Enhancing protection of Economic Social Cultural Rights:

Should Zimbabwe ratify the Optional Protocol to the International Covenant on Economic Social and Cultural Rights and Incorporate Socio-Economic Rights in its Constitution?

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Acronyms

ACHPR	African Charter on Human and People's Rights
BEAM	Basic Education Assistance Module
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic Social and Cultural Rights
DPSP	Directive Principles of State Policy
CPR	Civil and Political Rights
ECHR	European Convention on Human Rights
ESC rights	Economic Social and Cultural Rights
GA Res	General Assembly Resolution
GC	General Comments
GDP	Gross Domestic Product
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IMF	International Monetary Fund
MTCN	Mother to Child Transmission
NAP	National Action Plan
OM	Operation Murambatsvina
OP-ICESCR	Optional Protocol to the Covenant on Economic Social and Cultural Rights
SERAC	Social and Economic Rights Action Center
UDHR	Universal Declaration of Human Rights
WHO	World Health Organisation

Content

1 Introduction

Zimbabwe has been wrought by a vast array of socio economic challenges with the national economy shrinking by 48% between 2000 and December 2008, inflation catapulting to over 66,000% and the GDP also shrinking due to a drop in agricultural output (value added contracted by 86%) and industrial production. With a population of 12.5 million as of 2008, the former breadbasket of Africa has a 'gross national income per capita estimated in 2008 to be USD360 (compared to sub-Saharan Africa's average of USD 1,428) making it one of the poorest countries in the world.'[1] With arrears of about USD 3.2 billion on external debt and a 'public debt overhang' of about USD 6 billion direct foreign investments reduced significantly and by 2004 Zimbabwe's foreign debt repayments had ceased resulting in its suspension from the International Monetary Fund (IMF). As the economy shrunk, levels of deprivation increased adding to the number of homeless, deprived persons with limited access to health care and education[2].

The health sector has been hard hit, as it has suffered from massive brain drain, shortage of equipment and medication. Recent evidence of this was the State's failure to control the spread of a curable disease like cholera which resulted in the death of many. The education sector has also deteriorated suffering a shortage of teachers and books. In 2008 there were no examiners to mark examinations written at the end of the year impacting negatively on the right to education. Aware that Zimbabwe is party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) [3] binding it to meet its legal obligations to respect, protect and fulfil the socio-economic rights enshrined in this instrument, one questions whether sufficient safeguards have been put in place to meet these obligations and what can be done to enhance protection.

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[1] Africa Development Bank, *Zimbabwe Country Brief*, 2010

[2] Ibid, pg3

[3] Acceded on the 13th of May 1991

1.1 The Constitution of Zimbabwe

Zimbabwe acquired independence in 1980 upon adopting the Lancaster House Constitution[4] whose main purpose as described by Lord Carrington[5] at that time, was to determine the proper basis for granting of legal independence to the people of Zimbabwe on the basis of justice and democracy. Also termed the 'Independence Constitution', the Constitution was drafted focusing on guaranteeing majority rule and ending discrimination among other Civil and Political Rights (CPR) at the exclusion of Economic Social and Cultural Rights (ESC rights). [6]

This same Constitution was later amended to provide for a dual legal system requiring that all treaties or conventions signed under the authority of the President be subject to approval by Parliament and that they shall not become law unless they have been incorporated into the law by an Act of Parliament.[7] As such, to date, despite the ratification of the ICESCR in 1991, the Constitution of Zimbabwe does not provide for the protection of ESC rights despite the numerous constitutional amendments that have taken place in the past few years.

1.1.1 Constitutionalisation of ESC Rights

Constitutionalisation involves incorporation or entrenchment of rights or provisions into a state constitution. Over the years, most State Parties largely incorporated CPR in their constitutions at the exclusion of socio-economic rights. However, like Henry Shue put it, 'no one can fully, if at all, enjoy any right that is supposedly protected by society if he or

[4] Signed on the 21st of December 1979 between the British Government, the Patriotic Front (Composed of the Zimbabwe African People's Union and the Zimbabwe African National Union) and the Government of Rhodesia Zimbabwe (led by Able Muzorewa and Ian Smith).

[5] British Foreign Secretary 1979 - 1982

[6] This was characteristic of most Bills of Rights in independence constitutions of states of the British Commonwealth.

[7] Section 111B Subsection 1(a) and (b)

she lacks the essentials for a reasonably healthy life'.[8] Echoing Shue, the African Charter on Human and Peoples' Rights (ACHPR),[9] makes a 'bold juxtaposition of: civil and political rights and of economic, social and cultural rights……'[10] The Vienna Declaration also emphasised the validity of ESC rights as fundamental rights by highlighting that 'all human rights are universal, indivisible, interdependent and interrelated'.[11] Post Vienna has seen gained momentum in the acceptance of ESC rights as crucial rights for the full enjoyment of all the other rights. The stereotype of a human rights dichotomy[12] is falling away at a national level as State Parties (like South Africa, Algeria, Benin, Mozambique, Brazil, Indonesia among others), revise their constitutions to incorporate both socio-economic and civil and political rights on an equal footing.

Constitutionalisation of ESC rights as fundamental rights will help provide a framework of social justice, which will ensure consistency of governmental policies with fundamental human rights thereby enhancing the rule of law and redressing social injustice.[13]

1.1.2 The Optional Protocol to the Covenant on Economic, Social and Cultural Rights

Adopted by consensus on the 10th of December 2008[14] and having been opened for signature on the 24th of September 2009[15], the Optional Protocol to the Covenant on

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[8] Shue (1980) p.24-5

[9] Entered into force 21 October 1986

[10] Yusuf (2004)

[11] Vienna Declaration and Programme of Action, Part 1 para 5

[12] Olowu (2007)

[13] The International Commission of Jurist (2009) pg 1

[14] GA Res. 832 (2008)

[15] 2009 Treaty Event,

Economic, Social and Cultural Rights (OP) endows the Committee on Economic Social Cultural Rights (CESCR) with a quasi-judicial function to hear and adjudicate on 'individual' and 'groups of individuals' complaints among other measures for the realisation and protection of ESC rights as provided for in the Covenant. To date the OP has thirty two signatories[16]and one ratification (Ecuador). It will enter into force upon ratification by at least ten State Parties.

The OP, will assist in closing the historical gap existing between socio-economic and CPR[17], and equip the CESCR with an additional monitoring and enforcement mechanism.

1.2 Research Questions

Zimbabwe has experienced a continuous retrogression of socio-economic conditions including massive evictions, the collapse of the health system and a deterioration of the education sector. Conscious of the legal obligations and the progressive nature of some of the rights under the convention, this thesis will try to answer the following questions:

a) Are ESC rights sufficiently protected and promoted under existing frameworks in Zimbabwe?

b) Should Zimbabwe's draft constitution incorporate ESC rights? To what extent can the Constitution guarantee protection of these rights?

c) Should Zimbabwe ratify the Optional Protocol to the Covenant on Economic, Social and Cultural Rights?

[16] Argentina, Armenia, Azerbaijan, Belgium, Chile, Congo, Ecuador, El Salvador, Finland, Gabon, Ghana, Guatemala, Guinea Bissau, Italy, Luxembourg, Madagascar, Mali, Montenegro, Netherlands, Paraguay, Portugal, Senegal, Slovakia, Solomon Islands, Spain, Timor Letse, Togo, Ukraine, Uruguay

[17] Courtis (2008) pg 1

Zimbabwe ratified the ICESCR in 1991and part of its immediate obligations included translating the ICESCR into national law. As a starting point, it is crucial to assess to what extent Zimbabwe has done this 19 years after ratification and whether these mechanisms are sufficient. Assuming the measures are not sufficient and aware that the constitution does not provide for such rights, it will be important to assess if Zimbabwe should constitutionalise and ratify the OP assessing what opportunities and challenges this might raise.

1.3 The relevance of study

Over the years little attention has been paid to the need to develop ESC rights and to establish protection mechanisms to enforce them. A consequence of not prioritising development of these rights is that they have been considered to be 'programmatic' rights which require the political branches of government to take action, without giving right holders the entitlement to claim them before the courts[18]. Limited jurisprudence has undermined their growth and interpretation for better implementation.

However, the jurisprudence of the Human Rights Committee (HRC), the African Commission under the African Charter on Human and People's Rights (ACHPR) and some national jurisdictions has shown that ESC rights are justiciable and can be adjudicated on at a domestic level. In light of the above and the socio-economic challenges Zimbabwe is facing, it is important to interrogate the mechanisms, if any, Zimbabwe has put in place to protect these rights. Have they been prioritised or are they also programmatic rights. It will be important to then analyse the benefits of constitutionalisation of the same rights and what it could mean for Zimbabwe.

Taking a lesson from the First OP-ICCPR, it is without a doubt clear that jurisprudence of the HRC has assisted in the interpretation of the rights provided for in the ICCPR and enhanced their application and enforcement. ESC rights have also been realised by the

[18] Ibid

HRC through adjudication based on the 'related[19]' and 'organic[20]' interdependence of rights.[21] It is therefore critical to examine the OP and its provisions, identifying the opportunities and challenges presented by it as a tool for change in Zimbabwe.

1.4 Methodological Overview

This research will adopt an inter-disciplinary approach combining a legal positivist approach and a social science angle. The legal approach will help examine the current legislative framework in place in Zimbabwe today, and analyze the OP as a legal instrument, binding on states upon ratification, and the consequences for Zimbabwe. A number of legal sources shall be relied upon, e.g. Constitutions, domestic legislation, conventions, resolutions, general comments (GC), reports, case law, and treaty communication recommendations. Reference will also be made to secondary literature including books, articles, journals, reports, and electronic sources. The social science methodological approach will be used to partly argue for and against ratification and constitutionalisation.

Although this research is not a comparative analysis, I will examine the constitutional mechanisms of ESC rights protection existent in selected State Parties as a tool from which to draw possible impacts of constitutionalisation of welfare rights. Jurisprudence will also bring invaluable perspectives to the study. Several credible, critical academic sources have followed the developments of the drafting of the OP and others have followed select constitutionalisation processes and these will be valuable academic sources.

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[19] Craig, (1989) pg 771

[20] Ibid pg 782

[21] Zwaan de Vries v Netherlands

1.5 Thesis Content

The thesis will be divided into six chapters, with the thematic questions being answered in each section. The first chapter will focus on an introduction, background, methodology, research questions. The second chapter will examine the nature and content of Zimbabwe's socio-economic obligations which will be tallied with Chapter three briefly analysing the current legislative and policy frameworks in place in Zimbabwe today. Chapter Four will debate as to whether Zimbabwe should include ESC rights in its draft constitution, presenting arguments for and against constitutionalisation. Here the constitutional mechanisms in select State Parties will be analysed. The fifth chapter will analyse main provisions of the OP and discuss the opportunities and challenges of ratification for Zimbabwe.

2 The content of ESC Rights and Nature of State Obligations

ESC rights have for decades been deemed non-justiciable, with State Parties arguing that they are vague, they provide for positive obligations and hence resource constraints stand as obstacles to the enforcement of the same rights and that treating them as rights "undermines the enjoyment of individual freedoms, distorts the functioning of free markets by justifying large scale state intervention in the economy and provides an excuse to downgrade the importance of CPR. This debate dates back to the drafting of the 1966 conventions when two dichotomies of rights were created to separate ESC rights from CPR"[22]. Of particular relevance was the difference in nature of obligations in Art 2(1) of both treaties.

Article 2(1) of the ICESCR provides for the progressive realization of ESC rights to the maximum of a state's available resources, hence recognizing that "valid expectations and concomitant obligations of State Parties under the Covenant are not uniform or universal"[23] but subject to levels of development and available resources. However, to protect the Covenant rights from nullification as states perpetually allege a lack of available resources, various benchmarks have been put in place by the CESCR (mostly through general comments) to retain the *raison d'être* of these rights.

To fully appreciate the measures put in place in Zimbabwe to protect ESC rights, it will be important to first assess the content and nature of these rights and Zimbabwe's obligations under the Covenant.

