPSPs is not any different from the Human Rights Commission. The Commission of Investigations is also incapacitated by the Constitution which stipulates that DPSPs shall not be justiciable, and legally enforceable in any court, tribunal or administrative body.<sup>17</sup> Therefore, the Investigator General cannot hear claims of DPSPs against the State. From the foregoing discussion on protection of DPSPs, the executive on their own cannot effectively protect DPSPs. This is because the Constitution prohibits enforcement of DPSPs by any court, tribunal or administrative

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<sup>11</sup> Zambia, *Parallel State Report on Economic, Social and Cultural Rights (2005)*: 50. [www.ictj.org.zm](http://www.ictj.org.zm); accessed 28 June 2012.

<sup>12</sup> Article 125 of the Constitution of Zambia.

<sup>13</sup> Article 90 of the Constitution of Zambia.

<sup>14</sup> Act No.39 of 1996.

<sup>15</sup> Section 9 of the Human Rights Commission Act.

<sup>16</sup> Article 111 of the Constitution of Zambia.

<sup>17</sup> Art. 111 of the Constitution of Zambia.

body, including executive institutions. The State may also renege on its obligations to citizens. And citizens cannot bring claims against the State on alleged denial or violation of principles in the DPSPs. The answer may therefore lie in having justiciable ESCRs in the Constitution.

## 5.2 THE LEGISLATURE

The Zambian Constitution vests legislative powers of the Republic of Zambia in Parliament, which consists of the President and the National Assembly.<sup>18</sup> Article 62 specifies the extent of Parliament's legislative powers and its role, as being to;

make laws for peace, order and good governance. But it may not pass any Act purporting to derogate from constitutional provisions. It may not alter the Constitution otherwise than in accordance with the stringent amendment procedure laid down in it for doing so.<sup>19</sup>

Given that the DPSPs are mere aspirations of the State, there is nothing that obliges the legislature to create laws that promote justiciable DPSPs. Enshrining DPSPs in the Bill of Rights would make them justiciable and central, rather than incidental to the law-making process. However, the legislature has enacted several pieces of legislation that support DPSPs in the field of equality and discrimination, ranging from education and women's rights; general labour laws and conditions of service; social security and intestate succession. These Acts of Parliament include the Education Act,<sup>20</sup> Industrial and Labour Relations Act,<sup>21</sup> the Employment Act, the Marriage Act,<sup>22</sup> the Anti-Gender-Based Violence Act,<sup>23</sup> among others.

There is no specific legislation on a mandatory right to food, health, or education. The provisions that relate to DPSPs are not measured against a standard provided by a constitutional right. The laws are inadequate as regards the protection of citizens' DPSPs as they are left to fend for themselves. Citizens are at the mercy of the legislature to provide adequate laws to protect their

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<sup>18</sup> Art. 62 of the Constitution of Zambia.

<sup>19</sup> Kasonde, "The need for Justiciable Economic-socio Rights," 50, quoting Carlson Anyangwe, *The Zambian Constitution and the Principles of Constitutional Autochthony and Supremacy*, 1997, Vol. 29 Zambia Law Journal, 22

<sup>20</sup> Chapter 134 of the Laws of Zambia.

<sup>21</sup> Chapter 269 of the Laws of Zambia.

<sup>22</sup> Chapter 50 of the Laws of Zambia

<sup>23</sup> No.1 of 2011

rights to health, food, education and housing. Thus without justiciable ESCRs in the Constitution, laws inconsistent with these rights cannot be challenged and many rights that are not put into law are left unprotected. Thus learning from jurisdictions like South Africa, and Kenya, the answer lies in constitutionalizing ESCRs.

### **5.3 THE JUDICIARY**

The principle of constitutional supremacy<sup>24</sup> means that the judiciary is supposed to ensure that all laws are consistent with the Constitution. The Zambian Constitution provides that, any law that is inconsistent with the Constitution is void to the extent of the inconsistency.<sup>25</sup> Further, Article 28(1) of the Constitution gives the High Court the jurisdiction to hear matters relating to the infringement of any of the fundamental rights and freedoms. And Article 94(1) gives the High Court ‘unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law.’ Article 27 gives courts the power to review the constitutionality of prospective legislation.

