

THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ZAMBIA

Dominic Liche

Jesuit Centre for Theological Reflection

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MAJOR CONCERN

- The major questions surrounding this topic are:
 - Are all “rights” claimable?
 - Who should guarantee that the “rights” are claimed?
 - Does claiming a “right” necessarily mean seeking redress in a court of law?
 - Are there sets of “rights” that we can claim are necessarily for a good human life?

PRESENTATION OUTLINE

- What are Economic, Social Cultural Rights (ESCR)
- The Current Promotion of ESCR
- Current Debates of the Limitations of the Current Promotion of ESCR
- Justiciability of ESCR
- Problems Associated with making ESCR Justiciable
- Recommendations and Conclusions

WHAT ARE ECONOMIC, SOCIAL AND CULTURAL RIGHTS?

- One group of human rights that is about how well people enjoy and meet their basic needs
- They are those human rights which mandate that social conditions be adequate for meeting basic needs that are necessary for the enjoyment of a fully human life
- Examples of these are health, education, water and sanitation, employment, fair wage, self-determination, culture, shelter, clean environment

CURRENT PROMOTION OF ESCR

1. **Zambian Constitution**

- Part IX, Article 113 of the Constitution “Directive Principles of State Policy” states that these rights (ESCR) are directives only fulfilled if resources are available or demand for welfare of people is unavoidable.
- Some cultural rights are protected in Part III of the Constitution (that part of the Constitution that protects CP rights); e.g. freedom of expression, freedom from discrimination based on race, tribe, etc.
- Some social, and economic rights are protected through the Employment Act, Education Act, Persons with Disabilities Act, the Affiliation and Maintenance of Children Act, the Adoption Act, and the Lands Act (**Question to ask is WHY have so many ACTS addressing rights when their proper place is the Bill of Rights?**)

CURRENT PROMOTION OF ESCR

2. Fifth National Development Plan

- Human rights and development are inseparable
- Rights in the FNDP are stressed in the emphasis on the following sectors:
 - Education and Skills Development (Chapter 16)
 - Health (Chapter 17)
 - Water and Sanitation (Chapter 19)
 - Social Protection (Chapter 22)
 - Housing (Chapter 20)
 - Employment and Labour (Chapter 24)
 - Governance (Chapter 31)
 - Public Safety and Order (Chapter 30)
 - Gender and Development (Chapter 34)
 - Youth and Child Development (Chapter 23)

CURRENT PROMOTION OF ESCR

3. Regional and International treaties Zambia is party to:

- the Universal Declaration of Human Rights;
- the UN International Covenant on Civil and Political Rights (ICCPR)
- the UN International Covenant on Economic Social and Cultural Rights (ICESCR);
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT);
- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- the Convention on the Elimination of All Forms of Racial Discrimination (GERD);
- the African Charter on Peoples' Rights (both CP and ESCR);
- The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW); and
- The Convention on the Rights of the Child (CRC).
- African Commission on Human & peoples' Rights

LIMITATIONS TO THE CURRENT PROMOTIONS OF ESCR

- ESCR are clearly not claimable through the courts of law – they are clearly not justiciable and not legally enforceable (Part IX of Zambian Constitution)
- The Mung'omba Draft Constitution proposed justiciable ESCR – but for many Zambians ESCR is still an elusive area
- There is great misunderstanding that ESCR is about free social services – making the whole discussion ridiculous

JUSTICIABILITY OF ESCR

- Governments need to fulfill its obligations to its citizens (main duty bearer in a nation state) by creating a forum (institutional framework) for citizens to claim their rights
- Governments need to be made accountable to human rights norms especially those that they are signatory to
- In a sense all rights require considerable amount of resources to promote them

JUSTICIABILITY OF ESCR

- Experiences in South Africa where there are fully justiciable ESCR, and other countries where some ESCR are justiciable show that these facilitate the hearing of the voices of the minority

PROBLEMS WITH JUSTICIABLE ESCR

1. The nature of ESCR (negative vs positive rights);
2. ESCR are almost always connected to resources, how about when they are scarce?;
3. Obligations imposed by ESCR are vague and indeterminate, those of CP rights are more precise;
4. The obligation to fulfill or progressively realise ESCR involves the courts in reviewing state inaction, while CP rights involve review of state action.
5. The main obstacles remain (i) a lack of commitment on the part of gvt, international institutions and NGOs whose responsibility is to respect, protect and promote these rights for the benefit of all human beings, and (ii) misunderstanding about what ESCR involves.

CONCLUSIONS

- Interdependency – for important rights such as the right to life to be promoted ESCR are important
- Moral grounds – human dignity can mostly be upheld with justiciable ESCR
- Logical grounds – in any discourse, minimums are a requirement, and so is with rights. Society has to be involved in determining these minimums (the need for referendum)

RECOMMENDATIONS

- There must be a set of rights that Zambians consider very important and worth claiming even in the courts of law
- If the voices of the minority has to be heard, ESCR must be justiciable – in any case a basic human right is only a right if it can be claimed
- What is the role of governments? – deliver services, meet the expectations of people, accountable to the people – ESCR helps in this

OTHER CONCERNS

- Having little resources does not mean that you cannot seek legal redress, e.g.,
- ESCR can be implemented progressively but also immediately, prioritisation of allocation of resources
- Theoretically the principle of indivisibility, universality, inalienable rights need more sharpening – especially in their application
- Making rights justiciable rights is not targeted at government but any duty bearer

OTHER CONCERNS

- It has been argued, especially in the Indian experience and even in USA, that the right to life can be used to adjudicate on ESCR
- International and regional treaties that form the international human rights law can also be used to argue for the adjudication of ESCR
- The promotion of ESCR does not necessarily mean “free” distribution of social services but “access”

Thank you very much!