[22] Steiner (2000) pg237

[23] Chapman, (2002), pg 5

2.1 Defining the Content of ESC Rights

In arguing against ESC rights, contenders ignore the given notion that the content of CPR has grown over time which can largely be attributed to jurisprudence and political debate whilst ESC rights have been sidelined as mere 'programmatic rights'. CESCR GC and recommendations to State Parties (often in response to State Party reports) stand as a guide pointing out the core content of socio-economic rights and the state obligations (whether immediate or progressive). Emerging jurisprudence from both the national and international level has also helped to elaborate the content of these rights, providing fuller, more elaborate benchmarks.

2.1.1 The Minimum Core Content of ESC Rights

According to the Limburg Principle 25 States Parties 'are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.'[24] This means that there is a basic, inexcusable vital minimum core threshold to be met by State Parties in ensuring human dignity. The core content approach, also known as the minimum core content or minimum core obligations[25] and as the 'essential content'[26] is not anything unique to ESC rights but has been used to establish the content of CPR to ensure human dignity. It helps to assert state obligations whilst highlighting the "absolute minimum needed, without which the right would be unrecognisable or meaningless".[27] The approach helps to set parameters for the justiciability of ESC rights giving "substance to minimum legal obligations in both national and global distributive justice debates". [28]

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[24] The Limburg Principles (1987)

[25] As referenced in the 9th Maastricht Guideline

[26] Art 19 (2) of the German Constitution

[27] Courtis (2008) pg 23

[28] Young (2008) pg

In a bid to clarify this minimum core, the Committee adopted GC 3 holding that a "State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant". [29] The Committee also recognised that it remains essential to take into account the resource constraints applying within a country.

Zimbabwe, although facing resource constraints at many levels, is still bound to meet the minimum core obligations necessary to uphold human dignity. Where it fails to meet its minimum core obligations then it has to show that it made every effort possible to use all resources at its disposition to satisfy, as a matter of priority, its minimum obligations. Steps towards meeting these obligations must be "deliberate, concrete and targeted as clearly as possible".[30]

However, in South Africa the Constitutional Court expressed concerns in using the concept of minimum core arguing that it is problematic to define and that it places unrealistic duties on the State as it is impossible to give everyone access to a core service immediately[31]. As an alternate the Court developed a reasonableness model where it assesses whether the means chosen by the State are reasonable to facilitate the realisation of the socio-economic rights in question as opposed to setting a supposed minimum.[32]

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[29] Ibid para 10

[30] Ibid para 2 and para 12 (even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes)

[31] Government of the Republic of South Africa v Grootboom and others

[32] Ibid para. 41

Bilchitz[33] argues that the Court's claim against a minimum core approach shows a misunderstanding of the concept. As far as he is concerned, the socio-economic rights in the South African Constitution present two interests. The first is the need for the very basic goods to survive (minimum core). The second interest is to be provided with the conditions that enable them to pursue their own project and live a good life. 'The notion of progressive realisation links the two interests'[34]. Therefore the recognition of a minimum core that must be realised without delay takes into account the fact that some interests require more urgent attention than others. Whilst some proponents for the minimum core also argue that unlike the reasonableness approach, it defines the content of rights[35] others hold that all case law to some extent always ends up reading some content into the right in question, which in itself is a weak form of minimum core (without expressly using the term)[36]. Therefore, defining the core content of a right will remain important for national courts and the Committee in assessing enforcement, as this will provide a minimum standard to measure against.

The reasonableness review approach has been adopted in analysing complaints under the OP and now seems to be the more preferred standard of assessment.

2.1.2 Duties of Immediate Effect vs. Progressive Realisation of ESC Rights

In establishing the minimum content of a right, it is crucial to determine whether the duty is immediate or progressive. One right can contain both immediate and progressive characteristics. The immediate duties are those whose results are realisable immediately like providing against discrimination or formulating protective legislation, provide judicial remedies and other policy administrative measures necessary to facilitate the realization of

[33] Bilchitz (2003) pg 11 and 12

[34] Ibid Pg12

[35] Mbiada,(2010)

[36] Chowdhury,(2009) pg 13

these rights. Progressive duties are those realisable over time at the discretion of State Parties e.g. providing adequate housing for all. Here Zimbabwe is expected to take 'concrete, targeted steps while taking full advantage of its available resources, to ensure that the right is fully realized….'[37] Deliberate adoption of retrogressive measures is unjustified. [38]

2.2 Obligations to Respect, Protect and Fulfil

As Special Rapporteur to the UN Sub-Commission, Asbjorn Eide introduced a tripology of rights to get rid of the dichotomy of negative and positive obligations which he described to be inadequate[39]. He proposed that States be examined under the obligations to protect, respect and fulfill.

Similarly the Maastricht Guidelines provide that States should respect, protect and fulfill Covenant duties, failure of which may result in violations of such rights. [40] The same Guidelines further expound on how the obligations to respect, protect and fulfil each contain elements of the obligation of conduct (requiring action reasonably calculated to realise the enjoyment of a particular right) and the obligation of result (requiring states to achieve specific targets to satisfy a detailed substantive target)[41]. The CESCR has applied this taxonomy of rights in a number of its GC, specifying how each obligation attaches to a right.

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[37] Purohit and Moore v The Gambia

[38] CESCR GC 3, para. 9

[39] The Right to Food as a Human Right

[40] Guideline 6

[41] Guideline 7

Eide has also proposed the introduction of a fourth obligation to facilitate[42]. This has been supported by Steiner and Alston[43] who have described this fourth obligation to be an obligation to 'create institutional machinery essential to realisation of rights'. The CESCR has used this obligation as a component of the obligation to fulfil.

2.2.1 Obligation to Respect

This obligation requires that Zimbabwe refrain from unduly interfering with the socio-economic rights of its people. So where the right to health, housing, work or food are already enjoyed, the duty to respect will protect citizens against arbitrary deprivation by the state. In the *Jaftha v Schoeman* and *Van Rooyen v Stoltz*[44]case the South African Constitutional Court held that selling a persons home to pay a judgement debt was a breach of this duty to respect the appellants' right to housing.

This immediate obligation will also include respecting an individual's own efforts to realise such rights[45]. The African Commission on Human and People's Rights echoed this in the *Social and Economic Rights Centre & Center for Economic and Social Rights v Nigeria* (SERAC case) when it held that the obligation to respect means that the State should 'respect right holders, their freedoms, autonomy, resources and liberty of their action'.[46] Whilst to a large extent the obligation to respect has been viewed as a negative obligation, the European Court of Human Rights has interpreted it to include positive obligations. Here the State would not only have to refrain from but also take action to ensure respect of one's rights.[47]

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[42] *Rendering Justice to the Vulnerable: (* 2000) pg 111

[43] Steiner (2000) pg 182

[44] Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others

[45] Zimbabwe Lawyers for Human Rights (2009)

[46] SERAC and CESR v. Nigeria, Communication

[47] Akandji-Kombe (2007) pg 14

2.2.2 Obligation to Protect

The obligation to protect recognizes the horizontal effect of rights. Under this obligation Zimbabwe is required to protect individuals from the acts or omissions by third parties that threaten their socio-economic rights. Access to some of these rights is often determined by private forces (e.g. employers and landlords) hence Zimbabwe has to regulate private party conduct and enforce administrative and judicial sanctions for non compliant third parties.[48] The SERAC case summed it up as an obligation to protect individuals from 'political, economic and social interferences' by third parties 'through legislation and provision of effective remedies'[49].

2.2.3 Obligation to Fulfil

Here the State is under an obligation to take appropriate legislative, administrative and budgetary, judicial and other measures towards the full realisation of such rights.[50] Zimbabwe is therefore expected to be a 'proactive agent, capable of bringing about an increase in access to a range of rights....., identifying problematic situations, providing relief and creating conditions that would allow rights holders to manage their own access to the provisions protected by rights.'[51] This often involves the provision of basic needs for the actual realisation of rights (often affected by availability of resources). To fulfil, Zimbabwe must provide, facilitate and promote access to given rights.

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[48] Maastricht Guidelines, Guideline 15

[49] Ibid SERAC para 16

[50] Maastricht Guideline 6

[51] Courtis pg 23

Noting the obligations to respect, protect and fulfill ESC rights, the state must create and adopt a plan of action for the implementation of such rights (providing both immediate and progressive duties), ensuring that the basic minimum core is met to maintain the *raison d'être* of each right. Unjustified retrogression in the enjoyment of these rights will be contrary to obligations under the ICESCR.

3 Protection of ESC Rights in Zimbabwe: A Review of Existing Programmes

Zimbabwe is bound to protect socio-economic rights as provided in the treaties it is party to. In light of the content of rights and nature of State obligations presented in the previous chapter, this chapter will give a brief examination of some legislative, policy and other mechanisms in place in Zimbabwe today. Due to space limitations it will not be possible to provide a comprehensive overview but will limit it to the rights to health, education and housing.

As previously stated, the current Constitution of Zimbabwe does not in itself provide for the protection of ESC rights (with the exception to the right to property). Section 111B provides that conventions signed by Zimbabwe do not form part of the law unless incorporated through an Act of Parliament. However, article 27 in the Vienna Convention on the Law of Treaties provides that a State Party cannot 'invoke provisions of its internal law as justification for its failure to perform' its treaty obligations. Piecemeal mechanisms and approaches can be seen in an attempt to address some rights within the context of Zimbabwe.

3.1 Right to Health

3.1.1 Content of the Right

Article 12 of the ICESCR requires that Zimbabwe ensures the highest attainable health by taking the necessary steps to prevent, treat and control disease. In GC 14, the CESCR expands it to include that all persons under its jurisdiction must have access to "functioning public health and healthcare facilities, goods and services", which must be available, accessible, acceptable and of good quality to meet the needs of the population. Accessibility incorporates both distance and cost.[52] This includes health related education,

[52] Ibid para12

sexual reproductive freedom, and underlying determinants of health such as safe and portable water, sanitation, nutrition, housing and health occupational and environmental conditions[53].

3.1.2 Existing Frameworks

Zimbabwe has had no legislation explicitly providing for the right to health, but providing for public health administration. In keeping with its obligation to protect, the Public Health Act *[Chapter 10:09]* promotes public health and the prevention and management of infectious diseases, provides for application of international standards on sanitation, housing sanitation, food, water supply and infant nutrition. The Mental Health Act provides for the reception, detention and treatment of mentally challenged individuals. The Medical Services Act empowers the Minster of Health to delegate some of his/her function in the provision of medical services to local authorities and private medical actors. The government also introduced the Environmental Management Act *[Chapter 20:27]* providing environmental quality standards, preventing pollution and environmental degradation.

At a policy level, the Government introduced national days for immunisation, free health care programmes for orphans, children under the age of 5 and senior citizens over 60 years.[54] The Government also set up a National Policy to regulate the operations of traditional healers to ensure that tradition practices do not counter State effort to uphold rights. The registered traditional healers work in collaboration with doctors. To fight the increased spread of HIV and AIDS infections Zimbabwe also established the National AIDS Council[55] to ensure the development of strategies and policies to combat AIDS. The

[53] Ibid para 11

[54] Cabinet adopted the Orphan Care Policy in 1999, to cover free health care and food subsidies.

[55] National AIDS Council of Zimbabwe Act

Council administers a 3% AIDS Levy on all personal incomes of persons employed in the formal sector. The money is targeted towards prevention promotion and treatment.

3.1.3 Prevailing Situation

According to the Zimbabwe Human Rights NGO Forum, major referral hospitals were closed around the country in 2009, whilst the small clinics in both the rural and urban areas were understaffed with minimum supply of drugs to the point where they were as good as closed. The Forum explained that the reasons given for the closure of the hospital ranged from a lack of running water, poor sanitation, obsolete equipment and a lack of drugs[56]. After reopening, the hospitals have not been operating in full capacity. As of 2003 it was recorded that less than 50% of health facilities had vital equipment.[57] Private health care, as an alternative, is extensive but too expensive and inaccessible to a large majority of the population while the public hospitals, if open, suffer from obsolete equipment or a shortage of staff and drugs. The health crisis was exacerbated by the mass exodus of medical personnel to work in other countries. This compromised availability, access and the quality of health services leaving many Zimbabweans vulnerable to curable diseases.