In relation to DPSPs, they were only introduced in the Constitution as State Policy in 1996. The Constitution provides that, although they may be referred to as rights in certain instances, DPSPs are non-justiciable. In the Indian jurisdiction referred to in chapter four of this study, where ESCRs are under DPSPs (and not in the Bill of Rights), there is judicial activism where courts have interpreted the right to life to extend to DPSPs. The question that begs an answer at this stage is, whether or not the Judiciary in Zambia can be innovative enough to hear and uphold claims against the State for denying or violating citizens’ DPSPs, by construing these policies from the perspective right to life. In answering the question, the starting point is reference to the constitutional provision under Article 111 which stipulates that DPSPs shall not be justiciable and legally enforceable in any court, tribunal or administrative body. This constitutional provision acts as a bar to would-be litigants since the Constitution is very clear on the issue of non-enforceability of DPSPs against the State. However, since these DPSPs are there in the Constitution, though non-justiciable, the State has a duty to provide them.

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<sup>24</sup>Kasonde, “*The Need for Justiciable Socio-economic Rights*,” 51.

<sup>25</sup>Article 1(3) of the Constitution of Zambia.

Secondly, judges in Zambia are appointed by the President and ratified by the National Assembly.<sup>26</sup> Some judges have in the past shown that they are unable to make decisions on cases that are in conflict with decisions of the executive. Judges need to feel secure in their employment before they can make decisions that challenge exercise of power by the executive. Due to the interference that the judiciary has experienced from the executive in the past, judicial activism as practiced in India is weak in Zambia. A case in point where the judiciary crossed paths with the executive was one which later became known as the “Skinner saga,”<sup>27</sup> which involved Mr. Justice James Skinner, the first Chief Justice of Zambia after independence. In the Skinner saga, two Portuguese soldiers had been convicted for illegal entry into Zambia. The sentence handed down was in excess of the powers of the presiding Magistrate. Judge Evans called for the case to be reviewed and found that indeed the magistrate had exceeded his powers. Judge Evans commented as follows:

There was nothing sinister on the part of the prisoners; they divested themselves of their weapons before entering Zambia, and they came openly across the border in daylight after exchange of non-abusive words with the Zambian immigration officer who called them across...

Upon hearing of Judge Evans’ comments, President Kaunda was enraged, and he called upon the Chief Justice to apologize on behalf of the judge. The Chief Justice refused to do so, on the grounds that the judge had acted in his own judicial capacity, and there was nothing that could be done about it. The President was angered by this response. He sent the party’s youth cadets to storm the High Court where they stoned judicial staff and broke windows. The Chief Justice, and a few expatriate judges, including Judge Evans resigned. Hence in subsequent cases like *Patel v Attorney General*,<sup>28</sup> the Courts became more conservative in their interpretation of the law involving violation of a right by the State. In turn, this hampered the development of judicial activism on the part of judges. It suffices to mention that the examples being cited on the ability of the judiciary to protect DPSPs were at a time when these rights were not provided for in the

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<sup>26</sup> Art. 93 of the Constitution of Zambia..

<sup>27</sup> Kasonde, “*The Need for Justiciable Socio-economic Rights*,” 59, quoting Judge T.K. Ndhlovu’s commentary in the case, *The People v Silva and Freitas* (1969) ZR 121 in the article; *The Problem of Constitutional Interpretation in Zambia: a Thing of the Past*. 2002, Vol. 34 Zambia Law Journal at p13.

<sup>28</sup> (1968) ZR 128.

Constitution of Zambia. What is being demonstrated is the ability or inability of the judiciary to make decisions that are at variance with executive decisions.

