

# Alternative Ways of Protecting and Promoting Economic, Social and Cultural Rights in Zambia

A Study by the Jesuit Centre for Theological Reflection  
(JCTR)

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# List of Acronyms

AIDS	-	Acquired Immune Deficiency Syndrome
DIHR	-	Danish Institute for Human Rights
FNDP	-	Fifth National Development Plan
HIV	-	Human Immune Virus
ICESCR	-	International Covenant on Economic Social and Cultural Rights
ICCPR	-	International Covenant on Civil and Political Rights
ILO	-	International Labour Organisation
JCTR	-	Jesuit Centre for Theological Reflection
NAC	-	National HIV/AIDS and Tuberculosis Council
NPA	-	National Plan of Action (for Human Rights)
UDHR	-	Universal Declaration of Human Rights
UNDP	-	United Nations Development Programme

# Executive Summary

The Universal Declaration of Human Rights of 1948; the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights, both of 1966; the Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights in June 1993; and the United Nations Declaration on the Right to Development of 1986, all affirm the indivisible and interdependent nature of all human rights. Sadly, despite Zambia's subscription to the provisions of these treaties and declarations, the State's protection and enforcement of economic, social and cultural rights is still a far cry. Much controversy, resistance and debate still surrounds the importance of these rights and the need for their enforcement.

The Faith and Justice Programme of the Jesuit Centre for Theological Reflection (JCTR), in continuing with its work in the area of research and advocacy for the promotion and protection of economic, social and cultural rights (ESCR), decided to undertake this study and explore alternative ways of promoting and protecting economic, social and cultural rights.

This report discusses what human rights, and in particular economic, social and cultural rights are, and the state of their enjoyment and enforcement in Zambia. The report looks at some interventions that Zambia has made to promote these rights. It will also examine the methods applied in other countries and the recommendations made towards their fulfilment. The report establishes that there is an irrefutable interconnection and interdependence between economic, social and cultural rights and civil and political rights. It concludes with recommendations on how Zambia can better protect and promote the economic, social and cultural rights of its people. These recommendations include:

- Enactment of adequate protective legislation supported by judicial activism;
- Well coordinated, targeted and widespread human rights education and information dissemination activities and campaigns;
- The inclusion of concrete strategies relating to economic, social and cultural rights in the national development planning process and the application of a human rights approach to development;
- Ensuring administration of justice in the provision of social services, including dealing with matters affecting the enjoyment of human rights such as corruption, poverty and HIV and AIDS;
- Enhancing the state reporting process;
- Devising and implementing domestic monitoring mechanisms;
- Enhancing access to information;
- Providing interpretation of the duties relating to protection and promotion of economic social and cultural rights to various duty bearers;
- Adopting a national human rights policy or plan of action, taking into account past experiences, economic and social changes, and practices applied in other jurisdictions.

# General Introduction

The Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights in June 1993, and the United Nations Declaration on the Right to Development of 1986, both reaffirm the indivisible and interdependent nature of all human rights. Yet for most of the world's population, including Zambia, adequate protection and enforcement of economic, social and cultural rights is yet to be fully realised. Much controversy, resistance and debate still surrounds their importance and the rationale for their enforcement.

Zambia is currently going through a constitution making process, the fourth such process since the country attained its independence in 1964. A constitutional committee, the National Constitutional Conference (NCC), was convened through an Act of Parliament and has been facilitating deliberations on the constitution. The process has been marked by protests from among major church mother bodies, civil society organisations, opposition political parties and individuals<sup>1</sup>. The draft constitution that provided the point of departure for the constitution making process was the Mun'gomba Draft Constitution. Like its predecessors, the Mvunga and Mwanakatwe Draft Constitutions, the Mun'gomba Draft contains substantive provisions aimed at enhancing the protection and promotion of human rights, particularly economic, social and cultural rights. The Mun'gomba Draft proposes the inclusion of various economic, social and cultural rights, including the right to employment and just and fair labour practices, the rights to social security, health, education, shelter and housing, food, water and sanitation and an environment that is safe for life and health<sup>2</sup>.

Other rights that have been included are the rights of women, children and older persons<sup>3</sup>. There are also rights for the protection from discrimination and equal treatment of all as well as the right to equal opportunities for both men and women<sup>4</sup>. The Mun'gomba Draft Constitution also restates the three-fold obligation of the state to **respect, protect** and **fulfil** the human rights contained in the Bill of Rights. It further obligates institutions tasked with the protection of human rights, such as the Human Rights Commission, to familiarise themselves with the rights-related needs of different sectors of society. The Draft also directs the President to report on measures taken to give effect to the rights enshrined in the Bill of Rights when addressing the National Assembly each year<sup>5</sup>.

It must be borne in mind that most if not all of the proposed inclusions to the Constitution relating to human rights protection and promotion are intended for inclusion in the Bill of Rights. Any change to the Bill of Rights requires holding a referendum in which two thirds of the eligible voters must vote in favour of the changes. Failure to do this means the Bill of Rights remains the same even if the National Constitutional Conference adopts all the proposals.

Furthermore, doubt surrounds the question of whether or not these provisions will be adopted as proposed since the NCC's argument is that the adequacy of the resources

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<sup>1</sup> See, 'Quest for a Good Constitution' @: <http://www.zambianwatchdog.com>,

<sup>2</sup> See Articles 69, 70, 71, 72, 73, 74 and 75 respectively of the Constitution of Zambia Bill, 2005

<sup>3</sup> Ibid, Articles 42, 43 and 44

<sup>4</sup> Ibid, Articles 40 and 41

<sup>5</sup> Ibid, Article 28

available should be the main factor that determines the fulfilment of the demands entailed in these rights.

## Background to the Research

The Faith and Justice Programme of the JCTR has in the past carried out research on and advocacy for the promotion of economic, social and cultural rights, especially their inclusion in the Bill of Rights of the new constitution. The JCTR has also in the past contributed to the State Party reports for Zambia and facilitated the production of “shadow reports” to the Committee on the Convention on Economic, Social and Cultural Rights.

Considering Zambia's history in the area of constitution making, particularly with regard to amendments to the Bill of Rights and the adoption of stronger measures to protect rights, including economic, social and cultural rights<sup>6</sup>, and owing to the realisation that economic social and cultural rights cannot be promoted by mere inclusion in the Bill of Rights, JCTR decided to undertake this study and explore alternative ways of promoting and protecting economic, social and cultural rights. Many countries in the world do not have economic, social and cultural rights enshrined in their Bills of Rights yet they remain committed to promoting them.

## Methodology

This research was a desk study. It was therefore entirely compiled from secondary data sources that included:

- Text Books
- Articles
- Case Law
- UN Treaties and Other Documents
- Various Reports
- Government and National Plans
- Information obtained from the Internet

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<sup>6</sup> In 1995 the government in its White Paper No. 1 of that year, rejected the expansion of the scope of human rights protection in the Constitution and the creation of a Constitutional Court to deal with human rights issues among others. See Pgs. 18-40 of the said White Paper

# What Are Human Rights?

Human rights are understood as those claims which every human being is entitled to by virtue of their being human, independent of the law and without discrimination on grounds such as race, sex, ethnicity, nationality, religion, language or social status.

In other words, human rights are universal and apply to every person in the whole world. However, it is important to remember that human rights are not absolute: one's enjoyment of one's rights extends only as far as one does not infringe on other people's rights.

In the current UN understanding, human rights are indivisible, interconnected, interdependent, interrelated and equally important. This calls for both national and international communities to put the same emphasis on all rights. This indivisible, interconnected, interdependent and interrelated nature of human rights is very important and must be borne in mind as the discussion progresses. How a government and its agents together with other duty bearers understand and interpret this nature of human rights has a bearing on how far rights are protected and promoted, both civil and political and economic, social and cultural rights.

The primary duty bearer of the promotion and protection of all human rights is a country's government. It must be noted that with the growth in the discourse and increase in the understanding of the nature of rights and the duties they impose, the nature and number of duty bearers is growing. It now often refers to more than just government and includes more stakeholders such as parents or guardians if one is discussing children and young persons, employers with regard to employees, and private enterprises within the corporate world.

This duty to promote and protect human rights imposes both positive and negative obligations on government and other duty bearers. The negative obligation requires government and other duty bearers to abstain from committing violations of human rights. The positive obligations, on the other hand, are threefold. They require government to respect, protect and fulfill the rights of all persons in Zambia. Both positive and negative obligations are applicable to economic, social and cultural rights – the positive ones more than the negative ones owing to the nature of these rights.

The duty to **RESPECT** protects citizens from arbitrary interference with the enjoyment of their rights. It means the government cannot violate human rights directly through laws, policies, programs or practices. Furthermore, government cannot perform, sponsor or tolerate any practices, policies, or legal measures that violate the integrity of individuals or that infringe on their freedoms.

The obligation to **PROTECT** entails that government must prevent violations of rights by others, and where violations occur, government should provide affordable and accessible redress or legal remedies for victims of the violations. It should also prevent their recurrence.

The obligation to **FULFILL** rights means that government must take measures that are designed to realise the full enjoyment of rights by people. This entails the obligation to establish services and an environment that facilitates the real enjoyment of rights.

Often, as stated by Eide, Krause and Rosas, the above-mentioned government obligations give rise to a widespread misunderstanding that the State is the only one that must promote economic, social and cultural rights without the individual or other duty bearers shouldering



any responsibility<sup>7</sup>. Contrary to this widespread misunderstanding, the individual, as stated in the United Nations Declaration on the Right to Development, is the active subject of all economic and social development<sup>8</sup>. This means that individuals have a duty to themselves and to others to find ways of satisfying their own needs individually and in association with others through their own efforts and with their own resources whenever possible. Therefore, in light of this, the obligations of the State are to ensure not only that an enabling environment exists for an individual to fulfil this obligation, but also that the State should not interfere with the individual's ability or resources to meet this responsibility.

This, together with the nature and characteristics of human rights, particularly of economic, social and cultural rights, and their accompanying duties and obligations (aforementioned) should be borne in mind when considering alternative ways in which to protect, promote and fulfill economic, social and cultural rights.

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<sup>7</sup> See Eide A, Krause C, and Rosas A, 1995, 'Economic, Social and Cultural Rights, A Textbook,' at pg. 36

<sup>8</sup> Article 2, UN Declaration on the Right to Development

# The Nature of Economic, Social and Cultural Rights

*“Recognising that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights...”*(Preamble ICESCR and ICCPR).

*“All human rights and fundamental freedoms are indivisible and interdependent”* (Article 11 (2), UN Declaration on the Right to Development).

Economic, social and cultural rights are as integral a part of the whole corpus of human rights as civil and political rights, possessing an equivalent echelon of importance. They are “security-orientated” rights requiring active measures for their enjoyment on the part of the State and other duty bearers. For example, the right to education requires the building of schools and provision of school material and teaching staff; employment and work-related rights require the creation of jobs or an environment enabling the creation of jobs; the right to an adequate standard of living, to food, health care and shelter each require putting in place programmes relating to food security, provision of medical facilities, adequate housing and related amenities such as sanitation facilities.

Economic, social and cultural rights, as the name suggests, constitute three interrelated components which, owing to the interrelated and interconnected nature of all rights, are also linked to civil and political rights. The core of social rights is the right to an adequate standard of living<sup>9</sup> whose enjoyment requires the enjoyment of the necessary subsistence rights such as adequate food, nutrition, clothing, housing, and necessary conditions of care. In order to enjoy these rights, one needs to also enjoy certain economic rights.

Economic rights play the dual function of serving as a basis for entitlements and as a basis for independence and therefore for freedom. For example, the right to property can ensure an adequate standard of living and can free one from dependence on another. The right to work can also be a basis for independence provided the work is chosen freely by the person concerned, that it provides sufficient income, and that the workers are able to protect and promote their rights and interests through trade unions.

Cultural rights are considered more complex. They contain the following elements as outlined in Article 27 of the UDHR and Article 15 of the ICESCR: the right to take part in cultural life; the right to enjoy the benefits of scientific progress and its applications; the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which the beneficiary is the author; and the freedom indispensable for scientific research and creative activity. An important aspect of cultural rights is the right to preserve the cultural identity of minority groups,<sup>10</sup> which has implications for both civil and political rights as well as economic and social rights.

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<sup>9</sup> Article 25, UDHR; Article 11, ICESCR; Article 27, CRC.

<sup>10</sup> Article 27, ICCPR; Article 30, CRC.

It must be borne in mind that rights such as the right to property cannot be enjoyed on an equal basis by all, and that in ensuring the entitlement to an adequate standard of living, it has to be supplemented by the right to work and the right to social security which can supplement and where necessary, fully substitute insufficient income derived from property or from work<sup>11</sup>.

Economic, social and cultural rights therefore require for the larger part “positive progressive” action on the part of the State such as the devising and implementation of development plans and agendas through national policies and programmes. They also require that the Government, in addition to its own efforts, engage in international cooperation for the realisation of these rights.

