



Economic, Cultural and Social Rights

A Knowledge Product for Zambian Policy Makers

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Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
ANC	African National Congress (South Africa)
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CKRC	Constitution of Kenya Review Commission
COMESA	Common Market for Eastern and Southern Africa
CPR	Civil and Political Rights
CRC	Convention on the Rights of the Child
ECOSOC	United Nations Economic and Social Council
ESCR	Economic, social and cultural rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MP	Member of Parliament
NGO	Nongovernment Organisation
NP	National Party (South Africa)
OAU	Organization of African Unity
OP	Optional Protocol
SADC	South African Development Community
SNDP	Sixth National Development Plan
UDHR	Universal Declaration of Human Rights
UN	United Nations
USAID	United States Agency for International Development
WHO	World Health Organisation

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1. Introduction

The purpose of this knowledge product is to give an overview of economic, social and cultural (ESC) rights, especially as they relate to the Zambian context. Although Zambia ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 10 April 1984, none of these rights are currently provided for in the legally enforceable section of the Zambian Constitution. Under the 1996 Constitution, ESC rights do not form part of the Bill of Rights; but rather are included as Directives of State Policy, which explicitly are not legally enforceable.

Zambia is currently undergoing a process of constitutional review that is likely to change this. Many groups in Zambia have been arguing for the inclusion of ESC rights over a long period of time. After a thorough national consultative process that has included the input of groups and individuals from across the country, the Draft Constitution's Bill of Rights has been broadened and now contains ESC rights. Including these in the Bill of Rights makes them directly enforceable constitutional rights, which creates new obligations on the State. Parliament is specifically tasked with passing legislation to ensure these rights can be realised in practice. The Draft Constitution also states that ESC rights will be legally enforceable in courts, including a newly created Constitutional Court. These new provisions represent a major change for Zambia and have important implications for lawmakers.

This knowledge product will serve as a comprehensive primer on economic, cultural and social rights. It will be used both as a teaching aid during expert-led seminars for Members of Parliament (MPs) and as a valuable resource for MPs and others. It can be used to inform their engagement with this and any future constitutional review processes, as well as a guide for creating and implementing new laws and policies under the new Constitution.

The manual examines the evolution of ESC rights in international law, and regionally in the African context; the international and regional norms currently applicable to Zambia; current provisions in Zambian law that provide for ESC rights; provisions in the Draft Constitution and the potential role of the new Constitutional Court; the various types of ESC rights and how they are applied in practice, including the concept of progressive realisation; and the justiciability and enforceability of ESC rights. The manual also includes comparative regional case studies from South Africa and Kenya, examining the processes that these countries have gone through to create constitutionally enforceable ESC rights and their experiences in applying those rights. It then provides suggestions for activities that MPs can undertake to promote the application of social, economic and cultural rights in Zambia.

2. International Provisions on Economic, Social and Cultural Rights

Background

In the wake of World War II and three years after the creation of the United Nations (UN), on 10 December 1948, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR), the first international declaration of human rights principles recognising that human rights and fundamental freedoms apply to everyone, everywhere. The UDHR is considered the global standard for human rights. It is the basis of more than 60 treaties, and many countries have included human rights modelled on the UDHR in their national constitutions and laws. The UDHR has 30 articles that cover a wide range of political, social, cultural and economic rights, including the rights to:

- Freedom from discrimination of any kind based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status
- Life, liberty, and security of person
- Equal protection of the law and right to legal remedy for violations of rights
- Freedom of expression, peaceful assembly, association, religious belief, and movement
- Protections from slavery, arbitrary detention, imprisonment without fair trial, and invasion of privacy
- Right to participate in government
- Right to own property

[The above are generally considered **civil and political rights**]

- Right to marry freely and have equal say in marriage
- Right to economic, social and cultural rights necessary to live in dignity
- Right to education, healthcare, and social services, with special rights to motherhood and children
- Right to adequate standard of living
- Right to work and equal pay
- Right to join trade unions
- Right to rest and leisure and to participate in cultural life

[These are generally considered **economic, social and cultural rights**]

International Bill of Rights

After the adoption of the UDHR, the UN Commission on Human Rights set about drafting agreements on the specific political, civil, and socio-economic rights set out in the UDHR in order to make them legally enforceable - meaning that states would be obligated to take steps to ensure the rights of individuals were respected, protected and fulfilled in practice. These steps include enacting appropriate legislation and providing for remedies (for instance, for cases to be heard in domestic courts). States would be held accountable by UN treaty monitoring bodies if they failed these obligations.¹

The original idea was for all of the rights to be contained in a single International Bill of Rights. However, there was much debate among the UN Member States about whether ESC rights could actually be

¹ The UDHR, although universally accepted, is a declaration, and not a treaty, and thus is not legally enforceable.

enforceable upon states. The debate was fuelled largely by the ideology of the Cold War. Western States believed that socio-economic rights were different from political and civil rights. They gave priority to civil and political (CP) rights, which they viewed as integral to the foundation of liberty and democracy. They argued that, as opposed to civil and political rights, ESC rights are ideals to be attained, rather than actual rights to be ensured by the state; that enforcement of ESC rights is difficult and costly and thus dependent on state resources; and that enforcement involves making policy decisions that are not within the realm of the judiciary.

Socialist countries on the other hand made strong arguments for the equal treatment of ESC rights with civil and political rights. These states associated ESC rights with the aims of a socialist society. They argued that ESC rights were a critical part of obtaining CP rights; that ESC rights were easily defined; and that the state had an obligation to ensure such rights, focusing on the role of the government rather than the judiciary.

In the end, the Western arguments won out and two separate treaties were adopted in 1966: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These, together with the UDHR, form the **International Bill of Rights**.

International Covenant on Economic, Social and Cultural Rights (ICESCR)

The International Covenant on Economic, Social and Cultural Rights (ICESCR) commits states to work toward achieving economic, social, and cultural rights for individuals. Zambia ratified ICESCR on 10 April 1984. It is thus obligated to take measures to realise ESC rights for the people of Zambia, including by enacting laws to ensure these rights. ICESCR requires states to take steps to the maximum extent of their available resources to achieve progressively the full realisation of economic, social and cultural rights. (The concept of progressive realisation will be discussed in detail in Section V.) It also requires states to guarantee the enjoyment of ESC rights without discrimination and to ensure the equal right of men and women to the enjoyment of these rights.

In terms of human rights obligations, states generally have three obligations:

1. **Respect:** To refrain from interfering with the enjoyment of the right
2. **Protect:** To prevent others from interfering with the right
3. **Fulfil:** To adopt appropriate measures towards the full realisation of the right

Enforcement

Treaties generally establish bodies and procedures to monitor states' implementation of and compliance with the treaty. Some UN treaties include procedures for specialised committees to receive and investigate complaints against states regarding violations and decide what action a state should take – or stop taking – in order to remedy a violation. Other treaties only include reporting procedures, under which states must periodically report their implementation. If the UN body receiving the complaint finds that the state is not fully complying with its obligations, it can initiate discussions with the state and relevant parties and make recommendations. Although these treaty-monitoring bodies may lack the ability to directly enforce their decisions or recommendations, states will often comply either out of a sense of obligation, because of diplomatic efforts, or because there is a threat of shame if they do not.

While the ICCPR established a new Human Rights Committee and provided a mechanism for states to complain when rights violations occurred, plus an Optional Protocol which allowed for individuals or groups to bring complaints, the ICESCR did not; rather, states were only mandated to report on their

compliance to the UN Economic and Social Council (ECOSOC).² Put another way, civil and political rights had an enforcement mechanism at the international level, while economic, social and cultural rights did not.

This situation changed in 2008 when, due to the evolution of thinking around ESC rights and international recognition of their importance, the UN General Assembly adopted an Optional Protocol to ICESCR, which came into force on 5 May 2013. The protocol allows for complaints regarding violations of ESC rights to be submitted by or on behalf of individuals or groups to the Committee on Economic, Social and Cultural Rights (CESR). The Optional Protocol also allows CESR to hear complaints between states and to initiate investigations into grave or systemic violations. As of the end of 2013, 45 countries have signed the Optional Protocol and 11 have ratified it. Zambia has not yet signed on.

Note: International and regional courts are generally considered courts of “last resort.” That means that a state, group or individual claiming a violation must go through channels in their own country first to resolve the issue. When that does not work – for instance when the state or court is slow or refuses to act on the claim, or there is no adequate law or remedy for the violation, an international or regional body can hear the claim.

Current Trends in Economic, Social and Cultural Rights

Although historically ESC rights were considered less important than civil and political rights, the distinction between the two types of rights has substantially morphed over time. Emerging trends in international human rights discourse strongly affirm that ESC rights are of equal importance to civil and political rights, and that the two categories of rights are interdependent; one type of right cannot be meaningfully enjoyed without the other. For instance, the rights to life and dignity are not fulfilled if people do not have access to adequate education, health care, housing or food; people cannot participate politically and civically if they do not have their basic needs met or if they cannot read or write; people cannot enjoy equal protection of the law if they cannot access courts because of costs, distance or discriminatory systems. This interdependency has been reflected in more recent international human rights instruments – including the Convention on the Rights of All Forms of Elimination of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD) – which have integrated all types of rights into single texts.

Opponents of ESC rights have argued at length that their equal status with CP rights is not tenable because their full realisation would cost the state too much money. In recent years, however, the argument that implementation of ESC rights costs too much has also been countered. Proponents have pointed out that civil and political rights also cost a substantial amount because they require, for instance, functioning court systems, prisons, free legal aid, election systems etc. On the contrary, some ESC rights have no costs associated with them, but rather require that the state refrain from taking action; for instance, the principle that the state not interfere with individuals’ rights to join trade unions.

Another common criticism has been that ESC rights are vague or unclear. While it may be true that ESC rights are not always clearly defined in treaties or constitutions, the same can be said of civil and political rights. Furthermore, recent developments in international, regional and national laws and jurisprudence have increasingly defined these rights and given insight into how governments can guarantee them and how courts might enforce them.