Regarding the issue of *locus standi* in the Zambian jurisdiction, the Supreme Court in the case of *Nkumbula v The Attorney General*,<sup>29</sup> held that for an individual to have *locus standi*, there must be an actual or threatened action in relation to him. This position limits access to courts and rules out court applications by interest groups acting on behalf of affected persons. It is worth pointing out that the Supreme Court is not bound by its previous decisions, and it may decide to broaden the scope of *locus standi* through judicial activism like in the Indian jurisdiction. Increasing the capacity of Legal Aid Board to take up cases is another option. However, the ultimate solution lies in the Constitution being amended to widen the scope of standing, as is the case in the South African and Kenyan Constitutions referred to in chapter four.

It is worth mentioning here that, the courts in Zambia have in some cases demonstrated judicial activism and independence from the executive. This has been demonstrated by courts passing judgments that are at variance with the executive's decisions, in judicial review applications and determinations of constitutionality of sections of some Acts of Parliament. For instance, in the 1995 case of *Mulundika and Others v The People*,<sup>30</sup> the applicants who were members of the opposition political party UNIP, held a public meeting without obtaining a permit as required by section 5(4) of the Public Order Act. When they were arrested and brought before the Magistrate Court, their lawyer raised a preliminary issue challenging the constitutionality of section 5(4) of the Public Order Act. The issue was referred to the High Court where the Act was upheld. On appeal to the Supreme Court, section 5(4) of the Public Order Act was found to contravene Articles 20<sup>31</sup> and 21<sup>32</sup> of the Constitution. The decision was applauded as indicative of the impartiality of the judiciary and a measure of judicial activism. Judge T.K. Ndhlovu<sup>33</sup> comments that, although more subtle than was previously the case, the independence of the judiciary is still interfered with by the executive. He however raises optimism that the *Mulundika* case is a turning point in the way judges decide cases without giving too much deference to the State.

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<sup>29</sup>(1972) ZR 204 (C.A.).

<sup>30</sup>(1995-1997) ZLR 20 (SC).

<sup>31</sup>Protection of the Freedom of Expression.

<sup>32</sup>Protection of Freedom of Assembly and Association.

<sup>33</sup>Kasonde, "The Need for Justiciable Socio-economic Rights," 59.



The case of *Roy Clarke v Attorney General*,<sup>34</sup> in which the High Court quashed the decision of the Minister of Home Affairs to deport the applicant, was another example of the judiciary taking a progressive approach in respect of protecting fundamental rights of citizens. If people's rights are to be fulfilled, there is need to have an independent and progressive judiciary as is the case in India. As seen in chapter four of this study, in the absence of ESCRs in the Bill of Rights, civil and political rights have been used to give protection to ESCRs by the courts in India. In Zambia, one may be asking for too much to expect the judiciary to construe and uphold ESCRs from the right to life as is the case in India. The judiciary in Zambia does not seem to be innovative enough to give protection to ESCRs which are not justiciable for now. The net result is little improvement in access to health, education, water and sanitation and employment opportunities, particularly in rural areas. Hence the solution for Zambia may lie in constitutionalizing ESCRs.

#### **5.4 AFFORDABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

In discussing the issue of why the current Government framework does not offer adequate protection to DPSPs, the issue of whether or not DPSPs are too costly to be included in the Bill of Rights is discussed. It has been argued in some quarters that poor countries like Zambia cannot afford to enforce justiciable ESCRs due to inadequate resources. The counter argument to this proposition is that Government will only be made to spend resources on issues that it should have been spending on, in the first place. As the Mung'omba Report put it:

Protection of any right has a cost, and the country should be prepared to spend resources in order to guarantee its citizens a minimum of economic, social and cultural rights. The fact that a country is poor does not constitute a legitimate excuse for it to avoid striving to ensure that its citizens enjoy economic, social, and cultural rights such as the right to adequate food, education, and health care.<sup>35</sup>

It does not therefore mean that once ESCRs are made justiciable, then the Government will be overwhelmed with litigation and pending financial claims from litigants. The issue here is that, Government will only be made to spend resources on issues it should have been spending on in the first place. Further, the courts are also cautious with how they interpret ESCRs claims. The

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<sup>34</sup>Case No.2004/HP/003.