A number of key international treaties in addition to the UDHR and the ICESCR cited above make reference to economic, social and cultural rights. These include:

- International Convention on the Elimination of All Forms of Racial Discrimination (1965);
- Declaration on Social Progress and Development (1969);
- Convention on the Elimination of All Forms of Discrimination against Women (1979);
- Declaration on the Right to Development (1986);
- Convention on the Rights of the Child (1989);
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990);
- The African Charter on Human and Peoples’ Rights (1981);
- The African Charter on the Rights and Welfare of the Child (1990);
- The Protocol on the Rights of Women (2003).

The adoption of the UDHR by the United Nations General Assembly in 1948 constituted a major step in the protection and promotion of human rights at the international level. The declaration, which has become a standard-setting document and a standard of achievement for human rights protection and promotion the world over, comprises in one consolidated text nearly the entire range of what today are recognised as human rights and fundamental freedoms. It encompasses civil and political rights, economic, social and cultural rights and collective or group rights and the various rights to self determination. The UDHR is a declaration that is not legally binding. However, in an attempt to hold states accountable for the promotion and protection of the rights enshrined in the UDHR, the United Nations went a further step to devise legally binding documents. The international community could not agree on whether both civil and political and economic, social and cultural rights should be placed into legally binding documents that legally obligate states to fulfil them. The disagreement was owing to, among others factors:

- (a) The perceived fundamental differences between the two sets of rights, that is, between civil and political rights which are considered to be “immediate” in nature, and economic, social and cultural rights which are considered to be more “programmatic” or gradual in and dependent on resources for their realisation;
- (b) The perception that civil and political rights are justiciable whereas economic, social and cultural rights are not;
- (c) The perception that civil and political rights are “free” in that they do not cost much but only obligate States not to interfere with the integrity and the freedom of the individual;

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<sup>11</sup> For a more detailed discussion on this see Supra Note 8 at pg. 31

while the implementation of economic, social and cultural rights, in contrast, is held to be costly since they are understood as obliging the State to provide welfare to the individual; and

- (d) The cultural divide between various states, their differing political histories and stages of development and their differing political autonomy, which usually leads to varying interpretations of what rights should or should not be enshrined in a legally binding document.

Eventually, the UN came up with two separate but very similar documents. One was to encompass civil and political rights – the International Covenant on Civil and Political Rights (ICCPR) of 1966 and another to cover economic, social and cultural rights - the International Covenant on Economic, Social and Cultural Rights (ICESCR), also of 1966.

Nevertheless, it must be noted that owing to the interconnected, interrelated and interdependent nature of civil and political and economic, social and cultural rights (as repeatedly expressed and emphasised in international human rights instruments), none of the set of rights is superior to the other, and one cannot authentically enjoy one set of rights without the other. The preamble of both the ICCPR and the ICESCR underline the indivisibility and interdependence of all human rights by stating that “the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights”.

This has been re-emphasised in the Declaration on the Right to Development (1986) which states that “all human rights and fundamental freedoms are indivisible and interdependent and that equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights”<sup>12</sup>.

The ICESCR, which is the main international instrument enshrining economic, social and cultural rights, protects the following rights:

- Self-determination.
- Equality of men and women.
- Right to work.
- Right to just and favourable conditions of work, including fair wages, equal pay for equal work and holidays with pay.
- Right to form and join trade unions, including the right to strike.
- Right to social security.
- Protection of the family, including special assistance for mothers and children.
- Right to an adequate standard of living, including adequate food, clothing and housing and continuous improvement of living conditions.
- Right to the highest attainable standard of physical and mental health.
- Right to education, primary education being compulsory and free for all, and secondary and higher education generally accessible to all.
- Right to participate in cultural life and enjoy the benefits of scientific progress and benefit from the protection of scientific, literary or artistic production of which one is the author.

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<sup>12</sup> Article 6 (2), Declaration on the Right to Development, A/RES/41/128

# The State of Economic, Social and Cultural Rights in Zambia: A Situation Analysis

## The Legislative Provisions

Zambia is a signatory to the ICESCR and all the other major specialised human rights treaties containing provisions relating to economic, social and cultural rights, i.e. the CEDAW, CRC, CERD, the ACHPR, ACRWC and the African Protocol on the Rights of Women.

The African Charter on Human and Peoples Rights of 1981 guarantees all categories of rights, including economic, social and cultural rights. The Charter obliges States to recognize the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative or other measures to give effect to them. It also prohibits discrimination in the enjoyment of these rights and freedoms. Unlike the ICESCR, the obligations assumed by the parties to the African Charter are immediate and absolute even with respect to economic, social and cultural rights. Among the rights guaranteed by the African Charter are: the right to work under equitable and satisfactory conditions and to receive equal pay for equal work; the right to enjoy the best attainable state of physical and mental health; the right to education; the right to culture; and the right to protection of the family.

Zambia is also a signatory to the major ILO Conventions. The Constitution of Zambia follows a dualist system, which considers international law as a separate system of law from the domestic legal system. Thus, Zambia's ratification of international and regional treaties does not render them self-executing or immediately enforceable in Zambia. Provisions of international and regional treaties must be specifically incorporated into the domestic law if they are to be enforceable in Zambia. Furthermore, there is no law in place requiring domestic laws to be interpreted in conformity with treaty obligations. The courts are expected to follow the Bangalore Principles on the Application of International Human Rights Norms to the Domestic Legal System adopted by leading judges and jurists from Commonwealth countries<sup>13</sup>.

According to the Bangalore Principles, international human rights norms can be used in domestic courts where there is a gap in the common law or where a local statute is ambiguous. The judge may then fill the gap or resolve the ambiguity by reference to international human rights jurisprudence which will ensure that the domestic law conforms as far as possible to such principles. In practice, very few judges or lawyers take international human rights law into account, although there is a tendency now for this to happen more often and more so in relation to civil and political rights<sup>14</sup>. The first legal challenge relating to economic, social and cultural rights is currently before the Zambian High Court in

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<sup>13</sup> See Heyns C and Viljoen F, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level', at Pg. 613

<sup>14</sup> See *Nkumbula and The People, Feliya Kachasu and the People, Christine Mulundika and 7 Others and the People* 1995/SCZ/25, *Sara Longwe and Intercontinental Hotel*, 1995, *William Banda and Another and Attorney General* 1992/HP/1005 (unreported)

Livingstone. It is a challenge by two former Zambia Air Force staff for their dismissal on allegations of discrimination on the basis of their HIV status<sup>15</sup>.

It must be noted that by ratifying these instruments, a government assumes a solemn legal obligation to implement, in good faith, the rights and freedoms enshrined in those instruments. Part III of the Constitution of Zambia contains a justiciable Bill of Rights, which unfortunately only contains civil and political rights (which are subjected to a number of limitations).

Like a number of other countries, Zambia recognises economic, social and cultural rights in the Constitution under Part IX, which enshrines “Directive Principles of State Policy”. These provisions are perceived not to be legally enforceable but merely require governments to create enabling environments that make the enjoyment of these rights possible, as well as take these rights into consideration in its planning and programmes. Indeed, the Constitution makes it clear that these principles are not legally binding for the State and can therefore not be enforced in any court, tribunal or other administrative forum. Their purpose is merely to serve as a guide to the executive, legislature and the judiciary in the performance of their functions. Furthermore, the application of the directive principles may be observed only in so far as State resources are able to sustain their application, if the general welfare of the public so unavoidably demands, and as may be determined by Cabinet<sup>16</sup>.

The Directive Principles oblige the State to endeavour, *inter-alia*, to create conditions under which all citizens shall be able to secure adequate means of livelihood and opportunity to obtain employment; to provide clean and safe water, adequate medical and health facilities and amenities; to provide equal and adequate educational opportunities in all fields and at all levels for all; to take measures to promote the practice, enjoyment and development by any person of that person’s culture, tradition, custom or language in so far as these are not inconsistent with the constitution; to provide a clean and healthy environment for all; and to recognize the right of every person to fair labour practices and safe and healthy working conditions<sup>17</sup>.

It must be borne in mind that although the directive principles are not legally directly enforceable, they create enforceable obligations for the State owing to the indivisible, interconnected, interrelated and interdependent nature of all human rights. The principles can therefore affect the interpretation of other rights (civil and political) by being “read into” those rights and may be relevant to the interpretation of legislation. The Indian Supreme Court was the first to successfully make this connection and interpretation when it interpreted the right to life to include the right to provision of emergency medical treatment in the 1996 case of Paschin Banga Khet Mazdoor Samity vs. State of West Bengal AIR (see details on pg 26).

Zambia possesses a number of other pieces of legislation whose application has a bearing on the protection and promotion of economic, social and cultural rights. However, most of these statutes are drafted for sector-specific administrative purposes and processes and hence have their limitations. These statutes include:

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<sup>15</sup> The matter is on court and therefore no comment will be made on it suffice to say the Human Rights and HIV/AIDS communities wait with anticipation to hear the outcome of this matter.

<sup>16</sup> Article 111, Constitution of Zambia

<sup>17</sup> Ibid, Article 112

- i) The Lands Act which provides for the alienation of land. No land policy is currently in existence and the Act does not make provision for vulnerable groups like women or disabled persons.
- ii) The Agricultural Lands Act which provides for allocation of land for agricultural purposes and for tenant farming with preference being given to persons who do not already own agricultural land.
- iii) The Agricultural Credits Act which facilitates the creation of charges on farming stock or other agricultural assets and thereby allowing farmers to raise money.
- iv) The Food Reserve Act which creates a national food reserve and an agency to oversee it. The food reserve is, among other things, intended to ensure a reliable supply of designated commodities for the country, meet local shortfalls in the supply, correct problems relating to supply arising from manipulation or monopolistic trading practices, and meet food emergencies caused by drought, floods or other natural disasters.
- v) The National Food and Nutrition Commission Act which created the National Food and Nutrition Commission under the Ministry of Health. The mandate of the Nutrition Commission is to focus public attention on the nutritional needs of children and youth and to reduce mortality due directly or indirectly to malnutrition. The Commission is also mandated to initiate studies relating to food and nutrition and make recommendations for solutions to nutrition related needs.
- vi) In the area of employment, a number of instruments exist, the primary being the Employment Act and the Industrial and Labour Relations Act. The Employment Act provides generally for the employment of persons. It provides for holiday with pay; maternity leave for women who have served at least 2 years in their employment and prohibits termination of employment on the basis of pregnancy; the payment of redundancy packages in appropriate circumstances; prohibits dismissal of an individual without due process; and obligates government inspectors at any time to enter any premises and ensure conformity with the act.

The Industrial and Labour Relations Act makes provision for and protects an individual's right to join a trade union or employee association and to take part in the activities thereof; provides for the right to strike, and prohibits discrimination on the grounds of race, sex, marital status, religion, political opinion or affiliation, ethnicity or social status.

The Minimum Wages and Conditions of Employment Act make provision for the regulation of minimum wages and conditions of employment. It also empowers the Labour Commissioner to ensure compliance to it. In Zambia, the current minimum wage stands at slightly below K500 000. It should be noted, however, that a minimum wage set by the Government is not necessarily an adequate wage for meeting the cost of living.

The Workers Compensation Act makes provision for the payment of compensation to employees and/or their dependants for disability suffered or diseases contracted during the course of work.

- vii) In the area of social security and pensions, the National Pensions Scheme Act creates the National Pensions Scheme Authority which is mandated to ensure the payment of pensions to employees in the formal sector. The Public Service Pensions Act, on the other hand, governs pensions and other benefits for persons employed in the public sector, including their families.
- viii) In the area of housing, there exists a National Housing Authority (NHA) created pursuant to the National Housing Authority Act. The NHA is mandated to develop housing through local authority housing schemes, housing estates, to clear

squatter areas, to plan improvements or re-development of squatter areas and to control housing throughout the country.

- ix) The Public Health Act provides for the prevention and suppression of diseases and for the regulation of all matters relating to public health in Zambia.
- x) In the area of education and vocational training, the Education Act makes provisions, among others, for the development, promotion and control of schools, educational institutions and services, and prohibits refusal of admission on discriminatory grounds such as race or religion.

In the area of technical education and vocational training, the Technical Education and Vocational and Entrepreneurship Training Act establishes the Technical Education and Vocational and Entrepreneurship Training Authority (TEVETA) to regulate, monitor, and coordinate technical, educational, vocational, and entrepreneurship training in consultation with industry, employers, workers and other stakeholders, and to offer scholarships, bursaries and/or loans to deserving students. The act also provides the establishment of government institutions of technical education, vocational and entrepreneurship training and also regulates all such institutions.

The Universities Act provides for the registration, regulation and operation of universities.