² ECOSOC subsequently established the Committee on Economic, Social and Cultural Rights to receive reports.

Socio-economic rights hold special importance for developing countries. Guaranteeing ESC rights is often a critical part of efforts to reverse historical injustices and promoting development by addressing poverty and inequality. It is now generally believed that the groups made vulnerable by social exclusion and inequality are best protected through the effective implementation of ESC rights and the right to development in addition to civil and political rights.³

3. Regional Provisions on Economic, Social and Cultural Rights

The development of ESC rights by regional and sub-regional bodies in Africa is evidence of the critical role these rights are playing in furthering the development of countries on the continent and the particular contexts in which they are important. Zambia is a member of several regional and sub-regional communities whose treaties create economic, social and cultural rights obligations. In this section, we examine some of the most important regional provisions affecting Zambia.

The African Union

The African Union (AU) has a human rights system in place that characterises specific African values such as the prominence of socio-economic rights.⁴

The original Organization for African Unity (OAU) came into existence in 1963, during the struggle for independence of many states on the African continent. Because it was founded during the fight for freedom and justice, human rights became an integral part of the OAU system. The colonial powers had completely disregarded human rights and oppressed and exploited native cultures, leaving behind vast poverty, inequalities and social injustices. In addition, during the post-independence period of the 1960s and 1970s many countries such as Uganda, Malawi, Central African Republic and Ethiopia were under the rule of brutal dictators that committed severe human rights abuses. South Africa suffered under the inhuman system of apartheid.

The establishment of a human rights system was thus the product of a concerted struggle against the prevailing political, social, economic and cultural conditions on the continent after colonialism. In this regard, human rights in Africa are as much about economic, social and cultural rights as they are about civil and political rights.

The **African Charter on Human and Peoples' Rights (African Charter)**, adopted in 1981, provided the first explicit recognition of development as a right. It is the only regional instrument that incorporates economic, social and cultural rights equally with civil and political rights and subjects all of them to a complaint procedure. Its preamble specifically affirms the equality and interdependence of all human rights, stating: "Civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality." The African Charter includes the rights to:

- Work and equal pay
- Physical and mental health

³ UN Declaration on the Right to Development, UN General Assembly Resolution 41/126, 1986.

⁴ African Court of Human and Peoples' Rights, *Sources of Law*, at <http://www.african-court.org/en/index.php/documents-legal-instruments/sources-of-law>

- Education
- Participation in cultural life
- Protection of family
- Protection and promotion of the rights of women, children and elderly
- Pursuit of economic and social development
- Freely dispose of wealth and natural resources and freedom from economic exploitation

The African Charter is even more progressive than international law in that it does not subject ESC rights to any limitations, and it obligates states parties to implement ESC rights without the progressive approach envisaged in ICESCR.

The **2000 Constitutive Act of the African Union**, which replaced the OAU, provides Africa with a legal framework for the protection and promotion of *all* human rights, including ESC rights. It has among its objectives:

- To promote and protect human and peoples' rights in accordance with the African Charter on Human Peoples' Rights and other relevant human rights instruments.
- To promote sustainable development at the economic, social and cultural levels as well as the integration of African economies.
- To promote cooperation in all fields of human activity to raise the living standards of African peoples.

ESC rights are thus clearly imperative to the African Union's objectives.

Additionally, the AU's **2004 Declaration on Economic, Social and Cultural Rights in Africa** is an excellent statement on the interrelation of all types of rights, the commitments of governments with regards to ESC rights, and the benefits and challenges of these rights. The Declaration:

- Stresses the indivisibility, interdependence and universality of all human rights.
- Reflects concern regarding on-going conflicts on the continent, which impedes the realisation of ESC rights.
- Reflects concern regarding the lack of human security due to poverty and under-development, and the failure to address poverty through development.
- Recognises the urgent need for human rights, judicial and administrative institutions to promote human dignity and address core human rights issues facing Africans including food security, sustainable livelihoods, human survival and prevention of violence.
- Highlights the core contents of ESC rights outlined in the African Charter.
- Highlights the need to incorporate human rights into development planning and implementation for the full realisation of both rights and development.

The African Union has also passed other treaties related to ESC rights including the African Charter on the Rights and Welfare of the Child; the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol); Convention on the Conservation of Nature and Natural Resources; and the OAU Convention Governing the Specific Aspects of Refugees in Africa.

Enforcement

Anyone may bring a complaint to the attention of the African Commission on Human and Peoples' Rights alleging that a state party to the African Charter on Human and Peoples' Rights has violated one

or more of the rights contained therein. In addition, the African Court on Human and Peoples' Rights, which began operations in 2006, complements and reinforces the functions of the African Commission on Human and Peoples' Rights. It began operations in 2006. To date only 26 states are parties. Zambia has signed but not yet ratified the Court's protocol and thus is not yet a part of the Court.

The *SERAC* Case

In 2001, a landmark decision of the African Commission on Human and Peoples' Rights demonstrated the AU's commitment to economic, social and cultural rights and illustrated the importance of these rights in the African context.

The case was brought on behalf of the Ogoni people against the Nigerian government. It alleged violation of various ESC rights including the rights to life, health, healthy environment, property, housing, food and protection of the family. The government was accused of failure to regulate oil companies' exploitation of oil in the Ogoniland region of Nigeria, which had caused environmental degradation and health problems for the local population. (The companies involved were the State-owned National Nigerian Petroleum Company and Shell Petroleum Development Corporation.) The companies dumped toxic wastes into the local environment and waterways causing serious health problems. In addition, it was alleged that state security forces aided the oil companies and carried out brutal attacks on the Ogoni people, including the burning and destruction of homes and crops, and the killing of people and livestock.

The Commission found that, in failing to regulate the oil companies and permitting its security forces to engage in acts of terrorism and destruction, the Nigerian government failed to protect the Ogoni people and violated their rights to health; a clean environment; life; housing; family protection; food; and to economic, social and cultural development. The Commission appealed to the Nigerian government to ensure the protection of the environment, health and livelihood of the Ogoni through measures including conducting investigations into rights violations and ensuring adequate compensation to victims; conducting appropriate environmental and social impact assessments for future oil development; and providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations. It also urged the Nigerian government to keep the Commission informed of progress of institutions mandated to respond to environmental and human rights issues in Ogoniland.

Due to the lack of an effective mechanism for enforcing the Commission's recommendations, the Government of Nigeria has not complied with the decision and thus it has had little concrete impact on the community. However, the case has had major influence on the development of ESC rights jurisprudence in the region. It was the first claim before an international human rights monitoring body directly addressing economic, cultural and social rights. Its decision, rooted in the rights provided by the African Charter, proved that a tribunal could decide violations of ESC rights.⁵

⁵ *SERAC and CESR v. Nigeria*, Communication No. 155/96, 13-27 October 2001.

Southern African Development Community (SADC)

The Southern African Development Community (SADC) is a community of 15 states aimed at economic well-being, improvement of the standards of living and quality of life, freedom and social justice and peace and security for the peoples of Southern Africa.⁶

The objectives outlined in Article 5 of the **SADC Treaty**, which is binding on all Member States, include the achievement of development and economic growth; the alleviation of poverty; the enhancement of the standard and quality of life; support of the socially disadvantaged through regional integration; the promotion and defence of peace and security; promoting and maximizing productive employment; self-sufficient development; and achieving the sustainable utilisation of natural resources and effective protection of the environment.

The **SADC Protocols** are the instruments through which the SADC Treaty is implemented. They have the same legal force as the Treaty itself, meaning that states are obligated to follow them. Protocols related to economic, social and cultural rights include:

- **Gender and Development:** To provide for the empowerment of women and to eliminate discrimination and achieve gender equality by encouraging and harmonising the development and implementation of gender related legislation, policies, programmes and projects.
- **Education and Training:** To develop harmonised and eventually standardised policies regarding education and training for more effective education.
- **Culture Information and Sports:** To enhance a regional identity in diversity and the right of access to information and participation in the areas of culture, information and sport by all citizens.
- **Health:** To coordinate regional efforts on preparedness, prevention, control and where possible the eradication of communicable and non-communicable diseases, and to develop common strategies to address the health needs of women, children and vulnerable groups.
- Various protocols related to environment and resources in order to support economic growth, alleviate poverty, safeguard livelihoods and improve standards of living, including: **Energy, Fisheries, Forestry and Mining.**

Other SADC instruments related to ESC rights include the Charter of Fundamental and Social Rights in SADC (which covers employment and labour rights); the Declaration on Agriculture and Food Security; and the Declaration on HIV and AIDS.

Enforcement

The SADC Tribunal began operations in 2005 in Windhoek, Namibia. The landmark 2008 case *Mike Campbell (PVT) Limited & Another v The Republic of Zimbabwe* compelled the Tribunal to rule on a dispute concerning human rights, the rule of law and democracy in order to ensure adherence to Article 4 of the SADC Treaty. The tribunal stated:

Article 4 (c) of the Treaty obliges Member States of SADC to respect principle of “human rights, democracy and the rule of law” and to undertake under Article 6 (1) of the Treaty “to refrain from taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the

⁶ SADC website, at <http://www.sadc.int/about-sadc/overview/sadc-vision/>.

Treaty.” Consequently, Member States of SADC, including the Respondent, are under a legal obligation to respect, protect and promote... fundamental rights.

Although this case did not directly involve ESC rights, it can be inferred from the Court’s statement that human rights, including ESC rights, must be protected, in order to carry out the objectives of the SADC as listed under Section 5 of the Treaty.

The Tribunal ruled against Government of Zimbabwe for taking farms of whites without compensation in breach of the SADC treaty Articles 4(c) and 6(2) of the SADC Treaty, finding that the applicants had been denied access to the courts in Zimbabwe; the applicants had been discriminated against on the ground of race; and fair compensation was payable to the applicants for their lands compulsorily acquired by the Republic of Zimbabwe. In considering the question of discrimination, the Tribunal referred to several international instruments including ICESCR and the African Charter on Human and Peoples’ Rights as well as specific comments of the UN Committee on Economic, Cultural and Social Rights CESR regarding discrimination.

