
**Submission
by the
Jesuit Centre for Theological Reflection
to the
Human Rights Committee of the
National Constitutional Conference**

***Inclusion of Economic, Social and Cultural
Rights in the New Bill of Rights of the
New Constitution***

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**03 February 2009
Mulungushi International Conference Centre
Lusaka, Zambia**

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INTRODUCTION AND BACKGROUND

The Jesuit Centre for Theological Reflection (JCTR) is a faith based non-governmental organisation operating in Zambia and Malawi, working on issues of faith and social justice. Last year, 2008, the Centre celebrated its 20th anniversary. The Centre does research, education and advocacy on issues that affect the day-to-day lives of Zambians with the aim of promoting the fullness of human life of all people, especially for the poor. The mission of JCTR is to foster, from a faith-inspired perspective, a critical understanding of current issues. To fulfil this mission, the JCTR works through four Programmes: the Church Social Teaching Programme, Debt, Aid and Trade Programme, Social Conditions Programme, and Outreach Programme.

As you may be aware, the JCTR has remained a strong and intelligent moral voice in Zambia on socio-economic issues, political governance, and constitutional matters. **Several years ago the JCTR offered proposals to the Mung'omba Constitutional Review Commission (CRC), with some of the proposals incorporated in the December 2005 Draft Constitution.** This Draft Constitution is the main document now being deliberated on by members of the National Constitutional Conference (NCC). For example, we recommended Parliamentary oversight of contraction of external debt and the inclusion of Economic, Social and Cultural Rights (ESCR) in the new Bill of Rights.

Today we are grateful and glad to submit to the Human Rights Committee of the NCC this presentation supporting some provisions on human rights in the Mung'omba Draft Constitution relating to ESCR. Our submission benefits from our experience in working for social justice in Zambia for the past 20 years and relies on several well-researched JCTR publications. Recent examples include the publication and wide circulation of policy briefs and papers on specific aspects of ESCR and ways in which they can be incorporated into the new Constitution. Moreover we regularly release the well-known *Basic Needs Basket* and *Rural Basket* for information on actual living conditions of Zambians across the country. These studies and publications (copies of which we are making available to the Committee) highlight the grave difficulties that Zambians are facing in terms of access to justice, enjoyment of human rights, challenges to the urban poor, and promotion of rural development.

In 2005, the JCTR was asked to make a submission to the United Nations Committee on Economic, Social and Cultural Rights in Geneva. The submission was based on our survey, done in cooperation with several civil society organisations, of the status of ESCR in this country. We argued from our research that the Government is not doing enough to promote and protect these important rights. The United Nations Committee in their recommendations advised the Zambian Government to do more, for example, in the areas of employment, health care, education and special concern for the girl child. Therefore the JCTR has followed up with a campaign for inclusion of the range of ESCR in the new Bill of Rights in the new Constitution.

It is important at the outset to state that it is central to the vision and mission of the JCTR that what we emphasise should be contained in the final Republican Constitution (content) and the method utilised to adopt the new Constitution (process) are not only *political* and *legal* matters, but are fundamentally *ethical* and *moral* issues. This is true because this content and process touch the very lives of the Zambian people and either respect or do not respect their dignity. Therefore we firmly believe that a good Constitution will be one that prioritises the following value dimensions: human dignity, common good, principles of subsidiarity and responsibility, protection of human rights and freedoms, and special concern for the vulnerable groups, particularly the majority poor in the country.

JCTR's campaign for the inclusion of ESCR is grounded on these ethical and moral values highlighted above, especially on the dignity of the human person (see Genesis 1:27 and John 10:10). The worth of our being human is not constituted by any human declaration or institution, but rather given by God as a fundamental and universally shared reality. **Hence, human dignity, realised in community with others (the African virtue of *ubuntu*), becomes the norm against which all social institutions and state activities (including the deliberations of this NCC that you are privileged to participate in) must be measured.**

Economic, Social and Cultural Rights (ESCR) are a set of human rights that assure that social and economic conditions are adequate for meeting basic needs for every human person. These ESCR include: rights to education, health, self-determination, food, safe water and sanitation, clean environment, housing, social security, employment, respect for one's own culture.