## **The Economic and Social Situation**

During the last few years, the Zambian economy has seen positive growth trends resulting, among other factors, from the benefits flowing from the growth of the global economy, favourable commodity prices and the overall impact of economic reforms that started in the early 1990s<sup>18</sup>. The government implemented various strategies to try and tackle various economic challenges such as corruption, as well as devised poverty-reduction and wealth-creation strategies such as the Poverty Reduction Strategy Paper (PRSP) from 2002 – 2004, and the Transitional National Development Plan (TNDP) from 2002 to 2005.

The country also qualified for debt relief in 2005 after reaching the Heavily Indebted Poor Countries (HIPC) initiative resulting in the cancellation of its debt. In the same year, it also became eligible for debt relief under the G8 initiative which proposed to cancel 100% of all concessional debts owed to the International Monetary Fund, the African Development Bank and the World Bank. These qualifications resulted in Zambia's debt being reduced almost by half, from US\$7.1 billion at the end of 2004 to US\$4 billion in 2005.

Sadly, the country's improved economic performance over recent years has neither translated into significant decline in the country's poverty levels nor into significant improvement of the economic and social state of the average Zambian. In reality, despite perceived economic growth trends and implementation of poverty reduction strategies, the majority of Zambians do not fully enjoy economic, social and cultural rights. The situation remains as revealed by studies done 15 years ago that showed that over six million of the estimated population of more than nine million people in Zambia live in absolute poverty (UNICEF 1996), which was defined by Robert MacNamara, the former World Bank President, as "a condition of life so limited by malnutrition, illiteracy, disease, squalid surroundings, high infant mortality, and low life expectancy as to be beneath any reasonable definition of human decency<sup>19</sup>." (Oxfam, 1995).

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<sup>18</sup> See the FNDP, Pgs. 5 and 6

<sup>19</sup> See the National Plan of Action for Human Rights, 1999-2009 at Pgs.20 and 21



Indeed, according to the CSO Living Conditions and Monitoring Survey of 2006, as much as 64% of the Zambian population fell under the national poverty line, with rural populations suffering the bulk of extreme poverty. This is particularly so for female headed households, households headed by the elderly who are supposed to be living off their benefits (pensions), and persons with low or no education. The majority of Zambians continue to live on less than US\$1 a day<sup>20</sup>.

According to the UNDP Human Development Report, Zambia is in the lowest category of human development. This determination is made, among others, by a country's life expectancy at birth, adult literacy rates, school enrolment and GDP per capita<sup>21</sup>. The economic and social status of the majority of the Zambian population, which is characterised by adverse human welfare indices such as reduced access to a nutritionally adequate food basket<sup>22</sup>; child and adult malnutrition; high levels of maternal and child mortality<sup>23</sup>; and insufficient access to education and health facilities, bears witness to this and is reflected in the degree to which economic, social and cultural rights are enjoyed in Zambia. Poverty remains pervasive in Zambia. The Living Conditions Monitoring Survey of 2006 reveals that the poverty levels in the country average 64%.

An earlier Poverty Report notes that, "As incomes continue to dwindle, human survival in Zambia has become more and more difficult. Most people have been left without any choices of what they can do to survive and, as a result, have been particularly affected in areas of food security, health, education, sanitation and employment" (*Will the poor always be with us? Poverty Experiences in Zambia, by the Committee for Campaign against Poverty, p.4*)<sup>24</sup>.

## Education

The right to education still poses a challenge in Zambia despite some visible growth in basic school enrolments, completion rates and even increased enrolments in the two national universities. According to the Human Rights Commission's 2007 State of Human Rights Report, equitable access to quality education is still a dream for most of the young population owing to poor infrastructure, inadequate teaching staff and teaching materials. Physical accessibility to acceptable education facilities at secondary school level is relatively poor in rural communities, with only 22% of the children in rural Zambia accessing a secondary school within 5 kilometres of their residence. There are still more males than females accessing higher education and training in Zambia<sup>25</sup>. A moderate number of children are attending school in the lower grades, with attendance at 70%<sup>26</sup>.

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<sup>20</sup> See Pgs. 1 to 15 of the Fifth National Development Plan 2006 – 2010 (FNDP) for more detail

<sup>21</sup> See generally any UNDP Human Development Report for more detail on this determination criteria

<sup>22</sup> See generally the JCTR Food Basket published every month – it compares average incomes earned with the cost of an average needs basket for a family of 6.

<sup>23</sup> See Part II, Human Rights Commission, 2007 State of Human Rights Report

<sup>24</sup> See the National Plan of Action for Human Rights at Pgs. 20 & 21

<sup>25</sup> See Pgs. 16 and 17, Human Rights Commission, Annual State of Human Rights Report

<sup>26</sup> See the CSO 2006 Living Conditions Monitoring Survey

The education sector also suffers from inadequate funding, rundown infrastructure (both for schools and teacher training institutions), poor information communication technology, and high attrition rate of teachers due to HIV and AIDS and poor retention rates.

The Zambian government should however be applauded for a number of positive initiatives that are being implemented in the education sector. The Ministry of Education is guided, among other policies, by the Education Policy of 1996 whose main focus is equitable access to quality education by all at all levels. Implementation of the policy is based on the sector's strategic plan(s). Other initiatives being implemented by the Ministry include improvement of girls' access to education and affirmative action policies aimed at increasing the completion rate of the girl child. The Zambian government is also implementing a Free Basic Education Policy, which aims at opening up basic education opportunities for all; although upon close examination the intentions of the policy seem far from being realised. The unforeseen/hidden costs attached to education overtake the good intentions and strides of the policy<sup>27</sup>. The education sector in Zambia has in recent years also seen the opening up of the environment for the facilitation, establishment, operation and access to private universities and colleges. No new specific initiatives for persons with disabilities have been undertaken in the sector, save the already existing limited ones that cater for children with hearing and speech disabilities. At very countable institutions do the facilities for physically disabled children exist.

## **Housing**

According to Zambia's first report to the Universal Periodic Review under the United Nations Human Rights Council (UPR) of May 2008, Zambia has been facing a critical shortage of housing since independence. A very high rural-urban migration has resulted from the uneven pattern of development between rural and urban areas, coupled with failure on the part of civic authorities to provide adequate and appropriate housing together with the required social amenities such as water, roads and sanitation facilities.

The report largely attributes this state of affairs to a lack of finances in the housing sector. In an effort to address this concern, the Zambian government devised and adopted the National Housing Policy in 1996. The policy is envisioned as a tool for providing a vision for the development of adequate and affordable housing for all income groups in Zambia. In the mid 1990s, the Government initiated the Presidential Housing Initiative that was aimed at constructing and providing medium to high cost housing in Lusaka and Ndola.

According to the Human Rights Commission's 2007 State of Human Rights Report, only 58% of the Zambian population enjoys access to a clean and safe drinking water supply. Most of the rural population access their water from unsafe sources such as lakes, rivers and unprotected wells, resulting in deaths each year owing to unsafe water, (which is used for drinking, cooking, cleaning-laundry, and livestock), poor sanitation and hygiene<sup>28</sup>.

## **Health**

Enjoyment of the right to health is still a concern in Zambia and falls below that required for the people to fully enjoy that right and other related rights such as the right to life. The introduction of user fees in hospitals in the 1990s has meant that the poor have lost access to these services and facilities. The Government and the councils have failed to provide decent shelter and running water to the majority of the population who live in filthy

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<sup>27</sup> See the JCTR Study Report on 'How Free is Free Education? The Cost of Education in Lusaka', July, 2006

<sup>28</sup> See Note 1 above Pg. 17

conditions, in small huts or round hovels. As a result, these people are vulnerable to epidemics, such as cholera, dysentery and malaria.

The 2006 CSO Living Conditions Monitoring Survey shows that the major threats to the right to life in Zambia are still curable diseases such as malaria/fever, diarrhoea, and tuberculosis. The estimated HIV prevalence rate in Zambia among the 15 to 49 years age group, which is the most sexually active age group, is 15.6 percent, more than twice the estimated average of HIV prevalence rate of Sub-Sahara Africa.<sup>29</sup>

According to the 2008 *Zambian Country Report to the UN General Assembly*<sup>30</sup>, approximately one million Zambians are HIV positive, of which over 295 240 are in need of antiretroviral therapy. The Human Rights Commission 2007 *State of Human Rights Report* indicated that only an estimated 24% of those in need of ART in 2006 received the treatment. Women account for 54% of HIV positive persons while young people aged between 15 and 24 years account for 7.7 percent of the HIV positive population<sup>31</sup>. According to a 2008 report by the Ministry of Health, by 2007 the number of infants born HIV positive had risen to 15 631<sup>32</sup>.

Studies by UNICEF in the mid 1990s and the *Zambia Poverty Assessment Report of 1994*<sup>33</sup> indicated then, that the signs of distress or low welfare in the form of malnutrition, disease, illiteracy, ragged clothing and dirty conditions were to be seen everywhere in Zambia. 47% of the poorest rural households were affected by chronic malnutrition. The infant mortality rate had shot up from 97 deaths per 1,000 births in 1980 to about 197 per 1000 births at the end of the 1990s. By 2000, according to the CSO Living Monitoring Survey, infant mortality stood at 110 deaths per 1,000 live births and rose to 168 deaths per 1,000 live births in 2002. The percentage of children found to be stunted, wasted or underweight has increased over the last couple of years. Currently, the child mortality rate remains high especially in rural areas where only about 54% of the population has access to a health facility within 5 kilometres of their residence<sup>34</sup>.

The maternal mortality also remains high with a ratio of 729 deaths per 100,000 in 2002 and with less than 50% of women having access to health care services<sup>35</sup>. This was an increase from an estimated 694 maternal deaths per 100,000 in the late 1990s, and from about 200 in 1980<sup>36</sup> (ZDHS, 1996; World Bank, 1994). The average life expectancy has fallen from about 54 years in the mid 1980s to less than 47 years currently.

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<sup>29</sup> Zambia Country Report-National M&E Report to UN General Assembly.2008. pg. vii and 3

<sup>30</sup> This is a report the Zambian government prepares to show progress towards implementation of the Political Declaration of Commitments on HIV and AIDS which the Zambian government together with 189 other UN member states endorsed and adopted in June, 2001.

<sup>31</sup>Zambia Country Report-National M&E Report to UN General Assembly.2008, Pg. 3

<sup>32</sup> See the 2008 Ministry of Health Report

<sup>33</sup> See Note 18 above

<sup>34</sup> See Central Statistics Office 2006 Living Conditions and Monitoring Survey

<sup>35</sup> Human Rights Commission 2007 State of Human Rights Report, at pg. 19

<sup>36</sup> See note 18, as represented in the NPA from the Zambia Demographic Health Survey of 1996 and the World Bank Report of 1994

Overall, the disease burden remains high, owing particularly to the impact of the HIV/AIDS epidemic; with high poverty levels and continued limited resources and facilities in the sector (such as poor road networks and ambulance services) further exacerbating the situation.

### **Employment**

The period between the mid 1990s and today has seen varying changes in the employment sector in Zambia. During this period, the country has witnessed a steep decline in employment opportunities as a result of economic liberalisation, privatisation, civil service reforms, liquidation of unprofitable parastatal companies (such as Zambia Airways, United Bus Company of Zambia, Contract Haulage, and LIMA Bank), and collapse of the manufacturing sector, among other factors. According to the National Plan of Action for Human Rights 1999-2009 report (NPA) based on the monitoring of the Structural Adjustment Programme (SAP), more than 60,000 jobs had been lost from 1991 to 1997, and the majority of workers earned pathetically low wages which were not adequate to sustain them and their families. In 1991, average wages were merely a quarter of their level in the mid-1960s, in real terms (Oxfam, 1995).

Today the Zambian landscape is characterised by high unemployment and informalisation of labour despite the coming of many investors and the re-opening of mines. Violation of employment and labour related rights is high.

The liberalisation of the agriculture sector, coupled with a poor road network, inadequate storage facilities and lack of access to extension services and market information, has adversely affected the livelihoods of most small-scale farmers and, in particular, women farmers. This has been aggravated by the lack of access to agriculture credit and the rising price of fertilizer (*Poverty Report*, p.7)

### **Social Security**

Social security in Zambia is generally limited to formal employment. With the reduction of employment opportunities in the formal sector experienced in the last 15 to 20 years, the majority of the population (in the informal sector) have little or no social security in most cases<sup>37</sup>. Measures undertaken by the Zambian government to address problems relating to social security include: provision of free medical care in all public institutions for children under the age of 5 years, pregnant women and persons above the age of 65 years; prioritisation of the payment of pension arrears under the 2008 budget in order to alleviate the poor living conditions some pensioners find themselves in; and the designing of the Public Welfare Assistance Scheme for the protection of vulnerable persons through the provision of various services such as bursary schemes for underprivileged children, medical schemes and food security packs<sup>38</sup>.