As part of its immediate obligation to protect, Zimbabwe is obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post natal care and family planning. However, early this year The Herald, a Zimbabwean newspaper, reported the death of women in a religious sect during child birth due to their belief that sickness is treated through prayer[58]. The United Nations Population Fund in collaboration with the University of Zimbabwe and UN agencies Report stated that 725 women out of every 100 000 die due to child birth complications and that 29% of these women belong to the sect. 223 children from the same sect are reported to have died from a measles outbreak

[56] The Right to Health in Zimbabwe (2009)

[57] World Health Organisation (2007)

[58] Sachiti (22 January 2010)

that started in February 2010. The World Health Organisation 2007 Country Profile reported that only half of Zimbabwe's children receive all the recommended vaccinations and about 21% have received no vaccinations.[59] This suggests that the mechanisms in place are not sufficient to prevent child and maternal mortality.

HIV and AIDS related vulnerabilities continue to increase as exacerbated by the Operation Murambatsvina/Restore Order[60] which saw the displacement of many families, some of whom were living with AIDS, resulting in many of them having no access to clean water, sanitation or Anti-Retroviral Treatment (ART). A lack of access to clean water and sanitation also resulted in the spread of cholera which caused the deaths of over 4000 lives in 2009 and more than 90% of the 62 districts in Zimbabwe were reported to be infected by this disease.[61]

Zimbabwe has a public health rather than the right to health approach. The laws in effect relating to health so far do not recognize health as a justiciable right under the domestic framework. In light of the prevailing situation, it would be important for legislation to recognize health as a right, to ensure the State can be held to account for health budget allocations and policy formulations.

3.2 Right to Education

3.2.1 Content of the Right

Zimbabwe is under an obligation to respect, protect and fulfil the right to education, directing it to the 'full development of the human personality'.[62] As an indispensable

[59] Ibid, WHO

[60] Operation where government destroyed 'illegal' homes and places of work

[61] UN News Center, *Cholera in Zimbabwe* (2009)

[62] ICECSR Art 13(1)

means to realising other human rights, GC 13 requires Zimbabwe to ensure that functioning educational institutions and programmes are available and accessible to everyone without discrimination, in sufficient quantity, within safe physical reach and affordable to all. It must be acceptable to the students and parents and adaptable to the changing needs of society.[63]

The other core contents of the right include the adoption and implementation of a national educational strategy which includes steps towards free and compulsory primary education, provision for secondary, higher and fundamental education and to ensure free choice of education without interference from the state or third parties.[64]

3.2.2 Existing Frameworks

The right to education is explicitly provided for as a right in the Education Act *[Chapter 25:04]*. Section 5 of the Act provides that primary education is compulsory hence parents are obliged to send their children to school. To ensure parents can send their children to school, the Act provides that fees must be the lowest possible fees consistent with the maintenance of high standards of education[65]. The Act further prohibits discrimination, provides for the establishment, maintenance and regulation of schools, teachers' colleges, the decentralisation of the administration of the system of education and the establishment of an advisory council.

To ensure functioning institutions, the Manpower Development Act of 1994, provides for the establishment, management and operation of vocational institutions, universities and

[63] para 1 and 6

[64] Ibid para 57

[65] s6 Prior to amendment the Education Act provided for free compulsory primary education which resulted in more than a 100% enrolment. It was however not sustainable and the low fees were introduced in 1991.

colleges whilst the draft Zimbabwe Qualifications Authority Bill will establish a Zimbabwe Qualifications Framework to improve the quality of education through competency based learning[66]. Distance learning centres have also been established to improve access to education.[67]

To ensure affordability, the Education Amendment Act [Chapter 25:05] of 2006 and Statutory Instrument 159/07 [Temporary Presidential Powers on Pricing and Monitoring of Fees] were enacted to monitor the fees and levies charged by public and private schools. This was in attempt to reduce the growing disparity in the parallel education system, where fees in private schools was so high only children from specific racial and elite social stratum could afford to go there. The State also introduced the Basic Education Assistance Module (BEAM) in 2001 to provide financial assistance to vulnerable children through payment of their tuition fees. In 2004 the education ministries adopted the 'National Action Plan: Education for all towards 2015 (NAP)' which aims to increase enrolment and improve the quality of all levels of education in line with the Millennium Development Goals.[68]

For a long time Zimbabwe invested heavily on education such that primary and secondary school enrolments expanded by 79% and 841% and university enrolment increased by 300% in the period 1980 to 1989. During this period primary education was made free and by the end of the first decade after independence, universal primary education was achieved.[69] However, this has not remained the same.

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[66] Ibid

[67] Mugadzaweta (1999)

[68] Southern African Regional Universities Association

[69] The Zimbabwe National Commission for UNESCO (2001) Pg 4

3.2.3 Prevailing Situation

Despite the legislative and policy measures and gains made, school drop outs have continued to increase with the current economic decline. In 2006 alone, 29% of primary pupils dropped out of school due to financial reasons.[70] Although enrolment at primary level is almost at parity for boys and girls, at secondary and tertiary level the scales are skewed in favor of men.

A research project done by the Women and Law in Southern Africa Research and Education Trust (WLSA) to determine why girls in Zimbabwe were dropping out of school revealed that it is partly due to a lack of facilities and appropriate sanitary protection materials combined with cultural constraints and restrictions on activities during menstruation.[71] This is also coupled by insufficient sanitary facilities to allow dealing with menstruation during a girl's day in school. In some remote Zimbabwean areas schools are also not very easily accessible. Of particular concern is education for children with disability. Most schools for children with severe handicaps are in the urban areas and are expensive.[72]

Inclusive education is vital for the development of children with disabilities. The 2004 Education Management Information Systems recorded that 14 115 students are mentally handicapped, 50 000 have learning disabilities, 1 634 with hearing impairment and 2 635 with visual impairment were enrolled in school, out of an estimated 300,000 disabled children of school going age[73]. Zimbabwe does not have specific legislation providing for inclusive education. What is available are the non-discrimination clauses in the Education Act and Disability Act which do not specify

[70] Education Management Information Systems (EMIS) Draft Report (2006)

[71] Stewart (2007) pg 294

[72] UNICEF (2001)

[73] WHO (2004)

and regulate what services should be provided for disabled children and by who. This exposes most disabled children to continued lack of access to education and sufficient facilities. It is therefore critical for the State to develop binding legislation on inclusive education[74].

The education levels in Zimbabwe continue to drop, school dropouts continue to increase at all levels, primary education is not free although compulsory, trained teachers continuously strike or leave the profession and fees remain higher than the basic salaries of most parents. Public funding to meet basic necessities has decreased drastically resulting in deterioration of infrastructure, stationery, water and electricity[75]. The State has not been challenged judicially on its educational policies. The cases heard by the courts pertaining to education have been largely limited to discrimination. Examples include the *Mandizvidza v. Morgenster Teachers College* [76] and the *Dzvova v Ministry of Education and Ruvheneko Primary School.*[77] It will be crucial for Zimbabwe to open scrutiny of its policies beyond the legislature.

3.3 Right to Housing

3.3.1 Content of the Right

Zimbabwe is under an obligation to recognise everyone's right to adequate housing as provided for in Art 11 (1) of the Covenant. In GC 4, 'adequate' housing includes legal security of tenure, availability of services, materials, facilities and infrastructure (to ensure

[74] Inclusive Education in Zimbabwe (2007)

[75] Ibid Zimbabwe Lawyers for Human Rights

[76] The High Court ordered that a female trainee teacher who had been expelled due to pregnancy be reinstated as the expulsion amounted to discrimination on the grounds of gender

[77] In the Dzova case a boy had been expelled from school for having dreadlocks and it was considered discrimination on basis of religion.

health, security, comfort and nutrition), affordability of housing related costs, habitability (to protect against natural elements), accessibility to those entitled to the right, and that the location of housing allows access to employment and basic services[78]. The materials and structures of the houses also need to allow the expression of cultural identity and diversity.

Regardless of the state of development of any country, adoption of domestic legislation and a housing strategy[79], commitment to facilitating self help, a request for international cooperation and abstention by the Government from certain practices, are all immediate obligations Zimbabwe has to observe.[80] GC 7 obligates Zimbabwe to refrain from forced evictions and that prior to any evictions all feasible options are explored in consultation with those affected. It further provides that legal remedies should be provided ensuring the right to adequate compensation for any property both real and personal.[81]All evictions should not result in individuals being rendered homeless and vulnerable to the violation of other human rights.[82]

3.3.2 Existing Frameworks

The right to housing is not explicitly spelt out in the Constitution of Zimbabwe. However, Constitutional Amendment No. 17 of 2005 provides that the State can acquire all agricultural land required for resettlement purposes for the relocation of

[78] GC 4 para 8

[79] Global Strategy for Shelter to the year 2000 (1987)

[80] GC 4 paras 10-12

[81] Ibid Para 13

[82] Ibid Para 16

dispossessed persons[83]. To date, several farms have been acquired by the Government for housing developments[84]. The allocation of land for housing purposes is largely on a freehold basis to ensure security of tenure[85].

The Housing and Building Act [*Chapter 22:07*] facilitates self help by providing for the establishment and control of building funds and housing guarantee funds. To ensure security of tenure and affordability of housing the Rent Regulations provide for conditions of rent increments and prohibit arbitrary eviction without the regulated three months notice. A National Taskforce on Operation 'Dzikisai Mutengo' (Reduce Prices) was also established to monitor rental charges and to protect tenants from unwarranted evictions. The Housing Standards Control Act [*Chapter 29:08*] establishes housing courts (every Magistrates' Court), granting them specific powers and functions to ensure habitability. It provides for the repair, demolition or closure of buildings of unsatisfactory standards, abatement of overcrowding among other functions. The Act also sets out when clearance warrants may be granted by a local authority for the acquisition and clearance of areas in which buildings of unsatisfactory standards are prevalent[86].

The Regional, Town and Country Planning Act [*Chapter 29:12*] provides that a local authority can remove and demolish or alter existing buildings or discontinue or modify uses or operations therein. However, the authority has to give notice to the affected persons, stating the nature and grounds upon which it proposes such action allowing time for this decision to be contested by those affected or them to attempt to legalise their structures. The Urban Councils Act and Rural Districts Councils Act also

[83] Section 16B

[84] Sakabuya, (2008) Pg 3

[85] UN Habitat (2009) pg 12

[86] Preamble to Act

provide towards regulating housing. The Administrative Justice Act [*Chapter 10:28*] requires local authorities to act in a reasonable and fair manner in dealing with the interests of persons, allowing them time to contest its intended actions.

In 2003 the government adopted the National Housing Development Programme (NHDP) aimed at reviewing the housing policies and standards to facilitate the creation of an environment for investment in the housing sector. It calls on the participation of other actors in housing developments such as local authorities, private developers, housing cooperatives and NGOs. The programme requires that 30% of public acquired land be allocated to land developers and community based organisations[87] to improve access to housing. In the same year the Civil Servants Housing Scheme, with a revolving fund administered by the Minister of Finance, was introduced so as to facilitate self help towards home ownership among civil servants.

The Infrastructural Development Bank of Zimbabwe was also put in place so as to finance housing cooperatives and indigenous land developers among other functions. Through the Public Sector Investment Programme (PSIP), local authorities were also loaned funds with very low interest rates for infrastructural development.

To develop rural housing Zimbabwe established the Ministry of Rural Housing and Social Amenities. The Ministry is expected to provide model houses with modern standards in the rural areas as a means to curb rural urban migration. Under the Rural Electrification Funds Act [*Chapter 13:20*] a Rural Electrification Agency was also set up to provide electricity in the rural communities. The programme has targeted electrifying schools, business centres, hospitals and villages.

[87] Ibid 112. To date 66% of the 277308 stands have been allocated as such.

3.3.3 Prevailing Situation

As seen above, quite a number of Acts regulate housing, with one even establishing a court. However, although the Regional Town Planning Act and Housing Standard Acts provide for criteria to be fulfilled before destroying a premises or evicting person, the 2005 Operation Murambatsvina(OM) caused the destruction of 'illegal' vending sites, structures and homes leaving thousands of Zimbabweans homeless, without fulfilling the prerequisites. Notices of the operation were not widely publicised and those affected were not given adequate notice. No alternative accommodation was provided. Court enforcement orders were disregarded by the State and very little if any compensation and reparations were provided for loss of property. The UN estimates that about 2.4 million Zimbabweans were affected by the evictions[88]. These evictions were deemed to be contrary to Zimbabwe's obligation to respect and protect against forced arbitrary evictions.