Zimbabwe refused to accept the judgment and in 2012 the Tribunal was disbanded completely, leaving the SADC without any enforcement mechanism. However, adhering to the principles outlined in the SADC Treaty and Protocols is important in achieving the aims of the SADC to improve the lives of people in Southern Africa.

The Common Market for Eastern and Southern Africa (COMESA)

The Common Market for Eastern and Southern Africa (COMESA), based in Lusaka, focuses on regional integration in all fields of development. Although COMESA’s main focus is economic development, human rights were included in its treaty because they were considered critical to achieving sustainable development. Some of COMESA’s fundamental principles as outlined in Article 6 of its treaty include the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights; accountability, economic justice and popular participation and development; and the recognition and observance of the rule of law; amongst others.

COMESA treaty provisions that relate to ESC rights include:

- Cooperation on health matters: illustrates the importance of health for economic development.
- Standardisation and quality assurance: recognises the importance of standardisation and quality assurance in goods for the promotion of health, the enhancement of the standard of living, and in the protection of life, property, and the environment.
- Cooperation in development of science and technology: recognises the fundamental importance of science in socio-economic and cultural development and technological progress.
- Cooperation in rural development, which involves various ESC rights such as:
 - Improved water supply
 - Health services
 - Improved nutrition
 - Educational services
- Cooperation in social affairs, which includes:
 - Employment and working conditions
 - Labour laws
 - Vocational training and eradication of illiteracy
 - Cultural and sporting exchanges

- Prevention of occupational accidents and diseases
- Provision of facilities for people with disabilities
- Right of association and collective bargaining between employers and workers
- Cooperation on agricultural and agro-industrial development with a focus on employment and improved living conditions for people in the least developed areas

COMESA also has a Gender Policy and Agricultural Policy that address ESC rights.

Enforcement

The COMESA Court of Justice, established in 1994, decides claims arising under the Treaty to ensure that the Treaty's goals and objectives are enforced. The Court can hear claims from member states, individuals or corporations alleging violations of the Treaty by either the COMESA Council or a member state. The COMESA Secretary General, with approval of the Council, can also bring a member state before the Court for failure to fulfil its Treaty obligations. The Court can also receive requests from national courts for clarification of matters concerning the Treaty. Under the Treaty, the Court's decisions have precedence over decisions of national courts, and member states must take measures "without delay" to implement the court's judgments.

Due to lack of funding, the Court only sits for one session per year. The Court's decisions, at least as far as those made publicly available, have not yet involved rights violations.

4. Domestic Provisions Related to Economic, Social and Cultural Rights

Although Zambia's current Constitution does not provide for legally enforceable socio-economic rights, there are certain provisions in the country's legal system that relate to ESC rights. This section will examine applicable provisions in the current Constitution, laws and policies that relate to these rights as well as the provisions that may be enacted under the new Draft Constitution.

1996 Constitution

Under Zambia's 1996 Constitution, economic, social and rights are included as Directives of State Policy, which are explicitly *not* legally enforceable by any court, tribunal, or administrative institution; but rather are principles to guide the State in the setting of laws and policies. According to these, the State shall "endeavour" to create conditions for:

- Self-reliance and promoting investment
- Adequate means of livelihood and employment opportunity
- Clean and safe water
- Adequate medical and health facilities
- Decent shelter
- Equal and adequate educational opportunities
- Social benefits especially for people with disabilities, the elderly and other disadvantaged groups
- Practice of culture, tradition, custom and language
- Clean and healthy environment
- Sustainable management of natural resources
- Fair labour practices and safe and healthy working conditions

Zambia has been slowly enacting legislation related to these Directives, however laws need to be strengthened in many areas and enforcement has been an issue. This is a direct result of making them not legally enforceable rights.

Claims of Violations of Economic, Social and Cultural Rights under Current Zambian Law

Kingaipe et al. v Attorney-General: The first legal challenge relating to economic, social and cultural rights was recently decided by the High Court in Livingstone. Two members of the Zambian Air Force alleged discrimination and violations of the rights to health and education, amongst other things, because they had been subjected to HIV testing without their consent, given drugs without counselling and dismissed from the ZAF based on their HIV positive status. The Court said it would not address the rights to health and education because they fell under the Directive Principles of the Constitution and were not legally enforceable by the Court. It did find that the HIV testing without consent was a violation of the men's constitutional rights to privacy and to be free from inhuman and degrading treatment. The Court ordered the State to pay them damages for mental anguish and emotional distress. (It did not, however, order reinstatement because it found that the dismissal was based on the men's medical condition as it affected their ability to work, and not their HIV status.)

Mwanza and Another v. Attorney General: Southern African Litigation Centre and Legal Resources Foundation have brought a case challenging the right of HIV positive prisoners on treatment to adequate food. The High Court in Lusaka has heard arguments and a decision is expected in January 2014. Arguments were made based on the Constitution, Directive Principles, and ICESCR.

The Constitution does include some provisions related to ESC rights that are legally enforceable under Part III on the Protection of Fundamental Rights and Freedom of the Individual:

- Article 16 of the Constitution protects the right to own property, which is critical for socio-economic development as it relates to livelihood and food security.
- Article 21 provides for the right to assembly, including the right to form or belong to a trade union or other association.
- Article 23 prohibits discrimination on grounds of race, tribe, sex, place of origin, marital status, political opinions, colour or creed, which would include in socio-economic contexts, for instance in employment. However, the same article also makes several exceptions, and thus still allows for discrimination in family law and customary law and against non-citizens.
- Article 24 protects youth (anyone under the age of 15) from exploitation, including:
 - Prohibition on employment that would harm their health or education, or interfere with their physical, mental or moral development
 - Protection against physical or mental ill-treatment, all forms of neglect, cruelty or exploitation
 - Prohibition against trafficking

Legislation

Zambia is a State Party to the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights, which both require it to take measures including enacting laws to ensure that its citizens can fully enjoy their socio-economic rights. Some laws have been enacted in this area. Listed below are current laws that relate to ESC rights.

Employment

- Employment Act, Chapter 268 (1965): Regulates employment contracts and contains provisions regarding payment of wages; holidays; maternity leave; provision of water and housing under certain circumstances; and the employment of minors.
- Industrial and Labour Relations Act, Chapter 269 (1993): Addresses the right to join trade unions and create federations of trade unions.
- Workers Compensation Act, Chapter 271 (1964): Provides compensation for employment related accidents.
- Minimum Wages and Conditions of Employment Act, Chapter 276 (1982): Sets minimum wages for categories of employment; guarantees sick leave; and regulates hours of work and leave.
- Factories Act, Chapter 441 (1967): Regulates conditions of employment in factories and other places as regards safety, health and welfare.
- Technical Education, Vocational and Entrepreneurship Act (1998): Provides for the establishment of government institutions of technical education, vocational and entrepreneurship training.
- Pension Scheme Regulation Act, Chapter 255 (1996): Provides for a compulsory pension scheme for all those in formal employment.
- Occupational Health and Safety Act (2010): Establishes the Occupational Health and Safety Institute and provides for safety in the workplace.

Health

- Public Health Act, Chapter 295 (1930): Provides for the prevention of diseases and regulates matters relating to public health. Creates some responsibility for local governments to keep water clean.
- Tropical Diseases Research Centre Act, Chapter 301 (1984): Provides for the conduct of research and training in tropical diseases and the support of research programmes relating to disease control and primary health care.
- Mental Disorders Act, Chapter 305 (1949): Provides for the care of persons suffering from mental disorders or mental defects and provides for the custody and detention of such persons under court order or police action.
- National Health Services Act, Chapter 315 (1995): Provides for the establishment of the Central Board of Health and Management Boards for hospitals and health services.
- Medicines and Allied Substances Act (2013): Provides for the registration and regulation of pharmacies, health shops and agro-veterinary shops and for the registration and regulation of all medicines and allied substances;

Education

- Education Act (2011): Regulates the provision of accessible, equitable and qualitative education, providing that every person has a right to early childhood education, basic education and high school education, and that every child has the right to free basic education. Prohibits

discrimination by education institutions and ensures equal access to all learners, including poor and vulnerable children.

- Higher Education Act (2013): Establishes the Higher Education Authority and provides for quality assurance in higher education and for the establishment, governance and regulation of public higher education institutions.

Food

- Food Reserve Agency Act, Chapter 225 (1995): Establishes the Food Reserve Agency to ensure a reliable supply of national food reserves that are considered essential for the food security of the country.
- National Food and Nutrition Commission Act, Chapter 308 (1967): Establishes the Nutrition Commission to promote improved nutrition through awareness raising activities and helping to incorporate the concepts of improvement of nutrition in food and agricultural development planning.

Water

- Water Supply and Sanitation Act (1997): Regulates the provision of water, provides for powers of service providers and establishes the National Water Supply and Sanitation Council (NWASCO).
- Water Resources Management Act (2011): Establishes the Water Resources Management Authority and provides for the management, development, conservation, protection and preservation of water resources, the equitable, reasonable and sustainable utilisation of water resource, and guarantees that poor and vulnerable members of the society have a free adequate and sustainable source of water.

Housing

- National Housing Authority Act, Chapter 195 (1971): Establishes the National Housing Authority to make better provisions for the development and control of housing.
- Rent Act, Chapter 206 (1972): Outlines obligations and protections of tenants and landlords and prohibits any form of eviction.
- Town and Country Planning Act, Chapter 283 (1962): Makes provisions for urban planning and development.
- Lands Act, Chapter 184 (1994): Provides for the various land tenures and leaseholds and recognises customary tenure.⁷

Environment

- Environmental Protection and Pollution Control Act, Chapter 204 (1990): Provides for protection of the environment and the control of pollution with respect to water, air, pesticides, toxic substances, wastes and hazardous wastes, noise and ionizing radiation.
- Environmental Management Act (2011): Provides for integrated environmental management, the protection and conservation of the environment and the sustainable management and use of natural resources; makes provisions for the Zambia Environmental Management Agency.