<sup>35</sup>*Mungomba Report*, 193.

courts will, depending on circumstances of the case, merely point out the violation and instruct the relevant authority to remedy it in the most appropriate way.<sup>36</sup> This point was clearly demonstrated in decided cases in the Indian, South African, and Kenyan jurisdictions discussed in chapter four. In Zambia, there have been cases of citizens' civil and political rights which have resulted in courts ordering the executive to confer ESCRs on citizens. In the case of *Nyirongo v Attorney General*<sup>37</sup> for instance, it was held that pursuant to Article 22 on the freedom of movement, a citizen has the right to travel and to be issued with a passport. That involved a cost to the State.

And commenting on whether or not a country can afford ESCRs once enshrined in the Bill of Rights, the Committee on Economic, Social and Cultural Rights has stated that, where a country is unable to meet the minimum core standard, it must prove that it has tried its best to meet its minimum obligations.<sup>38</sup> In other words, after enshrining the ESCRs in the Bill of Rights, the country need only provide what it can afford. As shown in the South African cases referred to chapter four, under the reasonableness test, the country must only do what it can, to provide for the needs of the most desperate in society. There is no reason why Zambia should fail to have justiciable ESCRs in the Constitution. The argument of affordability of ESCRs does not stand. In fact, after ESCRs were incorporated into the ACHPR, also known as the Banjul Charter, adopted in 1986, several African countries included ESCRs in their Bill of Rights in the 1990s.<sup>39</sup> Hence there is a general trend to incorporate justiciable ESCRs in domestic Constitutions of countries with comparable economic situations to Zambia. There is international recognition of the fact that, ESCRs must be made justiciable in order for denial or violations of these rights to be adequately remedied in the same way that civil and political rights are. This confirms the declaration that the two rights (first and second generation rights respectively) are interdependent and indivisible.

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<sup>36</sup> Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*. U. Intl' L.Rev. (2006): 35. <http://www.auilr.org/pdf>; accessed 16 February 2013.

<sup>37</sup> (1990-1992) Z.R. 82 (S.C.).

<sup>38</sup> General Comment No.3, para 10.

<sup>39</sup> Kasonde, "The Need for Justiciable Economic-socio Rights," 59.

## 5.5 THE ROLE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN IMPROVING CITIZENS' STANDARD OF LIVING

It is the central theme of this paper to make a case for justiciable ESCRs. Therefore, in discussing the role of ESCRs in improving citizens' standard of living, as departure point, reference is made to some of the assumptions and research questions raised in chapter one of this paper. It has been assumed and confirmed by research that many Zambians are jobless, homeless, hungry, illiterate, failing to access proper medical care, and without safe water and sanitation.<sup>40</sup> And some of the research questions being addressed in this paper are, whether or not citizens' rights to food, housing, clean water, education and health care among other rights, can be achieved in the current economic and political dispensation in Zambia, and; how could ESCRs be entrenched, and claimed by citizens in order to alleviate poverty. Thus far, it is apparent from the previous chapter (four), that these rights have a crucial role to play in addressing the plight of citizens in the countries referred to (India, South Africa, and Kenya). Further, chapter four has established that, the most direct and arguably best way to guarantee citizens' ESCRs is by enshrining them in the Bill of Rights, so that they are automatically justiciable. The rationale behind the case for justiciable ESCRs in Zambia is to use these rights to alleviate poverty in a country where 63.7 percent of the population lives on less than a dollar a day.<sup>41</sup>

The Committee on Economic, Social and Cultural Rights defines poverty as:

A human condition characterized by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.<sup>42</sup>

The foregoing definition means that poverty is not just a lack of economic or material resources, but constitutes a denial of human rights, including ESCRs.<sup>43</sup> It follows that without justiciable

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<sup>40</sup>UNDP, 2011 Human Development Report, 2011, 129.

<sup>41</sup> Central Statistical Office; accessed on 24 August 2012.

<sup>42</sup> 'Poverty and the International Covenant on Economic, Social and Cultural Rights': 10/05/2001. E/C.12/2001/10. Statement adopted by the Committee on Economic Social and Cultural Rights on 4<sup>th</sup> May 2001. [http://www.unhcr.ch.tbs/doc.nsf/\(symbol\)/E.C.12.2001.10.En?Opendocument](http://www.unhcr.ch.tbs/doc.nsf/(symbol)/E.C.12.2001.10.En?Opendocument); accessed 8 February 2013.