The current debates on whether or not ESCR should be included in the Bill of Rights arise from the fact that human rights have traditionally been divided into two categories: ***civil and political rights***, and ***economic, social and cultural rights***. (More recently, a third category is cited: ***group or solidarity rights***.) This division even internationally has led to a situation where civil and political rights have been protected by laws based on a constitutional Bill of Rights, whereas Economic, Social and Cultural Rights have been left to the margins and unprotected by law. However it has now been more widely recognised that **these sets of rights are indivisible and the protection of one set depends on the protection of all others.**

It is from this background that the JCTR is making this submission for the inclusion of ESCR in the new Bill of Rights. Our submission mainly dwells on Parts III (Protection of Fundamental Rights and Freedom of the Individual) and IX (Directive Principles of State Policy and the Duties of a Citizen) of the current Republican Constitution and Part VI (Bill of Rights) of the December 2005 Mung'omba Draft Constitution. We will systematically address six questions:

1. **Why are human rights provisions in the current Constitution inadequate?**
2. **What provisions are made for ESCR in the Mung'omba Constitution?**
3. **Why do we need ESCR included in the new Bill of Rights?**

4. How is it possible to have ESCR in the new Bill of Rights?
5. How do we respond to arguments against ESCR in the new Bill of Rights?
6. What recommendations do we make to this Committee on Human Rights?

1. WHY ARE HUMAN RIGHTS PROVISIONS IN THE CURRENT CONSTITUTION INADEQUATE?

In the current Republican Constitution (last revised in 1996), human rights are provided for in the Bill of Rights found in Part III, “Fundamental Rights and Freedoms of an Individual.” Mostly the rights provided for are Civil and Political Rights. But also, some Cultural rights are provided for in this section. The complete ESCR are not provided for in the Bill of Rights but are mentioned in Part IX of the Constitution, “Directive Principles of State Policy.” In Article 112, it clearly states that the State shall only “endeavour” to meet these rights. The State is not “mandated” or “required by law” to provide for these rights. Moreover, in Article 111, **it clearly states that these ESCR shall not be justiciable and shall not be legally enforceable in any court or tribunal.**

This is despite the fact that ESCR are indeed referred to as rights in certain instances. But they may have actual effect and be legally called upon only if the State has enough resources or if the general welfare of the public so unavoidably demands, as may be determined by Cabinet (Article 110, 2). What this means is that even though these are true human rights, one cannot claim them in a court of law and cases involving these rights are not even worthy of being brought in a court of law.

Perhaps it is important at this point to emphasise that **we are dealing with a Bill of Rights that was designed by the British in 1964** as part of the colonial heritage left to Zambians in a new Independence Constitution. *Since 1964 there have been no changes in that Bill of Rights as inscribed in our Constitution!* But there have been significant changes in the statement, understanding and practice of human rights in democracies the world over, including in Africa. South Africa, Namibia, Malawi, Ghana and Uganda, to mention a few, have in varying degrees Bills of Rights that reflect a more holistic approach to protection and promotion of human dignity. Can we not ask ourselves bluntly and honestly why Zambia should be stuck with a document given us 45 years ago by our colonial masters?

2. WHAT PROVISIONS ARE MADE FOR ESCR IN THE MUNG’OMBA CONSTITUTION?

We now want to share with you the specific Economic and Social Rights as proposed in Part VI of the Mung’omba Draft Constitution for inclusion in the new Bill of Rights. We feel that it is a good move that the rights of persons with disabilities, women, children and youths, older members in society, family, consumer rights, and right to justice have all been put under the broad heading of “Civil, Political and Cultural Rights” and these rights are justiciable and legally enforceable. **This is definitely an improvement over the current constitutional provisions.**

Economic and Social Rights have been put separately in the text of the new Bill of Rights. **These rights though *justiciable* are to be fulfilled within reasonable time, or, in the proper legal expression, these rights are to have *progressive realisation*.** What does this mean? To provide a simple example by way of comparison, a child can be expected to grow into adulthood but this does not happen instantly but gradually. Similarly, the fulfilment of the right to a good education is not accomplished overnight but in appropriate stages. We will return to this point below.