⁷ Although land rights are not specifically designated under ESC rights, they are an important element of both housing and livelihood.

Cultural Life

- National Arts Council Act, Chapter 170 (1989): Establishes the National Arts Council for the development, promotion and regulation of performing, literary and visual arts.
- National Heritage Conservation Commission Act, Chapter 173 (1989): Provides for the conservation of ancient, cultural and natural heritage, relics and other objects of historical, archaeological or scientific interest.

Protection of Family and Children

- Juveniles Act, Chapter 53 (1956): Provides for child welfare and measures for dealing with delinquents.
- Intestate and Succession Act, Chapter 59 (1989): Addresses the distribution of property to spouses and children when an individual dies without a will.
- Affiliation and Maintenance Act, Chapter 64 (1995): Provides for courts to determine maintenance of children in cases of neglect, divorce or separation, and to determine custody according to the best interests of the child.
- Employment of Young Persons Act, Chapter 274 (1993): Prohibits the employment of children under the age of 14.
- Matrimonial Causes Act (2007): Regulates divorce and separation.

Persons with Disabilities

- Persons with Disabilities Act (2012): Promotes the participation of persons with disabilities and ensures accessibility in all civil, political, economic, social and cultural spheres, provides for mainstreaming of disability issues into national policies and strategies for development and domesticates the Convention on the Rights of Persons with Disabilities.

Customary Law

Customary law is recognised as a valid source of law in Zambia as long as it is not “repugnant to justice or morality” and does not contravene statutory law. Local courts, presided over by lay judges who are usually prominent local citizens, use the principles of customary law to make judgments regarding marriages, divorces, inheritances and other civil proceedings, and to rule on minor criminal matters.

Local courts are guided by the traditions and customs of Zambia's seven main tribes, but because traditional practices and procedures are unwritten, magistrates often use their own judgment when deciding such cases. Although in theory the practice of customary law is subjected to the provisions of statutory law including non-discrimination, in reality discrimination against vulnerable groups – especially women and children – is prevalent in customary courts, where traditional patriarchal systems consider women and girls subordinate with respect to property, inheritance and marriage. This is a major impediment to the realisation of rights, especially ESC rights.

In 2005 a precedent setting divorce case between Martha Kembo Mwanamwalye and Collins Mwanamwalye decided by a local court in Lusaka said that women married under customary law should have the right to an equal share of marital property in the event of a divorce or death of the husband, thereby establishing that women should have the same rights as men.⁸ Owning property is critical to earning a livelihood and maintaining a home, and barriers to ownership under customary law have

⁸Irin Africa, *Zambia: Landmark Judgment for Women in Customary Marriages*, Lusaka, 21 December 2005, at <http://www.irinnews.org/report/57641/zambia-landmark-judgment-for-women-in-customary-marriages>.

created serious problems for vulnerable groups, perpetuating injustices and inequalities especially for women and children. Customary laws need to be brought in line with statutory law in order to prevent discrimination, especially as it relates to the socio-economic development of vulnerable groups such as women and children. The Zambian Law Development Commission has been working with local courts to use customs in a non-discriminatory manner when determining cases of a traditional nature.

If ESC rights become legally enforceable in Zambia, it will be even more critical to work to ensure that customary law conforms to statutory law. For instance, under the Draft Constitution, women and men have equal rights to inherit, own and use property, and equal rights in marriage, during marriage, and at the dissolution of marriage. Customary law will need to respect and follow these principles. Parliament will have to enact adequate laws and procedures to harmonise customary and statutory laws and courts. Both court personnel and traditional leaders will need to be trained on the new obligations and sensitised to the implications of ESC rights in their communities. In addition, it will be important to educate communities on their rights and on options for bringing cases both before local courts and the Constitutional Court.

Policies

Zambia has been more progressive in developing policies related to economic, social and cultural rights than it has been with legislation. Like many countries in the region, the Government of Zambia has made the important link between rights and socio-economic development.

The country's long-term development strategy is articulated in its **Vision 2030**, which aims to make Zambia a middle-income country by 2030. Amongst its seven key basic principles are sustainable development and respect for human rights. The objectives within Vision 2030 include reduced national poverty; reduced income inequities; access to safe potable water and improved sanitation; access to education; and equitable access to quality health care.

To reach these objectives, the Government of Zambia has put into place a series of national development plans. The current **Sixth National Development Plan (SNDP)**, covering the period 2011-2015, has three overarching objectives: infrastructure development, rural development and human development. The SNDP recognises the critical role of human development in poverty reduction and economic development and focuses on:

- Skills development
- Improving labour productivity
- Increasing access to health
- Increasing access to higher and tertiary education
- Facilitating the distribution of skilled labour within and across sectors throughout Zambia

Governance, HIV/AIDS, gender, nutrition, disability, environment and disaster risk management are addressed by the SNDP as crosscutting issues linked to the achievement of the SNDP's broader development objectives.

Within the framework of the national development agenda, the Government has developed several other policies that relate to ESC rights, which include:

- National Health Strategy Plan 2011-2015
- National Multi-sectoral HIV and AIDS Policy and Strategic Framework
- National Food and Nutrition Policy

National Agricultural Policy
National Policy on Education
National Labour Market Policy
National Labour Policy
Child Labour Policy
Occupational Health and Safety Policy
Social Security Policy
National Gender Policy
National Housing Policy
National Youth, Sport and Child Development Policy

New Draft Constitution

The new Draft Constitution brings major changes, placing economic, social and cultural rights within the Bill of Rights and making them specifically enforceable – meaning that individuals and groups alleging violations of these rights will be able to take their claims to court.

This follows the trend in constitution making in the region as ESC rights are increasingly recognised as equal to civil and political rights, and critical to a nation's economic development. Older constitutions, such as Zambia's 1996 Constitution, included directives intended to guide states in making laws and policies related to ESC related rights. However, despite the good intentions outlined in such directives, the non-enforceability of ESC rights generally meant that they went unfulfilled. Recent developments emphasise the interdependence of rights and the equal importance of *all* rights, and there is a growing practice around the world that ESC rights should be included as fundamental rights in states' constitutions.⁹ Recognition of ESC rights in the Constitution is the strongest way to ensure their protection and enforcement. It requires domestic law to comply with these rights, and provides for court action. It also provides a safeguard against the limitation of these rights for political reasons.

Furthermore, the constitutional review process has included extensive nationwide consultations and input from groups and individuals throughout the country. The Draft Constitution thus reflects the will of the Zambian people and their desire to see ESC rights included as enforceable rights in the new Constitution, so that the quality of their lives will be improved.

The Draft Constitution states in **Article III** that Zambia's national values, principles and basis of state policy include democracy, the rule of law, human dignity, equity, social justice, equality, non-discrimination, protection of minority and marginalised groups, and sustainable development; and declares that the State shall promote the economic empowerment of citizens in order for them to contribute to sustainable economic growth and social development. These statements recognise the pressing need to address the barriers that exist in Zambia to development; the importance of righting historical injustices and inequalities; and the significance of empowering all individuals in society.

The Bill of Rights (Part V) lists the rights and freedoms that belong to every person and are to form the basis of Zambia's social, political, economic and cultural policies. These include both civil and political rights as well as economic, social and cultural rights, and *all* are equal and legally enforceable. It should

⁹ Most constitutions in Africa adopted since the end of the Cold war have entrenched at least some elements of ESC rights in their constitutions (for instance South Africa, Malawi, Uganda, Rwanda, Kenya, Tanzania, Ethiopia, Burkina Faso, Cape Verde, Ghana, Sao Tome and Principe and the Transitional Constitution of South Sudan).

be noted that ESC rights are contained in both the civil and political and economic, social and cultural rights sections of the Draft Constitution.

The Bill of Rights provides that **Parliament will enact legislation to give effect to these rights and for the enforcement of these rights.** It will therefore be important for Members of Parliament to be familiar with these new rights and understand what they mean, what obligations they place on lawmakers, and how they will be enforced.

The Draft Constitutional also provides for the **progressive realisation** of ESC rights, stating that parliament “shall enact legislation that provides measures, which are reasonable, to achieve the progressive realisation of the economic, social and cultural rights under the Bill of Rights.” Where the State claims that it does not have the resources to implement a particular ESC right, the State will be responsible for showing justification.

Outside of the Bill of Rights, several provisions in the Draft Constitution also address elements of ESC rights. **Part XIX on Land, Property, Environment and Natural Resources** specifically grants equitable, efficient, productive and sustainable land rights in Articles 293-301 and provides for management and protection of the environment and natural resources in Articles 302-305. **Parliament is to enact legislation in accordance with these provisions.**

Potential Role of the New Constitutional Court

Under the 1996 Constitution, claims of violations of the fundamental rights contained in the legally enforceable provisions of the Constitution can be brought before the High Court. The Human Rights Commission can also investigate claims of human rights violations and make recommendations, but does not have the power to adjudicate.

The Draft Constitution establishes a **Constitutional Court**, which will be tasked with hearing claims of constitutional violations and will also have the power to review Acts of Parliament, bills or statutory instruments to determine whether they comply with the Constitution. This is a new court, and Zambia is following in the footsteps of other countries that have established specialized constitutional courts where judges who are experts in constitutional law and human rights interpret constitutions and decide claims of violations. Constitutional courts in countries such as South Africa have been instrumental in defining and enforcing economic, social and cultural rights. In many developing countries undergoing processes of legal and social reform, a new, independent and impartial judiciary is often necessary to provide the judicial activism and leadership necessary to help bring about the social transformation envisioned by new constitutions.¹⁰ The Constitutional Court will play a critical role in Zambia’s new legal system. Under the Draft Constitution, the Court is to develop human rights jurisprudence where legislation does not exist.

