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**SKWKAB001**

**LLM – Human Rights Law**

**THE RIGHT TO ADEQUATE HOUSING: THE NEED FOR ITS JUSTICIABILITY IN  
THE ZAMBIAN CONSTITUTION**

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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws in approved courses and minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

**University of Cape Town, Faculty of Law**

**Department of Public Law**

**Cape Town, 2013**

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Kabukabu Sikwibele

Date: 25 February 2013

## **DEDICATION**

This work is dedicated to my mum and my late dad.

University of Cape Town

## ACKNOWLEDGEMENTS

I would like to express my gratitude to the various people who have given me their unwavering support and have inspired me in my academic pursuit.

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University of Cape Town

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## Abbreviations

1. CESCR- Committee on Economic, Social and Cultural Rights
2. CEDAW- Convention on the Elimination of all Forms of Discrimination against Women
3. CERD- Convention on the Elimination of all Forms of Racial Discrimination
4. CRC- The Convention on the Rights of the Child
5. DPSP- Directive Principles of State Policy
6. ESCR- Economic Social and Cultural Rights
7. ICESCR- International Covenant on Economic Social and Cultural Rights
8. ICCPR- International Covenant on Civil and Political Rights
9. NHA- National Housing Authority
10. PHI- Presidential Housing Initiative
11. UDHR- The Universal Declaration of Human Rights
12. UN- The United Nations
13. ZNBS- Zambia National Building Society

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Introduction

Housing is a basic human need and, as with other basic needs, adequate housing is a prerequisite to national social-economic development.<sup>1</sup> Inadequate housing can have adverse effects on the environment, the health of communities as well as their general well being.<sup>2</sup> In addition, in line with the principle that all human rights are indivisible, interdependent and interrelated,<sup>3</sup> violation of the right to adequate housing can have direct implications on the enjoyment of other human rights and vice versa.<sup>4</sup> Enjoyment of the right to adequate housing is crucial for the enjoyment of other rights, such as the rights to health, work, social security, education, vote or privacy.<sup>5</sup> Zambia's housing problems cannot be overstated. The current Constitution of Zambia<sup>6</sup> does not recognise the right to adequate housing as a fundamental human right. It provides that the State shall endeavour to provide decent shelter for all but as a directive principle of state policy.<sup>7</sup> In essence, as explicitly stated by the Constitution, the right to housing is not justiciable.<sup>8</sup> This means that Zambians cannot approach any court, tribunal, administrative institution or entity to claim violation of the right to adequate housing.<sup>9</sup> It is submitted that rights must be claimed if they are to be fully enjoyed. This thesis will discuss the importance and the need for a justiciable right to adequate housing in Zambia enshrined in the Constitution.

This chapter gives the background to the research problem and states the objectives of the study. It also provides the significance of the study and the methodology. The chapter concludes with an overview of the chapters.

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<sup>1</sup> Zambia National Housing Policy of 1996 available at [www.mlgh.gov.zm/](http://www.mlgh.gov.zm/) accessed on 21 September 2012.

<sup>2</sup> Ibid.

<sup>3</sup> Vienna Declaration and Programme of Action 12 July 1993, UN Doc. A/CONF.157/23 para 5.

<sup>4</sup> Office of the United Nations High Commissioner for Human Rights 'The Right to Adequate Housing' Fact Sheet No.21 (Rev.1) OHCHR/UN Habitat 9.

<sup>5</sup> Ibid.

<sup>6</sup> Constitution of the Republic of Zambia 1996, Cap 1 of the Laws of Zambia.

<sup>7</sup> Art 112(d) of the Constitution of Zambia.

<sup>8</sup> See Art 111 of the Constitution of Zambia.

<sup>9</sup> Ibid.

## 1.2 Background to the research problem

Zambia has been facing a critical shortage of housing since independence.<sup>10</sup> In Zambia, inadequate housing is more pronounced in the low income groups, which constitute majority of the country's population. In addition, Zambia is one of Africa's most urbanised countries.<sup>11</sup> The disparities in the levels of development in rural as compared to urban areas, and the fact that most employment opportunities are in the cities,<sup>12</sup> has led to migration from rural to urban areas.<sup>13</sup> This rapid urbanisation has placed severe pressure on housing. In essence, the high population caused by these migrations have led to housing deficits in the cities. The result has been the mushrooming of unplanned settlements in towns and cities.<sup>14</sup> Houses constructed in these unplanned settlements are far from adequate as they are poorly serviced. Further, the occupants of these settlements are usually at risk of being evicted or having their dwellings demolished.