The Economic and Social Rights included in this section are rights to: choose a trade, occupation or profession; employment and to just and fair labour practices; social security, including, where appropriate, social welfare for that person and dependants of that person; health which includes the right to health care services and reproductive health care; education; adequate shelter and housing; adequate food, water and sanitation; an environment that is safe for life and health.

But JCTR feels it is very important at this point to note that despite the proposed inclusion of these rights by the Mung'omba Draft Constitution, **there is one serious problematic paragraph (67, 3b) that in effect waters down these rights.** This paragraph states the condition that though these rights are justiciable, the State, when it has a different conclusion about acceptability or affordability of the rights, can overrule decisions on these rights made by any court, tribunal, or the Human Rights Commission.

But surely this is a blurring of responsibilities in a clear instance of conflict of interests. Since it is the State itself that would have been brought to court for failing to provide for the people, it should not be the State which should have the final say in excusing itself in this matter. The State might explain its situation of some delay, but it should not be unquestionable or immune from action by court, tribunal, or the Human Rights Commission.

Because of this anomaly in the text of the Draft, **the JCTR is recommending removal of paragraph 67, 3b.**

3. WHY DO WE NEED ESCR INCLUDED IN THE NEW BILL OF RIGHTS?

At this point in our submission we want to offer six very strong reasons for the inclusion of ESCR in the new Bill of Rights:

1. **ESCR are about “access” to opportunities** (e.g., health care, education) and will 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. In practical terms, this should be shown through adequate budget allocations, clear policy priorities and strong implementation efficiencies. **It has to be stressed here that promotion of ESCR does not necessarily mean “free” distribution of social services but “access” as stipulated above.** For example, in the Budget announced last Friday in Parliament, the

Minister was under no constitutional obligation to outline a timetable for health and education allocations. But with constitutional inclusion of ESCR, such a timetable to demonstrate progressive realisation could be required.

2. **Sustainable and integral human development demands that ESCR be protected and promoted as much as possible.** Food, good health, quality education, shelter, work, water and sanitation, a clean environment makes it possible for people to develop as persons but also enables the nation to develop. Realisation of ESCR has direct implications for Zambia's ability to meet the *Millennium Development Goals* (MDGs) by 2015, to implement the *Fifth National Development Plan* (FNDP) and to move effectively toward *Vision 2030*. These basic human requirements are central to meaningful development and poverty eradication. This stress on development should be understood as more than economic growth, but true social growth in an equitable fashion. This means development for "all" human beings and for the "whole" person and not just some persons or just some aspects of a human person.

We at JCTR feel this is an extremely important point to emphasise during this time of global financial crisis and when Zambia is experiencing increasing foreign investment. **Realisation of these basic ESCR demands that both citizens and the Government take seriously their moral obligation to ensure full development of each person.** Hence, any deprivation of these rights should be considered repressive and morally unacceptable. Their guarantee in the new Bill of Rights is obviously necessary in Zambia today.