The aftermath of OM saw the Government embarking on Operation Garikai/Hlalani Kuhle (meaning live comfortably) aimed at building houses for those who were displaced during OM. Phase one of this programme was completed and phase two involving the allocation of residential stands is ongoing. Of the more than 90 000 homes that were destroyed in the OM, only about 3, 325 houses have been constructed, many of which are still incomplete and inhabitable[89]. Some of the sample houses are also being constructed on land the High Court issued a provisional order for banning the government from allocating stands on it as it is private property.[90] This also has an impact on the security of tenure of the properties. Most of those evicted still live in transit camps, have been rendered homeless and remain vulnerable to continuing violation of their rights

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[88] Ibid Report of the Fact Finding Mission to Zimbabwe(2005)

[89] Ibid Zimbabwe Lawyers for Human Right pg 49

[90] Ibid Report of the Fact Finding Mission to Zimbabwe, pg 59

The cases brought before the courts on housing have been largely individuals contesting eviction[91] as opposed to demanding their right to housing. And even in eviction cases (e.g. with the OM), the courts dismissed cases[92] contrary to the CESCR GC. Availability and accessibility of housing continues to be limited and more would need to be done to enhance protection of the same right.

Conclusion

Overall, Zimbabwe has legislation and other mechanisms providing, to some extent, for the respect, protection and fulfillment (to a lesser extent) of some basic socio-economic rights. However, most of these frameworks are regulatory in nature and do not explicitly recognise them as rights, which impacts on their implementation. The policies and programmes are often also centralised, largely determined by the legislature with limited public participation, resulting in them not being challenged and hence not open to scrutiny by the courts. In the wake of continued inadequacies, limited availability, accessibility and acceptability it will be crucial to adopt additional mechanisms recognising ESC rights as legally enforceable rights. It can be presumed constitutional protection would open doors for individuals to use the courts to assess the reasonableness of government policies in protecting the right. As it stands, participation in formulation is very limited as individuals wait for the state to pronounce a new move.

[91] *Tinashe Tafira & 6 others vs Harare City Council & 2 Ors Harare Magistrate Court* . See submissions from Law Society of Zimbabwe, Action Aid, and Zimbabwe Lawyers for Human Rights. June/July 2005

[92] *Dare Remusha Cooperative Vs. The Min of Local Government, Public Works & Urban Development & Ors*

4 Institutional and Normative Arguments for and against Constitutionalisation

In 1950, Britain became party to the European Convention on Human Rights (ECHR) providing for the protection of CPR, without ratifying the OP (providing for ESC rights). In 1953 it extended operations of the ECHR to its dependencies.[93] The Convention was translated into bills of rights in various dependencies, including Southern Rhodesia (Zimbabwe) in 1961. Lord Perth is quoted to have proposed that Britain insert a bill of rights into all African constitutions they were drafting as justiciable rights considering it would be difficult for the colonies, upon independence, to justify repeal.[94] True to this, like other African States, Zimbabwe adopted the 1961 Bill of Rights (limited to CPR) into its Lancaster House Constitution.

By appreciating the indivisible, interdependent and interrelated nature of rights, moves have been made by various African countries to incorporate both CPR and ESC rights in State Constitutions either directly in the bill of rights, or as directive principles of state policy (DPSP) or as a mixture of both. The strength of incorporation into the constitution is based on the premise that the constitution is the supreme law of the land requiring that the obligations it imposes be fulfilled and law or conduct inconsistent with it be deemed to be invalid. This would mean that any acts or omissions contrary to it can be challenged and struck down by the courts.

Notably, Botswana, Tunisia, Zambia and Zimbabwe's constitutions do not explicitly contain guarantees of socio-economic rights or DPSP. Viljoen notes that despite numerous opportunities through redrafting (Zambia) and constitutional amendments (Zimbabwe), the

[93] Parkingson (2007) pg 5

[94] Ibid pg 247

above named countries did not provide for the inclusion of socio-economic rights in their constitutions due to relative 'stability and continuity'[95].

In 1999 a Constitutional Commission, appointed by the Government presented a draft constitution for Zimbabwe. This proposed draft was rejected, in a referendum held in 2000, largely for its provisions on presidential powers and land reform. Another constitutional draft (the Kariba Draft) was drawn by the political parties in 2007 and like the 1999 draft incorporated ESC rights as non-justiciable national objectives. Following the Inter-Party Political Agreement signed in September 2008, providing for an eighteen-month period of drafting and enacting a new constitution (Art 6), Zimbabwe is currently undergoing a constitution making process. To ensure a people driven process, outreach teams have been sent out to ask the people what they want in their constitution.

It can be concluded from the previous chapter that the mechanisms currently in place in Zimbabwe today are not providing sufficient protection. To determine whether constitutional protection may help enhance socio-economic protection in Zimbabwe, this chapter will discuss arguments for and against constitutional protection. A comparative analysis will then be done to analyse how select State Parties, have incorporated ESC rights in their constitutions and what impact this has had in their domestic sphere. The chapter will end with lessons to be learnt by Zimbabwe in considering including these rights into its constitution.

4.1 Arguments Pro-Inclusion of ESC Rights in State Constitutions

Article 2(1) of the ICESCR calls on State Parties to take 'all appropriate means, including particularly the adoption of legislative measures' to meet their obligations. GC 3 para3, further elaborates that in fields such as health, education and other socio-economic rights,

[95] Viljoen (2007) pg 583

legislation ‘may also be an indispensable element for many purposes’. Constitutional protection of socio-economic rights may have the following benefits for Zimbabwe :

4.1.1 Creates a national remedy to protect marginalised and disadvantaged groups

The disadvantaged and marginalised communities are often the groups in need of socio-economic protection. With very little and sometimes no legislative or executive representation, the groups are left vulnerable subject to being sidelined, (although often times not as a conspiracy against them). Majoritarian institutions, which in many African countries are not easily accessible, often tend to focus on the whims and inclinations of the majority so as to maintain popularity and votes, leaving the vulnerable with no form of recourse in case of any violations.

Explicit inclusion of socio-economic rights in the constitution will force the legislature to mainstream these rights in creation of law and policy. This would help reduce vulnerabilities as the communities are educated and empowered on their rights hence better placed to advocate for better promotion and protection on their own behalf. Where the rights are in the bill of rights, the victims can file actions against the legislature in court, giving both parties the opportunity to comprehend each others legitimate expectations, guided by the constitution.

Some may argue that constitutional inclusion is not necessary as marginalised and disadvantaged groups are often represented and well protected under other existing policy frameworks. Yet the indispensable nature of constitutional protection can be seen from examples in two eviction cases in Zimbabwe and South Africa. In 2005, Zimbabwe embarked on Operation Murambatsvina which saw the eviction of thousands of people in the urban areas. Upon eviction, no form of compensation or redress has been provided for most victims, a lot of whom are living in transit camps that have no structures, subjecting the evictees to the elements. They have not been able to claim protection under the right to housing in the courts as this does not exist in Zimbabwe’s legislative framework. Some

who filed with the courts had their cases thrown out.[96] In the *Port Elizabeth v Various Occupiers*, were the Port Elizabeth Municipality wanted to evict individuals who had erected shacks on private land. The Constitutional Court (the Court) held that it would be reluctant to issue an order for eviction where there have not been attempts at mediation between the parties and unless the Municipality shows that a reasonable alternative may be provided. In *Olga Tellis v. Bombay Municipal Corporation* the Indian Supreme Court nullified a statute providing for local authorities to forcibly evict urban dwellers without due process safeguards and held that the 'pavement dwellers' could not be forcibly evicted as this would deny them of their livelihoods, violating their right to life. The dwellers could only be moved where an alternative and compensation are offered.

4.1.2 Improves accountability and service delivery by States

Constitutional protection of rights always gives rise to institutional interaction between the three arms of government. Where the legislature and executive adopt questionable laws and policies they can be challenged in the courts. In the *Treatment Action Campaign v Minister of Health and Others* the state policy to limit the administration of nevirapine to private centers and specific public pilot sites for two years while they tested its effects was challenged. The Court ordered that nevirapine be made available in all public health institutions and that the State presents to it an outline of how it will spread access countrywide. This opened a forum for public debate about HIV and AIDS, mother to child transmissions, and attracted considerable media attention worldwide resulting in the Department of Health having to account to its citizens on both the social, political and legal front.

In *Mazibuko v. City of Johannesburg & Ors* the Court emphasised the need for accountability when it held that "the purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms

[96] See note 108

of government to account through litigation….. [which] fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy'.[97]

Constitutional protection of socio-economic rights may also compel policy makers to evaluate potential ESC rights implications of their proposed policies before adoption knowing that they will have to "explain why the policy is reasonable….disclose what it has done to formulate the policy: its investigations and research, the alternatives considered, and the reasons why the option underlying the policy was selected"[98] before the courts. It can be assumed that after the *TAC* case the Department of Health will now consider its obligations first before adopting any further health policies. This in itself works to improve service delivery.

4.1.3 Prompts review and amendment of existent law and Policy

Where ESC rights are incorporated into the constitution, the legislature will have to review and amend law to be in conformity with it, hence allowing for better protection of individual socio-economic rights. Review of legislation will also be important for the judiciary who will decide cases on existing law without having to always rely on judicial activism. Articles 32 of the Indian Constitutions empowers the S.C to quash legislation contrary to the Constitution (as seen in the *Olga Tellis* case) and the Columbian Constitutional Court has a duty to review economic policies. This means that if the governments concerned want a law to remain in existence, then they make sure it conforms to the constitutional standards

[97] para 160

[98] Ibid Mazibuko para 161

Review and amendments will also be important in removing the disparity between CPR and ESC rights as both would be recognised as legal entitlements (and not socio-economic rights as privileges).

4.1.4 All human rights are Interdependent and Indivisible

As reiterated by the African Charter, the Vienna Declaration and various scholars, all rights are interdependent and indivisible. According to Scott, ESC rights and CPR are distinct yet mutually dependent on each other. This implies that the realization of ESC rights can help ensure the maintenance of peace and security,[99] hence both sets of rights should be equally protected under state constitutions.

The benefits of constitutional protection go beyond litigation, giving a voice to the masses, raising a consciousness of ESC rights as entitlements as opposed to privileges, guiding the political processes and creating a platform for domestic accountability.

4.2 A case against constitutional protection of ESC rights

While constitutional protection of ESC rights, creates a national remedy, enhances accountability and prompts legislative review, several scholars still debate against their incorporation into state constitutions.

4.2.1 Compromises the separation of powers doctrine

Several scholars express concerns and argue that constitutional protection of ESC rights will undermine parliamentary sovereignty, shifting power from parliament or the legislator to the judiciary.[100] Proponents of this argument hold that there is a danger that the courts would usurp legislative powers as they will depart from the literal meanings, adopting creative interpretations that indirectly rewrite legislation. Lord Lester added that the

[99] Scott, (1999) pg 782-83

[100] Davies (1994) pg 104

supervisory role of the courts should be limited "because of the constitutional separation of public powers and because of the limits of judicial expertise".[101]

In the South African First Certification judgement[102] in response to the argument on separation of powers, the Court stated that

> 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 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.[103]

Bilchitz in justifying judicial review contended that judicial review does not involve replacement of majoritarian decision-making by judicial decision making but that it involves "the judiciary reviewing, on a number of limited and specified grounds, the decisions already taken by majoritarian decision makers".[104] An-Na'im explains that if human rights are universal, then they must include ESC rights and "that cannot be without judicial supervision of normal political and administrative process…." He further held that judges know the limitations of their office and the nature of judicial process hence respecting the separation of powers.[105] This is evidenced in the *Narmada Bachao Andolan v Union of India* case where the Court set its own boundaries holding that when the

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[101] Lord Lester of Herne Hill QC (2004) pg 17-22

[102] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*

[103] Ibid *re Certification* para 77

[104] Bilchitz, (2008), pg 104

[105] An-Na'im (2004) pg 7-16

government makes a decision after "due consideration and full application of mind" then the court cannot sit in appeal over such a decision.[106]

Therefore if Zimbabwe incorporates ESC rights in its constitution, this will not impinge on the separation of powers but instead, were cases are brought, the court will arbitrate between the elected and the electorate within the parameters of the constitution.