<sup>43</sup>JC Mubangisi, "Know your rights: Exploring the Connections Between Human Rights and Poverty Reduction with Specific Reference to South Africa," SAJHR 21 (2005): 32.

ESCRs, the poor cannot effectively claim these rights against the State. Thus the Committee on Economic, Social and Cultural Rights states that “anti-poverty policies are more likely to be effective, sustainable, inclusive, equitable, and meaningful to those living in poverty if they are based upon international human rights.”<sup>44</sup> This position underscores the need to enshrine ESCRs in Zambia’s Bill of Rights.

In conclusion, it is apparent from the foregoing discourse that, the three arms of government cannot, through legislative, administrative measures and judicial activism, guarantee effective access to ESCRs by citizens. Without a constitutional provision in the Bill of Rights providing for justiciable ESCRs, there will be no application of human rights in poverty reduction strategies that can work. Enshrining ESCRs in the Bill of Rights provides hope that the State will be compelled to provide at least a minimum core of these rights to the millions of Zambians who languish in poverty.

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<sup>44</sup>Poverty and the ICESCR.<http://cesr.org/optionalprotocol?PHPSESSID=91>; accessed 27 November 2012.

## **CHAPTER SIX**

### **6.0 CONCLUSIONS AND RECOMMENDATIONS**

The aim of this study has been to explore the prospects and challenges of including ESCRs in the next Constitution. And in order to ascertain the said prospects and challenges, the following research questions have been considered in the preceding chapters of this study:

- vii. What are ESCRs, and how different are they from CPRs?
- viii. Despite recommendations of the Mwanakatwe and Mung'omba Constitutional Review Commissions to constitutionalize ESCRs, why has Zambia not included these rights in the Bill of Rights?
- ix. Would the ESCRs be too costly to be required of a State like Zambia?
- x. What do other jurisdictions have to say about ESCRs?
- xi. Does inclusion of ESCRs in the Bill of Rights result in excessive judicial interference upon the political processes, thereby violating the principle of separation of powers?
- xii. Would the inclusion of ESCRs in the Bill of Rights result in providing a mechanism by which citizens can enforce their ESCRs and better their standard of living?

Chapter one of this study introduced the subject of study, by giving background information on the study, stating the problem that the study is endeavoring to find a solution to, and its importance to meeting economic, social and cultural needs of citizens. Chapter two of the study dealt with the question of what ESCRs are, and ascertained that ESCRs and CPRs are indivisible, and therefore States Parties should endeavor to provide for both sets of rights. And chapter three dealt with the question of how Zambia has dealt with the issue of ESCRs in respect of recommendations from constitutional review commissions constituted by successive Zambian Governments. Chapter four dealt with the question of how selected jurisdictions have considered ESCRs in their respective Constitutions. Accordingly, chapter four explored the Indian, South African and Kenyan jurisdictions, which revealed that, the last two States have enshrined ESCRs in the Bill of Rights. For that reason, when citizens' ESCRs are denied or threatened with violation or are actually violated by the State, citizens can claim their rights from the State through courts of law. Chapter five has shown that, in the same way other jurisdictions have

dealt with the cost element associated with ESCRs, Zambia can manage to have ESCRs in her Bill of Rights. And further that, enshrining of ESCRs in the Bill of Rights does not necessarily result in the violation of the principle of separation of powers. It actually results in providing a mechanism by which citizens can enforce their ESCRs against the State and thereby improve their standard of living. It is in view of the foregoing findings, analysis, and deductions that the ensuing specific conclusions and recommendations are made in this study.