### **Culture**

Article 112 (g) of the Constitution of Zambia recognises the right of every person to participate freely in their cultural life. It further provides that the State shall take measures to promote the practice, enjoyment and development by any person of that person's culture, tradition, custom or language in so far as these are not inconsistent with the Constitution. The National Arts Council has been put in place to develop, promote and regulate

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<sup>37</sup> See Zambia's 1<sup>st</sup> National Report on the Universal Periodic Review under the United Nations Human Rights Council at pg. 15

<sup>38</sup> Ibid

performing, literary and visual arts (standards) at national level<sup>39</sup>. Government has also put in place a National Cultural Policy that seeks to promote cultural identity and heritage; artistic, intellectual-creation and art education; culture and development; and international cultural cooperation<sup>40</sup>.

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<sup>39</sup> Ibid, pg. 16; see also the National Arts Council Act No. 31 of 1994

<sup>40</sup> Ibid, the policy was adopted in 2003

# Ensuring, Protecting & Promoting Economic Social and Cultural Rights

## PART II: International Covenant on Economic Social & Cultural Rights

### Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

### Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

### Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

### Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.
2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

The above articles of the ICESCR lay down the basis for government's obligations with respect to economic, social and cultural rights. This direction has been applied and interpreted (or not) by various countries in various ways, both positive and negative. This section will therefore look at the jurisprudence created by the Committee on Economic, Social and Cultural Rights and the various practices applied by countries endeavouring to promote and protect these rights.

## The Nature of Government's Obligations with Regard to Economic, Social and Cultural Rights and their Application

The Committee on Economic, Social and Cultural Rights, which is responsible for the supervision of the implementation of the ICESCR by member states, has issued a number of general comments outlining the content, intent and legal meaning of various provisions of the treaty. General comments are guidelines on the interpretation and application of the provisions of human rights treaties provided by the bodies tasked with the supervision of their implementation. These guidelines, which are continuously revised, are developed on the basis of all the country reports the Committee examines and the (best) practices cited therein, and are intended to assist and promote further implementation of the ICESCR<sup>41</sup>.

Part II of the Covenant, Articles 2 to 5 cited above, outlines the obligations of the State Parties in the implementation of the rights guaranteed. Most significantly, Article 2(1) states that:

*"Each State Party...undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures"*.

This provision requires governments to begin immediately to act, to take or adopt measures towards the full enjoyment of all the rights in the Covenant by everyone. It is an obligation that has two-parts: an obligation of conduct and an obligation of result. Thus, while the Covenant makes room for governments to progressively achieve full realisation of economic, social and cultural rights, the undertaking of steps towards the goal must be within a reasonably short time after the signing or ratification of the Covenant. The steps or measures should be deliberate, concrete and as clearly targeted as possible towards meeting the obligations to the rights in the Covenant.

The Committee has directed that when interpreting or applying the provisions of this article, governments and other duty bearers must give the phrase "by all appropriate means" its full and natural meaning. While each government is at liberty to determine what it considers appropriate means in line with each right and its economic, social, political and cultural situation, the selected means should be justifiable and considerations provided for why the selected means are considered the most appropriate under the circumstances. The means can be legislative as indicated in article 2 (1) or they may be administrative, judicial, educational, or financial.

In many cases, the adoption of legislation is indispensable if economic, social and cultural rights are to be enforceable and equitably enjoyed by all at the same level as civil and political rights. For example, to ensure that the rights in the Covenant are enjoyed by all persons without discrimination as per article 2 (2), a government would have to ensure it enacts non-discriminatory or equality legislation. The Zambian Bill of Rights, though encompassing mostly civil and political rights, contains a non-discrimination clause in Article 23 which prohibits discrimination on the basis of race, sex, place of origin, marital status, political opinions, colour or creed. The aforementioned Industrial and Labour Relations Act also contains a clause prohibiting discrimination.

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<sup>41</sup> See Generally UN doc E/1989/22, Introduction: The Purpose of General Comments

Legislation need not only be in form of a country's constitution but can also be encompassed in subordinate legislation such as an act of parliament. Denmark has at least four different pieces of legislation that protect against various forms of discrimination. The Danish Government has even gone further to devise plans of action aimed at enhancing this protection and at creating institutions such as the Danish Centre for International Studies and Human Rights which is tasked, among other of its duties, with the promotion of equal treatment of all persons without discrimination on various grounds<sup>42</sup>. In Africa, the South African Government has put in place legislation and standards that lay down a framework for what access to water entails and what government obligations must be<sup>43</sup>.

Another instance when the adoption of legislative measures becomes necessary is when the existing legislation is in violation of or incompatible with the obligations assumed under the Covenant. Legislative action would be required to remedy this; for example, laws allowing governments to remove people arbitrarily or violently from their homes or land, or legislation that sanctions their eviction without due process of law, would require amendment so that domestic legislation conforms to the right to adequate housing<sup>44</sup>.

A number of national constitutions have gone beyond just protecting against discrimination but have also elevated a whole corpus of economic, social and cultural rights to the same degree of justiciability as civil and political rights. South Africa, Finland and Portugal are among some of these countries.

The South African experience has a wealth of jurisprudence that has been developed in the area of economic, social and cultural rights. A number of legal/judicial challenges have come before the South African Courts.

In the 1997 case of *B and Others vs. Minister of Correctional Services and Others*, the Court held that the applicant prisoners were entitled to adequate medical treatment as provided in the Constitution<sup>45</sup>.

Other more illustrative cases are summarized below.

## **Case No. 1**

In a 1998 appeal case, the Constitutional Court of South Africa enforced the right to adequate housing and declared that Section 26(2) of the South African Constitution requires the State to devise and implement within its available resources a comprehensive and coordinated programme to progressively realise the right of access to adequate housing<sup>46</sup>. This case raised the State's obligations under Sections 26 and 28 (1) of the South African Constitution which gives everyone the right of access to adequate housing and also affords children the right to shelter. It concerned questions about enforceability of social and economic rights. The Cape High Court had previously found that children, and through them, their parents, were entitled to shelter under Section 28 (1) (c) and ordered the concerned

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<sup>42</sup> See E/C.12/4/Add.12, Fourth Periodic Report of Denmark at pages 20-22

<sup>43</sup> See, *Economic, Social and Cultural Rights in South Africa*, a study by the Human Rights Committee of South Africa, 2000, at Pg. 88

<sup>44</sup> See generally the Committee's General Comment on The Right to Adequate Housing, UN doc E/1992/23

<sup>45</sup> 6 BCLR 789

<sup>46</sup> *Government of RSA and Others v Grootboom and Others*, CCT11/00



government departments to provide them with tents, potable latrines and a regular supply of water.

## Case No. 2

Hoffmann is an HIV-positive man who applied to work as a cabin attendant with South African Airways (SAA). He successfully completed the required four-stage selection process. However, the required medical examination revealed his HIV-positive status. On the basis of the examination results, SAA rejected his application. Hoffmann challenged that rejection.

He argued that denying employment on the basis of HIV status violates the constitutionally protected rights to equality, human dignity, and fair labour practices. SAA defended its action on the basis of public health concerns. Hoffmann, because of his HIV-positive status, was unable to receive a yellow fever vaccination, which posed risks to customers. SAA also argued that the short life expectancy of HIV-positive persons and the high cost of training made hiring such persons uneconomical. Employing an HIV-positive person would adversely impact the efficient operation of the airline, and the public perception of the airline's efficient operation. The High Court dismissed the application. Hoffmann appealed to the Constitutional Court, which held that an employer who declines to hire an HIV-positive applicant violates section 9 of the Constitution, which prohibits unfair discrimination.<sup>47</sup>

## Case No. 3

In another case, a company in South Africa planned to get a sample of its 100 employees to undergo voluntary and anonymous HIV testing. It defended its intention by claiming that in planning for manpower needs, it was necessary to assess the prevalence of HIV among employees. The company also intended to use the test results to determine the impact of HIV in the workplace, establish support facilities for employees living with HIV, and develop preventive measures to protect employees from infection. The company had already undertaken measures to raise employees' awareness of HIV/AIDS, and to encourage them to seek voluntary testing and counselling.

The Employment Equity Act of South Africa prohibits the "testing of an employee to determine that employee's HIV status" unless the Labour Court finds that the testing is justified. The Company applied to the Labour Court for a declaration that its plan for anonymous and voluntary HIV testing did not fall within the proscribed act of the Employment Equity Act, or alternatively, that the plan was justified under the Act. The court ruled that the Employment Equity Act does not prohibit employers from conducting anonymous and voluntary HIV testing of employees. The court however stated that under the provisions of the Act, employers cannot require their employees to undergo medical testing, if the employer intends to use the results to discriminate among employees. The court thus ruled in favour of the Company as the tests would be anonymous and intended for policy formulation.<sup>48</sup>

Other countries like England and New Zealand have Human Rights Acts incorporating selected economic, social and cultural rights. The remaining countries that recognise economic, social and cultural rights in their domestic legal provisions include their promotion

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<sup>47</sup> For more details on the case read: *Hoffmann v. South African Airways* (South Africa, Constitutional Court, [2001] (10) BHR 571; 3 CHRLD 146–148; [2002] (2) SA 628)

<sup>48</sup> For more details on the case read: *Irvin and Johnson v. Trawler and Line Fishing Union and Others* (South Africa, Labour Court, Case No. C1126/2002 [Unreported]) and compare with *PFG Building Glass (Pty) Ltd. v. Chemical Engineering Pulp Paper Wood and Allied Workers' Union (CEPPAWU) and Others* (South Africa, Labour Court, [2003] (24) ILJ 974 (LC); Case No. J90/03)

and protection as general state duties within the legal and political spheres (directive principles of state policy in most cases). These include India, the Netherlands, Mexico and Zambia.

It is important to bear in mind that as important as legislative provisions are, laws alone are not a sufficient response to ensuring the rights protected under the ICESCR. "All other appropriate means," as indicated above, be they administrative, judicial, policy, economic, social and educational measures and any other necessary steps, should be applied to ensure the enjoyment of these rights by all. As stated by the Committee, as important as it is, the law alone is rarely enough to ensure the widespread enjoyment of economic, social and cultural rights.

Indeed, the Limburg Principles, a set of principles developed by a group of distinguished international experts in international law meeting at the University of Limburg at Maastricht, also reaffirm this and state that "at the national level State Parties shall use all appropriate means ... including legislative, administrative, judicial, economic, social and educational measures consistent with the nature of the rights in order to fulfill their obligations under the Covenant"<sup>49</sup>.

The Indian Supreme Court was the first to positively interpret the provisions of its Constitution and extend application of the protection afforded to civil and political rights to economic, social and cultural rights owing to the indivisible, interdependent, and interconnected nature of human rights. The Court made this successful connection and interpretation when it interpreted the right to life to include the right to provision of emergency medical treatment in the 1996 case of *Paschin Banga Khet Mazdoor Samity vs. State of West Bengal* AIR. Since that ruling, the Indian Supreme Court has delivered additional rulings with regard to the rights to food, and a clean environment.

Other cases decided in the region relating to economic, social and cultural rights and more specifically to the rights to health, employment and non-discrimination (and HIV/AIDS) are<sup>50</sup>:

#### **Case No. 4**

This is a case from the Botswana Industrial Court that took a leaf from the decisions of the Indian Supreme Court and ruled on a matter relating to economic, social and cultural rights based on the enshrined civil and political rights of the applicant.

Diau was employed by the Botswana Building Society as a security assistant. Her employment was however conditional on her undergoing a probationary period of six months and passing a full medical examination. The Building Society subsequently asked her to submit a certified document of her HIV status. She refused to undergo an HIV test and in response she was told that she could not be confirmed. She was eventually dismissed. The Botswana Industrial Court ordered that Diau be reinstated. The dismissal was found to be an unconstitutional violation of the employee's right not to be subjected to inhuman and degrading treatment.

The case of Diau<sup>51</sup> illustrates how enactment of effective laws can protect the rights of people living with HIV in the workplace. It should be noted that judicial activism in this case

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<sup>49</sup> The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1986

<sup>50</sup> These cases are extracted from *HIV/AIDS and Yo Rights*, a Human Rights Commission publication, 2009, Pgs. 22-24

<sup>51</sup> *Diau v Botswana Building Society (BBS)* 2003 (2) BLR 409 (BwIC)

enhanced the enjoyment of one's right to work and earn a decent living. The interpretation of the Constitution was based not on the provision of economic, social and cultural rights but on the civil and political rights which were guaranteed by the Botswana Constitution.

It can thus be noted that clear legislative provision (in both the Constitution and other statutes) as well as judicial activism is very important in the promotion and protection of human rights in general and economic social and cultural rights in particular.

### **Case No. 5**

The issue raised in a case of Nanditume and the Namibian Defence Forces<sup>52</sup> was whether the exclusion on the grounds of HIV status alone of a prospective applicant for enlistment in the Defence Force constituted unfair discrimination as contained in the Namibian Labour Act. The Labour Court ruled in favour of Nanditume and ordered the following:

(1) That the Ministry of Defence discontinue discriminating against Nanditume on the grounds of being HIV positive in respect of his application for enlistment in the Defence Force (hereafter NDF);

(2) That the Ministry processes his application for enlistment in the NDF, without having regard to his HIV status;

(3) That the Ministry enlist Nanditume in the NDF should he re-apply for enlistment, provided the he was certified fit for the job. (The Court emphasized that regardless of whether he was HIV positive or not, if Nanditume was fit for the job then he should be enlisted in the NDF).