3. A major point that often is missed in these discussions is that **protection and promotion of Civil and Political Rights does in fact require that Economic, Social and Cultural Rights are also protected and promoted.** Actually the enhancement of ESCR is a precondition for enjoyment of Civil and Political Rights. For example, for me to enjoy my right to life, I will need food, good health, shelter, clean water and a healthy environment. For me to exercise an intelligent right to vote will require at least basic literacy. For me to participate in a citizen's exercise in governance such as at this NCC demands good education. This link between ESCR and Civil and Political Rights is obvious. *All human rights are interdependent* and as such we should not leave out these very important ESCR in the new and comprehensive Bill of Rights.
4. **People have through the three recent Constitutional Review Commissions (Mvunga, Mwanakatwe and Mung'omba) expressed keen interest in including ESCR in the Bill of Rights.** The issue was raised in the Mvunga process but not tabled in the text. But in both the Mwanakatwe and Mung'omba drafts, the issue was explicitly dealt with. If this Constitution is to be a people's Constitution, the voices and aspirations of Zambians should be taken seriously and not set aside by the NCC. **Also, today, the JCTR is able to lay on the table over 12,000 signatures gathered from Zambians across the country from December 2007 to date, who are demanding that ESCR be included in the Bill of Rights.** The citizens, from every walk of life, signed up after hearing how important the ESCR are for the future of our country.

5. **The promotion of ESCR through the “Directive Principles of State Policy” in Part IX of the current Constitution is weak.** It is clear that more must be done to secure a higher priority to the implementation of these rights. The obvious first step is including them in the new Bill of Rights. This will provide a tool for monitoring and evaluating Government’s commitment to ensuring that ESCR are promoted. For example, through the principle of *progressive realisation*, the budgetary allocation to sectors that relate to ESCR can show such a commitment. Imagine if the Budget 2009 Address of the Minister of Finance and National Planning, made last Friday 29 January, had been guided by constitutional guarantee of ESCR. If it had been so guided, the priorities of allocation of scarce resources would have been experienced in the social sectors of health and education.

Another important factor to take into consideration is that the 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 ESCR in the Bill of Rights. **This would mean that funds allocated for poverty reduction would in effect be constitutionally “ring-fenced” or protected** – they could not be “diverted,” for example, to by-election expenses or unnecessary salary enhancements. This “ring-fencing” of constitutional expenditure commitments already occurs, for instance, in the requirement for payment of servicing of external debt.

6. **Finally, Zambia is a signatory to many regional and international human rights treaties** such as the Universal Declaration of Human Rights, International Convention on Economic, Social Rights, and the African Charter on Human and Peoples Rights. Despite signing and ratifying these treaties, domestication of their contents as they relate to ESCR has been very weak. For us at the JCTR, domestication means three things: i) including major aspects of ESCR in the Constitution; ii) having detailed legislation on ESCR (e.g., through an ESCR Act); and iii) having policies and strategies to implement the promotion of ESCR.

4. HOW IS IT POSSIBLE TO HAVE ESCR IN THE NEW BILL OF RIGHTS?

The JCTR believes that this Human Rights Committee can indeed empower the entire National Constitutional Conference by courageously taking *four steps* to make possible the inclusion of ESCR in the new Bill of Rights of our new Constitution.

1. **ESCR must be made *justiciable and legally enforceable* through their incorporation in the Bill of Rights.** This is very necessary because if it is done citizens can actually claim their ESCR once they are denied or if state policies and/or actions do not show any indicators of progressive realisation of these rights. Otherwise, why put important rights in the Constitution that citizens are in effect denied the ability to seek legal redress if they are denied these rights?

2. **The implementation of ESCR must be directed through *progressive realisation* (time and resources).** Two extremes should be avoided in the realisation of these rights. On one hand, *indifference* or hiding behind the phrase “Zambia does not have enough resources” where government is not doing enough to realise these rights but takes as an excuse that Zambia has meagre resources. 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.

We find it interesting that too many discussions on ESCR have been distracted by heated debate about how much will be needed to realise these rights. A few weeks ago, in his testimony before this Committee an official from the Ministry of Finance and National Planning alluded to the fact that so much money would be needed to meet these rights. But such estimates can at best be only very *tentative* and *vague* in a correct constitutional process of “progressive realisation.” **These estimates should not be used as arguments against inclusion of ESCR in the Bill of Rights.** Some violations of ESCR, however, may require immediate attention and expenditures (e.g., a river is polluted, there is a cholera outbreak, citizens houses are demolished to build a shopping mall, direct discrimination in accessing ESCR).