## **6.1 CONCLUSIONS**

It is apparent from the foregoing discussion that, ESCRs hold the key to facilitating the minimum core content of access to basic rights and services which have the effect of improving citizens' standard of living. As discussed in chapter two of this study, States or national governments bear the primary responsibility for making human rights a reality. This study has shown that there is a general discourse towards constitutionalizing ESCRs. In countries where these rights have been constitutionalized, citizens are able to seek redress in courts of law where their ESCRs are denied, violated, or threatened to be violated. Hence human rights have been used as a vehicle to protect the rights of the vulnerable in society and in poverty reduction. This study has endeavoured to show that the need, and demand for inclusion of ESCRs in the Bill of Rights of the Zambian Constitution is alive, and are a necessity in addressing many challenges that citizens of this country are currently facing. As discussed in chapter two, there have been lobbying and campaigns by people in their submissions to the Mwanakatwe and Mung'omba Constitutional Review Commissions on ESCRs, evidenced by the high number of submissions. It is thus the wish of the Zambian people to have their ESCRs protected and guaranteed by enshrining them in the Bill of Rights

And one of the findings of this study in chapter three is that, despite respective constitutional review processes 'consulting' widely, there is still lack of wide and intelligent understanding and participation by Zambian citizens on technical and legal aspects of the Constitution like ESCRs. This is despite holding of debates, discussions, seminars, workshops and conferences by various stakeholders to discuss the constitutional process. The focus of many citizens and lobbyists has been on civil and political rights. Constitutional issues which have pre-occupied the majority of citizens are those to do with the 50 percent-plus-one thresh-hold for election of Republican

President; academic qualifications of the presidential candidate; presidential running mate clause; dual citizenship, among many others. Matters to do with ESCRs have received limited attention, as articulated in chapter two of this study. This is because, by their nature, issues of ESCRs require legal education for citizens to understand their importance, and how they can make Government accountable and thereby alleviate poverty.

Further, drawing from the comparative study in chapter four, particularly in the Indian jurisdiction, the judiciary is one vessel that could have been used in Zambia by inferring and recognizing existence of ESCRs in the Constitution, from the right to life. As shown in chapter five of this study (at 5.3), the judiciary in Zambia lacks the requisite activism and innovativeness. This has been attributed to the fact that the judiciary lacks total autonomy from the executive branch of government. The lack of autonomy arises from constitutional hindrances like judges being appointed by the President. As if not enough, the Constitution prohibits litigation on matters falling within the DPSPs.<sup>1</sup> For this and many other reasons, the judiciary in Zambia has not been proactive in order to revolutionize the litigation of ESCRs. Therefore, the Indian approach cannot work in Zambia. To remedy the Zambian situation, a leaf may be taken from the South African, and Kenyan Constitutions where ESCRs have been enshrined in the Bill of Rights. Thus similarly, Zambia can and should enshrine justiciable ESCRs in the Bill of Rights. This will call for an amendment of the Bill of Rights. And for the Bill of Rights to be amended in Zambia, the Constitution provides that the bill to amend this part (Part III) of the Constitution has to be put to a national referendum with not less than 50 percent of persons entitled to be registered as voters, participating in the referendum.<sup>2</sup> Thus incorporating ESCRs in the Constitution will go a long way in addressing the problem of poverty in the country.

In addition, as seen in chapter five of this study, other methods of protecting DPSPs, that is, through the legislature, judiciary or executive, do not offer the same guarantees as having ESCRs in the Bill of Rights. This is because Government cannot be held directly accountable for failure to provide DPSPs and the same cannot be enforced. Further, the narrow common law

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<sup>1</sup> Article 111 of the Constitution of Zambia.

<sup>2</sup> Article 79(3) of the Constitution of Zambia.

interpretation of *locus standi*<sup>3</sup> in the Zambian jurisdiction limits access to the judiciary as only persons directly and personally affected by a denial or infringement can bring an action before the courts. Since the people who are most affected by such infringements are the indigent, compounded by lack of justiciable ESCRs, Zambians are unable to access justice to redress their inherent rights, by virtue of being human beings, through the courts of law. There is, therefore, need to widen the scope of standing in the Constitution, in addition to enshrining the ESCRs in the Constitution.