(4) That the medical examination to which the Ministry of Defence is obliged to subject applicants for enlistment shall include an HIV test together with a CD4 count test and a viral load test, and no person may be excluded from enlistment into the NDF solely on the basis of such a person's HIV status where such a person is otherwise fit and healthy, unless such a person's CD4 count is below 200 and his viral load is above 100 000<sup>53</sup>.

### **Case No. 6:**

In the Danish High Court of Eastern Denmark (Østre Landsret), the High Court had to determine whether a store that had dismissed an experienced trainee who showed up for work wearing a headscarf had violated the Act on Discrimination on the Labour Market. The plaintiff invoked a large number of provisions, covenants and conventions, including article 2 of the International Covenant on Economic, Social and Cultural Rights. The High Court did not expressly refer to the covenants and conventions invoked, but found that the store's dismissal of the plaintiff solely because she wore a headscarf - owing to her religious faith - was a manifest of indirect discrimination against the plaintiff. The plaintiff was awarded compensation in consequence of the racially discriminating act<sup>54</sup>.

### **Case No. 7:**

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<sup>52</sup> Haindongo Nghidipohamba Nanditume v. Minister of Defence, Case No. LC 24/98, Labour Court of Namibia (2000) (AHRLR (NaLC 2000))

<sup>53</sup> Note that if one's CD4 count is below 200 and viral load above 100 000 then one is very ill and said to have AIDS. In such a case, it is in his or her own good that they are not subjected to work, but given chance to recuperate and improve in their health before they return to active workforce.

<sup>54</sup> A judgement of 10 August 2000 (reproduced in the Danish Law Reports (*Ugeskrift for Retsvæsen*) 2000: 2350) reported in Denmark's Fourth Periodic Report to the Committee on Economic, Social and Cultural Rights

In Programa Venezolano de Educacion Case<sup>55</sup>, a Venezuelan case, a group of aggrieved persons commenced court action citing infringement of the right to adequate healthcare, following the enactment of laws protecting the right to health. The court ordered that surgery equipment be provided by the Venezuelan government, following its failure to provide sufficient budgetary allocations for that purpose.

It is evident from the cases illustrated above that promotion and protection of economic, social and cultural rights goes beyond merely making legislative provisions. All “appropriate means” must be applied. In this case, judicial measures were employed, thereby fulfilling the requirement that State Parties shall provide for effective remedies including, where appropriate, judicial remedies. This also fulfills a government’s obligation to protect against violations. However, where adequate laws and policies are not only designed but are also well implemented, individuals or groups of individuals are less likely to need judicial help to secure their rights.<sup>56</sup>

It must be further noted that the measures employed do not operate in isolation and should therefore be applied in a complimentary manner if they are to be effective. The legislative and judicial measures in this case complimented each other, and supplemented by that was judicial activism and educational measures. For the applicants in the cases cited above to find themselves before court, they required knowledge of their rights and of the protective provisions and measures available to them. This gives credence to the requirement for effective educational measures empowering rights holders.

Other measures that states undertake to ensure economic, social and cultural rights as aforementioned can be administrative or in form of economic and social policy. These measures, particularly the administrative and policy ones, fall directly within the realm of the executive arm of government that is responsible for the design and implementation of the government development agenda.

Article 2 (3) of the Declaration on the Right to Development states that states have the right and duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals.

In 2002, Zambia re-introduced national planning, a process that in the Second Republic had been abandoned with the drafting of the Transitional National Development Plan. From 2006, the country’s Ministry of Finance and National Planning was tasked to produce five-year national development plans to fulfill the Country’s Vision 2030 of “becoming a prosperous middle income country by the year 2030<sup>57</sup>”. The resurgence of the planning process was, according to the first of these five year plans - the Fifth National Development Plan (the FNDP), intended to tackle the challenges of wealth-creation and poverty reduction, to effectively address the national development challenges and to address the economic and social ills being suffered by the Zambian population. The development goals of Vision 2030 therefore include:

- Reaching middle income status;
- Significantly reducing hunger and poverty; and
- Fostering a competitive and outward-oriented economy.

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<sup>55</sup> Expediente No 3174

<sup>56</sup> <http://www1.umn.edu/humanrts/edumat/IHRP/ripple/chapter6.html>

<sup>57</sup> The Vision 2030 and the FNDP were designed following a countrywide consultative process

The theme of the FNDP, which is for the period 2006 to 2011, is: “Broad-Based Wealth and Job Creation through Citizenry Participation and Technological Advancement”; while its strategic focus is: “Economic, Infrastructure and Human Resources Development”.

Human rights are addressed in the FNDP under the general governance umbrella, which has been placed under the 31<sup>st</sup> chapter on governance issues. It is interesting to note that governance is being treated as a cross cutting issue in the plan and not one of the priority sectors, principally in light of the assertion of the Declaration on the Right to Development that the individual is and should be a central and active participant of economic and social development. It is also because governance - good governance - should be aimed not only at ensuring democratic processes but also at the promotion, protection and equitable enjoyment of rights by all.

The objective of the chapter on governance is “a Zambia where individuals and families have an opportunity to earn a dignified living; raise healthy and educated families; participate in economic, political, cultural and social decision making in a safe and secure environment, with respect for the constitution and fundamental rights and freedoms especially for women and children; and where the rule of law prevails”.

The chapter addresses issues of constitutionalism, human rights, transparency, accountability, administration of justice, and democratisation. Sadly, the chapter does not adequately tackle the governance challenges or particularly the human rights challenges that the country faces. One of the chapter’s goals is the protection and promotion of human rights, with strategies that include human rights information dissemination, domestication of international conventions, the monitoring of the status of reporting, and establishment of rehabilitation centres for human rights victims. No specific mention is made of economic, social and cultural rights and thus the FNDP does not contain any indication of how government intends to promote and protect these rights.

The FNDP contains other chapters relating to issues of human rights such as the chapters on law and order (public safety), children and youths, economic and social issues such as water and sanitation, education, health, to mention a few. Sadly these other chapters do not reflect human rights principles or perspectives, which today are a necessity for sustainable (human) development.

Indeed, it is now taken as obvious that there is an inextricable link between development and the enjoyment of one’s human rights. Contemporary discussion around the subject of development and recent United Nations documents now emphasise the human aspect of development, and now express development in terms of human development. According to the 2000 Human Development Report on “Human Rights and Human Development”, human rights and human development share a common vision and a common purpose, that of ensuring basic freedoms, well-being and dignity of all people everywhere. Creating the conditions for the full attainment of human rights is therefore a central and irreducible goal of development<sup>58</sup>. It is now generally accepted that sustainable development is impossible without human rights and that the advancement of an interconnected set of human rights is impossible without development<sup>59</sup>.

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<sup>58</sup> Development and Human Rights, the Role of the World Bank,  
<http://www.worldbank.org/html/extdr/rights/hrintro.htm>

<sup>59</sup> Human rights are by their nature interconnected, interrelated and interdependent. Each different category of rights cannot be enjoyed in isolation without reference to the other.

The World Bank has also re-emphasised and restated this in its publication *Development and Human Rights: The Role of the World Bank*, published to commemorate the 50<sup>th</sup> Anniversary of the Universal Declaration of Human Rights. In this publication, the World Bank states that “creating the conditions for the attainment of human rights is a central and irreducible goal of development. Placing the dignity of every human being - especially the poorest - at the very foundation of development approaches [...] helps people [...] build lives of purpose and hope”.

According to the United Nations Declaration on the Right to Development, “development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from”<sup>60</sup>. The Declaration goes further to affirm that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations. It further states that “the human person is the central subject of development and should be the active participant and beneficiary of the right to development”<sup>61</sup>.

The Declaration, therefore, makes it the primary responsibility of the State to create national and international conditions favourable to the realisation of the right to development; this can and should be achieved in a country’s planning processes and development instruments.

The human rights principles reflected in the international human rights protective framework made up of the human rights values, standards and principles set out in the UN Charter; the International Bill of Rights<sup>62</sup> and the five major international human rights treaties<sup>63</sup> – all of which Zambia is party to save the Convention for Migrant Workers, indicate the minimum requirements for human rights-based planning and programming or, in other words, for a human rights based approach to development. Applying these principles to development planning and programming is dynamic in nature and leaves room for additional context-specific elements to be added to the process.

Adopting a human rights approach to the national development process i.e. in the planning, programmatic and budgetary processes, would therefore marry the pursuit of human rights with the objectives of the development agenda, both of which are now believed to be two sides of the same coin. Thus, if the Zambian Government hopes to adequately tackle the development challenges highlighted above, it needs to adopt a human rights based approach to its development planning and processes.

A number of countries have also adopted and are implementing developed national plans of action for human rights. Examples of such countries are South Africa, Malawi, Venezuela, Latvia and Sweden<sup>64</sup>. The benefits to a country having a national plan of action for human rights are numerous<sup>65</sup>. A national action plan will:

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<sup>60</sup> See General Assembly Resolution A/RES/41/128 of 1986.

<sup>61</sup> Article 2 (1).

<sup>62</sup> The international Bill of Rights is made up of the UDHR, the ICESCR and the ICCPR and its 2 Optional Protocols

<sup>63</sup> CEDAW, CRC, CERD, CAT and ICMW

<sup>64</sup> <http://www.ohchr.org>

<sup>65</sup> See the United Nations Handbook on National Human Rights Plans of Action, Pg. 7

- ✓ Review a country's human rights needs;
- ✓ Raise awareness of human rights issues among government officials, security authorities, civil society organizations and the general public;
- ✓ Mobilise a broad spectrum of society in a cooperative atmosphere;
- ✓ Propose realistic activities;
- ✓ Set achievable targets;
- ✓ Promote linkages with other national programmes, particularly in the areas of development and education;
- ✓ Generate commitment to action.

The outcomes of a national action plan include:

- ✓ Stronger legal frameworks, embracing firmer adherence to international norms, more effective incorporation of human rights standards in domestic law, enhanced independence of the judiciary and more effective rule of law;
- ✓ Better protection for individuals;
- ✓ A stronger culture of human rights;
- ✓ Stronger national institutions for the promotion and protection of human rights;
- ✓ More effective social programmes that enhance the quality of life for all, particularly vulnerable groups;
- ✓ Improved national harmony and reduced risks of internal conflict.

Zambia's first National Plan of Action for Human Rights (NPA) was drafted for a 10 year period running from 1999 to 2009. It was drafted following the establishment of the Human Rights Commission that was established as the focal point institution for the protection and promotion of all human rights including economic, social and cultural rights. The drafting of the NPA was commendably preceded by extensive consultations with various stakeholder groups that included non-governmental organisations, political parties, traditional leaders, academicians, business people, students and many others. The NPA was intended to give practical application to the provisions of the Zambian Bill of Rights, set out priorities, actions, goals and strategies for human rights protection and promotion. It was also a guide and framework for the Human Rights Commission's effective execution of its mandate through identified priority areas that included, among seven others, economic social and cultural rights.

The economic, social and cultural issues identified, and the strategic objectives included in the plan were: to raise the level of employment in the formal sector; to guarantee every person in Zambia access to adequate food, decent clothing and shelter; to enable all citizens to attain a high standard of physical and mental health; to increase the literacy levels in Zambia and expand educational opportunities for all; and to provide sanitation, clean water and a healthy environment.

A report of an assessment of the implementation of the NPA carried out by the Human Rights Commission reveals that this laudable effort was not sustained, and thus the NPA was largely not implemented. Therefore, objectives and strategies designed to tackle issues relating to the promotion and protection of economic, social and cultural rights among others remain unfulfilled. Reasons for this failure varied from limited funding to the Human Rights Commission and the absence of a clear implementation plan<sup>66</sup>. Other factors attributed to this failure include low levels of understanding of human rights among both the rights holder and rights bearers, and low levels of political will and support to the process.

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<sup>66</sup> See generally recommendation of the UN Supervisory Committees that have expressed among others, concern over funding to the Human Rights Commission.

A perusal of the process of drafting the National Plan of Action for Human Rights for the Republic of South Africa reveals that the plan was drafted with the Government leading the process and ensuring that it received the necessary political will and support. The South African Government realised that integral to the implementation of the NAP were: the government's commitment to the eradication of poverty; the end of discrimination and inequality; the realisation of human rights, particularly socio-economic rights, public expenditure to meet basic needs; the development of infrastructure; and job creation. Therefore, the South African Plan encompasses a policy framework termed the Reconstruction and Development Programme (RDP), and a clear implementation and financing plan was also devised.