4.2.2 ESC Rights are non- justiciable

According to Arambulo, a right is justiciable where it can be applied by a judge and this application results in the further determination of the right's meaning[107]. She analyses arguments by various scholars who contend that ESC rights are not rights but 'mere utopian aspirations' or programmatic guidelines for government policy. Others argue that ESC rights are 'too vague and require positive action' hence not justiciable. An example given is with the right to health care which is perceived to be impossible to give sensible content.

However, domestic and regional practice has shown the courts deciding on these rights and clarifying their content and ensuing obligations. The book 'Social Rights Jurisprudence: Emerging Trends In International and Comparative Law' in elucidating ESC rights made use of about two thousand judicial and quasi judicial social rights decisions from 29 national and international jurisdictions, showing that these rights are justiciable. The General Comments have also shown socio-economic rights to have not only positive but negative obligations (obligation to respect) e.g. by prohibiting arbitrary evictions or not inhibiting trade union freedoms. In the First Certification judgement the court responded

[106] Pg 696

[107] Arambulo, (1999), pg 55

that ESC rights are to some extent justiciable and at the very minimum can be negatively protected from invasion.[108]

Mureinik explained that the basis of contestation with ESC rights is largely because they can be realised in more than one way whereas if a CPR is denied, the court knows almost without thinking that it must respond by quashing the denial. He stated that CPR generate their own remedy which is usually an annulment whereas ESC rights can be delivered in political and economic ways.[109] However, there is room for structural interdicts with CPR, for example where there are not enough polling stations, a court would quite happily order that more be provided or that polling days be extended, which costs money. The decision may even be made on a political front beyond the courts.

4.2.3 Competency and Capacity of Judges

Questions pertaining to the competency and capacity of the judiciary to enforce ESC rights have been raised. Sunstein in his article stated that courts lack the tools of a bureaucracy and cannot create government programs as "(t)hey do not have a systemic overview of government policy."[110] Other proponents argue that the courts may end up making judgements on the value and effectiveness of government policy and the allocation of resources when they do not have the capacity or competence to make budget decisions over what should be prioritised.[111] The misapprehension in arguing that these rights cannot be decided by a court is often based on false assumptions that judges want to formulate government policy and that all ESC rights cases are complex[112].

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[108] Ibid First Certification, para 78

[109] Mureinik (1992) pg 467

[110] Sunstein (1993) pg 37

[111] Courtis (2008)

[112] ibid pg 89

According to the International Commission of Jurists, "what determines the complexity of a case are factors such as the number of actors involved, the scope of the violation, the extent of the required remedies' not the nature of the rights".[113] Judges are trained to evaluate and consider evidence which is why they can consider complex issues pertaining to finance, maritime, or tax laws. To enhance their understanding in complex technical issues, judges often call upon expert witnesses to clarify issues. To then state that they cannot determine positive and negative duties of the right to health or housing or evaluate state policy can be somewhat misguided.

4.2.4 Adequacy of ESC Rights protections through democratic institutions and legislation

Some may want to argue that sufficient safeguards to protect ESC rights are already in place through legislation and policies in place so there is no need for them to be in a constitution. Sunstein contends that there is a "big difference between what a decent society should provide and what a good constitution should guarantee." For Sunstein, the constitution is a legal document that should contain concrete tasks. A decent society should then ensure that its citizens have enough food, shelter and other socio-economic guarantees through market arrangements and other strategies[114].

However, the question one would ask is to what extent the legislation and other social mechanisms recognize ESC rights as rights claimable by individuals. Is the right to health less concrete than freedom of expression? Sunstein does not define what a decent society means, but he over presumes social goodness to share and distribute evenly to all. What is clear is that relying on democratic institutions alone may not be enough as evidenced by the *status quo* in Zimbabwe. It is the democratic institutions initiating mass evictions, or

[113] Ibid pa 90

[114] Sunstein (1993) pg 36

keeping in stock surplus grain in their silos people are starving.[115] Like Justice Chaskalsan said, it is not the function of the courts to govern a country but that of the executive and legislature who should do it in conformity with the constitution. It becomes the duty of the court to make sure that they respect democracy[116] as a necessary checks and balance.

4.2.5 Availability of Resources

States, at variance with constitutional protection of ESC rights often argue that it is pointless to provide for these rights without sufficient resources to ensure their protection. This positiveness argument contends that to realise these rights requires action and resources as opposed to refraining that is required of CPR.

However, if a form of checks and balances is not put in place, State Parties may always allege a lack of resources to the detriment of vulnerable individuals. In *Ratlam Municipality v Vardhichand* the municipality alleged inaction due to a lack of resources. The Indian Supreme Court then they should make representations to the legislature to seek sufficient resources. As a result the legislature did allocate resources for the construction of drains. The Court guided the municipality into considering options.

Courts often review adopted measures in line with the available resources without necessarily imposing measures on a state. In the *Purohit v Gambia* case[117] the African Commission acknowledged that most African countries have to deal with poverty, and suffer resource constraints hence resource scarcity is a possible defense.

However, like clearly spelt out by the CESCR in its GC3, 'in order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of

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[115] *People's Union of Civil Liberties v. Union of India*

[116] Chaskalsan (2001) Pg 251

[117] Communication 241/2001, unpublished

available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations……under the prevailing circumstances'.[118]

As seen in the Purohit case, the courts, in reviewing adopted measures, will not decide on the merits in isolation of the available resources.

4.2.6 Governments should not interfere with free markets

Sunstein is convinced that constitutional protection of some socio-economic rights will compel governments to interfere with free market economies.[119] He gives an example of the Hungarian Constitution providing for the right to equal pay for equal work and also the right to an income conforming to the quality and quantity work performed. For him the consequence of this is that courts will have to oversee labour markets and make sure every bargain produces the right wage.

What is clear and generally accepted is that all rights are indivisible hence if one set is justiciable, both should be. If a state is also party to ILO Conventions or other treaties providing for labour rights, then the state has the obligation to protect its individuals from exploitation and regulate the conduct of employers and transnational corporations. Secondly, the courts do not have to police sectors and free markets but act upon an application alleging a violation, and then only will they review the legislative and executive measure in place.

In assessing the arguments for and against constitutional protection, it is clear that ESC rights are in themselves justiciable, that they do not impinge on the separation of powers but instead will help to improve accountability and service delivery in Zimbabwe, among

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[118] Para. 10 and 11

[119] See note 127

other considerations. To fully appreciate this potential impact on Zimbabwe, it will be essential to assess how other State Parties provide for their protection.

4.3 Protection Mechanisms existent in select jurisdictions

For purposes of this paper the comparative analysis will be limited to South Africa, Nigeria, India and Columbia and close with lessons to be learnt by Zimbabwe. For better comparative analysis it makes sense to make reference to countries in different regions with different applications of ESC rights in their constitutions.

Incorporation into the Bill of Rights

4.3.1 South Africa

The constitutional protection of ESC rights as justiciable rights in South Africa has been hailed as being among the best in the world today. In spelling out the socio-economic rights, each article provides both positive and negative obligations emphasising that the State must take 'reasonable legislative and other measures, within its available resources, to achieve progressive realisation' of the specified rights. The Bill of Rights also highlights both the horizontal and vertical application of these rights, creating duties for both the state and private parties[120].

Legislation has been wide-ranging, providing minimum standards, procedural rights and positive obligations[121]. However, it is through judicial review that South Africa has been able to conjure political debate to enhance protection of socio-economic rights, clarifying to some extent on the meaning and content of each right and whether State policy choices are in conformity. It will be important to note that South African courts rejected the minimum core content as a method of review arguing that it is problematic to define and

[120] Liebenberg, pg 78

[121] South Africa: Draft Concept Note, October 2009

that it places unrealistic duties on the State as it is impossible to give everyone access to a core service immediately. The reasonableness test has been the preferred option.

The legislature can also use these rights to defend its own programmes as can be seen in the case *Ministry of Public Works v Kyalami Ridge Environmental Association*[122] where the government had established a transit camp to temporarily settle flood victims. A residence association challenged the settlement arguing that it was contrary to the town planning scheme and environmental legislation. The Court held that the move by the State was justified to meet its constitutional mandate to provide access to housing. Indirectly the courts acted as a mediator between the legislature and the communities.

One might want to argue that despite all the socio-economic protections, South Africa still has growing disparities between different social groups. It is important to note that constitutional protection and legislative reforms in themselves will not change things overnight or end deprivation but it stands as an important component of the process of socio-economic development. It is as Beth Simmons put it, a modest step forward. *Grootboom* made a significant impact on evictions and government housing policy, giving the poor people a degree of bargaining power to fight evictions. It established a "strong defensive right that prohibits evictions in the absence of alternative accommodation being made available."[123] The *TAC* case resulted in the South African Cabinet committing to implement a comprehensive MTCT prevention program, the government established a Joint Health and Treasury Task Team to examine treatment options to supplement comprehensive care for HIV and AIDS in the public sector and the Department of Health developed a detailed Operational Plan on an ARV treatment programme[124] hence improving access to healthcare.

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[122] 2001 (7) BCLR 652 (CC)

[123] Berger (2008) pg 81

[124] Ibid pg83

Incorporation as Principles of State Policy

4.3.2 Nigeria

The 1999 Constitution of Nigeria provides for ESC rights as Fundamental Objectives and Directive Principles of State Policy. Chapter II (containing rights to economic activity, adequate shelter, welfare rights, access to health and medical care, education and the environment) expresses ESC rights as duties of the state as opposed to rights and S6(6)(c) explicitly spells them out as non justiciable. Section 13 nevertheless calls on organs of government and persons exercising legislative, executive and judicial powers to observe and apply Chapter II.

Various groups have alleged marginalisation and underdevelopment, violations of the right to housing, health and a healthy environment among other concerns as seen in the *SERAC* case. The African Commission in considering admissibility stated that the military government had passed several decrees which would make the prospect of receiving a domestic remedy impossible. In 2008 the Social and Economic Rights Centre lodged another communication before the African Commission, on behalf of the Maroko Community of Lagos who were forcibly evicted……. resulting in the "loss of lives, the destruction of homes, schools, religious institutions and businesses"[125]. The Centre stated that the Maroko evictees have pursued their claims in the Nigerian national courts for more than 18years but have not yet obtained a remedy or redress.

The courts have been hesitant to hear ESC rights cases. The few successful cases of judicial enforcement of health and education rights has been achieved through CPR. Examples are education cases were the court orders non-closure of a private school to protect the interests and profits of proprietors as opposed to the claim of students' right to education.

[125] SERAC *http://www.serac.org/Pages.asp?id=301*

Were a decision is made, enforcement and compliance cannot be guaranteed because under the Sheriff's Civil Process Act, court orders against the assets of government require the consent of the Attorney General at federal level who is known to routinely decline. Odinkalu[126] comments that there seems to be 'no value maintaining suits against a party whose own consent must be sort before the benefits of the judgement can be enjoyed.

The Centre on Housing Rights and Evictions expressed that it is difficult to make constitutional provisions on ESC rights a basis of legal complaints before the court of law in Nigeria because they are none justiciably provided for and the courts have been hesitant to entertain complaints based on the same rights.[127]

4.3.3 India

Like the Nigerian Constitution, the Indian Constitution provides for ESC rights as DPSP. The difference is that the judiciary in India has been active and not hesitant to order for the realization of such rights, resulting in a lot of jurisprudence giving content to the rights. The Supreme Court (SC) relaxed its rules of standing and procedure to allow for access and participation[128] by any person even if they are not victims. This has seen an increase in public interest litigation in India.

The SC has relied heavily on organic and related interdependence of rights for the realization of ESC rights, employing the right to life and non-discrimination to litigate socio-economic rights. According to Justice Iyer (former SC Judge), the court decisions by the Indian Review Court have had substantive impact on people's lives[129] as seen in the *People's Union for Civil Liberties v Union of India* case. The applicants sort the right to

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[126] Odinkalu (2008) pg190

[127] COHRE (2004) pg 21

[128] Shankar (2009) pg149

[129] COHRE (2003) pg33

food deriving from the right to life and the SC ordered that various schemes be put in place to prevent starvation. This resulted in the reactivation of social programmes for food and nutrition.[130]

Another special feature in the Indian Constitution is article 13, providing that the courts can challenge a government decision and any law if it is inconsistent with the constitution and fundamental rights. Such laws will be considered void, hence securing protection for all rights. The decisions by the courts have had positive impact on policy and the lives of specific groups but there have been concerns as to the lack of uniformity in the approach of the judiciary in enforcement of ESC rights, partly attributed to the change in bench compositions in the SC. The concern is based on one bench making a decision which is then doubted by a later bench of judges in a similar case, whilst the political circles have debated over the limits of judicial activism.[131] However, this does not overshadow the strides achieved by the SC in protection ESC rights.

