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**ZAMBIA'S ECONOMIC, SOCIAL AND
CULTURAL RIGHTS:
WHY SHOULD THEY BE IN THE NEW CONSTITUTION?**

by

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ZAMBIA'S ECONOMIC, SOCIAL AND CULTURAL RIGHTS: WHY SHOULD THEY BE IN THE NEW CONSTITUTION?

INTRODUCTION

There is an increasing demand from diverse sectors of the Zambian society today to incorporate Economic, Social and Cultural (ESC) rights into the Constitution currently under review. This raises very important questions, both ethical and constitutional. How the new Constitution might deal with ESC rights will have direct effects on human dignity and the capacity of every Zambian to grow in a healthy community.

But what are these rights? Why are they important for Zambia? What implications and obligations result from Zambia's previous ratification of international and regional covenants? Does Zambia have adequate resources to meet basic rights such as food, housing, clean water, education and health services?

Are these basic rights really achievable? How could they be claimed in Zambia? Are there specific lessons that can be drawn from a value framework that emphasizes human dignity, community, and special concern for the poor? Can we learn from the experience of other African States?

Because of the importance of these questions at this moment in time, the Jesuit Centre for Theological Reflection (JCTR) has prepared this *Policy Brief* both to throw light on the topic and to motivate action for justice. Our *Policy Brief* will address two key questions:

- First, why should these ESC rights be in the new Constitution?
- Second, how could they be included in the Bill of Rights with effective measures for implementation?

1. WHAT ARE ECONOMIC, SOCIAL AND CULTURAL RIGHTS?

Economic, Social and Cultural rights are those rights which mandate that social conditions be adequate for meeting physical, moral and biological requirements for every category of people. They aim at ensuring everyone's access to resources, opportunities and essentials for an adequate standard of living. Among the ESC rights most discussed in Zambia for the inclusion in the new Constitution's Bill of Rights are: the rights to education, health, food, safe water and sanitation, housing, employment, culture and a clean environment.

At the international level, ESC rights are provided for in the United Nations Universal Declaration of Human Rights, 1948; the International Covenant on Economic, Social and Cultural Rights, 1966. In Africa, ESC rights are defined in the African Charter on Human and Peoples' Rights, 1981. At the national level, ESC rights have been defined in the current Constitution as "policy directives" and are mentioned in other parts of national legislation.

2. WHY SHOULD ESC RIGHTS BE IN THE CONSTITUTION?

Realisation of ESC rights has direct implications for global and national development and has received increased public attention. One attempt to achieve improved global development has been the proclamation of the Millennium Development Goals (MDGs) by the United Nations in September 2000. These goals aim at positively addressing the crippling poverty and growing suffering that grips the world over. Member States such as Zambia have

committed themselves by 2015 to reduce by half extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria and other diseases; ensure environmental sustainability; and to develop partnership for development.

Moreover, the Zambian Government with the involvement of large numbers of citizens coordinated by Civil Society for Poverty Reduction (CSPR) prepared the Poverty Reduction Strategy Paper (PRSP) as a guide towards the attainment of MDGs. As a three year planning document (2002-2004), the PRSP seeks to address poverty reduction in areas such as health, education, gender, water and sanitation, agriculture and good governance.

These basic human requirements are central to meaningful development and poverty eradication. To ensure that 100% of all budgeted resources for poverty reduction programmes do in fact reach the intended beneficiaries, one appropriate legal mechanism is to enshrine basic ESC rights in our Bill of Rights. This would mean allocated funds would in effect be constitutionally “ring-fenced” or protected. (CSPR has submitted constitutional proposals to protect budgeted poverty funds.) Such funds could not be diverted for other purposes, as has often been the case in the past. This is an urgent necessity, because as CSPR notes commitment to poverty reduction is not only an issue of *resources* but also an issue of *priorities*.

If ESC rights are in the Bill of Rights, two results will occur. Firstly, the government will be obliged to make clear efforts to meet these basic needs. This will ensure accountability and transparency by the government in its preparation of the National Budget and in its distribution of the country’s resources. Thus it will act as a criterion for government to prioritise development. Secondly, citizens will have a right to seek legal redress if these rights are denied or infringed upon. Claims can be made in court that the government is not fulfilling its constitutional obligations.

Therefore, there is strong evidence that *development goals* ought to be understood as *basic human rights* and not mere *policy directives*. This can be realised if the ESC rights are in fact enshrined in the Bill of Rights of the Zambian Constitution.