Moreover, the study under chapter five has also established that, there is a link between poverty and human rights. And that a holistic human rights approach could be effectively used in poverty reduction. Notwithstanding the seemingly low understanding of ESCRs among citizens, the Mung'omba Constitutional Review Commission recorded a high number of submissions on the need to have justiciable ESCRs. In agreeing with these submissions, the Mung'omba Commission noted that there has been a trend in the African region towards making ESCRs justiciable by including them in the Bill of Rights. It also noted that resource constraints should not prevent these rights from being implemented as the government can be made to deliver optimal services to the people within its available resources. This brings in the need to provide for a minimum core content threshold of ESCRs alongside their constitutionalization. Thus once ESCRs are enshrined in the Bill of Rights, government will be obliged to make clear budgetary and implementation efforts to meet citizens' basic needs. In turn, this will ensure accountability and transparency in government's budget preparation process and distribution of the country's resources. Further, and most importantly, citizens will have a right to seek redress through the courts of law, if their ESCRs are denied or infringed upon or threatened.

Further, as discussed in chapter three of this study, the first draft Constitution<sup>4</sup> produced by the Technical Committee appointed by President Michael Sata, has for the first time in the history of constitution-making in Zambia, provided for ESCRs within the Bill of Rights of the first draft Constitution, as follows:

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<sup>3</sup> Nkumbula v The Attorney General (1972) ZR 204 (C.A.).

<sup>4</sup> Published on April 30, 2012.



A person has the right to-

- (g) The highest attainable standard of health, which includes the right to health care services and reproductive health care;
- (h) Accessible and adequate housing;
- (i) Be free from hunger, and to have access to adequate food of acceptable quality;
- (j) Clean and safe water in adequate quantities and to reasonable standards of sanitation;
- (k) Social security and protection; and
- (l) Education.<sup>5</sup>

Citizens' right to use language and participate in the cultural life of their choice is provided under Article 63 of the draft Constitution.

However, the challenge that is likely to be encountered with the ESCRs provided in the draft Constitution is that of enforcement of the rights. This is because the Constitution further provides that, where a claim for ESCRs is made before the constitutional court, it is the responsibility of the State to show that the resources are not available. It further provides that the constitutional court shall not interfere with a decision by the State concerning the allocation of available resources solely on the basis that the constitutional court would have reached a different conclusion.<sup>6</sup>

So, it appears that the draft Constitution gives with one hand and takes away with the other. This is because, any ESCRs-based claim brought before the courts against the State may not succeed, so long the State shows that there are no resources. Thus in order to have enforceable ESCRs in the draft Constitution, the derogation clause at Article 61(3) should be removed from the draft. Such a move would bring the draft Constitution to the same level as in the South African, and Kenyan Constitutions. That will give meaning to the ESCRs in the draft Constitution.

Having reached the foregoing conclusions, the study suggests some recommendations that can, and should be immediately considered in order to have justiciable ESCRs in the Constitution. And since this study is being undertaken at a time when Zambia is conducting a review of its Constitution, this is the time to bring on board some of the recommendations in this study.

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<sup>5</sup>Article 62 of the First Draft Constitution.

<sup>6</sup>Article 61(3) of the First Draft Constitution.

## 6.2 RECOMMENDATIONS

As argued and established in this study, in order to reduce poverty and achieve intended and desirable developmental goals, the full guarantee and protection of ESCRs must be in the Bill of Rights, which is in any event the heart of the Constitution. For the Bill of Rights to be amended to include ESCRs, there is need for the government of Zambia to facilitate a referendum process to allow for the amendment of Part III (Bill of Rights) of the Constitution as required under Article 79(3). Further, since the draft Constitution has derogation clauses<sup>7</sup> shielding government from being compelled by the constitutional court to provide ESCRs where these are denied, violated, or threatened to be violated, it is hereby recommended that Article 61(3) be dropped from the draft Constitution.

It has been established in this study that a human rights approach can alleviate the deprivation of ESCRs of citizens thereby meeting citizens' basic necessities of life. In order to have justiciable ESCRs in the Constitution, the starting point recommended in this study is to mount a comprehensive civic education to sensitize government officials, and the civil society players on the importance of ESCRs in the Constitution. The civic education should be undertaken by legal experts through appropriate fora like workshops and radio discussions. Civil society organizations (CSOs) would also be involved in sensitizing the public, with the aim of imparting knowledge and arousing public interest in citizens on the importance and need for justiciable ESCRs. Also, CSOs, and other interest groups should lobby government and advocate for inclusion of ESCRs in the new Constitution.