Under the Draft Constitution, **Parliament will be tasked with enacting legislation regarding the processes and procedures of the Constitutional Court.**

¹⁰ As illustrated in the case studies in Section VI.

5. Economic, Social and Cultural Rights in Practice

Assuming that the new Zambian Constitution will include economic, social and cultural rights as enforceable rights, what will this mean? This section looks more closely at ESC rights in practice, including the types of rights, the concept of progressive realisation and the justiciability and enforceability of ESC rights.

Duties of the State

As discussed above, the State has the duty to respect, protect and fulfil human rights including ESC rights. The Draft Constitution in Article 61(2) says that the State must take measures, including enacting legislation, that:

- a. Promotes equity, equality and freedom from discrimination
- b. Ensures that the State fulfils its obligations under the Bill of Rights
- c. Ensures that individuals fulfil their obligations under the Bill of Rights

Does this mean that the government is obligated to supply goods and services free of charge? Generally no, this is not the meaning given to such provisions. Providing legally enforceable ESC rights does not necessarily mean that the government has to provide free health care, water, education, food and other services related to ESC rights. Rather, it must ensure that such services and goods are **accessible (both physically and financially) and affordable** and provided **without discrimination**.

There are some instances, however, when the government may need to provide subsidized or free services where individuals would otherwise not be able to provide for themselves, or in cases of emergency of a drought or natural disaster the State may be required to provide food and water so that nobody goes hungry.

In addition, under international, regional and national law there may be some services which must be provided free of charge, for instance primary education.

Providing for ESC rights also does not necessarily mean that all services have to be provided by the government. Many services may be provided by the private sector – for instance water sanitation, housing, health care services etc. However, where the service is not provided by the public sector, the State must regulate public providers to ensure that they comply with ESC obligations, including monitoring and penalties for non-compliance.

In enforcing ESC rights, courts may compel the State to take certain steps to remedy its violation of rights, which may include requiring the State to provide certain services; directing the State to develop plans of action or policies to address ESC issues or prevent discrimination; provide money or other compensation to victims of violations; change policies such as eligibility requirements for programs; regulate the actions of the private sector in order to prevent rights violations; or cease any actions that might be causing rights violations; amongst others.

Types of Economic, Social and Cultural Rights

ESC rights have become increasingly well defined in national, regional and global legal systems through constitutions, laws and regulations and international treaties. In addition, cases from around the world provide examples of what might be considered violations of ESC rights. In this part we consider each type of right, what the Draft Constitution says about these rights and how they might be interpreted.

Members of Parliament should be sure to review current legislation to see whether these rights are currently covered and where gaps exist.

- a. **Non-discrimination:** This is an essential element of every right. Article 27 of the Draft Constitution prohibits discrimination on any ground, including birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, pregnancy, health, or marital, ethnic, tribal, social or economic status. Parliament cannot make any law that discriminates against any group or individual either directly or through its effects, unless it involves affirmative action in order to address discrimination. In addition, the State must take care to ensure that there is no discrimination of any sort in the provision of or access to any of the rights below. Under international law, vulnerable groups such as women, children, persons with disabilities, the elderly, migrants, refugees and internally displaced persons must especially be protected. The Draft Constitution addresses special groups in Articles 52 (gender), 53 (elderly), 55-56 (children and youth, 58 (persons with disabilities) and 60 (minority and marginalised groups).
- b. **Employment Rights:** These are addressed under Articles 33, 64 and 65 of the Draft Constitution. They include freedom from forced labour; the rights to decide freely to accept or choose work and to decide one's trade, profession or occupation; fair wages; equal pay for equal work, pensions; leisure and reasonable limitation of working hours; safe and healthy working conditions; and the rights to join and form trade unions, and to strike.

Employment rights are generally considered rights that must be given immediate effect, and do not involve many costs to the State. Zambian law already has provisions on employment rights and Parliament must ensure that these are adequately enforced. There must also be legislation to guarantee equality and non-discrimination and promote job opportunities especially for women and persons with disabilities.

- c. **Right to Health:** Article 62(1)(a) of the Draft Constitution says that a person has the right to "the highest standard of health, which includes the right to health care services and reproductive services." In addition, Article 52(a) guarantees to women the right to reproductive health, including family planning and access to related information and education. Health is one of the areas where current legislation would need to be significantly strengthened.

The right to health does not necessarily mean the right to *free* health care. However, it includes the rights to accessible and quality health facilities, goods and services on a non-discriminatory basis; provision of essential medicines; access to shelter, housing and sanitation, an adequate supply of safe drinking water and minimum essential food which is healthy and safe; healthy occupational and environmental conditions; protection against epidemic diseases; and access to sexual and reproductive health services.

Parliament should adopt appropriate legislation and devote the necessary and available financial resources to ensure the right to health. Within the public health system, the State should enact health policies for the provision of health care, including immunization programmes against infectious diseases; ensure the availability of adequate facilities, trained personnel, essential drugs and safe drinking water; take measures to improve child health as well as sexual and reproductive services and family planning; disseminate information and promoting good health and preventive care; and provide information and counselling on health-related issues such as HIV/AIDS, domestic violence and substance abuse.

Regarding private actors, Parliament should adopt legislation that guarantees that they conform with human rights standards when providing health care services; controls the marketing of medical equipment and drugs; maintains the availability, accessibility and quality of health care facilities and services; and protects individuals from harm by third parties – for instance, legislation protecting women from female genital mutilation.

Courts have interpreted violations of the right to health to include failure to provide basic health services and health care facilities; denying access to information and services related to sexual and reproductive health; contaminating water, for example, with waste from state-owned facilities; failure to make vaccines available; failure to provide a drug shown to reduce transmission of HIV from mothers to children; and discriminatory exclusion from and termination of health coverage, particularly by private health insurance companies.

- d. **Right to Education:** Article 62(f) of the Draft Constitution states that everyone has the right to education. Under international law, states must provide free and compulsory primary education without discrimination. They should also take steps to ensure available and accessible secondary and higher education, which should progressively be made free. Parents also have the right to choose schools for their children.

Zambia's Education Act of 2011 lays out a detailed framework for education that encompasses the right to education, including the right to free basic education (defined as through grade nine), and prohibitions on discrimination. It also states that the government shall make general and vocational education progressively available and accessible. Parliament should ensure that these provisions are fully implemented.

- e. **Right to Food:** Article 62(1)(a) of the Draft Constitution states that everyone has the right to be free from hunger and to have access to adequate food of acceptable quality. The State should take measures to improve methods of production, conservation and distribution of food and to ensure the equitable distribution of food; promote improved nutrition by dissemination of information and ensuring access to nutritional food; regulating the food industry; and strengthen people's access to resources so that they can ensure their livelihoods, including food security.

The State must also protect individuals' right to food against violations by third parties. This includes preventing third parties (groups, corporations etc.) from destroying sources of food (for instance by polluting land, water and air with hazardous waste or destroying the lands of indigenous people for industrial or other development), establishing food quality and safety standards so that food put on the market is safe and nutritious and ensuring fair and equal market practices.

Courts have interpreted the right to food to include duties to prevent starvation in all areas and communities in the country; prohibit public and private entities from destroying or contaminating food and its source, such as arable land and water; provide food from government reserves during famine; and provide fair access to livelihoods, for instance to fishing rights.

- f. **Right to Housing:** Article 62(1)(c) of the Draft Constitution provides that everyone has the right to accessible and adequate housing. This does not necessarily mean that the State must provide

everyone with a home. Rather, the right to housing covers measures that are needed to prevent homelessness, prohibit forced evictions, address discrimination, help the most vulnerable and marginalised groups, ensure security of tenure and guarantee that everyone's housing is adequate. It means that the State must ensure that everyone has access to affordable, safe housing, and provide assistance to those in need. The State must take measures to ensure the affordability, habitability and accessibility housing; availability of services and infrastructure such as gas, electric, water, sanitation etc.; legal security of tenure; prohibit any form of discrimination by anyone in the public or private sector in the way that housing is provided; and prevent any type of forced eviction or demolitions.

The State should also adopt legislation regulating private actors—such as landlords, property developers, landowners and corporations— so that they comply with human rights standards. The State should, for instance, regulate the housing and rental markets in a way that promotes and protects the right to adequate housing; guarantee that banks and financial institutions extend housing finance without discrimination; and ensure that the private provision of water, sanitation and other basic services is sufficient and adequate.

Courts have interpreted violations of the right to housing especially in forced evictions; housing in such poor condition that it is a risk to safety; and failure to make adequate provisions for homeless persons or other vulnerable groups.

- g. Right to Water:** Article 62(1)(d) of the Draft Constitution says that everyone has the right to clean, safe and adequate amounts of water and to reasonable standards of sanitation. The right to water and sanitation has also been discussed in relation to health and housing. It requires the State to ensure that everyone has access to a sufficient amount of safe drinking water for personal and domestic uses such as drinking, bathing, washing clothes, food preparation, and personal and household hygiene. It does not necessarily mean that the government has to provide water for free. However, it does mean that water services must be affordable to everyone and that the State must provide them free of charge if a person or household is unable to afford them. Zambian law currently provides for this. The State must continue to take measures to ensure the availability, quality and accessibility of water, to regulate third party providers and to provide full and equal access to information concerning water for individuals and groups.

Courts have interpreted violations of the right to water to include arbitrary and illegal disconnection of water for personal and domestic use; contaminating water; discriminatory or unaffordable increases in the price of water; and failure to regulate third parties in regards to provision or pollution of water.

- h. Right to Social Security:** Article 62(1)(e) says that everyone has the right to social security and protection. This includes social security benefits for those who cannot provide for themselves or are unemployed due to sickness, old age, disability, or any other circumstances beyond their control. In its social security scheme, the State should take measures to ensure that basic necessities such as food, housing, education and medical care are met; that no individual is denied coverage arbitrarily or unreasonably; and that vulnerable groups such as women, the elderly, persons with disabilities, impoverished children, and migrant families receive social protection.