3. DOES ZAMBIA HAVE OBLIGATIONS BECAUSE OF COVENANTS SIGNED?

Zambia is a signatory to the *Universal Declaration of Human Rights* (1948) and the *African Charter on Human and Peoples’ Rights* (1981). Moreover, Zambia has ratified the *Convention on Economic, Social and Cultural rights* in 1984; the *Convention on Elimination of All forms of Discrimination Against Women* in 1985; and the *Convention on the Rights of the Child* in 1990.

Zambia is also a signatory of a number of global declarations, including the *Education for All Declaration* (2000), and the ten commitments of the *Copenhagen Declaration* (1995). These ten commitments include, among others, the eradication of poverty and the promotion of full employment, social integration, human rights, gender equality and equity, adequate education for all, and access to universal primary health care. What can be said about Zambia’s obligation to these agreements?

On one hand, although these instruments do not constitute hard law and are, therefore, not directly binding in a legal sense, they are broadly recognized as establishing *standards* that are frequently invoked in connection with human rights issues. For example the Universal Declaration of Human Rights provides a framework for development of human rights policies.

On the other hand, every nation is expected to obey international law. Regardless of Zambia's Constitution or legal system, it cannot and should not use its domestic law as an excuse to breach an international agreement or violate an international rule, in this case the respect for ESC rights.

Therefore, it can be argued that the Zambian government, having ratified most of these instruments, has pledged to *recognize, observe* and to *fulfill* what is contained therein. One, as a signatory to these agreements, the government has a duty to work for the common good and general welfare of all citizens, to ensure that everyone is treated fairly and to provide balanced support to all. Two, the government has a responsibility to uphold human rights, to be committed to the promotion of basic human needs, and, given the available resources, to make them accessible by all over a period of time. Local and international co-operation and assistance should also be made available.

4. WHAT DOES THE CURRENT ZAMBIAN CONSTITUTION SAY?

In the Zambian Bill of Rights Part III, "Protection of Fundamental Rights and Freedoms of the Individual," ESC rights are not explicitly provided for. However, some of these rights covered in these principles are mentioned within Part IX, "Directive Principles of State Policy," in Article 112. This provides that government shall endeavour to provide: clean and safe water; equitable educational opportunities in all fields and at all levels; adequate medical and health facilities; decent shelter for all persons; and development of a person's culture, tradition, custom or language that is not inconsistent with the Constitution.

Article 111 of the same Part IX clearly states that the "Directive Principles of State Policy" shall not be *justiciable* or be legally enforceable in any court, tribunal or administrative institution or entity. This means Zambian citizens cannot go to a law court and sue the government on the grounds that their right to education, for example, has been denied.

However, as the Constitution stands, the State is expected only to *consider* these rights in formulating and implementing its policies relating to development, law reform and application of law – but only in so far as State resources are able to sustain their application, or if the general welfare of the public so unavoidably demands, as may be determined by Cabinet.

But questions still remain: for how long shall Zambia excuse itself from achieving these basic rights for its citizens? Is the status given to "Directive Principles of State Policy" a permanent solution? Several civil society organisations (CSOs), the general public and faith-based organisations have challenged the inadequacies in the Constitution with regard to the protection of ESC rights. A few examples can illustrate this point.

In November 2003, the Zambia Episcopal Conference (ZEC) noted in their pastoral letter on constitutional reform, "Let My People Go," that for our nation to meet the challenges of globalization, social and economic transitions, there is need to provide a clear set of guidelines on economic and social rights in the Bill of Rights. And one such right ZEC reaffirmed in their August 2004 letter, "Empowerment through Education," is the universal right to education for all children, young people and adults.

In September 2004, the Permanent Human Rights Commission in its submission to the Mung'omba Constitutional Review Commission (CRC) highlighted the pressing need to strengthen the scope of fundamental rights and freedoms in the next Constitution. It urged that the provision be made to include social and economic rights that have not been previously been explicitly guaranteed by the Constitution. Furthermore, it observed that the current enforcement mechanisms are inadequate or inefficient. Hence, there is clear need to

establish within the Judiciary a Constitutional Court and an Administrative Office to deal with issues like human rights and election petitions.

Similarly, the OASIS Forum's submission to the Mung'omba CRC in September 2004 recommended that the economic, social and cultural rights should be incorporated in the Bill of Rights. It also noted that women should have a right to equal treatment and opportunity to participate in the political, economic, social and cultural life of the nation.