Further, popular participation of citizens in the constitution-making process in general is imperative. By ensuring this participation, it will promote and strengthen popular support for the case of inclusion of justiciable ESCRs. Participation strategies need to be put in place by the government, CSOs, and faith-based institutions. This would give the constitution-making process the moral and legal legitimacy, including the durability of the outcome that a Constitution needs.

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<sup>7</sup> Article 63(1).

Hence government should ensure inclusiveness in the constitution-making process in order to have broad-based consensus which will foster ownership of the Constitution.

Further, it is recommended in this study that, there is need for information sharing and sensitization of key stakeholders like Members of Parliament on the importance of ESCRs in the Constitution. The canvassing should be to both ruling and opposition MPs, and political parties to join in the campaign for justiciable ESCRs. And a related strategy is that of dispelling the misconception that ESCRs are expensive, by among other ways, strengthening public consultation and in-put into the national budgeting process. This would include preparation and publicizing “alternative” or “parallel” budgets that emphasize implementation of ESCRs and poverty reduction programmes.<sup>8</sup>

Further, this study recommends that, government and other players like CSOs should strengthen working relationship with the Judiciary, the Human Right Commission, and other public bodies in efforts aimed at monitoring human rights violations, and ultimately protecting them. There is also need to closely work with the media, trade unions, and educational institutions to inform the public about ESCRs. Additionally, there is need for translation of the draft Constitutions and its provisions, particularly the ESCRs into local languages.<sup>9</sup>

Drawing from the example of South Africa, there is the issue of public interest litigation. As seen in chapter four, in the case *Nkumbula v. Attorney General*,<sup>10</sup> there is need to broaden the legal definition of *locus standi* to include other categories of claimants like; any one acting in their own interest; any one acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; any one acting in the public interest; and an association acting in the interest of its members. This should be done by introducing a new Article in the Constitution modeled on the South African or Kenyan

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<sup>8</sup> Mwale, *Zambia's Economic, Social and Cultural Rights*, 17.

<sup>9</sup> Matibini, “*Constitution Making Process*,” 7.

<sup>10</sup>(1972) ZR 204 (CA).

constitutional provision articulated in chapter three. The foregoing proposal will raise access to courts by nearly all citizens with ESCRs grievances.

Once the ESCRs are enshrined in the Bill of Rights, there is need to attend to the enforcement mechanisms for ESCRs. This should include the establishment of a constitutional court.<sup>11</sup> There is need for the Constitution or subsidiary legislation to provide for monitoring mechanisms of judgments. This is because mere pronouncement of a judgment may not lead to actual redress of a violated right. The executive and legislative branches of Government should work with the judiciary in ensuring implementation of court decisions in ESCRs. From the South African jurisprudence, it was seen that several years after the constitutional court ruled in the *Grootboom* case, the judgment of the court had not been implemented.

Further, the argument that courts are not best placed to rule on ESCRs cases with budgetary implications can best be taken care of by borrowing from the Indian jurisdiction of appointing commissions of inquiry. By having such an approach in legislation, courts in Zambia would be deciding on ESCRs, once constitutionalized, from an informed point of view. Since adjudication of ESCRs litigation would be new in the jurisdiction, there will be need to train lawyers and judges on how to best handle ESCRs matters. Lastly, but not the least, the judicial branch of government should be made more independent from the executive, by among other ways, having judges appointed say by the Judicial Service Commission and ratified by Parliament, instead of being appointed by the President.

Accordingly, having delved into the prospects and challenges of the inclusion of ESCRs in the next Constitution, this study has demonstrated that Zambia is on the thresh-hold of introducing ESCRs. There is therefore no reason why ESCRs should not be introduced in the next Constitution.

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<sup>11</sup> The establishment of a Constitutional Court is provided for under Article 162(1) (b) of the First Draft Constitution, 2012.

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