4.3.4 Colombia

Colombia has been distinct in its protection of ESC rights. Its 1991 Constitution provides for CPR as fundamental rights (including a few ESC rights) and Social, Economic and Cultural Rights, as such. The distinction between the two is that most of the fundamental rights are "applicable immediately" and in case of a violation or omission, every person has the right to file, against the State or individuals providing public services, a writ of protection (tutelage action) for the immediate protection of their fundamental rights.[132] The admissibility criterion is open, requiring no special prerequisite.[133] The court reviews

[130] Ibid 18

[131] Scenario (2006) pg 265

[132] Article 86

[133] Yepes (2006) pg360

hundreds of tutela cases annually.[134] Where a tutela judge finds a violation of the "programmatic facet of a fundamental right, he must protect that right by adopting orders to ensure its effective enjoyment"[135] yet still maintaining respect for the process of public debate and decision making characteristic of a democracy. The order must be complied with immediately failure of which the applicant can file for contempt of motion resulting in the respondent's arrest or other sanctions until they comply. This has resulted in high compliance with the writ issued by the court.

The Constitutional Court has been creative to ensure the tutelage action also covers ESC rights. It adopted interpretive practices to determine the applicability of these rights, by broadly interpreting 'fundamental rights' to mean rights that are by nature fundamental based on the intertwine between CPR and ESC rights.[136] Justice Espinosa, in reviewing a tutela of cases on the right to health, held that even though the obligations arising from the right to health were programmatic in character and their realization was progressive, they were directly susceptible to protection through tutela as they constituted obligations upon which the right to life or personal integrity depended.[137]

The Court also uses the "concept of minimum conditions for a dignified life" approach providing that if an individual's basic subsistence falls below the accepted minimum, resulting in an undignified life, then they can invoke tutelage action.[138]

The third method is the 'concept of the unconstitutional state of affairs' referring to cases revealing a systematic and widespread violation of several constitutional rights that affect a

[134] Judgement T-760\08

[135] Ibid pg 6

[136] Sepulveda(2009) pg147

[137] Judgement T/760\08 pg 4

[138] Ibid Sepulveda pg148

significant number of people.[139] This has worked to protect marginalized groups like prisoners and displaced persons. This Court also reviews the constitutionality of economic legislation like annulling laws that extended the VAT to necessity goods and other pension orders. This has resulted in the Government making sure that its economic policies and decisions abide by the Court's lineaments, if it wants them to remain in the legal system.[140]

Tutela actions have increased tremendously in Colombia. In 1999 there were about forty thousand social security actions that cost almost seven million dollars compared to 1998 that had about ten thousand action that cost two million dollars. Quite a number of concerns have been raised as to these actions and the risk they pose in making social security systems financially unsustainable and that they may create inequalities as some individual will benefit whilst others do not.[141] However, the gains made through judicial activism resulting in jurisprudence on ESC rights have helped to protect the socio-economic rights of the vulnerable members of society, through the writ of protection, whilst at the same time providing guidelines on state obligations to state authorities for the design and implementation of law and policy.

In view of the constitutional mechanisms of protection provided in the selected countries, the question to be asked is what this means for Zimbabwe.

4.4 Lessons to be learnt

Zimbabwe is already party to various regional and international instruments providing for socio-economic protections and is expected to bring its domestic legislation to be in line with ensuing obligations. To date the constitution does not provide for such protections and

[139] Ibid

[140] Ibid Yepes pg373

[141] Ibid pg368

the current processes to draft a new constitution usher in an opportunity to remedy the omission.

The 1999 Draft Constitution and the Kariba Draft both adopted ESC rights as National Objectives Directing State Policy, which, like seen in Nigeria and several other states, stunt the growth of jurisprudence which would help towards good governance and the welfare of all Zimbabweans. Whilst it could be proposed that Zimbabwe may adopt the Indian approach of interpreting CPR to protect ESC rights, this approach is subject to many limitations, and may under spell the content of the rights concerned. "….(D)enying an individual or group the ability to make constitutional claims against the state with respect to nutrition, housing, health and education, excludes those interests from a process of reasoned interchange and discussion, and forecloses a useful forum for the recognition and redressing of injustices."[142]

Mureinik in discussing directive principles stated that their use is designed to immunise from legal challenge government action which is actually repugnant to a first generation right, just because it pursues a goal postulated by one of the ESC rights. He further held that this "has the capacity to erode the fundamental character of 1st generation rights without doing anything to make ESC rights fundamental' and that to make economic rights mere interpretive presumptions is plainly to declare them worthless than political rights".[143]

However, when looking at Colombia, it is clear that a Review Court can creatively adopt its own mechanisms that ensure the protection of ESC rights. The Court interpreted its writ of protection to include socio-economic protection and this has been generally accepted. The weakness in the DPSP approach is that it is dependent on judicial activism. The Colombia and Indian courts have been proactive whilst the Nigerian has been hesitant. Zimbabwe

[142] Scott (1992)

[143] Ibid Mureinik pg 469

may consider justiciable incorporation to ensure socio-economic protection with or without an active judiciary.

After making socio-economic rights justiciable under its constitution, it will be important for Zimbabwe to consider mechanisms of enforcement. Taking a lesson from South Africa, the enforcement/implementation of the *Grootboom* decision has been criticised as weak and tardy as not much has been done for the affected community.[144] However, the Court has been seen granting mandatory relief and exercising supervisory jurisdiction over some of its orders. This means the State will be ordered to present to the court an action plan of how it will remedy the violation and it will have to report back to the court at specified intervals as to its progress in implementation. In Indian courts enforcement is through declaratory and mandatory orders. However, supervisory orders maybe the most progressive as it will be easy to return to the courts were an order is not complied with.[145] In Colombia, the order must be complied with immediately failure of which the respondent may be charged with contempt and arrested or sanctioned. This has made compliance with writ issued very frequent.[146] The UN Fact Finding Mission and COHRE reported that during Operation Murambatsvina, the High Court of Zimbabwe issued some provisional orders to interdict the police and a number of them went unheeded.[147] It will therefore be important for Zimbabwe to adopt enforcement mechanisms that will ensure respect for the courts' judgements. As clearly articulated by the High Commissioner,

> 'All human rights must be given effect at the national level. This requires the creation and implementation of legislative as well as administrative and policy measures. Regarding enforcement, international law emphasizes judicial remedies for violations of human rights, though administrative remedies can also be acceptable if they are "timely,

[144] Kamesshni (2002) pg255-277

[145] COHRE (2003) pg18

[146] Yepes (2006) pg382

[147] Pg 59

> accessible, affordable and effective". Courts are playing an increasingly vital role in enforcing socio-economic rights, making clear the transition from need and charity to meaningful entitlement and binding obligation. In practice, effective judicial enforcement depends more on courts being granted the authority to hear claims, than on the inherent nature of the rights'.[148].

Zimbabwe continues to face increasing levels of deprivation adding to the number of homeless people with limited access to health care, education and social security. The legislature and executive have adopted numerous legislative and policy measures which have not been subject to scrutiny by other systems or challenged in the courts, perpetuating the deprivation and the lack of clarity on the content of each right in the Zimbabwean context. It is desirable that Zimbabwe choose to learn from its neighbor, South Africa by opting to incorporate ESC rights as legally enforceable rights. If the legislature and executive insist on maintaining the drafts (incorporating as DPSP) then the courts can learn methods of judicial creativity from Colombia and India and allow for public interest litigation.

It is important to note that constitutional protection and legislative reforms in themselves will not change things overnight or end deprivation but stand as important components of the process of socio-economic development. It is as Beth Simmons put it, a modest step forward.[149]

[148] High Commissioner for Human Rights 14 January 2005

[149] Simmons (2009) pg64

5 Should Zimbabwe Ratify the Optional Protocol

5.1 Introduction

In addressing the Open Ended Working Group working on the elaboration of an Optional Protocol to the ICESCR in 2005[150], the High Commissioner for Human Rights explained that one of the basic challenges faced by the United Nations human rights system is giving true meaning to the Vienna Declaration Principles of the indivisibility and interrelatedness of all human rights and that because of this, ESC rights have not always received the same amount of attention as CPR. The adoption of the OP therefore represents a milestone in the history of human rights, establishing a quasi-judicial body to assist victims of ESC rights violations where they have failed to get an effective remedy at the domestic level.

Having been formally adopted by consensus by the General Assembly on the 10th of December 2008, as the world commemorated the 60th anniversary of the UDHR, the OP ushers in a new dawn confirming the equal value and status of rights and creating a petition mechanism for a crucial treaty body in the field of human rights. The OP was opened for signature on the 24th of September 2009 and to date 32 States have signed and one ratification. Zimbabwe is party to the ICESCR but is not yet a signatory to the OP.

The OP is to be administered by the CECSR which was established in 1987 and is composed of independent experts who have been developing jurisprudence on ESC rights through general comments, state specific observations and now prospectively through litigation.

This chapter will aim to ascertain whether Zimbabwe should ratify the OP as a tool for enhanced protection. In the first part of this chapter I give a brief outline of the OP, analysing some of its provisions and highlighting its potential strengths and weaknesses. I will then discuss some of the opportunities and challenges that may be raised in choosing to

[150] http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=7657&LangID=E

ratify the OP. I will conclude with a brief analysis of what all of this will mean for Zimbabwe.

5.1.1 Relationship between the OP-ICESCR and the ICESCR

The OP exists as a separate treaty that has to be signed and ratified by States that are already party to the ICESCR. It is important to note that the treaty is a 'procedural instrument' which does not create new socio-economic rights but provides for the establishment of mechanisms to strengthen the monitoring and implementation of rights provided in the ICESCR (notably, inclusion of the reasonableness doctrine modifies the Covenant). The communications and inquiry procedures will create jurisprudence and advance claims which may progressively improve state performance and strengthen the acceptance of ICESCR treaty obligations as legal duties that are not negotiable[151].

5.2 An overview of the Optional Protocol

5.2.1 Competence of the Committee and *Locus Standi*

The OP starts by recognising the authority of the CESCR to adjudicate over all ESC rights complaints pertaining to State Parties to the Covenant and OP. By becoming party to the Covenant, a State will acknowledge that the CESCR can receive and consider complaints against it. Adjudication includes the right to self determination which was an issue of contention before. Execution of this right will 'presumably exclude the civil and political rights dimensions such as any right to secede'[152].

Similar to other treaty bodies, communications maybe submitted by or on behalf of an individual or groups of individuals who are 'under the jurisdiction' of a State Party and

[151] IWRAW Asia Pacific, (2008)

[152] Langford (2009) pg 20

claim to be victims of violation of ESC rights[153]. Therefore there has to be a causal link between the violation and the individuals and a relationship between the individuals and the state. The jurisdictional limitation is not explicitly highlighted so whether it will be territorial[154] or based on the exercise of effective control[155] is yet to be seen.

5.2.2 Admissibility

The admissibility criteria and procedures in articles 3 and 4 of the OP to the ICESCR are similar with that of the OP to the ICCPR, among other treaty bodies. All 'available' domestic remedies must be exhausted. Availability denotes effective and sufficient[156], hence Zimbabwe would have to ensure that domestic legislative and policy measure are in place. Borrowing from the ECHR, it can be presumed that where more than one effective domestic remedy procedure exists, the author of the communication will only be required to use one[157].

Where it would be unreasonably prolonged, as seen in the Maroko case[158], then the rule will not apply. According to article 10(1)(c) the requirement for the exhaustion of domestic remedies is also important under the interstate communications procedure.