Housing in rural areas is also poor. There is extensive use of temporary building materials<sup>15</sup> as the majority of the people who live in rural areas cannot afford conventional building materials.<sup>16</sup> In these areas, residents are faced with lack of housing-related infrastructure such as piped water supply and electricity. They also lack services like waste management. Moreover, these communities also lack supportive social services such as health and education.<sup>17</sup> It is worth noting that for housing to be adequate it 'must be in a location that allows access to employment options, health-care services, schools, child-care centres and other social facilities'.<sup>18</sup>

It must be noted that although it was not the first effort by the Government to deal with the housing situation in Zambia, the Government of the Republic of Zambia in 1996 for the first

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<sup>10</sup> Sixth National Development Plan 2011 – 2015 'Sustained Economic Growth and Poverty Reduction' available at [www.undp.org.zm/](http://www.undp.org.zm/) (accessed on 26 September 2012).

<sup>11</sup> The Draft National Development Programme – Zambia, available at [www.mlgh.gov.zm/](http://www.mlgh.gov.zm/) (accessed on 26 September 2012).

<sup>12</sup> Ibid at 3.

<sup>13</sup> Zambia National Housing Policy 1996 (n 1 above) 1.

<sup>14</sup> M.L.M. Mbaio 'Legal Aspects of Uncontrolled and Unplanned Urban Settlements in Zambia: A Comment on the Housing (Statutory and Improvement Areas) Act, 1974' (1983)15 *Zambia Law Journal* 86.

<sup>15</sup> John Kangwa *Land Tenure, Housing Rights and Gender in Zambia* (2005) 37.

<sup>16</sup> Zambia National Housing Policy 1996, (n 1 above) 13.

<sup>17</sup> Ibid.

<sup>18</sup> Committee on Economic, Social and Cultural Rights General Comment No. 4 *The Right to Adequate Housing* para 8(f) Sixth Session 13 Dec 1991 ESCR/GC/4.

time formulated a National Housing Policy.<sup>19</sup> The main objective of the policy is to provide adequate affordable housing for all income groups in Zambia.<sup>20</sup> The Policy was lauded for being comprehensive and was awarded a ‘scroll of honour’ by the UN-Habitat because of the participatory manner in which it was formulated.<sup>21</sup> This award-winning policy raised high expectations in the country. However, the objectives of the Policy have largely not been implemented.<sup>22</sup>

Most of the housing developments taking place in the country are a result of private investment. As a result, the poor are left without decent shelter. This is because funds for housing construction are only available through loans and the poor cannot afford these loans because interest rates are high.<sup>23</sup>

The issue of inadequate housing has had an adverse impact on Zambians especially the poor and vulnerable groups such as women and children. Due to the impact of the HIV/AIDS pandemic among other factors,<sup>24</sup> many children live on the streets without a place to come home to.<sup>25</sup> The United Nations (UN) has estimated that in 1996 alone, there were 35,000 children living in the streets of Zambia’s cities.<sup>26</sup> In view of the foregoing, there is need for a sustainable solution to the housing problems in Zambia.

### **1.3 The right to adequate housing in Zambia**

Shelter is one of the most important human needs. The right to adequate housing holds a central place in international law. Zambia is a party to the International Covenant on Economic, Social and Cultural Rights (ICESR),<sup>27</sup> which guarantees the right to adequate housing.<sup>28</sup> It is thus obliged under international law to promote, respect and fulfil the right to housing. The

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<sup>19</sup> Zambia National Housing Policy 1996 (n 1 above) 1.

<sup>20</sup> Ibid at 15.

<sup>21</sup> Zambia – Overview of the Current Housing Rights Situation and Related Activities: UN UPR Submission 3.

<sup>22</sup> Ibid at 3.

<sup>23</sup> Ibid.

<sup>24</sup> Kangwa (n 15 above) 36.

<sup>25</sup> Zambia Urban Housing Sector Profile 18.

<sup>26</sup> Zambia Country Profile Johannesburg Summit 2002 available at [www.un.org/esa/agenda21/natinfo/wssd/zambia.pdf](http://www.un.org/esa/agenda21/natinfo/wssd/zambia.pdf) (accessed on 11 February 2013).