The Women in Law and Development in Africa (WILDAF) draft report on "Minimum Standards Relating to Women and Children's Rights" (April 2004) observes in a similar fashion that the current Constitution does not recognize social and economic rights. WILDAF sees the exclusion of ESC rights from the Bill of Rights to be an anomaly because rights are inter-connected and indivisible and their inclusion would enable most women to gain economic independence.

Similar positions are being championed by the umbrella group of women's organisations in Zambia, the Non-Governmental Organisations' Coordinating Committee (NGOCC), in their nation-wide campaign to educate the general public in both urban and rural areas on the importance of ESC rights in the fight against poverty. Members of the NGOCC express their belief that enshrining in Zambia's Bill of Rights the ESC rights to health, education, and employment will contribute to the development of the nation and is crucial to fighting poverty. For these women's organisations, education for all is both a human right and a development necessity, for this ensures the elimination of gender disparities in primary and secondary education and consequently helps achieve gender equity and quality for all levels of education. Therefore, they demand the inclusion of ESC rights within the Bill of Rights.

It is clear, then, that the current state of affairs in which the Zambian Constitution has only "Directive Principles of State Policy" means that successful achievement of ESC rights is quite elusive because they are not enshrined in the Constitution in an enforceable character. Hence strong demands arise that stress a moral obligation for the government to consider enshrining ESC rights into the Bill of Rights. This means, of course, that the government must facilitate a Referendum Process to allow for the amendment of Part III (Bill of Rights) of the Constitution as demanded by Article 79(3).

5. WHAT QUESTIONS ARISE ABOUT PUTTING ESC RIGHTS IN THE CONSTITUTION?

As noted earlier, this debate over ESC rights has been necessitated by the non-justiciable character of the provisions in Part IX, article 111 of the current Constitution. Indeed, the political debate has been heightened because some high government officials have in recent months made strong comments such as, "Education is not a right, because it is not enshrined in the Constitution as a basic right," or "Zambians do not have a right to eat." Such statements are certainly confusing and disturbing because they imply that certain basic rights for full development of the person are not the urgent concerns of our democratic government.

The following are questions that must be addressed in discussing the inclusion of ESC rights in the Constitution:

APPLICATION

Three aspects are worth noting. One, *definition*: To what extent can ESC rights be fulfilled without legal inclusion within the Constitution? Two, *reasonableness*: Have advocates of inclusion exaggerated the benefits of making these rights legal? Is it within the capacity of

the State to provide access to these rights? Three, *resources*: Does the government have the financial capacity to deliver these basic needs? Who is held accountable for the provision of financial resources to improve living conditions in accordance with ESC rights?

CONSTITUTIONAL STATUS

What does domestication of international covenants and instruments imply for our country? Does it simply mean taking some pre-packaged articles and making them into Zambian law? How about the considerations of our prevailing situations? Is ratification of such commitments really enough to guarantee the fulfillment of ESC rights? Should in fact the new Constitution guarantee any of these rights in direct and explicit fashion?

LACK OF PUBLIC INTEREST LITIGATION

Do citizens or associations who may not be individually or directly affected by the actions of the government nevertheless hold the right to bring a complaint before the courts of law on behalf of those affected? This raises the very important legal question of "*locus standi*" which determines the ability to go to court with a complaint. For example, could a local Justice and Peace Committee sue the government because in its area there is very poor housing for most citizens?

CHALLENGES FROM PREVIOUS CONSTITUTIONS

Since Independence in 1964, Zambia has had four major constitutional changes. The 1964 Constitution emerged as a document of the Independence struggle; the 1972 Chona Commission enabled the introduction of a "One Party Participatory Democracy"; the 1991 Mvunga Commission re-introduced multiparty democracy; and finally the 1996 Mwanakatwe Commission, which was meant to effectively draft a Constitution that will stand the test of time. But the final elements of these Constitutions have not been embraced by all Zambians, for they were all considered to be the products of the ruling government. The current Mung'omba Commission may face the same problem of legitimacy if government insists to own the whole process of constitutional review and denies the popular demand for a Constituent Assembly.

DEBT SERVICING AND PROMOTION OF ESC RIGHTS

There is a clear conflict between Zambia's debt servicing and ESC rights obligation, for debt servicing diminishes government's resource capacity to provide basic social services while the ESC rights obligation implies increasing such funding. What can be done to address this situation where servicing debt has priority over the protection of ESC rights? Is donor aid impeding or facilitating recognition and realisation of ESC rights? How can Zambia, which is hard-pressed for resources, meet basic needs to its citizens in view of the current debt overhang that continues to consume resources? (The controversial and elusive HIPC offers only partial debt relief.)