The South African Government has also moved far along the path of re-prioritising its spending to meet the needs and aspirations of the majority of its people. Social service expenditure now amounts to nearly two-thirds of non-interest government expenditure, and most of it is targeted at the poor. In addition, the South African Government publishes a Medium Term Budget Policy Statement, a document that sets out the economic and fiscal framework within which the yearly budget is finalised. The publication of a Medium Term Budget Policy Statement several months before each budget is, according to the South African government, an indication of its commitment to openness and transparency since it enables parliament, the public and representatives of civil society to:

- participate in the budgetary process;
- be informed of the existing economic constraints that frame the budget;
- be aware of the policy choices that government is considering<sup>67</sup>.

China, a growing economic giant, is another of the countries that has put in place a national plan of action for human rights. In the editorial of China's first magazine on human rights entitled "Human Rights"<sup>68</sup>, it is stated that since the founding of the People's Republic of China in 1949 under the leadership of Communist Party of China, the Chinese government, combining the universal principles of human rights and the concrete realities of China, has made unremitting efforts to promote and safeguard human rights. Since the introduction of the reform and the "opening-up" policy at the end of 1978, China has enshrined respect for and protection of human rights in its Constitution and has taken the promotion of rights as a major principle of government. It has taken effective measures to promote the cause of human rights, while enhancing the material and cultural life of the Chinese people and providing firm guarantees for their political, economic, social and cultural rights. To help accomplish this, China instituted the National Human Rights Action Plan for China (2009-2010), which provided the government a working plan on human rights protection and promotion.

The Plan defines the Chinese government's goals in promoting and protecting human rights, and the specific measures it is taking to this end. According to the magazine, the Chinese National Plan of Action was framed on the principle that all human rights are inseparable and interdependent, and that economic, social and cultural rights must therefore be equally promoted and protected, just as civil and political rights are. The economic, social and cultural rights that the plan prioritises are the right to: work, basic living conditions, social security, health, and education. It also makes provision for cultural rights, environmental rights, and farmers' rights.

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<sup>67</sup> See the website of the United Nations Office of the High Commissioner for Human Rights at <http://www.ohchr.org> for more information on this and other National Plans for Human Rights lodged with the United Nations

<sup>68</sup> May 2009.p.5



The Chinese government has established the Joint Meeting Mechanism for the National Human Rights Action Plan for purposes of promulgating an operationalisational plan. Legislative and judicial departments under the State Council, various learning and research institutions as well as fifty three other organizations, are members of the Joint Meeting Mechanism (JMM). The JMM is thus responsible for coordinating the implementation, supervision and assessment of the Plan. The Chinese National Plan of Action has taken a step further from the Zambian Plan as it provides for an operationalisational plan and stipulates who is responsible for its implementation, supervision and evaluation.

It should be noted that because of their nature, economic, social and cultural rights are meant to be progressively realized (where a country does not have sufficient resources to guarantee them immediately). Taking into account the fact that a National Plan of Action is meant to be a short or medium term plan before another is formulated, and given the fact that Zambia is one such country that cannot guarantee economic, social and cultural rights in totality immediately, it would be more productive to emulate the Chinese government which has prioritized the rights it will promote and protect. This gives the Zambian government an opportunity to put in place measures that will realistically promote and fulfil economic, social and cultural rights. This approach is supported by the Limberg Principles.<sup>69</sup> The UN Handbook on National Action Plans recommends that in addition to individual government departments having their own departmental implementation plans, there is need for a coordinating committee and a funding strategy. Furthermore, the national plans must be tied to or reconciled with the general development agenda<sup>70</sup>.

The drafting of appropriate human rights protective legislation needs also to be enhanced by the creation of appropriate institutions to operationalise the legislation and offer practical application and protection of rights. Zambia has commendably created the National Pensions Scheme Authority (NAPSA) pursuant to an act of parliament. Unfortunately, this provision falls short of the requirements of a comprehensive social security system as envisioned under international human rights treaties.

Both the UDHR and the ICESCR recognise the right of everyone to social security, including social insurance. This right is central and important in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realise their rights. Indeed, Articles 22 and 25 of the UDHR recognise social security as a human right and state that: "Everyone, as a member of society, has the right to social security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond their control".

Social security, through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion. It includes the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, *inter alia*, from:

- a) Lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member;
- b) Unaffordable access to health care;
- c) Insufficient family support, particularly for children and adult dependents.

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<sup>69</sup> Paragraphs 8 and 19.

<sup>70</sup> See Note 60, Part III, Implementation, Monitoring and Evaluation of a National Action Plan

It is important that the measures to be used to provide social security benefits not be defined narrowly, and must guarantee all peoples a minimum enjoyment of this human right. Social security measures can therefore include:

- a) Contributory or insurance-based schemes such as social insurance, which is expressly mentioned in Article 9 of the ICESCR. These generally involve compulsory contributions from beneficiaries, employers and, sometimes, the State, in conjunction with the payment of benefits and administrative expenses from a common fund; or
- b) Non-contributory schemes such as universal schemes (which provide the relevant benefit in principle to everyone who experiences a particular risk or contingency); or
- c) Targeted social assistance schemes (where benefits are received by those in a situation of need).

South Africa is one of a handful of countries in Africa that provides a social security net to protect its most vulnerable and marginalized communities. The system, which has been equalized to cover previously excluded or disadvantaged groups, covers millions of people and their families who rely on old age and disability pensions amounting to just under US\$90.00 per month in the year 2000.

The Danish system on the other hand is wider, more comprehensive and covers more groups and situations. The main features of the Danish schemes are:

*Social pensions:* Older people and people with a reduced working capacity are assisted by a scheme established by the Social Pensions Act. A public old-age pension is payable to everyone over the age of 67 and an anticipatory pension is payable to people between the ages of 18 and 66 whose capacity to work makes them unable to earn an income that will make them fully or partly self-supporting.

The public old-age pension which is financed by the central Government is the basic Danish pension, ensuring that all older people are provided for from the time they reach the age of 67. It is not based on insurance principles or dependent on any previous attachment to the labour market. People with no previous attachment to the labour market, such as housewives, are also granted an old-age pension from the age of 67.

Public old-age pensioners are also entitled to a number of special benefits (favourable housing benefit rules, heating benefits, health allowances, reduced tax on owner-occupied housing), most of which depend on the individual pensioner's income and assets. Furthermore, particularly disadvantaged pensioners may be granted a personal allowance following a specific and individual assessment of their needs. They are also entitled to a number of free services, such as home help and hospital treatment.

Entitlement to an old-age pension is subject to Danish nationality, residence in Denmark, permanent residence in Denmark for a minimum period of three years between the ages of 15 and 67, and the condition that the claimant has attained the age of 67. There are however a number of exceptions to the requirements of nationality and residence. The public old-age pension is adjusted annually, on the basis of the trend in wages in the private sector.

*Anticipatory pension:* An anticipatory pension may be granted to persons aged 18 to 65 (67 if the pensioner was born before 1 July 1939) if their capacity to work is such that they are unable to earn an income that will make them fully or partly self-supporting. This means that no anticipatory pension will be granted if it is documented that a claimant is able to work in a job to which flexible working arrangements apply. 35% of the anticipatory pension is financed by the central Government and the remaining 65% by the local authorities. The requirements concerning nationality and residence and the exceptions to those requirements are similar to those for the old-age pension.

Anticipatory pensions are awarded by the local authorities. Decisions made by the local authorities may be taken before the regional social complaints board. Decisions taken by the regional social complaints board cannot be taken before any other administrative authority. The Central Government Social Appeals Board however, has the authority and may reopen any case deemed to be of general public importance.

*Partial pension:* This pension was introduced with effect from 1 January 1987. The purpose of the partial pension scheme is to help actively employed people between the ages of 60 and 66 prepare for retirement from the labour market before becoming full-time pensioners. The scheme makes it possible to combine part-time work with a public partial pension, so that the individual may reduce his/her working hours over a period of time according to his/her own wishes and needs. The partial pension is payable to wage earners and self-employed people between the ages of 60 and 66. Self-employed people, including assisting spouses, are also covered by the scheme.

Entitlement to a partial pension is not subject to Danish nationality. Foreign nationals living and working in Denmark are also entitled to a partial pension, provided they satisfy other conditions. The partial pension is payable up to and including the month in which the recipient reaches the age of 67. Partial pension is however not payable concurrently with anticipatory pension.

*Sickness benefits:* According to the Danish Daily Cash Benefit (Sickness or Maternity) Act, employed and self-employed people may be absent from work owing to illness or injury. Employed and self-employed people who are partially incapable of working may be entitled to a reduced sickness benefit, i.e. when a physician finds that the employed person can work part-time. The sickness benefit is usually based on the hourly income which an employed person would have earned had he/she not been absent because of illness. It must not exceed a fixed maximum which is revised from time to time.

*Assistance to the sick and elderly:* Home care on a permanent basis is provided for domestic work and personal needs to a person who, owing to a chronic affliction or infirmity, is in need of practical assistance. The Danish Social Assistance Act made it possible as of April 1990 for one to receive a home-care allowance in connection with care for terminally ill persons in their homes. The assistance comprises:

- Reimbursement of lost income paid to someone who takes care of the dying person in this person's home. However, the amount should not be more than the maximum wages for domestic helpers;
- Reimbursement of articles without regard to the economic situation of the sick person or the person's family. The scheme is based on the idea that care in the home should not involve expenses that the sick person would not have incurred had the person in question been hospitalised;
- Domestic help free of charge in connection with care for the terminally ill.

Any person suffering from a disability or chronic infirmity due to sickness or old age may be eligible for assistance towards the cost of aids, including such special articles of clothing as are necessary to enable the person concerned to carry on trade or business, or may substantially relieve his/her affliction, or largely facilitate daily life in his/her home. Such a person may also be eligible for necessary assistance to adapt the layout of his/her dwelling to meet his/her needs as far as possible. Assistance may be granted to meet the cost of help or special devices in service flats for disabled persons or old-age pensioners.

The local councils provide assistance towards welfare facilities for persons in receipt of a social pension with the exception of the disability benefit. The municipal councils will ensure that persons whose condition requires constant attendance and care which cannot be provided in their own home during the day are admitted to a day-care home. Furthermore, the local councils provide for the establishment of day centres within their areas and are tasked to provide care on a 24-hour basis to persons having such a need for health reasons. The Social Assistance Act and the Act on Dwellings for the Elderly have provided for and guided the building of nursing homes for the elderly.

*Compensation for industrial injuries:* The Act on Compensation for Industrial Injuries covers any person who is employed in the services of an employer in Denmark, including foreigners working in Denmark and seamen working on board vessels flying the Danish flag. Persons who have been posted to carry out employment abroad are also covered by the provisions of the Act, subject to certain terms and conditions. The Act includes paid as well as unpaid work of short or long duration, including private services rendered to the employer and his family. It covers diseases contracted and injuries sustained by a person as a consequence of the occupation or the conditions under which the occupation is carried out.

The Act comprises the following benefits: payment of costs incurred for treatment, rehabilitation and technical aids, compensation for loss of working capacity; compensation for permanent injury; compensation for loss of supporter; and transitional allowances in case of death. Children under 18 years of age, as a general rule, qualify for compensation for loss of their supporter. Benefits payable to children for whom the injured or deceased person was liable cease when the child attains the age of 18, or 21 if the child is still in school or college.

According to Denmark's fourth periodic report, all people with permanent residence in Denmark are guaranteed decent living conditions and all have the right to services, security and benefits, regardless of degree of affiliation to the labour market. Forty-five per cent of the adult population receives transfer payments, whilst parents have an obligation to take care of their children until the age of 18. However, each year there is a much larger number, about 60 per cent, who receive transfer payments in one form or another, for instance in the case of unemployment.

Almost all social security payments and services are financed through taxes and duties and nearly half of GNP goes to the social sector. The expenditure for social security benefits as a percentage of GDP for 1988 and 1998 respectively were 27.5 per cent and 29.1 per cent.

The report states further that although Denmark can boast of a fine-meshed social and health service safety net, there are people to whom society has been unable to offer adequate help. These include the homeless, drug abusers, street children, a few mentally ill patients, prostitutes and some immigrants and refugees. Since 1993, Denmark has progressively intensified its efforts towards this category by earmarking government funds for support to regional and local projects offering assistance and housing.

Therefore, there are provisions for the socially excluded in the form of residential homes, institutions and shared housing as well as an offer of activities aimed at making the individual person able to help him/herself. The local authorities are responsible for the provision of the necessary assistance to the residents within their respective local areas. Everybody who needs help can be offered personal assistance, home help, rehabilitation, activity opportunities, treatment and shelter.

Other areas from which best practices can be gleaned within the Danish system are in the areas of housing and education. Although Denmark does not recognise the right to housing, the country has a high-standard housing system. Denmark provides for private housing, public housing, housing owned by cooperatives, family and youth housing, and housing for

the elderly and other vulnerable groups<sup>71</sup>. In the area of education, Denmark provides free education to all up to the tertiary level, which includes the obtaining of a first postgraduate degree. Education from age 7 to 16 is compulsory<sup>72</sup>. Denmark also provides for the protection of the family, which includes registered partnerships, cohabiting couples and single parents. It also provides for family and child allowances, parental leave, and maternity benefits<sup>73</sup>.