The matter must not be before another procedure of inquiry, must be in writing (whether this limits oral submissions is still to be seen) and not anonymous. The facts of the case

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[153] OP-ICESCR, Article 1

[154] Bankovic & Ors v Belgium

[155] Nicaragua v USA, ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits)*, paras. 105–115

[156] Lovelace v. Canada

[157] Moreira Barbosa v. Portugal

[158] See note 44 above

must have occurred after entry into force of the communication unless the violations are continuing and they must not be ill founded or exclusively based on media reports.

However, fundamental differences can be seen. Article 4 of the OP ICESCR requires that where necessary the Committee decline to consider a communication were it does not reveal that the author has suffered a clear disadvantage unless it raises a serious issue of general importance. This was designed to create a stop gate measure to control a speculated flood of cases before the Committee.

Secondly, the OP presents a one year time limit for submission of communications after exhaustion of domestic remedies. According to Ovey and White[159], the time begins to run from the day the final judgement by the last court is handed down. Langford speculates that the ICESCR will also consider the exception of the ECHR to consider 'continuing violations' that fall outside the rule[160].

5.2.3 Interim measures

As an improvement from the first OP-ICCPR, CAT, and CERD whose Committees must rely on their rules of procedure for the authority to order interim measures, Article 5 of the OP-ICESCR, like the OP-CEDAW calls for the adoption of such measures to avoid irreparable harm to victims of alleged violations. However, a limitation of 'exceptional circumstances' was added to the OP-ICESCR. It is not clear what will define exceptional.

The interim measures can be considered at any point after receipt of the communication and even prior to admissibility. The request for interim measures shall not imply a determination on admissibility or on the merits. Whether the interim measures will be legally binding can be speculated from the Human Rights Committee whose views are not

[159] Ovey (2006) pg 487

[160] Ibid Langford pg 23

in themselves legally binding but "represent an authoritative determination" to be acted upon in good faith by the concerned state.

In applying interim measures, another question has been whether this will be limited to negative obligations and if it includes positive interim measures, then to what extent a State Party can be obligated to ensure positive interim measures. The presumption is that it will apply to both because a lack of certain immediate action for example in relation to housing can expose the authors to natural elements that could resulting in disease and deaths.

5.2.4 Transmission and Examination of Communications

Where admissible, the communication will be confidentially transmitted to the State Party concerned which should respond within six months clarifying on the matter and whatever remedies, if any, it may have provided. This gives the State Party time to settle the complaint and remedy it before the Committee considers it.

After relevant documentation has been transmitted to the parties concerned, the communications will to be considered in closed meetings and were necessary the Committee may consult documentation and reports from other UN bodies and specialised agencies[161]. It has been left open whether the submissions will be strictly written or oral. Some groups have argued that for equality of arms, the hearings should remain written as some individuals may not be able to reach the Committee.

Langford then hints that although the OP does not expressly provide for *amicus curiae*, open consultation (based on article 8(3) allowing the CESCR to consult third parties implying *amicus curiae* submissions by international organizations are acceptable) creates potential for CESCR to develop rules of procedure for *amici* intervention[162]. He however

[161] Art 8

[162] pg 25

highlights that this may be affected by some obstacles as the meetings are closed and the *amici* may not have access to relevant documentation.

5.2.4.1 Reasonableness Review – Art 8(4)

Of particular interest in assessing complaints is the reasonableness review. This requires the Committee to examine the reasonableness of the steps taken by a State in implementing a right, bearing in mind that there is a broad range of policy measures that can be adopted. This allows exercise, to some extent, of a margin of discretion for States that are "better placed to design and craft appropriate policies and programs". Porter describes the reasonableness review under article 8 as recognising that 'the right to effective remedies relies on, rather than undermines, the recognition of appropriate institutional roles and limitations'[163].

A number of State Parties expressed concern as to the standard of review to be adopted by the CESCR in assessing the reasonableness of steps adopted by States to meet their obligations. A good number of European States among others proposed that the margin of appreciation doctrine and a reasonableness standard be put together. The margin of appreciation doctrine is commonly used by the ECHR and those in support of it even lobbied further that terms like 'broad' or 'wide' be added to it. The Africa group among other States opposed this 'compromise' and Portugal characterised it as "launching a missile at the core values of the OP-ICESCR". At the end the reasonableness standard was adopted.

The CESCR, taking on the example of South African jurisprudence created a list of factors it would take into consideration in assessing reasonableness namely:

> (a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfillment of economic, social and cultural rights;

[163] Ibid Porter (2009)pg 41

> (b) Whether the State party exercised its discretion in a non-discriminatory and non arbitrary manner;
> (c) Whether the State party's decision (not) to allocate available resources is in accordance with international human rights standards;
> (d) Where several policy options are available, whether the State party adopts the option that least restricts Covenant rights;
> (e) The time frame in which the steps were taken;
> (f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk[164].

The High Commissioner, in addressing the Open Ended Working Group, also held that the key to normal judicial review is "often in examining the 'reasonableness' of measures adopted by each State - given its specific resources and circumstances - by reference to objective criteria that are developed in accordance with standard judicial experience and with the accumulation of jurisprudence"[165].

However, some critics of the reasonableness doctrine have held that it neither circumscribes the scope nor gives the content of these rights. Moreover, it does not provide room for individual claims. Instead they advocated for the adoption of the minimum core approach for the realisation of socio-economic rights, which as described in chapter two, comprises of two interests that complement each other. The first one caters for immediate provisions of services to all, while the second seeks to improve these services as time progresses.[166] Bilchtz in emphasing this point explains that the Court will have to define the minimum core content of each right first then only can it assess the reasonableness of the government measures against the 'general principles that the court interprets as defining the content of the right.'[167] Therefore, in applying the reasonableness review, it will be

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[164] Statement by the Committee: An evaluation of the obligation to take steps to the 'Maximum of available resources' under the Optional Protocol to the Covenant U.N Doc. E/C.12/2007/1 (2007) 10 May 2007, para.8

[165] High Commissioner for Human Rights, 14 January 2005

[166] Mbiada, Memoir Online

[167] Biltchitz (2002) pg 488

more than vital to ensure that it is framed around individual dignity and equality, and not confused with abstract policy review disconnected from rights claiming.[168]

After considering the merits, the Committee will submit its views to the parties concerned and the State Party will in turn be expected to respond within six months highlighting the steps taken in response to the views and recommendations[169]. This follow up measure is unique to the OP-ICESCR.

5.2.5 The Inquiry Procedure

The inquiry procedure is another important mechanism provided by the Protocol in article 11. Under this procedure, were there is "reliable information indicating grave and systemic violations" of ESC rights, the Committee may investigate the situation and where necessary and with the 'consent' of the State Party, visits may be conducted.[170] It is therefore based on an opt-in basis, meaning the State has to expressly recognize the competence of the Committee before the procedure can be invoked[171]. Although the opt-in helps ensure ratification, it waters down the inquiry procedure.

It can be presumed that the information may be written or oral, provided it is reliable. 'Grave' refers to severity and scale of violations whilst 'systematic' refers to the prevalence of the violations or "the existence of a scheme or policy directing a violation(s)"[172]. Under the Convention on Elimination of Discrimination against Women (CEDAW) OP, whilst the intensity and prevalence are important, the CEDAW Committee may consider a single violation that is grave in nature or a not so severe but continuing pattern of abuse, or abuses

[168] Ibid Porter pg 53

[169] Art 9

[170] Art 11

[171] Mahon (2005) pg 617

[172] Ibid International Women's Rights Action Watch Asia Pacific (2008) pg 32

committed pursuant to a policy, to be subject to inquiry. It will be interesting to note if the CESCR will adopt the same interpretation. Article 20 of CAT has a similar procedure of inquiry where there is reliable information that torture is being "systemically practiced" by the State in question. The CAT has interpreted "systemically practiced" to refer to incidents that appear to be habitual, widespread and deliberate in a considerable part of the territory of the State in question.

Under all procedures, the inquiry will be conducted confidentially, with the cooperation of the State Party concerned. In carrying out its inquiry, with the consent of the State, the CAT rules and practice allow for oral hearings to elicit testimony, interviews with individuals, inspection of sites and consultations with government officials and local non-governmental organisations[173].

After examination of findings, the concerned Committee will transmit its views to the State Party which will in turn respond within six months. Under CAT, where the State Party does not cooperate (e.g. Egypt which refused to allow the Committee to visit), investigations may continue, and the Committee will rely on the information it receives and draw inferences from the refusal in coming with its last report. At its discretion, the CESCR may follow up by requesting the State to report on the measures it has taken in response to the inquiry.

The benefits of this procedure lie in its ability to allow investigations where individuals cannot submit communications for one reason or another or where a communication reflects a possibility of violations beyond the specific complaint. The procedure does not call for exhaustion of domestic remedies, proof of having suffered a clear disadvantage and the petitions for investigation can be anonymous just provided the information is reliable.

[173] Bayefsky (2003) pg 125

5.2.6 Interstate communications and friendly settlements

In terms of Article 7, the Committee shall provide its good offices to consider friendly settlements, any agreement of which closes consideration of the communication under the Protocol. The OP also provides for interstate communications (Article 10) between states that are party to the ICESCR and the Protocol. States have hardly been known to invoke the interstate procedure but retaining it 'leaves open the door for possible developments in international jurisprudence in this regard.'[174]

5.2.7 International Assistance and Cooperation

Where necessary and with the consent of the State Party concerned, the Committee can transmit to relevant institutions, its recommendations and views that indicate a need for assistance and cooperation. A trust fund will also be established with a view to provide expert and technical assistance for State Parties to enhance implementation of ESC rights.[175] Some developed States were critical of the fund saying it would result in developing countries ratifying the protocol only so they can access the trust fund, however, whatever their intention, ratifying will make them accountable under the mechanism which does not defeat the purpose of the OP.

5.3 The OP as a tool for change in Zimbabwe: Opportunities and Challenges

Opportunities

There are numerous advantages that are associated with Zimbabwe adopting the OP - ICESCR. Individuals will be able to bring claims of socio-economic violations to an international body which will assist to enhance the implementation of the Covenant, develop jurisprudence on ESC rights creating precedence that will help guarantee long term

[174] Ibid, Mahon pg 645

[175] Art 14

protection of the rights. It also provides a mirror for Zimbabwe to reflect on its policies allowing for amendments and repeals were necessary. Public awareness of the rights will also be heightened and most importantly it will advance the principles of indivisibility, interrelatedness, interdependence and universalism of rights.

a) Creates a platform to discuss concrete, tangible cases

The only platform of engagement the Committee has had with State Parties was through the reporting mechanism which reports, if submitted, were potentially biased and based on what the state said. Zimbabwe submitted its initial report to the Committee in 1997 and has not submitted any other since limiting the interaction between Zimbabwe and the Committee to one encounter. The complaints mechanism under the OP allows for real problems faced by individual Zimbabweans to be discussed (rather than abstract generalised comments) revealing the shortcomings, if any, of state policy and also allowing the state to explain their efforts before the Committee. According to Simmons, "it is difficult to define in the abstract what constitutes steps taken 'to the maximum of [each State Party's] available resources' without a concrete instance of what is 'available' and what a reasonable 'maximum' might be."[176]

b) Clarifies content of rights and obligations

The Committee has presented General Comments on the content of rights in the Covenant, which comments have been very important for the development of socio-economic rights. However, the comments have been exactly that, general. A complaint mechanism therefore allows for application into specific tangible cases which will help clarify the rights better. The decisions of the Committee will also be specific to Zimbabwe, revealing the implications of its measures or omissions hence prompting it to make relevant changes. The feasibility of this can be seen from the examples set by the domestic courts in South Africa were for example 'concrete cases have led to rulings that the constitutional right to housing does not mean housing on demand, but rather a reasonable program to ensure

[176] Ibid Simmons pg 68

emergency housing relief.'[177] 'It is a reality that many governments will not move towards improved protection of economic, social and cultural rights unless shown the way by means of judicial or quasi-judicial examples or political pressure'[178].

