

JCTR

Policy Brief

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**WHAT IS NECESSARY IN A NEW
CONSTITUTION TO MEET THE
DEVELOPMENT NEEDS OF ZAMBIANS?**

by

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WHAT IS NECESSARY IN A NEW CONSTITUTION TO MEET THE DEVELOPMENT NEEDS OF ZAMBIANS?

INTRODUCTION

There is so much discussion in Zambia about the Constitution, especially with regard to what should be in the new Constitution as the National Constitutional Conference (NCC) meets. The Mung'omba Draft Constitution which the NCC is now deliberating was the one released in December 2005. But unfortunately among the wider Zambian public, there is very little understanding about what should be in the new Constitution and how this will have great consequences for integral and sustainable human development for everyone.

The Zambian Constitution is the supreme or fundamental law of the land. Therefore, it *must* be a product of *national consensus* if it is to command constitutional legitimacy (i.e., inclusiveness and ownership). So it is extremely important for the people of Zambia to understand what should definitely be in the new Constitution.

To promote this wider understanding, the Jesuit Centre for Theological Reflection (JCTR) has prepared this *Policy Brief* to offer input on what should be in the new Bill of Rights of this new Constitution. A key question that should guide our discussion is: "*What is necessary in new Constitution to meet people's developmental needs in Zambia?*" In this *Policy Brief*, the JCTR argues that what is needed for sure is a new *Bill of Rights* that effectively incorporates *Economic, Social and Cultural Rights (ESCR)*.

WHY DO WE NEED ECONOMIC, SOCIAL AND CULTURAL RIGHTS?

There is no doubt that ESCR are necessary for integral and sustainable human development. At least three reasons can confidently be advanced to demonstrate this fact. **First**, ESCR are about "access" to quality basic social services and will depend on progressive realisation. **Second**, emerging perspectives on "development" that are about improving the quality of life support the inclusion of ESCR in the Constitution. **Third**, from the standpoint of the Church's Social Teaching (CST) on "development", such rights are indispensable for human dignity and community development.

First, ESCR are about access to *opportunities* (e.g., health care, education) and depend on the *available resources* (in any particular country) so that every individual is able to meet *basic necessities of life* (i.e., enjoy a decent standard of living). These rights do not demand "overnight access" but require that Government clearly demonstrates a commitment to move toward that access for all citizens. This should be shown through budget allocations, policy priorities and implementation efficiencies.

Second, emerging perspectives of "development" are *people-oriented*. For example, the *Human Development Report* of the United Nations Development Programme (UNDP) in its *Human Development Index* presents a picture of what is happening to people, not in terms of economic growth, but in terms of life expectancy, adult literacy and access to the basic resources needed for a decent standard of living. Certainly the JCTR's own Basic Needs Basket also demonstrates this perspective.

Realisation of ESC rights thus has direct implications for Zambia's ability to meet the *Millennium Development Goals* (MDGs) by 2015 of halving extreme poverty and hunger; achieving universal primary education; promoting gender equality and empowering women; reducing child mortality; improving maternal health; combating HIV and AIDS, malaria and

other diseases; and ensuring environmental sustainability. These basic human requirements are central to meaningful development and poverty eradication. One appropriate legal mechanism to ensure that 100% of all budgeted resources for poverty reduction programmes do in fact reach the intended beneficiaries will be to enshrine basic ESCR in the Bill of Rights. This would mean allocated funds would in effect be constitutionally “ring-fenced” or protected -- not “diverted” to by-election expenses or salary enhancements for Government officials or other unhelpful consumption oriented expenditures.

Third, the CST focuses on integral human development. That is, development is about the “whole” person and “every” person (i.e., incorporating cultural, social, economic, political, spiritual, etc., dimensions) in community. In the CST, it is understood as a transition from “less human” conditions to those which are “more human”. This is a “transition from less human conditions”, for example, where people have insufficient food, have less access to clean water and proper sanitary facilities and live in inhabitable environments due to failure by local authorities responsible for the management of environmental waste to keep the environment clean -- “to conditions that are more human”, where there are assurances of, for example, food and water in adequate quantities and quality,. And development is also seen as a new name for “peace” (not simply absence of physical confrontation or war). (For these CST emphases, see *Progress of Peoples*, Paul VI, 1967.)

For CST, the central question is: “what is happening to the people, especially to the poor?” Realisation of these basic ESCR demands that both citizens and the Government take seriously their moral obligation to ensure full development of each person. Such is a call for integral human development. Hence, any deprivation of these rights should be considered repressive and morally unacceptable.

ARE ESCR IN THE CURRENT CONSTITUTION?

The current Zambian Constitution does *not* guarantee the ESCR in Part III, the “Bill of Rights.” Rather, these rights are defined only as “policy directives” in Part IX. There it is clearly stated that the directives shall not be “*justiciable*” or be “*legally enforceable*” in any court, tribunal or administrative institution or entity. Therefore, Government cannot be taken to a court of law and is not obliged to act if it argues that it can not (citing a shortage of funds) or will not (asserting other priorities) fulfil these rights of the citizens.

What this means is that without a change, no Zambian citizen has a right to education, health care, decent housing, etc.!

Efforts have been made in previous constitutional reviews (1991, 1996) to incorporate ESCR into the Bill of Rights. But these efforts have been politically blocked. However the current Mung’omba Draft Constitution (2005) that is being deliberated by the NCC does explicitly include ESCR in the new Bill of Rights. It is very important to note that this inclusion occurred after widespread national consultation and serious study of “best practices” from other countries (e.g., South Africa).