<sup>27</sup> G A Res 2200 A (XXI) 21 UN GAOR Supp No 16 at 49, UN Doc A/6316 (1966).

<sup>28</sup> Art 11(1) of the ICESR.

Constitution of the Republic of Zambia, which is the supreme law of the land,<sup>29</sup> does not recognize the right to adequate housing as a fundamental human right which can be legally enforced. It is classified under Part IX of the Zambian constitution which sets out the Directive Principles of State Policy.<sup>30</sup> Article 111 of the Zambian Constitution explicitly provides that the Directive Principles of State Policy set out in Part IX ‘shall not be justiciable and shall not thereby, by themselves, be legally enforceable in any court, tribunal, or administrative institution or entity’. Even though it is established that all human rights are universal, interdependent and mutually reinforcing,<sup>31</sup> which means that States are expected to give all rights equal consideration and treatment, in the current Zambian Constitution civil and political rights are enshrined in the Bill of Rights and thus recognized as fundamental human rights,<sup>32</sup> whereas economic, social and cultural rights are not. Civil and political rights are subject of judicial enforcement whereas economic, social and cultural rights, and in particular the right to adequate housing, are not.

The human right to adequate housing is of central importance to the enjoyment of all economic, social and cultural rights.<sup>33</sup> Zambia is one of the many States that are reluctant to have justiciable social rights citing limited or lack of resources.<sup>34</sup> State obligations *vis a vis* the right to adequate housing does not mean that the government is required to build houses for the entire population or to provide free housing to all citizens and residents or that the right should be manifested in the same manner in all places and at all times.<sup>35</sup> Rather, it means that the State is required to establish and facilitate an enabling environment to prevent homelessness, prohibit forced evictions, address discrimination, focus on the most vulnerable groups and ensure security of tenure for all.<sup>36</sup> Measures can take the form of policy, legislative, administrative or spending priorities.<sup>37</sup> However, in Zambia since policy and legislation have been unsuccessful as it shall

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<sup>29</sup> Art 1(3) of the Zambian Constitution Chapter 1 of the Laws of Zambia.

<sup>30</sup> Art 112(d) of the Zambian Constitution.

<sup>31</sup> Asbjorn Eide ‘Interdependence and Indivisibility of Human Rights’ in Yvonne Donders and Vladimir Volodin (eds) *Human rights in Education, Science and Culture: Legal Developments and Challenges* 11.

<sup>32</sup> See Part III of the Zambian Constitution.

<sup>33</sup> Committee on Economic Social and Cultural Rights General Comment No. 4 *The Right to Adequate Housing* (n 18 above) para 1.

<sup>34</sup> Mumba Malila ‘The Sleep of the Just: Misunderstanding Economic, Social and Cultural Rights in Zambia’ (2010) 14 *Zambia Law Journal* 106 at 111.

<sup>35</sup> Fact Sheet No 21 (Rev.1) (n 4 above) 6.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

be seen in Chapter Three herein, this thesis advocates for the need to have the right to adequate housing enshrined in the Bill of Rights as a justiciable right. When the right to adequate housing is enshrined in the Constitution, the Constitution will thus serve as an important guide in the interpretation of legislation and in the implementation of policy.

#### **1.4 Research objectives**

The aim of the paper is to assess the following:

- Zambia's obligations in international law with regard to the right to adequate housing.
- The extent to which Zambian law and policies facilitate the discharge of these obligations.
- The importance of having a right to adequate housing in the Zambian Constitution which can be judicially enforced.

#### **1.5 Significance of the study**

The study seeks to contribute to the ongoing debate on justiciability of economic, social and cultural rights in Zambia with specific reference to the right to adequate housing. The study will illustrate that the human right to adequate housing can be effectively implemented and realised if it can be capable of being judicially enforced by way of having it enshrined in the Bill of Rights of the Constitution. The study will demonstrate that domestication by Zambia of international human rights law with respect to the right to adequate housing especially the provision in the ICESCR is crucial for Zambia to effectively implement the right to adequate housing. Zambia will be obliged to conform to international standards when discharging its obligations in international law to provide adequate housing for its people.

#### **1.6 Research methodology**

This research will involve desk research. The research will refer to the relevant international and regional human rights legal framework in order to evaluate the extent of Zambia's obligations in international law to ensure adequate housing for its people. Case law, concluding observations relevant to the study as well as general comments with regard to the right to adequate housing will also be analysed in order to outline the nature of the international obligations and to assess the extent to which Zambia discharges them. The importance of the role of the courts in the

realisation of socio-economic rights will also be analysed in order to show why it is crucial that Zambia enshrines a justiciable right to adequate housing in its constitution.