Courts have interpreted violations of the right to social security to include denying social assistance to people because of their status – such as homeless people, non-citizens and asylum seekers;

establishing unreasonable or arbitrary criteria for coverage; requiring women to satisfy additional eligibility requirements for unemployment benefits than men.

- i. **Protection of and Assistance to the Family:** Article 54 of the Draft Constitution provides for protection of the family including establishing a minimum age for marriage; the right to marry by consent; adequate maternity and paternity leave; availability of adequate maternal health care and child health care; and promotion of the availability of adequate child-care facilities. Article 55 provides special protections to children. Zambian law already addresses elements of these rights and the State must ensure that legislation allows for full realisation of these rights, including in customary law.

Courts have interpreted the right to protection of the family to include duties to ensure maternity leave for working mothers; provide access to adequate pre-natal and post-natal care for mothers and babies; enact measures to prevent child labour; and prevent forced marriages or underage marriages.

- j. **Right to a Healthy Environment:** Article 67 of the Draft Constitution says that people have the right to a clean and healthy living environment. Further, Articles 302-305 provides detailed principles for the management and protection of the environment and natural resources. Zambia has recently enacted related legislation.¹¹ The State should continue to take measures to prevent pollution and ecological degradation; promote conservation; secure ecologically sustainable development and use of natural resources; regulate the dumping of toxic wastes and dangerous products; and ensure safe and healthy food and water. This includes regulating both the public and private sectors.

Courts have interpreted violations of the right to a healthy environment to include dumping toxic wastes, polluting water and failure to regulate companies with regard to pollution and dumping.

- k. **Cultural Rights:** Article 63 of the Draft Constitution contains rights of language and culture. These include the rights to:
- Use the language of one's choice
 - Participation in culture of choice
 - Promotion of national and cultural expression through literature, arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage
 - Recognition of the role of science, technology and indigenous technology in development and nation
 - Support for intellectual property rights
 - Legislation ensuring compensation to communities for use of biological knowledge, medicinal plants and cultural heritage and recognising and protect the ownership of indigenous seeds and plants

Cultural rights obviously involve a broad range of rights, and Parliament will need to enact legislation giving effect to these rights where there is not already adequate law.

¹¹ The Environmental Protection and Pollution Control Act and Environmental Management Act, discussed on page 14.

It is important to note that the enjoyment of cultural rights is still subject to other provisions of the Constitution and law that state that customs cannot be repugnant to justice or morality or conflict with statutory law. That is, culture cannot be used as an excuse to discriminate or to allow harmful practices such as early or forced marriage and gender-based violence.

Progressive Realisation of Rights

The Draft Constitution explicitly says that Parliament will provide for the progressive realisation of ESC rights.

The concept of progressive realisation is well developed. Recognising that ESC rights often depend on the availability of resources, ICESCR provides for the progressive realisation of these rights; meaning that states must take action to provide these rights to the maximum extent possible given the resources that it has available. This does not mean that States may not take any action; rather, they must **act in good faith, make constant efforts** and **develop legislation and plans** to implement ESC rights as resources become available. As the Committee on Economic, Cultural and Social Rights (CESR - the UN body tasked with overseeing implementation of the treaty) has stated, progressive realisation creates an obligation for states to move as quickly and effectively as possible to ensure the right in question.¹² In addition, most of the rights have some resource-free dimension and can at least in part be implemented immediately.

Progressive realisation is subject to the following principles:

Elimination of Discrimination: States must take immediate action to eliminate discrimination, for instance in health care, education and the workplace.

Certain ESC rights are not subject to progressive realisation: Some ESC rights do not require significant resources and thus can be realized immediately. Others may require some resources but must still be acted upon immediately. Such rights include:

- Right to form trade unions and to strike
- Obligation to protect children and youth from economic and social exploitation
- Right to equal pay for men and women
- Provision of free and compulsory primary education for all
- Right of parents to choose schools for their children other than public schools
- Obligation to respect the freedom indispensable for scientific research and creative activity

Reasonable measures: States must begin taking steps to improve the enjoyment of ESC rights using all appropriate means, including particularly the adoption of appropriate legislation. Examples of appropriate measures include:

- Assessing the current status of the enjoyment of ESC rights through data collection
- Formulating strategies and plans for the implementation of ESC rights
- Establishing indicators and timelines for assessing achievement
- Adopting appropriate laws and policies with adequate funding for implementation
- Regularly monitoring and assessing progress
- Establishing complaint mechanisms

¹² General Comment 3, 1990.

Standard of Reasonableness

The South African courts have developed a standard of reasonableness when determining the adequacy of steps taken by the State to ensure ESC rights.

In the *Grootboom Case*, the Constitutional Court of South Africa stated:

*A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.*¹³

The Court established that in deciding how to comply with obligations, authorities must consider three elements:

1. The need to take reasonable legislative and other measures;
2. The need to achieve the progressive realisation of the right; and
3. The requirement to use available resources.

It should be noted, however, that unlike South African's Constitution, Zambia's Draft Constitution places the burden on the State to prove inadequacy of resources; courts must therefore take this into consideration when determining whether actions taken by the State are reasonable.

Prohibition on retrogressive measures: States cannot take steps that would actually reduce the realisation of ESC rights - that is, make any changes that would suppress, restrict or limit entitlements already guaranteed by law, unless there is a compelling justification. For example, introducing fees for education or health care services that had previously been free would be considered a retrogressive measure that restricts the rights. In order to justify such an action, the State would have to show that it adopted the measure after carefully considering all the options, assessing the impact and fully using its available resources.

In addition, the CESR has developed certain **minimum core obligations** that states should guarantee, which include¹⁴:

- Access to employment, especially for disadvantaged and marginalized groups, in order to enable a life of dignity
- Access to minimum essential nutritional and safe food to ensure freedom from hunger
- Access to basic shelter, housing and sanitation
- Adequate supply of safe drinking water

¹³ *The Government of the Republic of South Africa and others v. Irene Grootboom and others*, 2001 (1) SA 46 (CC), 4 October 2000.

¹⁴ Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No. 33: Frequently Asked Questions on Economic, Social and Cultural Rights*, at <http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>.

- Access to essential drugs as defined by the World Health Organization (WHO)
- Free and compulsory education for all
- Access to a social security scheme that provides a minimum essential level of benefits that cover at least essential health care, basic shelter and housing, water and sanitation, food and basic education

Justiciability and Enforcement

There has been a great deal of debate about whether economic, social and cultural rights should be justiciable – that is, whether they can be enforced by courts or other tribunals. The international consensus now is clearly that they should be. Decisions in cases from around the world show that courts can in fact enforce ESC rights.

The justiciability of ESC rights has traditionally been questioned for several reasons:

1. Some argue that ESC rights are vague and undefined, and thus judges will not have a clear basis for determining whether a violation has occurred. For instance, questions may arise as to what constitutes hunger, adequate housing, or fair pay. On the other hand, the same can be said of civil and political rights. CP rights have been defined as a result of law-making, regulations, case law and jurisprudence, just like many other areas of law. Interpreting law and filling in gaps in legislation is a clear function of the judiciary. In the past ESC rights had not been clearly defined because little attention was paid to them; this however, has changed, with a broad body of international, national and domestic laws and mechanisms that now defines such rights.
2. Some argue that socio-economic rights are a matter of government policy, and that the judiciary would be over-stepping its role in deciding matters of social policy and resource allocation, which should be left to the political branches of the State. The counter argument to this is that the judiciary is not engaging in policy *making*; rather, it is reviewing government policies to ensure that they conform to the State's legal obligations, just as it does in any other area of law. In addition, judicial decisions in other areas of law often affect resources; that is, they require the government to spend money in order to comply with the court's decision.
3. Some argue that courts are inappropriate forums for deciding cases of ESC rights because such cases may be complex, involve large groups and require structural reforms, as opposed to cases that merely involve individuals. Nevertheless, many other areas of law may involve complex litigation or large groups and this has not been a deterrent to the enforcement of any other rights or laws. A key consideration for the successful handling of ESC rights by the courts, however, is that proper procedures must be put in place.

Judicial enforcement of human rights is fundamental to the enjoyment of rights in practice. As experience with ESC rights has shown, a right without a remedy tends to be granted less attention and thus goes unfulfilled. A solid body of case law from around the world now shows that ESC rights are indeed justiciable. Decisions by courts have served not only to ensure the enjoyment of these rights, but have also helped to define what these rights are and to bring about systemic change.

Courts and the Enforcement of Economic, Social and Cultural Rights

In 1996 the Constitutional Court of South Africa confronted a challenge to the inclusion of ESC rights in the new South African constitution. The Court found that ESC rights could be adjudicated just like any other rights:

It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.¹⁵

The enforceability of rights also depends on access to courts. Courts are often inaccessible to ordinary people, who may not be familiar with the court system and may be too poor to actually access them. Therefore human rights commissions and alternative dispute resolution mechanisms such as mediation or arbitration¹⁶ – including local and traditional mechanisms - can be very important to defend rights, including ESC rights.

Non-government organisations (NGOs) have been instrumental in helping individuals and groups seek enforcement of their rights. In some instances, they provide direct legal aid to individuals either before courts or in alternative dispute resolution. In other instances they engage in strategic litigation or public interest litigation, which involve cases brought on behalf of the public or a broad group of people alleging rights violations and seeking legal reform. A growing body of jurisprudence throughout African countries and globally shows that strategic litigation can be an effective tool to bring about reform where lawmakers have been slow or unwilling to act. However, although in African countries rights tend to be enforced more through NGOs rather than individuals, NGOs often lack capacity and funding.

It is important for the State to address these issues of access to justice in order to ensure that people can actually enjoy their rights.