3. **Extend *locus standi* to include cases brought to courts in the interest of the public.** Most Zambians who have their rights abused or not protected are those that cannot claim their rights on their own (e.g., children that are harassed, very poor people). There is need for concerned citizens and/or organisations who may not be affected themselves to have the right to bring a complaint before the courts of law on behalf of those affected. The current Constitution lacks endorsement of full *public interest litigation*. In effect, this means that only a victim can legally petition the courts of law if her or his rights are infringed upon or denied. But with the possibility of extended *locus standi*, for example, the Nurses Association of Zambia in Gwembe could sue the Government because of poor healthcare provisions in their district.
4. **There must be establishment of a *constitutional court* to specifically address cases related to ESCR but also other major constitutional issues.** After having made these rights justiciable, there is need to institute some judicial reforms. Given the current situation in the judiciary, many cases are not heard in courts for years. But remember the truism: “*Justice delayed is justice denied!*” It is necessary therefore that effective mechanisms are put in place to deal with human rights violations and a Constitutional Court must be part of these mechanisms. (Note that the *State of Human Rights Report 2007*, from the Zambia Human Rights Commission, makes it clear that legal protection of all human rights is weak.)

An important point, then, is that in your present deliberations as the Human Rights Committee, **you should take keen interest in the conclusions of the Judiciary Committee** in order to ensure that effective measures in addressing human rights are taken into consideration. For example, is the Judiciary Committee supporting the setting up of a Constitutional Court? We repeat that such a Constitutional Court is necessary for effective enforcement of the Bill of Rights.

We hope that we have made clear, then, that to make it possible to have ESCR in the new Bill of Rights, these rights must be *justiciable*, *progressive realisation* must be the norm of implementation, there must be an expanded understanding of *locus standi*, and a *Constitutional Court* must be established.

5. HOW DO WE RESPOND TO ARGUMENTS AGAINST ESCR IN THE NEW BILL OF RIGHTS?

Those arguing against ESCR have brought forward several arguments against the justiciability and legal enforcement of ESCR. Here are three of the most-often heard arguments and what the JCTR considers the reasoned response to each of them.

1. **“Including ESCR in the new Bill of Rights will bankrupt the nation.”** It is unfortunate that we have heard this objection made many times in the media by top government officials and even some people from the legal profession. Yes, promotion of ESCR depends on available resources but it cannot bankrupt the nation because of two important considerations: i) there will be prioritising of which sectors need the most attention and finding ways of maximising the use of available resources, ii) the realisation of ESCR demands progressive realisation as explained earlier.

Since legal enforcement of ESCR will mean that there are better accounting systems and that resources budgeted for a certain sector will therefore reach the intended persons, in fact it will mean the opposite of bankrupting the nation. And those who cry over how expensive human rights might be should first cry over – and act upon – the **massive expenses spent in the corruption and abuse of public resources revealed each year in the Auditor General’s reports!**

Moreover, it should be honestly noted here that **realising Civil and Political Rights is also very costly** (e.g., the right to vote demands a lot of money for electoral processes, or the right to fair trial demands establishment of networks of court systems that are effective).

2. **“ESCR are such vague, complex, and sometimes trivial rights that bringing them in front of a court of law will not only be difficult but meaningless.”** Moreover, **“Allowing these rights to be justiciable and legally enforceable will make courts jammed with cases and Government faced with many cases for settlements.”** But the answer to these objections is that the judicial system should create structures that will deal specifically with these rights and other constitutional issues (e.g., a Constitutional Court). Having the Supreme Court act as the Constitutional Court is inadequate and impractical, since it would be overloading its agenda.
3. **“Including ESCR in the new Constitution requires a Referendum and holding a Referendum will very costly.”** Yes, it will indeed require a Referendum. But so should the entire new Constitution be submitted to a Referendum. That is the only way to assure

the honesty of the opening statement in the Preamble to the Constitution, **“WE THE PEOPLE....”** To get a Constitution that “stands the test of time,” rather than one that will once again be changed with the election of another President and Party, approval from the Zambian people through a Referendum is essential. Let those who would argue otherwise defend their democratic credentials! **Why should you members of the NCC fear a Referendum?** Are you not confident that what you endorse here is going to be accepted by the people you claim to represent?