WHAT IS IN THE PROPOSED BILL OF RIGHTS?

The Mung’omba Draft Constitution incorporates several rights in the new Bill of Rights:

- First, *ESCR* (e.g., health, education, worker’s rights) to be realised progressively.
- Second, *women’s rights* (e.g., equal opportunities in cultural, political, economic and social activities).

- Third, *children's rights* (e.g., protection from all forms of exploitation, adequate nutrition, shelter).
- Fourth, *rights of persons with disability* (e.g., access to places, information and public transport, use of sign language, braille or other means of communication).
- Fifth, *rights of older members* (e.g., receiving care and assistance from Government, pursue personal development and retain their own autonomy).

Note that these rights are explicitly contained or implicitly implied in the international Covenants (e.g., from the United Nations and the African Union) that Zambia has solemnly signed.

SO WHAT DO WE DO WITH ESCR?

Four things are provided for in the Draft Constitution so that ESCR may be effectively and equitably implemented.

- **First**, ESCR must be *justiciable* or *legally enforceable* (legal guarantees). That is, they must be incorporated into the Bill of Rights so that citizens can actually claim them once denied or if state policies and/or actions do not show any indicators of progressive realisation of these rights. Otherwise, why put rights in the Constitution that citizens are in effect denied the right to seek legal redress?
- **Second**, ESCR depend on *progressive realisation* (time, resources). This means that two extremes should be avoided in the realisation of these rights. On one hand, *indifference* – that meagre resources are used as an excuse for the Government not taking any deliberate steps to their realisation. On the other hand, *overnight realisation* – that every Zambian shall automatically have immediate access to these rights in their fullest status simply by petitioning the courts for redress.
- **Third**, extend *locus standi* which determines the ability to go to court with a complaint. The current Constitution lacks *public interest litigation*. This means that only a *victim* can legally petition the courts of law if their rights are infringed upon or denied. Extension of the *locus standi* will allow concerned citizens and/or associations who may not be individually or directly affected by the actions of the Government to nevertheless have the right to bring a complaint before the courts of law on behalf of those affected. For example, a local Justice and Peace Committee could sue the Government because in its area very poor housing for most citizens receives no remedial action by Government.
- Fourth, establish a *constitutional court* (legal redress). The most important instrument of vindication of human rights violations is the Judiciary. However, if effective measures for vindication of such rights are lacking, human rights cannot be realistically enjoyed by individuals. The courts must be ready to resolve human rights conflicts according to the law, whether this be through a special Constitutional Court or through the High Court.

It is important to note that the Draft Constitution uses very careful legal language to assure that these ESCR can really be part of every Zambian's heritage. Examples of other African countries -- including South Africa, Namibia and Ghana -- are followed to assure responsible and effective implementation of ESCR.

BUT ARE THERE OBJECTIONS TO ESCR?

Yes! One common objection to the inclusion of ESCR is that there is a "likely potential" to bankrupt the Government. Undoubtedly, realisation of ESCR does have monetary implications in the face of competing needs. But their implementation always depends on "progressive realisation". Moreover, implementation is about the *right priorities* and the maximum utilisation of *available resources*.

Thus it is simply not accurate -- legally and morally -- to claim that ESCR in the new Bill of Rights is dangerous to the stability of the Government. Political leaders who reject ESCR on the grounds of instant bankruptcy for the Government either have not accurately read the full text and explanation of the Mung'omba Draft or are deceitfully running away from conscientious engagement with the demands for integral development supported by ESCR.

A second objection to including ESCR in the new Constitution is that this revision of the current Bill of Rights will require a national Referendum to approve the new Constitution. But surely this is not a reasonable objection! The Constitution begins with the sacred words "We the People" – so let the people endorse the new Bill of Rights and the entire new Constitution so that it truly is a people's document, not a product of politicians' manipulations.

POLICY CONCLUSION

In sum, ESCR are indispensable to human and national development. There is simply no integral development without provision of ESCR and the allied rights of women, children and the differently abled. Indeed, the implementation of the ESCR is necessary also for the implementation of the civil and political rights already included in the current Bill of Rights. For how can a person effectively vote in an election if not equipped with some education, or a person participate in local community activities if hungry, or a woman protect her children if not healthy?

The JCTR firmly believes that it is obvious, then, that ESCR must play a necessary role in the holistic thinking about development in Zambia. Indeed, it can be argued quite reasonably that in Zambia (and in any other country for that matter), there simply is *no integral and sustainable development without provision of ESCR*.

Hence, inclusion of ESCR in the new Bill of Rights in the new Constitution must be a *top priority* for the constitutional reform currently being undertaken by the NCC. Only then can we have a "constitution that will stand the test of time." This requires the following policy actions:

- Public education about the importance of ESCR must be promoted by churches and civil society organisations across the country.
- The NCC members must intelligently debate the meaning and consequences of inclusion or non-inclusion of ESCR in a new Bill of Rights.
- The Bill of Rights must clearly incorporate ESCR with all the attendant clauses of justiciability, progressive realisation, *locus standi* and constitutional court.
- A national Referendum must be mandated to give popular approval to this important improvement in the Bill of Rights.

Yes, given the strong impact that ESCR have on integral human development, their inclusion in the new Bill of Rights in our new Zambian Constitution is a necessary and indispensable step along the "path to development" in Zambia today!

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[Note that this JCTR *Policy Brief* is dated "Second Quarter 2007," but is issued now in order to be up-to-date with the discussions of the National Constitutional Conference. For more discussion of ESCR, visit the JCTR website: www.jctr.org.zm]