6. HOW CAN WE BUILD SOCIETY'S PARTICIPATION?

In order to have a durable Constitution understood by the majority of Zambian citizens, there is need for effective popular mobilisation. Lobbying and advocating for ESC rights should aim at arousing public interest. Inevitably people need to begin asking questions such as: Why don't we have these rights in our Constitution? What kind of rights do we want in the Bill of Rights? How can we seek legal redress if these rights are violated? What difference would these rights make in our lives? Other aspects worthy of consideration are:

INCLUSIVENESS: All the citizens of Zambia should as much as possible be part of the whole process from its beginning to completion. A good Constitution is one that is broad based, inclusive, open and allows every citizen to participate in its building process. There is a moral demand that involvement should not be an option, preserve or monopoly of a few. Hence, there is need for public debates at all levels of society and the instruments of Constituent Assembly and Referendum.

OWNERSHIP: An inclusive constitution-making process enhances wide participation at grass-root levels, and ensures that people pledge to support its contents as committed stakeholders. Furthermore, citizens become proud of it, own it and are ready to defend its cause because it truly reflects a fundamental national consensus. Therefore ESC rights claims must also be owned and championed by the people who are the ultimate custodians of the laws of the land.

SENSITISATION CAMPAIGN: Sensitisation to all issues surrounding constitution-making lies at the foundation of active participation in the debates around what is to be included in the Bill of Rights. It is also evident that Constitution changes are much more than revising inadequate words on paper, but rather changing the mentality and value systems of the people. Good civic education is necessary because a society that is aware of its basic rights is able to challenge the status quo of continual deprivation of these rights and is also ready to stand together in fighting for the enshrinement of these rights in the Bill of Rights.

COLLABORATIVE ADVOCACY: The Government, the Church and the Civil Society have a responsibility to engage in a wide campaign of disseminating information on ESC rights to reach all the corners of the country. Advocacy through organised national, district and local discussions must be a priority. To ensure that ESC rights are included in the Constitution and are effectively implemented, there is need:

- to strengthen sharing of information and advice with Members of Parliament, in order to persuade politicians in both ruling and opposition parties join this campaign;
- to strengthen popular in-put into the government budget, that would include preparing and publicising “alternative” or “parallel” budgets that emphasise implementation of the PRSP and the MDGs priorities;
- to strengthen working relationships with the Judiciary, the Permanent Human Rights Commission and members of the Public Service in efforts aimed at monitoring human rights violations;
- to closely work with the media, Trade Unions and educational institutions to inform the public about ESC rights; central to this effort must be translation of materials into local languages.

7. WHAT ARE THE ETHICAL AND VALUE ISSUES?

It should be clear from what this JCTR *Policy Brief* has argued so far that inclusion of ESC rights in the Constitution is not simply an economic or political issue, but it is a profoundly *moral* issue. We can be helped to examine this aspect of the debate by taking note of the value-added dimension of policy analysis that the Churches’ Social Teaching (CST) offers. The Church’s emphasis on human rights arises from its concern for the dignity of every human person.

For the CST, full enjoyment of ESC rights increases the capacity of each person to meet the basic needs and amenities necessary for a meaningful life. As such, every one is considered to have both a right and a duty to participate in the full range of activities and institutions of social life. But this is possible only in an environment that promotes policies sensitive to:

INTEGRAL DEVELOPMENT: that embraces the full social, cultural, political and spiritual dimensions of the person. Development is transition from less human conditions to conditions that are more human, where there are assurances of good health, fixed employment, better education and proper food security.

SOLIDARITY: that expresses the interdependence of people in effective relationships. No one person can realise full potential or appreciate the full meaning of human dignity unless that person shares life with others and cooperates on projects that hold the promise of mutual benefit.

SPECIAL CONCERN FOR THE POOR: or what is commonly called the “option for the poor.” This means that all programmes and policies – as well as personal actions – should have as one of their necessary criteria for evaluation the question: “What is the impact on the poor?” Pro-poor orientations must be a priority.

COMMON GOOD: that enables social conditions wherein each person both benefits from and contributes to the fullness of life. This means, for example, that when people are without a chance to earn a living, are hungry or are homeless, they are being denied their basic rights and the promotion of the common good is being blocked.

8. ARE THERE PRECEDENTS ZAMBIA CAN LEARN FROM?

Serious comparative study of what is contained in various Constitutions is vital in any constitution-making process. What kinds of ESC rights do we want? How should they be formulated? What categories of rights do we need to include or exclude? Since rights are not really for writing but for claiming, what kind of enforcement mechanism do we need?