6. Case Studies

In providing guidance on the meaning of having economic, social and cultural rights entrenched in the Constitution, it is helpful to look to the experience of other countries in the region. The experiences of South Africa and Kenya can be informative to Zambian MPs as they move forward in the constitutional review process and in crafting effective socio-economic legislation. South Africa has been a leader in the region – and globally – in developing constitutional ESC rights. Kenya has recently completed its constitutional review process, and its new constitution provides a very comprehensive system of ESC rights.

¹⁵ *Certification of the Constitution of the Republic of South Africa*, Case CCT 23/96, 6 September 1996.

¹⁶ Mediation involves negotiations between parties facilitated by an impartial third party; arbitration is when each party to a case presents evidence to an impartial third party arbitrator, who then makes a decision on the case.

a. South Africa

Background

Constitution making in South Africa took place in the context of the end of the apartheid system that had been in place since 1948. The negotiations to end apartheid began in 1991 between the ruling National Party (NP) and the African National Congress (ANC) led by Nelson Mandela, along with other political organisations. An integral part of the negotiations was the creation of a new non-discriminatory constitution.

After a nation-wide inclusive and consultative process, the permanent constitution was drafted by South Africa's new parliament in 1994 and adopted in 1996. Because of the grave violations of social and economic justice committed during the apartheid era and the need to remedy the injustices of the past, the South African Constitution included a comprehensive framework of economic, social and cultural rights. South Africa was the first state to include ESC rights in a constitution at such an extensive scale.

Debate

There was a great deal of debate over whether ESC rights should be included in the Constitution. Those who argued in favour of a significant role for these rights pointed out that it made little sense to tell people that their civil and political rights would be protected if they continued to suffer social exploitation. Freedom of expression means little to someone who is dying of hunger. If socio-economic rights were not given meaningful protection by the Constitution, it was said, the legitimacy of the Constitution would suffer because people would be bound to say it does not deal with their most fundamental needs.

Those who argued against the inclusion of ESC rights said that it would be equally harmful to the legitimacy of the Constitution if it promised too much. Rights impose corresponding duties, and the Constitution would lose its credibility if it told people they had rights that the State could not fulfil due to a lack of resources. The entire Bill of Rights would be discredited when it became apparent that the country could not meet the expectations the Constitution had created. Civil and political rights would go down together with socio-economic rights.

There was also a question as to the enforceability of such rights in courts and the role of judges, especially regarding budgetary issues. Some believed that judges would be overstepping their bounds and it would become a "rule of judges." However, this question was settled by the Constitutional Court in the *Certification* case (mentioned above). In that case, the court heard challenges to the inclusion of ESC rights in the constitution, including that ESC rights are not universally accepted fundamental rights; that courts will encroach on executive and legislature in making budgetary decisions; and that ESC rights are not justiciable mainly because of budgetary issues. The Court disregarded these arguments because (1) even though may not be universally recognized, the Constitutional Principles allowed the Constitutional Assembly to go beyond universally accepted fundamental rights and supplement with others; (2) there was no breach of the separation of powers – even civil and political rights involve budgetary matters; and (3) the fact that enforcement may give rise to budgetary implications does not bar justiciability.

ESC Rights in the Constitution

The interim constitution included only non-controversial rights because it was just meant as temporary document. However, the final constitution recognized ESC rights on same level as CP rights and made

them justiciable. The ESC rights were not listed separately or grouped together – but rather were interspersed with others rights, emphasizing their interrelation and indivisibility. Some ESC rights were included without limitation: the rights to education, language and culture, trade, occupation and profession, fair labour practices including the rights to join trade unions and to strike and the environment. However, others that would require more resources placed limitations on the obligations of the State. For the rights to housing, health care, food, water and social security, the State was required only to provide “access,” and to take *reasonable* legislative and other measures within its available resources to achieve the progressive realisation of these rights.

Role of Parliament

Although most attention is given to the role of South African courts in developing ESC rights, Parliament played an important role in enacting legislation to give effect to South Africa’s new constitutional ESC rights. The first priority of the new South African Parliament was to undo the discriminatory legal system of the apartheid era and to begin the reconstruction and development of South African society. After adoption of the Constitution in 1996, the democratic government in South Africa began to adopt a wide range of new policies and laws. Many of these laws were adopted specifically based on obligations listed in the Bill of Rights. These included laws related to labour and employment rights, education, housing, water, health care and the environment.

For instance, between 1995 and 1998 Parliament passed several laws related to employment including the Labour Relations Act of 1995, Basic Conditions of Employment Act of 1997 and the Employment Equity Act of 1998. Each of these laws were enacted in order to give effect to section 23 of the Constitution regarding labour rights and also to give effect to public international law obligations of South Africa relating to labour relations.

Parliament also passed several laws related to housing including the Housing Act of 1997, the Rental Housing Act of 1999, the Extension of Security of Tenure Act of 1997 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998. All of these pieces of legislation make clear in their respective preambles that they have been adopted in terms of section 26 of the Constitution, which provides that everyone has the right to have access to adequate housing, and that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

While South Africa has made strides in developing a legislative and institutional framework for the social, economic and cultural rights in its constitution and laws, it has struggled to progressively implement these rights. Ultimately, the Constitutional Court has given much guidance on how ESC should be realised.

Enforcement and Role of the Courts

The courts and the Human Rights commission were tasked with enforcing the Bill of Rights. At that time there was little precedent from other countries – courts had to look mostly to international law. In formulating their opinions they looked at ICESCR (even though South Africa had not ratified it), the Universal Declaration of Human Rights, the Convention on the Elimination of All forms of Discrimination Against Women, the Convention on the Right of the Child, and the African Charter.

The creation of a Constitutional Court to provide judicial review and give meaning to the new Constitution was a significant break with South Africa’s past. The old judiciary was deeply rooted in the old system and could not be trusted to give full meaning to the provisions of the new constitution.

“Therefore, judicial leadership with broad authority was required if constitutional adjudication was to become an effective partner in the transformation envisioned by the constitution.”¹⁷

The South African Constitutional Court has played a major role in defining ESC rights and how they will be applied, developing standards that are used in countries throughout Africa and the world. The key methodological tool formulated by the Court in the context of these cases is the “test of reasonableness,” as laid out in the *Grootboom* case described on page 26. This has become the standard legal test employed by the Court in its subsequent jurisprudence on economic and social rights and by many courts throughout the world.

Grootboom addressed the right to adequate housing. It involved a group of homeless people who had been evicted by a local authority from their informal settlements. Relying on the constitutional right to access to adequate housing, and using the test of reasonableness, the Constitutional Court held that the State had to put in place a comprehensive and workable plan to meet its housing rights obligations.

In the *Treatment Action Campaign Case*, the Constitutional Court decided an important case involving the right to health. In this case, the Court decided that the exclusion from public health care services of a drug that had been shown to reduce the transmission of HIV from mothers to children was unreasonable. The Court held that the State’s refusal to make the drug more widely available, despite its capacity to do so, and its failure to have a comprehensive plan to deal with the mother-to-child transmission of HIV, was unreasonable and violated the right of indigent mothers and their babies to have access to health care services.¹⁸

In the *Soobramoney* case, the Constitutional Court applied the reasonableness test to find that the government’s regulations regarding eligibility for State-provided dialysis service were reasonable given the State’s need to use scarce resources efficiently. The case involved an elderly man who had been declared ineligible for treatment, who subsequently died. Because it did not involve emergency treatment, the Court found that there was no violation to the right to health because the State’s eligibility requirements were reasonable and justified.¹⁹

In the *Khosa* case, Constitutional Court held that the Constitution vests the right to social security in “everyone,” including permanent residents. The exclusion of permanent residents from the welfare scheme was not a reasonable way to achieve the realisation of the right to social security. Furthermore, the Court held that the exclusion of permanent residents from the scheme was discriminatory and unfair and violated the right to equality.²⁰

The South African courts have decided other cases involving ESC rights. These can be found at www.escr-net.org/caselaw.

¹⁷ Ibid, p.112

¹⁸ Constitutional Court of South Africa, *South African Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721, 5 July 2002.

¹⁹ Constitutional Court of South Africa, *Soobramoney v. Minister of Health, KwaZulu-Natal*, 1998 (1) (SA) 765 (CC), 27 November 1997.

²⁰ Constitutional Court of South Africa, *Khosa and others v. Minister of Social Development and others*, 2004 (6) SA (505 (CC), 4 March 2004.

b. Kenya

Background

In 2010, Kenya completed the long, contentious and nearly 20-year process of adopting a new constitution.

Kenya gained independence from Britain in 1963. Like many African countries, colonialism left behind a legacy of poverty, marginalisation and deep ethnic divides. Kenyans suffered from widespread poverty, with 60% below the poverty level, and many groups felt marginalised. In addition, deep ethnic and religious tensions divided the Kenyan people.

The Review Act of 2001 set out principles for the constitutional review process. The Act placed great emphasis on human rights – especially in equity and socio-economic rights. It declared that the new constitution must ensure the basic needs of all Kenyans including adequate food, decent health, shelter, education, a safe and clean environment, protection of culture and economic security.

Over a period of two years the Constitution of Kenya Review Commission (CKRC) engaged in nation-wide consultations with citizens, special groups and experts and undertook a comparative international study. Several constitutions were drafted but failed for political reasons. In 2009 a Committee of Experts was convened to oversee the constitutional review process.

ESC Rights in the Constitution

The Constitution that was finally adopted in August 2010 has been hailed as one of the best in Africa. It contains comprehensive economic, social and political rights. Throughout all of the constitutions drafted, there was widespread agreement on the Bill of Rights because it reflected the social and economic changes that people wanted and which were necessary to ensure a democratic, participatory and just society.²¹ The Bill of Rights includes comprehensively defined rights to fair labour practices, health, housing, food and freedom from hunger, water and sanitation, a clean and healthy environment, social security, education, family, language and participation in cultural life.

Implementation of the Constitution

There are three bodies mandated with the task of implementing the Constitution:

- The Commission for the Implementation of the Constitution (CIC), which was created to help Parliament create laws in line with the new Constitution;
- Parliament; and
- The Attorney General.