As for the cost of the constitutional Referendum, it should be budgeted for, as are other essential governmental activities. **A suggestion:** a less expensive budget can be designed through linkage of the Referendum with the 2010 Census and the 2011 tripartite elections.

6. WHAT RECOMMENDATIONS DO WE MAKE TO THIS COMMITTEE ON HUMAN RIGHTS?

Based on the analysis offered so far in this presentation, the JCTR now makes these four clear and important recommendations to the Human Rights Committee of the National Constitutional Conference:

1. **We recommend that this Committee endorse the inclusion of ESCR in the new Bill of Rights of the new Constitution.** This will be worthy testimony and honourable response to Zambians who have consistently demanded that ESCR be constitutionally protected and promoted. Evidence of their demand is found in the reports of the Mvunga, Mwanakatwe and Mung’omba Constitutional Commissions. Moreover this demand is expressed in the over **12,000 signatures** that JCTR has gathered from Zambian citizens from across the country during the past year
2. **We recommend that this Committee argue its position of endorsement of ESCR if and when other members of the NCC might propose that these rights be left in their current status.** Let the call for the necessary Referendum be made very strong and clear, so that the new Constitution will truly be a people’s Constitution. Indeed, how can we say that this Constitution is a people’s Constitution if the Bill of Rights, the heart of the Constitution, remains essentially the one left us by the colonial masters?
3. **We recommend that this Committee remove from the Constitution any language such as is found in Clause 67 (3b) of the Mung’omba Draft.** This is a serious drawback clause that appears to give Government, if it so desires, an escape from any judicial action requiring enforcement of ESCR. Retaining such a clause would in effect undermine the whole effort to make ESCR justiciable and legally enforceable.
4. **We recommend that this Committee makes a submission to the Judiciary Committee of the NCC** to the effect of making sure that effective judicial measures are put in place to deal with human rights violations through the establishment of a Constitutional Court.

CONCLUSION

Effective protection and promotion of all human rights for all Zambian citizens demands that ESCR are in the new Bill of Rights as justiciable and legally enforceable. But let it also be said that in their protection and promotion, it would be inadequate to leave out the *duties* of the rights-holders. **Concurrent with government's obligations, we must widen these obligations to the private sector, civil society groups and all citizens.** For example, in a community, individuals, clubs, organisations and business entities should ensure that they do not infringe the ESCR of others. **Remember, for every *right* there is a corresponding *duty*!**

We believe that a very strong true reason that our Bill of Rights has remained essentially the same since Independence, lacking the obviously necessary inclusion of ESCR in the Bill of Rights, is the fear of having government action monitored and evaluated. **There is a dangerously undemocratic myth that Government has to be protected from any legal suits at all costs**, that Government ought to be immune from legal suits especially in areas where such lawsuits involve governmental provision of services for their people. But it is at this point that we must recall that ***government is of the people, by the people and for the people.*** As such therefore, if and when people feel Government is not doing enough for them, then government action should be brought to question both through an electoral process and through judicial relief.

Finally, we repeat now what we said at the outset of this presentation. The **JCTR emphasises that constitutional matters relating to human rights are not simply political and legal, but they are profoundly ethical and moral.** As such, your deliberations here on inclusion of ESCR in the new Bill of Rights of the new Constitution must look intensely on the people you represent, the Zambian people, the majority of whom are at this moment impoverished and denied of the rights due their God-given human dignity.

May you take up this ethical and moral cause with clear head and strong heart. And may God bless you!