Zambia can learn from precedents set by countries like South Africa. The South African Constitution contains ESC rights and allows citizens to have legal redress for the protection of these rights. That is, it gives aggrieved citizens access to recourse through the courts of law.

ESC rights in the South African Constitution are regarded as rights of "progressive realisation," that is, they should be gradually realised. But different rights are formulated differently. For example, Section 26, which provides for the right to housing and Section 27, which provides for access to health care, food, water and social security have been formulated in terms of the "rights of access." This means that in order to realise these rights the "State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights." However, sections 25 and 29, which provide for the right to property and the right to education respectively are considered "full-blown" unqualified rights.

Since 1996, when the new South African Constitution came into effect, at least four cases on socio-economic rights have been brought before a specially established Constitutional Court. Out of these, the Constitutional Court has ruled in favour of the claimants of the rights, essentially ordering government to provide for these rights or to take "reasonable measures" towards realising these rights.

Two outstanding and frequently cited examples are: One, the October 2000 case of *Grootboom versus Oostenberg Municipality and Others*. This dealt with housing and land rights as positive obligations. Homeless claimants argued that they had a right that the government was ignoring. As a remedy, the Constitutional Court ordered the State to provide

relief for those desperate people who had not been catered for in the State housing programme.

Two, the 2002 case of *TAC versus the Minister of Health* dealing with health rights as a positive obligation was brought before the Constitutional Court. The applicants sought to compel the South African government and its relevant agencies to allow the provision of anti-retroviral drugs, Nevirapine or AZT, to all HIV-positive pregnant women in order to prevent mother-to-child HIV transmission. It was argued that confining the use of Nevirapine to research and training sites could not be regarded as reasonable and thus constituted a violation of the constitutional right to access adequate health care.

In its judgement, the Court noted that while it is impossible to give everyone access to a “core” service immediately, the State’s policy not to make Nevirapine available at hospitals and clinics other than the research and training sites was unreasonable and, therefore, fell short of meeting its obligation to devise and implement within its available resources a comprehensive and coordinated programme. As a remedy, the Court ordered that the State act “without delay” to provide Nevirapine in public hospitals and clinics when this is medically indicated and to take reasonable measures to provide testing and counseling facilities.

It is clear that Zambia can learn several things from the South African precedents. The first is to put ESC rights and remedies clearly in the Constitution. Then there is the need to broaden the legal definition of “*locus standi*” to include these categories of claimants: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members. Moreover, the enforcement mechanism for ESC rights must be established by including within the Judiciary a special Constitutional Court.

9. WHAT CONCLUSIONS CAN WE DRAW?

The foregoing discussion has endeavoured to show that the demand for the inclusion of ESC rights in the Bill of Rights of the Zambian Constitution:

- Is not a new experience. Efforts to have these rights in our Constitution have in the past until now been part of the lobbying and advocating campaign as witnessed by peoples' submissions to the Mvunga Commission, and more extensively during the Mwanakatwe Commission and the current Mung’omba Commission;
- Is not the sole responsibility of civil society organisations and the Church. All the struggles are meant to make sure that the process of constitution-making is broad, inclusive and participatory, so that the new Constitution “stands the test of time”;
- Is the wish of the people of Zambia to have their basic rights protected, since Part IX of the current Constitution, “Directive Principles of State Policy,” has clearly failed to meet their basic needs;
- Is a realistic demand and one that is possible to achieve since there are very good precedents for such constitutional provisions, for example, in the Constitution of South Africa.

10. WHAT IS THE WAY FORWARD FOR POLICY?

In view of the above discussion, the JCTR makes the following *policy recommendations* as major initiatives that can and should be immediately undertaken:

- A coordinated civic education campaign should be launched by civil society and Church groups to help Zambian citizens understand the meaning of Economic, Social and Cultural (ESC) rights and the necessity and possibility of including these rights in the new Constitution.
- Special attention should be paid by civil society and Church groups to the ESC rights of women in order to assure that gender issues are adequately dealt with in the current Constitutional review.
- The Permanent Human Rights Commission should undertake a study of how the Constitution can effectively include ESC rights and how a Constitutional Court can be established (following the precedent, for example, of South Africa).
- The Government should firmly commit itself to a Constituent Assembly and a Referendum, in order that ESC rights can be included in the new Constitution.
- The new Constitution of Zambia should widen the scope and regime of rights and freedoms in the Bill of Rights to include issues that have become very important in recent years, especially ESC rights as required by an open and democratic society.

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For fuller explanation of the ESC rights discussion, a Research Report is also available at JCTR Offices.