Because the Constitution requires the enactment of so many new laws, the laws that Parliament must pass are specifically listed in a separate schedule of the Constitution (Fifth Schedule) along with timelines for their enactment. If Parliament does not enact these new laws within the specified timeframes, it will be dissolved. In reference to ESC rights, these include family (five years); consumer protection (four years); and the Kenya National Human Rights Commission (one year),

The process of legislative review and reform is underway in Kenya. The process is unique in that it involves two specific bodies that have been established to help Parliament enact legislation pursuant to its new constitutional obligations. The Commission for the Implementation of the Constitution (CIC)

²¹ *The People's Choice: The Report of the Constitution of Kenya Review Commission*, 18 September 2002.

became operational in January 2011. The Constitution also provided for the establishment of a parliamentary Constitutional Implementation Oversight Committee. Its key functions are to receive regular reports from the CIC, to coordinate with the Attorney General, the CIC and relevant parliamentary committees to ensure timely introduction and passage of relevant legislation and to address any problems in the implementation of the Constitution. The CIOC has taken up its mandate and is working closely with the CIC to ensure that the implementation process is on course.

In terms of legislation related to ESC rights listed in the Fifth Schedule, the Kenya National Human Rights Commission has been established in line with its one-year deadline. Reviews of family law and consumer protection have not yet been taken up. Other bills related to ESC rights are undergoing review and stakeholder consultations, including a water bill and persons with disabilities amendment bill. A marriage bill and matrimonial property rights bill have also been introduced in Parliament.

Challenges identified by the CIC in implementing the Constitution include insufficient knowledge and understanding of the Constitution; a conservative mind set towards reform both in the government and civil society; negative politics; and ideological and logistical disparities between government agencies that should be working together.

Enforcement and Role of the Courts

Kenya's Constitution did not create a constitutional court. However, it does direct courts to develop human rights jurisprudence where law does not exist, and to adopt interpretations that most favour enforcement of a right or fundamental freedom. This constitutional directive to the courts is of prime importance because without judicial activism in favour of human rights, especially in traditional and conservative judiciaries such as Kenya's, human rights litigation would find little success.²²

In *John Kabui Mwai & 3 Others v. Kenya National Examination Council & 2 Others*, the High Court echoed the traditional arguments against enforcement of socio-economic rights, stating:

Socio-economic rights are by their very nature ideologically loaded. The realisation of these rights involves the making of ideological choices which, among others, impact on the nature of the country's economic system. This is because these rights engender positive obligations and have budgetary implications which require making political choices. In our view, a public body should be given appropriate leeway in determining the best way of meeting its constitutional obligations.²³

However, in the *Garissa* case, the High Court heard a petition representing over 1,000 individuals that had been evicted from their homes on public land that they had occupied since the 1940s in the municipality of Garissa. The Court decided in favour of the petitioners, basing its decision on the new Constitution, ICESCR and the African Charter on Human and Peoples' Rights.²⁴ The Court reiterated the justiciability of ESC rights by declaring violations of the rights to life; adequate housing; water and sanitation; physical and mental health; clean and safe water; education; information, fair administrative

²² Traditionally, Kenyan courts have not been very favourable to human rights because they tended to align themselves with the elite. Some challenges remain because although the Constitution enacted major reforms, many of the judges who served under the old constitutional system still serve as judges in the reformed judiciary.

²³ High Court of Kenya, (2011) EKLK, 20 July 2011.

²⁴ Under Kenya's new Constitution, international law is considered directly applicable in Kenyan courts.

decisions; and freedom from hunger; as well as the right of the elderly to pursue personal development; to live in dignity, respect and freedom from abuse; and to receive reasonable care.²⁵

In *Patricia Asero Ochieng and 2 Others v. the Attorney General & Another*, the High Court struck down sections of Kenya's Anti-Counterfeiting Act of 2008 due to its negative impact on the ability of people living with HIV and AIDS to access generic anti-retroviral medications, in violation of the constitutional rights to life, health and human dignity.²⁶

In light of these cases, it is hopeful that Kenyan courts will continue to develop positive jurisprudence around ESC rights contained in the new Constitution.

7. The Role of MPs in Furthering Economic, Social and Cultural Rights

Zambia is a Lower Middle Income Country. Partly due to the decline in the price of copper, its main industry, Zambia's economy stagnated until the late 1990s and poverty remains entrenched. The realisation of socio-economic rights has consequently suffered due to lack of resources, lack of social infrastructure, corruption, high rates of disease and HIV/AIDS and discriminatory traditional practices. Over the past several years, the country recorded major improvements in macro-economic performance, with the average annual economic growth rate above five percent.²⁷ In 2010 the World Bank named Zambia one of the fastest economically reformed countries. However, these improvements have not yet significantly impacted on the socio-economic well-being of the population, the majority of whom remain poor and vulnerable. Zambia still has low rates of human development, and was rated 163 out of 187 countries in the UN's 2013 Human Development Index.

The new Draft Constitution recognises the importance of socio-economic rights to the lives of its citizens and the development of the nation, and provides lawmakers with a framework for introducing consistency and stability in law making and a basis for promoting the application of social, economic and cultural rights in Zambia.

Consistent with the principles and case studies outlined in this manual, there are several ways that Members of Parliament can work for the full realisation of these rights:

Understanding ESC Rights

- Promoting ESC rights begins with understanding what they mean.
- MPs should also understand the importance of these rights to their constituents – how they will improve people's livelihoods, health, education, standards of living and socio-economic growth.

Enacting Laws

- Under the Constitution, it is up to Parliament to enact laws to carry out the Bill of Rights.
- Parliament should perform a comprehensive review of current laws in order to determine what legislation needs to be enacted under the provisions of the new Constitution. This could be done as a part of the constitutional review process itself to generate a list of legislation that will need to be addressed once the new Constitution is adopted.

²⁵ High Court of Kenya, Constitutional Petition No. 2 of 2011, 23 June 2011.

²⁶ High Court of Kenya, Petition No. 409 of 2009, 20 April 2012.

²⁷ National Strategic Health Plan 2011-2015.

- MPs should work with the relevant parliamentary committees that provide a forum for parliamentarians to work together on socio-economic rights, such as the Committees on Human Rights, Gender Matters and Child Affairs, Governance and Legal Affairs.
- MPs can look to the laws and jurisprudence of other countries in the region for guidance and when possible work with counterparts and experts from those countries.

Ensuring Compliance with International and Regional Standards

- In Zambia, international laws are applicable through acts of Parliament. Zambia is a party to ICESCR and other UN human rights treaties, as well as the African Union, SADC and COMESA, all of which not only commit Zambia to realising ESC rights but also provide important guidelines for what these rights mean. Therefore Parliament should be sure to enact laws that apply the principles of these international and regional instruments into Zambian law.

Allocating Resources

- In its role in approving the national budget, Parliament can ensure that the maximum available resources are devoted to fulfilling these rights.

Ensuring Enforcement

- Parliament should make clear laws so that the Executive has well-defined standards on which to base its policies and actions.
- Effective legislation will also give the courts well-defined standards on which to base decisions and judgments, thus strengthening the justiciability and enforceability of ESC rights.
- Once the Constitution is adopted, Parliament should work quickly to enact procedures for the Constitutional Court, which will be instrumental in defining and enforcing ESC rights.
- MPs should work with NGOs on funding and donors– NGOs are the ones that usually bring actions but lack capacity and funding from donors. NGOs can also help educate MPs on ESC rights and their implementation.

Working with the Human Rights Commission

- National human rights institutions have the duty to assist state organs in analysis and capacity building. The Human Rights Commission also investigates allegations of human rights abuses. Parliament should collaborate with the Human Rights Commission to ensure the implementation of ESC rights.
- Some of the areas already under consideration for possible collaboration include sensitisation on human rights for MPs; lobbying for increased funding and resource allocation to the Human Rights Commission; and research and information dissemination through the National Assembly constituency offices and Parliament Radio platform.²⁸

Using the Duty to Report

- Under the Draft Constitution, the president has a duty to report to the National Assembly on progress in implementing the Bill of Rights. MPs should use this obligation to pressure the executive to enact effective socio-economic policies.

²⁸ As discussed during a courtesy visit by the Human Rights Commission to the National Assembly on 30 July 2012.

Resources

International Instruments Providing for Economic, Social and Cultural Rights

- Universal Declaration of Human Rights (1948)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- International Covenant on Economic, Social and Cultural Rights (1966)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- 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)
- Convention on the Rights of Persons with Disabilities (2006)

Key Regional Instruments

- African Charter on Human and Peoples' Rights (1981)
- African Charter on the Rights and Welfare of the Child (1990)
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)
- AU Declaration on Economic, Social and Cultural Rights in Africa (2004)
- Treaty of the Southern African Development Community (SADC) (1992)
- Treaty of the Common Market for Eastern and Southern Africa (COMESA) (1993)

Websites and Resources

- African Commission on Human and Peoples' Rights: www.achpr.org
- African Union: www.au.int
- Centre for Economic, Social and Cultural Rights (CESR): www.cesr.org
- Common Market for Eastern and Southern Africa (COMESA): www.comesa.int
- International Centre for the Legal Protection of Human Rights (INTERIGHTS): www.interights.org
- International Commission of Jurists: www.icj.org
- International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*: <http://www.refworld.org/pdfid/4a7840562.pdf>
- International Network for Economic, Social and Cultural Rights (ESCRNet) Caselaw Database: <http://www.escr-net.org/caselaw>
- Southern African Development Community (SADC): www.sadc.int
- UN Office of the High Commissioner for Human Rights (UNOHCHR), Factsheets on ESC Rights: <http://www.ohchr.org/EN/PublicationsResources/Pages/FactSheets.aspx>
- UNOHCHR, *Frequently Asked Questions on Economic, Social and Cultural Rights*: <http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>