Through the complaint procedure, the State also has a chance to influence the Committee's interpretation of the Covenant through their submissions and arguments in response to a communication. This is healthy in building socio-economic jurisprudence.

c) Prompts governments to establish effective local remedies

The complaint mechanism is available as a last resort after all domestic remedies have been exhausted. The complaint procedure will therefore have a direct effect in improving adjudication of socio-economic rights in Zimbabwe, as domestic courts operate aware of the possibility of the Committee being approached, thereby strengthening the protection of national disadvantaged groups[179]. 'The mere possibility that complaints might be brought before an international forum encourages governments to ensure that more effective local remedies are made available'[180]. It will also encourage the use of domestic mechanisms making citizens more informed about their country, its systems and their rights, enhancing their knowledge about the limits as well as the possibilities for demanding attention on economic and social rights in their domestic context.[181] Ratification will thus strengthen Zimbabwe's national mechanisms for the implementation and promotion of socio-economic rights.

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[177] Ibid

[178] Benefits of an Optional Protocol, ESCR-Net:

[179] Ibid

[180] Ibid

[181] Ibid Simmons pg 69

For those who will argue the ineffectiveness of the complaint procedure due to 'a lack of sufficient enforcement mechanisms' Dai[182], in discussing the domestic effects of human rights law, shows how international treaties have domestic consequences to which a government must respond failure of which victims of non compliance and their advocates seek redress hence providing a potential sources of domestic enforcement.

d) Important form of Civil Society Empowerment

The *locus standi* of Non Governmental Organizations was limited meaning they cannot directly bring claims before the Committee but they can do it on behalf of an individual or group of individuals.

Often a lot of marginalized groups cannot represent themselves and depend on civil society organizations to lobby on their behalf. Ratification of the OP may mean that civil society in Zimbabwe will have to do research on the complaint procedures and criteria required for a communication to be heard and in seeking to exhaust domestic remedies may also be forced to seek out what these remedies are which will strengthen their leverage and improve their information base. It will also encourage interaction between the legislature and civil society organizations.

e) Examination on a case by case basis

The Committee in assessing the communications against concerned State Parties will do it considering the level of development of the country in question. Hence its analysis of communications against Zimbabwe would not be on the same platter as those against Norway or Haiti. The committee will examine communications in light of available resources and were necessary recommend that technical assistance be rendered to assist a state party meet its obligations in terms of art 14 of the OP.

[182] Dai (2010)

Zimbabwe ratifying the OP will also work to encourage other states to, with equally limited resources and socio-economic challenges, to ratify which will enhance socio-economic protection.

Challenges

a) Impinges on State Sovereignty

Some States, in opposition to an OP, argued that the creation of a complaints mechanism will impinge on state sovereignty since ESC rights involve issues of resource allocation and public policy which should only be dealt with internally by state's authorities. More concern is on the legitimacy of the Committee and its competence as a quasi judicial body to deal with resource and policy issues.

What is clear is that the OP is optional. Upon ratification, its application will only come about after domestic remedies have been exhausted which means that before a communication is admissible Zimbabwe would have been given the opportunity to exercise its sovereignty to deal with issues to the best interest of its citizens. Secondly, the Committee will consider the reasonableness of measures adopted by Zimbabwe. Where there are shortcomings, it will make recommendations yet allow room for Zimbabwe to exercise its discretion on how to meet its obligations. Finally, some of the mechanisms under the OP (e.g. the inquiry procedure), will only take place with the consent of the concerned States, so the Committee will never just impose itself. The sovereignty of a state is also respected through confidentiality processes and attempts at friendly settlements.

b) OP-ICESCR: An over-judicialisation of Human Rights

A number of authors and States have argued that the adoption of the OP is an example of over-judicialisation of human rights[183], granting an international body power to decide on

[183] Helfer (2002), pg1832

its policies and what a state should do with its resources. Others have expressed concern that it will result in the CESCR adopting a strict violationist approach as propounded by Chapman[184] who proposes that it will be most helpful to first identify violations in terms of what states must not do as opposed to defining what they should do.

However, as Simmons clearly argues to the contrary stating that the OP stands as a policy complement and not a substitute. Its main agenda is to create this platform on which the State and Committee, acting on a complaint, can come to a shared understanding and friendly settlement on how best to improve the policy measures and programmes in place to protect ESC rights. She states that,

> '(t)he Committee is not a 'court', and the procedures described in the OP are not designed to take a 'strict violationist' approach to the ICESCR….. (it) is empowered to receive 'communications' not charges…….under exceptional circumstances that victims may suffer irreparable damage before it can consider a situation, it 'requests' the State to take interim measures; it does not issue injunctions. Communications are to be transmitted 'confidentially' to the State Party and discussed in 'closed meetings', in contrast to public accusations and proceedings in a trial setting. The State Party responds to the communication with 'clarifying' statements, not a defense brief…..the idea is settle the complaint amicably, 'with a view to reaching a friendly settlement…not explicitly to find guilt or punish the offender…..Committee follows up its discussions by transmitting its 'views' and 'recommendations'….. not render a verdict (and)… the State Party… is not fined or imprisoned……. (but)…. is to 'give due consideration to the views of the Committee' and provide a written statement in six months.[185],

c) Judicial and Quasi Judicial remedies not effective mechanisms

Dennis and Stewart[186] have argued that legitimate political processes offer a more likely pathway to achieve the goals of the covenant than international litigation. They argue that it has never been satisfactorily shown how the complaint mechanism under the OP will be

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[184] Chapman (1995) pg30-32.

[185] Ibid Simmons pg 70

[186] Dennis (2004) pg 462-515

practical, effective or worth the cost and effort, what standards of measurement shall be applied and whether they will be the same for all State Parties and how a complaints mechanism under the ICESCR would add meaningfully to the mechanisms and procedures already available in other international organizations. As far as they are concerned 'instead of advancing respect for, and implementation of, economic, social and cultural rights…there is a risk that trying to 'enforce' such rights through binding international adjudication will have the opposite result, causing states to deemphasise them and further undermining their stature and acceptability.[187],

What is clear is that other treaty bodies like the Human Rights Committee have used the complaint mechanism as one of its measures to enhance protection of rights under the ICCPR , whilst 'legitimate political processes' also exist as an important mechanism of enforcement. The complaint procedures do not exist in isolation of other mechanisms as the Committees submit annual reports to the General Assembly which can result in political mechanisms of follow up being employed. Hence the quasi-judicial and political processes will complement each other to monitor and enhance state compliance.

ESCR and CPR are indivisible and interdependent and the successes of one quasi-judicial body e.g. the Human Rights Committee or other judicial institutes can help speculate on the results of the CESCR. It is common cause that CPR adjudication sometimes impinges on the policies and resource allocation by governments. The Netherlands cases on discrimination on social security are common examples. Another example is *Airey v Ireland* where Mrs Airey had been indirectly denied access to a court through refusal of legal aid to seek a judicial separation which delved into resource issues.

Another consideration is that many CPR cases have involved applications that governments refrain from specific behavior. In the same vein, it can be anticipated that adjudication of ESC rights will largely require the government to refrain from certain behavior or regulate

[187] Ibid Dennis pg 467

actions by third parties which will not require impinging upon the resource allocation and policy adoption by government[188].

d) OP ICESCR: A Duplication of mechanisms

Some scholars have argued that a complaint mechanism is a duplication of work already existent under other treaty bodies e.g. the HRC, CEDAW, the ILO among others. The main concern is that Zimbabwe may get different recommendations from the different treaty bodies on the same right.

However, the other treaty bodies have co-existed and there have not been known to be any clashes between them. The ICCPR provides for torture and so does CAT but communications have been heard by both without any problems. This can be partly attributed to the fact that the chairpersons of the Committees meet once a year so they can agree on common positions and that the protocols provide that the same case cannot be heard if it is already been dealt with by another mechanism or body.

The rest of the arguments raised against ratification (justiciability, vague, unclear, competence and capacity of committee, adequacy of resource) are largely similar to those stated in the previous chapter on constitutional protection hence they will not be raised again to prevent repetition.

Having analysed the procedures under the OP-ICESCR and noted the advantages and arguments often raised against its ratification, one cannot help but conclude that as a sign of good faith, Zimbabwe should open channels for its citizens to participate in the realisation of their rights by ratifying the OP. As Simmons clearly put it the '…. consequences for ESC rights are likely to be modestly positive, if outcomes under the Optional Protocol of the ICCPR are any guide..... Ratifications will neither end

[188] ESCR-Net: Challenging Misconceptions around the OP-ICESCR :

deprivation nor damage the credibility of the international system. It will be a modest step forward in consensus formation of the meaning of esc rights, which in turn is a positive step towards their ultimate provision'[189].

[189] Ibid Simmons pg 64

6 Conclusion

Misconceptions of ESC rights have been used for a long time to avoid them being legally enforceable yet their realisation has not been unknown within the human rights sphere. They have been deemed non-justiciable because they are supposedly vague, their judicial or quasi judicial enforcement may impinge on separation of powers or state sovereignty, the lack of competence by the courts or the committee, among other reasons. For a long time, individuals have had to rely on the complaint procedure under the ICCPR with many of their rights being realised through the right to life or non-discrimination[190]. In Zimbabwe, some cases connoting socio-economic violations have also been realised through civil and political rights[191]. Including ESC rights in the draft constitution and the ratification of the OP-ICESCR by Zimbabwe will therefore help to adjust the misconceptions, and re-position ESC rights as being at par with CPR.

Zimbabweans have been hard hit by a host of socio-economic deprivations that continue to perpetuate. The Lancaster Constitution does not provide for the protection of ESC rights, legislation does not fully provide for their protection and Zimbabwe has not even signed, let alone ratified the OP-ICESCR for one reason or another. It is acknowledged that ratification and constitutional protection may not end deprivation immediately, but as Simmons puts it, it will be a modest step forward in consensus formation of the content of socio-economic rights leading to their eventual ultimate provision. Ratification and constitutional protection of ESC rights will provide Zimbabweans with both domestic and international accountability mechanisms, creating greater transparency, prompting review of legislation and allowing individuals, especially marginalized groups, an active participatory role in ensuring they enjoy their socio-economic rights.

'Human rights are not a utopian ideal. They embody an international consensus on the minimum conditions for a life of dignity. Respect for human rights requires determination

[190] E.g *Zwaan de Vries v Netherlands, Gueye et al v France, Waldman v Canada*

[191] E.g Dzoka v Ministry of Education, Mandizvidza v Morgenster College

and cooperative efforts. It also requires legal frameworks at the national and international levels within which individuals and groups can claim their rights. Only that possibility will give human rights their full meaning for every member of every society - the marginalized and excluded as well as the powerful and influential.'[192] It is therefore without a doubt necessary that Zimbabwe needs to provide for ESC rights in its constitution and ratify the OP as a catalyst to help enhance protection of these rights.

Recommendations

It is recommended that Zimbabwe incorporate ESC rights in its Bill of Rights as justiciable rights. Taking a lesson from the Nigerian experience, ESC rights as direct principles can result in the courts being hesitant to adjudicate on them, and their implementation not prioritized at state policy level. South Africa, by incorporating these rights in its Bill of Rights has been able to define these rights for itself and the decisions by the courts have helped to influence policies towards improved protection of socio-economic protection.

As Zimbabwe is already party to the ICESCR, which imposes obligations on it to respect, protect and fulfill, it is recommended that as a sign of good faith, Zimbabwe should ratify the OP. This will help it to improve its protection mechanism as review by the Committee will always give Zimbabwe a chance to look itself in the mirror in relation to its own policy decisions and the impact it has on those under its jurisdiction. With the economy of Zimbabwe still recovering from the decline that has happened in the past decade, it may take a while for Zimbabwe to be able to resuscitate some of the socio-economic related service deliveries. Ratification will therefore be important for Zimbabwe, as it will be have access to benefit from the trust fund and also learn from the Committees recommendations on how it can enhance its own protections. Both ratification and constitutional protection will not immediately end deprivations but will definitely help to enhance mechanisms of enforcement. It will be a modest step forward.

[192] High Commissioner for Human Rights 14 January 2005

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ICESCR	The International Convention on Economic, Social and Cultural Rights, adopted on the 16th of December 1966
ICCPR	International Convention on Civil and Political Rights, adopted on 16th of December 1966
OP-ICCPR	The Optional Protocol to the Convention on Civil and Political Rights adopted on the 16th of December 1966
ECHR	European Convention on Human Rights
ESC	European Social Charter, adopted in 1961 and revised in 1996
CEDAW	Convention on the Elimination of Discrimination against Women adopted on the 18th of December 1979
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