South Africa is an example closer to home from which we can learn some lessons, especially with regard to the inclusion of economic, social and cultural rights in the country's constitution and the judicial activism that goes with it.

In the area of education, South Africa has undertaken a number of policy initiatives to deal with inequalities in the school system, to instill a culture of learning, and the development of new curricula to suit the dispensation of democracy<sup>74</sup>.

South Africa has also created a number of different institutions commonly referred to as the 'Chapter 9 Institutions' with the mandate of protecting and promoting human rights, including economic, social and cultural rights. These include the Public Protector, the South African Human Rights Commission, the Commission for Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission on Gender Equality, The Auditor General, the Independent Broadcasting Authority, and the Commission on Restitution of Land<sup>75</sup>.

In respect to the right of access to clean and safe water, South Africa has legislation and standards laying out a framework for what 'access' to water entails and what government's obligations must be in respect to this. The definition of access is 25 litres of clean water daily, available 90% of the time within 200 metres of one's dwelling. This definition is short term for all South Africans, the long term one being 50-60 litres daily per individual<sup>76</sup>.

In the area of land, South Africa has designed and implemented a land redistribution exercise<sup>77</sup>.

A new and recent initiative that is being applied to promote and protect human rights is the design, use and application of service charters. The concept of service charters has in recent years enjoyed increasing attention as a model for increasing quality and accountability of public services. It has been implemented in most Commonwealth countries and, having been inspired by the adoption of the African Public Service Charter, in a number of African countries as well<sup>78</sup>.

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<sup>71</sup> See See E/C.12/4/Add.12, Fourth Periodic Report of Denmark on the Implementation of the ICESCR Pgs. 57 - 69

<sup>72</sup> Ibid, Pgs. 77 – 87 and 27 and 28

<sup>73</sup> Ibid, Pgs. 46 -50

<sup>74</sup> See Economic, Social and Cultural Rights in South Africa, at Pgs. 80-83

<sup>75</sup> Ibid Pgs. 67-74, Chapter 9 Constitution of the Republic of South Africa, 1996

<sup>76</sup> Ibid Pg. 88

<sup>77</sup> Ibid, Pg. 92

<sup>78</sup> See, Service Charters as a Mechanism to Promote Access to Justice a Brief, @ <http://www.humanrights.dk/files>

A service charter is a short public document that provides the essential information that citizens need to know about the services or functions of a public agency, institution, ministry or department of government and the manner in which they can access the services easily. For instance, a service charter covers key information about an institution's service delivery approach and the relationship the client will have with the institution, including:

- What the institution does;
- The standard of services clients can expect;
- Clients' basic rights and responsibilities;
- How to contact and communicate with the institution;
- How to provide feedback or make a complaint.

Service charters are developed by service sectors in consultation with staff and citizens. A service charter may cover both the direct and indirect service delivery functions of an organization, as well as the regulatory functions. It allows for an open and transparent approach to standard setting that all parties understand and can work within. Where they have been effectively designed and implemented, service charters have been used as a tool to strengthen administration and management procedures. They have also been a mechanism for increasing dialogue, accountability, transparency as well as openness and accessibility in the delivery of public services.

Service charters have mainly been developed in relation to social services, but a number of human rights actors like the Danish Institute for Human Rights sees a strong possibility in also reinforcing its application across the justice and law enforcement sectors.

The DIHR has based its arguments on an ongoing pilot project in Malawi developed as a model for service charters drawing on some of the key successes of other countries. The model seeks to reinforce these elements through a more holistic approach to standard setting, which includes planning, budgeting, monitoring, complaints mechanisms, and public participation. The model integrates key lessons from the implementation of human rights standards, which are seen both to strengthen public service charter thinking, but at the same time ensure that processes and outcomes of a service charter system would be in line with and reinforce human rights values and standards.

In some countries, the key input for the development of service standards are the national development policies of the country. The DIHR argues that while these are important, human rights protection and promotion through service charters can be enhanced by broadening the scope of input for the development of standards. This will help increase attention to:

- Constitutional rights and guarantees;
- Existing legislation on service delivery;
- Legislation and principles of administrative justice;
- Input and dialogue from citizen and stakeholders.

This broadens the scope of how service charters are developed. This is a strategy Zambia can consider, particularly in light of the on-going public sector reforms.

In November 1999, South Africa's health department launched a national Patient's Rights Charter to raise awareness about healthcare rights and responsibilities. The charter was a

result of a process of health rights campaigns by a number of civil society organisations<sup>79</sup>. Others countries that have been successfully implementing public service reform programmes to improve the quality and quantity of public services since the early 1990s, including client charters similar to the ones recently introduced in Malawi are Namibia, Ghana and Uganda<sup>80</sup>.

Other economic and social initiatives of the Zambian government are:

The creation of the Citizens Economic Empowerment Commission (CEEC) under the Citizens Economic Empowerment Commission Act of 2006. The CEEC has representation throughout the country and a perusal of their website reveals a number of local projects that have benefited from the initiative, including a nut factory in Mongu - Western Province and a project in Kabwe - Central Province.

The National Technology Business Centre (NTBC) was created by the Science and Technology Act No. 26 of 1997 and Statutory Instrument No. 136 of 1999. NTBC became operational on 1<sup>st</sup> April 2002. It was established with the main objective of linking developed and proven technologies from various local and international sources with the local technology seekers, i.e. business communities and entrepreneurs.

The NTBC's mandate is to commercialise and transfer new technologies. Its core functions include:

- Providing information on transfer of technologies and services;
- Providing database on technologies and on-line data banks;
- Providing information on technology and services;
- Acting as a liaison institution for search and matching of prospective parties for transfer of technologies;
- Evaluating the relevance of imported technologies and assess their environmental impact;
- Providing advisory services in engineering and process design to accompany the marketing and commercialization of prototypes;
- Setting up and maintaining a business development fund for the entrepreneurs in need;
- Promoting women in science and technology.

The NTBC has a Graduate Empowerment Scheme that was devised as an attempt to tackle the problems of unemployment created by, among other factors, job losses experienced during the period of companies liquidations and privatization, to tackle youth unemployment, and to respond to the problem of the inability of school leavers and college graduates to secure employment.

The overall objective of the TEVET Graduate Empowerment Scheme (TGES) is to empower and motivate TEVET graduates to start small businesses. Specific objectives of the scheme include the following:

- To stimulate and promote self employment among graduates;
- To create employment;
- To provide a practical way of harnessing the skills of the TEVET graduates for national economic development or wealth creation;

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<sup>79</sup> Supra Note 75 at 85

<sup>80</sup> See 'New Service Charter to boost Rights in Malawi', at <http://www.humanrights.dk/news>.

- To promote start up companies and exploit ideas and innovations from TEVET graduates through institutional incubation facilities;
- To act as a model for self employment and wealth creation by TEVET graduates in Zambia.

The scheme is multifaceted and includes the provision of tool kits, start up capital, and a mentoring programme. The programme has registered successes that include the establishment of the following projects and businesses:

- Muben Plastics Manufacturing
- Insaka Plastics Manufacturing
- Splendid Chilli
- Mungongo Oil Products
- Soymilk Production
- CFC– Briquette Project
- Stabilized block making
- Chankwankwa Foods<sup>81</sup>

Other administrative measures that a government can employ in the promotion and protection of human rights are the drafting of various thematic or sector specific policies. Policy documents guide the functioning of different government departments and sections in their implementation of national plans and agendas. The Zambian government has commendably devised a number of policies relating to economic, social and cultural rights. These include the Gender Policy, the Children’s Policy, the Nutrition Policy, the Free Basic Education Policy, the Water and Sanitation Policy, HIV and AIDS Policy, the Employment Policy, the Anti-Corruption Policy, the Environment Policy, and the Agricultural policy. These policies guide government programming and planning. In most cases, the task of implementing policies is given to an existing ministry; otherwise a new body may be created for the task.

## Other Important Aspects of Government’s Obligations

The Covenant on Economic, Social and Cultural Rights, in addition to obligating governments to undertake appropriate measures to promote and protect the rights enshrined therein, also obligates governments to progressively achieve the full realisation of the rights and to do so to the maximum of its available resources.

The progressive realisation component of economic, social and cultural rights is often mistakenly taken to imply that these rights can be realised only when a country reaches a certain level of economic development, or that the obligation to fulfill these rights can be postponed on the basis of lack of adequate resources to meet their requirements (for the moment). According to the Committee on Economic Social and Cultural Rights, this is neither the intent nor the legal interpretation of this provision. Rather, this duty obliges all States Parties, notwithstanding the level of national wealth, to move as quickly as possible towards the realisation of economic, social and cultural rights. While the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for a State Party. All available resources must be devoted in the most effective way possible towards the realization of the rights enshrined in the Covenant. A government’s failure to take steps is a violation of the provisions of the ICESCR.

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<sup>81</sup> <http://www.ntbc.co.zm/>



The Limburg Principles highlight that all States Parties have an obligation to begin immediately to take steps towards full realisation of the rights contained in the Covenant. According to the Limburg Principles the phrase “to achieve progressively” does not mean or imply that States have the right to defer indefinitely efforts to ensure the enjoyment of the rights contained in the Covenant. That kind of deferral would be inconsistent with international law.

Although certain rights, by their nature, may be more closely linked to the progressive implementation rule, many obligations under the Covenant are clearly required to be implemented immediately such as the non-discrimination provisions and the provisions obligating governments to refrain from actively violating economic, social and cultural rights or from withdrawing legal and other protections relating to these rights.

The obligation to protect economic, social and cultural rights requires states to develop targeted, legally consistent and sufficiently progressive policies to secure the rights contained in the Covenant. The use of indicators as a means of monitoring and evaluating specific aspects of economic, social and cultural rights appears to be increasingly accepted as a step towards the implementation of the Covenant.

A monitoring and evaluation system with set indicators is encompassed in the FNDP. However, the indicators do not adequately reflect the objective of poverty reduction or wealth creation, nor do they reflect any human rights aspects. Even those appearing under the Governance Chapter of the plan do not have an adequate reflection of human rights, let alone economic, social and cultural rights.

The Draft Constitution proposes that the President be obligated to present reports to Parliament every year on what has been done to promote and protect economic, social and cultural rights. This a practice applied with a slight variation by South Africa. The South African Constitution mandates the South Africa Human Rights Commission to require relevant organs of State to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment<sup>82</sup>.

The obligation of progressive realisation fulfills a government's obligation to protect and promote the rights of its people, and therefore includes an obligation for governments not to permit regressive measures. Regression from a higher level of enjoyment, partial or full, to a lower level of enjoyment may constitute a violation of the Covenant. An economic or social right that cannot be ensured in full must be ensured to the maximum extent possible - this partial realisation does not violate the Covenant. Any deliberately regressive measures however, such as rescinding legislation affecting the enjoyment of economic, social and cultural rights, can only be justified by reference to the totality of the rights provided for in the Covenant and in the context of the full utilization of a State's maximum available resources. Further, the Committee on Economic, Social and Cultural Rights has emphasized that “policies and legislation should ... not be designed to benefit already advantaged social groups at the expense of others”.

With regard to “to the maximum of its available resources”, the term “available resources” includes both domestic resources and any international economic or technical assistance or cooperation available to a state. The term covers both public expenditure and all other resources that can be applied towards the full realisation of economic, social and cultural rights.

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<sup>82</sup> See Article 184 (4), Chapter 9, of the Constitution of South Africa, 1996

Zambia should make the most of development cooperation with partners such as Denmark and Sweden who give substantial amounts towards development cooperation. Sweden gives 0.7%<sup>83</sup> and Denmark gives 0.85%<sup>84</sup>.

Like the progressive realisation provision, the “available resources” standard is also often used to justify the non-enjoyment or violation of economic, social and cultural rights. However, as recognised in the Limburg Principles, this requirement obliges a state to ensure minimum subsistence rights for everyone, regardless of the level of its economic development and is by no means intended as a method of non-compliance for poor states.

According to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, “as established by Limburg Principles 25-28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve states of certain minimum obligations in respect to the implementation of economic, social and cultural rights”.

Article 2 (2) of the Covenant provides for the realisation of economic, social and cultural rights without discrimination. This article obliges states to desist from discriminatory behaviour and to alter laws and practices which allow discrimination. Where discrimination occurs, states should ensure judicial and other recourse procedures. The article lists many prohibited grounds of discrimination: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This list is not exhaustive. Discrimination on any other ground that impairs the enjoyment of economic, social and cultural rights must be eliminated. So discrimination based on age, wealth, income level or sexual orientation would also be prohibited.

The Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on the Elimination of All Forms of Racial Discrimination, both to which Zambia is a party, provide that special measures taken to ensure equal enjoyment of economic, social and cultural rights for those protected by the respective convention are not discriminatory.

The Limburg Principles extends this approach to marginalized and disadvantaged groups and individuals generally. This allows for the application of ‘positive’ discriminatory measures that normally take the form of affirmative action programmes. Examples of these measures are: the black empowerment measures applied in South Africa; the differing examination cut off points between girls and boys applied in Zambia during national examinations; and the reservation of a certain quota of places in higher learning institutions. The measures must be discontinued after their intended objectives have been achieved, which are normally to bring a previously disadvantaged group to the same level of development as the others.

Further, state obligations under article 2 are to be performed “individually and through international assistance and cooperation”. The Covenant recognizes that many States will be unable to meet their obligations alone and that they will require international support. This provision has two dimensions: an obligation to receive and an obligation to provide.

Often, states which are in the course of development or transition do not have the resources to ensure the immediate full realisation of economic, social and cultural rights for all

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<sup>83</sup> See Pg. 2 Concluding Observations of the Committee on Economic, Social and Cultural Rights on Sweden’s 5<sup>th</sup> Periodic Report, E/C.12/SWE/CO/5, November, 2008

<sup>84</sup> See Pg. 2 Concluding Observations of the Committee on Economic, Social and Cultural Rights on Denmark’s 4<sup>th</sup> Periodic Report, E/C.12/1/Add.102, December, 2004

their citizens. For that reason, the Covenant requires not immediate implementation in full, but progressive realisation to the maximum of available resources. But the Covenant also requires that, where necessary, States should accept external assistance for their programme of progressive realisation. External assistance must be considered part of the available resources.

# The Way Forward for Zambia: Recommendations

Economic, social and cultural rights are as important as civil and political rights – more so for a society whose larger population is still fraught with multiple social and economic ills. Because of lack of a social safety net, social protective mechanism affects such groups more and deprives them their right to fully participate in the affairs of the nation.

The right to live a dignified life cannot be adequately fulfilled unless all basic necessities of life such as, food, housing, health care and education are adequately and equally available to everyone. Indeed, as stated by Joe Oloka Onyango, the ICESCR was primarily intended to enhance local and global social justice<sup>85</sup>. The government of any nation (and of the Republic of Zambia) is obligated to ensure this.

Indeed, the UN Declaration for Development places a right and a duty on states to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting there from.

Every man, woman and child is entitled to enjoy their human rights simply by virtue of being human. The principle of universality requires that no particular group, such as rural or remote communities or prisoners, be left out of the reach of development plans and programmes.

Furthermore, it must be recognised, emphasised and applied by all duty bearers that human rights are indivisible. Enjoyment of one right is indivisibly inter-related to the enjoyment of other rights. For instance, enjoyment of the highest attainable standard of health requires enjoyment of the rights to information and education as well as the right to an adequate standard of living. Thus, all human rights - civil, political, cultural, economic and social - should be treated with the same concern.

It is clear from the foregoing that there is a lot that the Zambian government needs to do in order to adequately promote and protect economic social and cultural rights, and that the realisation of these rights is not an impossibility or a far-fetched ideal.

This Report, therefore, recommends the following:

- **ENACTMENT OF ADEQUATE LEGISLATIVE PROVISIONS:** First and foremost, there is a great need that adequate legislative provisions be crafted and enacted for the promotion and protection of economic, social and cultural rights. Making provision for economic, social and cultural rights in the national Constitution as proposed in the Mung'omba Draft Constitution would be the preferred mode of protection. However, the drafting or strengthening of (existing) subordinate legislation is another acceptable option. This recommendation is motivated among others by the fact that some economic, social and cultural rights, such as protection against discrimination, can only be adequately protected through the enactment of appropriate legislation.

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<sup>85</sup> J. Oloka-Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic, Social and Cultural Rights in Africa*, <http://www1.umn.edu/humanarts/Africa/Oloka-Onyango.html>, at Pg. 5

Noting that providing adequate legislation alone is not enough, the above recommendation must be coupled with various administrative, educational, budgetary, judicial and other measures as directed by the ICESCR.

- **WIDESPREAD HUMAN RIGHTS EDUCATION AND INFORMATION DISSEMINATION:** It is the recommendation of this study that widespread countrywide (well) coordinated human rights education, sensitisation and information dissemination campaigns focused on economic, social and cultural rights be undertaken by the Human Rights Commission, the relevant departments of the Ministry of Justice - both of whom are tasked with this undertaking, other relevant Government ministries and civil society organisations. Human rights education and information sharing is a necessity for various reasons, whether or not economic, social and cultural rights are justiciable. Zambians must be educated about their rights and the mechanisms to access them as part of broader initiatives to eradicate poverty and realise economic, social and cultural rights.

Education and information campaigns ensure a raised level of consciousness among members of the judiciary and the legal profession to allow them to adequately interpret and litigate issues of economic, social and cultural rights.

The campaigns can also enhance access to institutions tasked with fulfilling these rights by empowering the public with knowledge of their entitlements, then with knowledge of how and where they can claim these rights or seek redress in the event of suffering a violation. Additionally, this knowledge is necessary in society to enhance the participation and contribution of communities to the design of their development programmes.

Furthermore, duty bearers can design specific information or education campaigns around the whole corpus of economic, social and cultural rights or on specific selected rights. Campaigns in Zambia have sometimes been successful on a number of political and governance issues such as preventing former President Chiluba's third term bid, the successful prosecution of persons accused of plundering natural resources and the campaign on debt cancellation. The Zambian civil society and the public need to also apply these campaign strategies to economic, social and cultural rights issues and with the same vigour.

- **INCLUSION OF CONCRETE STRATEGIES RELATING TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE NATIONAL DEVELOPMENT PLANS: APPLYING A HUMAN RIGHTS APPROACH TO THE DEVELOPMENT AGENDA:** Human rights and development are inter-related and self-reinforcing. Human rights and human development share a common vision and a common purpose – that of securing the freedom, well-being and dignity of all people everywhere. Indeed, when human development and human rights are advanced together, they reinforce one another, expanding people's capabilities and protecting their rights and fundamental freedoms.

Development is a process that aims at promoting and protecting the livelihoods of all individuals. It is movement from a less human condition to a more human condition. Human rights, on the other hand, are socio-economic and political entitlements necessary to protect individuals from threats to human dignity. Sustainable human development can only be attained when human rights are protected and promoted. This is because respect for human rights demands that the Government strives to do everything to ensure that its people are protected

against threats to their life, health, economic well-being, social stability, and political stability and participation. The development process should be rights-based.

A national development plan is a vital document reflecting a government's priority areas and guides policy and legal formulation as well as resource allocation. Applying a human rights approach to the development process would therefore entail reflecting human rights norms, priorities and related strategies not only in the human rights or governance chapter of the plan but throughout the document. Human rights can and should be emphasised in Government planning and programming in the same manner as gender is. Indeed, this would capacitate Government ministries and departments in the devising and implementation of human rights sensitive plans and programmes. Development plans, programmes and Government policies need not be aimed at implementing one particular right alone, but can combine and implement all rights together. This principle of the indivisibility of human rights does not however preclude priority setting in a country's planning and programming. The scarcity of resources and institutional constraints often dictate and require that governments establish priorities. For instance, priority could be given to food security, basic education and health in a given situation. The Zambian government under its FNDP for the period 2006 to 2010 has for instance prioritised the agricultural, health and education sectors.

- **ADMINISTRATION OF JUSTICE:** This is very key to ensuring equitable distribution and access to services. It entails ensuring equitable access to public services and the provision of working and accessible remedial measures in the event that one suffers a disadvantage. Just administrative action is central to the realisation of economic and social rights. Its inclusion in any human rights or governance strategy reflects recognition of the importance of service delivery mechanisms and the need for fairness and transparency in their processes.

Government also has the task of facilitating equality of opportunity for those who would otherwise be marginalized due to lack of resources to facilitate their access to social services. It has to devise and implement strategies to improve conditions for the poorer of society, strategies such as the redistribution of basic resources such as land.

- **STATE REPORTING:** State reporting serves a number of purposes and can help enhance a country's ability to protect and promote human rights. According to General Comment No. 1 of the Committee on Economic, Social and Cultural Rights<sup>86</sup>, the objectives of state reporting are:
  - I. To ensure that a comprehensive review of national legislation, administrative and judicial policies, practices and programmes is undertaken by a state party;
  - II. To ensure that a state party monitors the actual situation with respect to each right on a regular basis and thus provide a basis for the elaboration of clearly stated and carefully targeted policies including, the establishment of priorities which reflect the provisions of the covenant;
  - III. To enable governments to demonstrate that the above principled policy making is in fact being undertaken;
  - IV. To facilitate public scrutiny of government policies and programmes with regard to economic, social and cultural rights;

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<sup>86</sup> UN doc. E/1989/22

- V. To provide a basis on which both the state party and the Committee can evaluate the extent to which progress has been made towards realisation of the rights;
- VI. To allow the state party to develop a better understanding of the problems faced with regard to fulfilling these rights and to facilitate the exchange of information between the Committee and various states on how the rights enshrined in the Covenant can best be realised.

The requirement for states to report on the progress made on the implementation of a covenant like the ICESCR therefore allows a state to take stock of what it has done or not done. It sometimes prompts a government into action (even if it is just to save itself from international embarrassment).

Furthermore, if the state reporting cycle is followed, enhanced protection or at least some form of progressive action is assured. The Fourth Periodic Report of Denmark is a good example of this. Page 50 of the Report outlines some of the changes that have been effected since the country's earlier report and what the country has achieved with regard to the Committee's recommendations in respect of the measures undertaken to counter shortcomings in the protection of the family<sup>87</sup>. A similar example can be found on page 18 of the same Report, in which Denmark reports a case and an administrative action that had been taken following concerns raised by the Committee over whether or not judges and lawyers in Denmark were sufficiently aware that the rights enshrined in the ICESCR could be invoked in Danish domestic courts<sup>88</sup>.

- **DOMESTIC MONITORING MEASURES:** National human rights institutions, civil society organizations and others, however, will need to guard against the progressive realisation clause being used as an escape hatch by states seeking to avoid their obligations under the Covenant. Domestic mechanisms to monitor the implementation of the ICESCR or the fulfillment of economic, social and cultural rights therefore need to be developed for and by both national institutions tasked to protect and monitor human rights in general and civil society organisations whose mandate provides for this.
- **ENHANCING THE RIGHT OF ACCESS TO INFORMATION:** Application of the recommendations herein should in some cases be carried out collectively for maximum effect. For instance, the second and sixth recommendations above will be most effective if the right to access to information is enhanced, a right that is still currently grappling for adequate recognition and protection.
- **ADOPTING A NATIONAL HUMAN RIGHTS POLICY OR PLAN OF ACTION:** The implementation of Zambia's first national plan of action for human rights was not the success it was initially intended to be. The country can draft a new plan which would have to take into account the lessons learnt from implementing the last one. More importantly, consideration should be made on developments that have occurred in recent years that have given rise to the need for enhanced protection and promotion of economic, social and cultural rights. These developments include the phenomenon of privatisation, the influx of foreign investors, and growing concern over the environment. The new plan may be further enriched by borrowing what is noble from other countries' own plans of

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<sup>87</sup> See E/C.12/4/Add.12, Fourth Periodic Report of Denmark

<sup>88</sup> Ibid

action.

- **STRENGTHENING, COORDINATING AND EQUIPING OF RELEVANT NATIONAL INSTITUTIONS:** It is imperative that specific institutions be created and adequately tasked and equipped with appropriate mandates and legislation to promote and protect particular rights. Alternatively, already existing institutions such as the Human Rights Commission, the National Nutrition Commission, the National AIDS Council, the Gender in Development Division, and the Ministry of Community Development and Social Services, should be strengthened and adequately equipped to carry out the tasks of promoting and protecting economic, social and cultural rights.
- **PRIORITY AND SYSTEMATIC BUDGETING & BUDGET TRACKING:** The realisation of economic, social and cultural rights is progressive and subject to the availability of resources, particularly for a developing country like Zambia. Therefore, there is need for government not to only prioritise economic and social rights but also to systematically budget for their realisation and systematically fulfill and translate concrete policies into reality. Civil society organisations and national institutions like the Human Rights Commission can also play a role by tracking the budget and the allocations and spending in the economic and social sectors.
- **SERVICE CHARTERS:** The use of service charters as a model for increasing quality and accountability of public services, particularly in light of the on-going public sector reform programmes, should supplement other methods suggested above to fully realise economic, social and cultural rights.

## Conclusion

It is the hope of the JCTR, and indeed of the majority of Zambians, that the Government will realise the importance of economic, social and cultural rights and their indispensability, if fulfilled, in the integral development of all Zambians. Ignorance of this and laxity in the fulfillment of human rights condemns people to deprivation of their rights and denies them the opportunity to fully develop in an environment that legally respects, protects and assures a standard of living worthy of human dignity.



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# Alternative Ways of Protecting and Promoting Economic, Social and Cultural Rights in Zambia

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