In addition, secondary data in the form of books, journals, scholarly articles as well as internet sources will be consulted. The research will also analyse examples from other jurisdictions on best practices as regards protecting the right to adequate housing.

## 1.7 Overview of chapters

**Chapter 1:** This chapter was an introduction to the study. The chapter has discussed the housing situation in Zambia and highlighted the objectives of the study. The chapter also covered the methodology, the significance of the research and overview of chapters.

**Chapter 2:** This chapter discusses the international normative framework for the protection of the right to adequate housing. The Chapter shows the legal basis of the right to adequate housing in international law and discusses the standards which have been set by international law for States to effectively and fully protect the right to adequate housing. In addition, the chapter outlines Zambia's obligations in international law *vis-a-vis* protecting the right to adequate housing.

**Chapter 3:** This chapter examines the extent to which Zambia protects the right to adequate housing. It assesses the extent to which Zambian law as well as the housing policies facilitate the discharge of Zambia's obligations in international law to protect the right to adequate housing.

**Chapter 4:** This chapter discusses the significance of a justiciable right to adequate housing in the Bill of Rights of the Zambian Constitution. The chapter considers arguments that are usually advanced against justiciability of economic, social and cultural rights in the Zambian context. It argues that an explicit provision protecting the right to adequate housing which is justiciable is crucial to implementation of international law and effective realization of the right to housing by the people of Zambia. The chapter examines the impact of the role of the courts in the realization of the right to adequate housing.

**Chapter 5:** This chapter is a comparative study. It endeavours to discuss good practice examples from progressive countries which have incorporated a justiciable right to housing in their constitutions where Zambia can get a leaf from. The South African Constitution is discussed as

an example. However, other countries' national constitutions which are progressive will also be referred to.

**Chapter 6:** This chapter summarises the findings and gives recommendations.

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## CHAPTER TWO

### THE RIGHT TO ADEQUATE HOUSING IN INTERNATIONAL LAW

#### 2.1 Introduction

International law has given immense attention to the right to adequate housing. A number of international human rights instruments provide the basis for the legal status of the right to adequate housing. These international human rights treaties define the norms and set the standards for protecting the right to adequate housing. International human rights instruments also create binding obligations for States that have ratified them to give effect to the rights.<sup>38</sup> Customary international law also defines States' human rights obligations. Customary international law refers to norms of general practice of States accepted as law and followed by States out of a sense of legal obligation.<sup>39</sup> When States ratify international human rights treaties, they are required to give effect to the rights contained in these treaties within their jurisdictions. Zambia willingly ratified the ICESCR and most international instruments that protect the right to adequate housing. It therefore has obligations under international law to protect the right to adequate housing based on international standards.

This chapter will define what constitutes the right to adequate housing. It will discuss the international normative framework for the protection of the right to adequate housing under the United Nations system. The chapter will also discuss the right to adequate housing in regional human rights systems. The chapter focuses on the sources of international law on the right to adequate housing and shows the basis of the international standards required for effective protection of the right to adequate housing by States. Further, this chapter shall discuss Zambia's obligations in international law as regards providing adequate housing for its people.

#### 2.2 International normative framework for the protection of the right to adequate housing

The right to adequate housing is founded in international human rights law. The International Bill of Human Rights which consists of the Universal Declaration of Human Rights of 1948

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<sup>38</sup> Fact Sheet No 21 (n 4 above) 29.

<sup>39</sup> Ibid.

(UDHR)<sup>40</sup> and the 1966 covenants namely the ICESCR<sup>41</sup> and the International Covenant on Civil and Political Rights (ICCPR)<sup>42</sup> recognises the right to adequate housing. The UDHR recognises the right to adequate housing as a subset of the right to an adequate standard of living and provides under Article 25(1) that '[e]veryone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing and medical care'.<sup>43</sup> The most important source of the right to adequate housing<sup>44</sup> is contained in Article 11(1) of the ICESCR which provides that State parties should 'recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions'. Although a number of international instruments address aspects of the right to adequate housing, the Committee on Economic, Social and Cultural Rights (CESCR) the body in charge of monitoring implementation of the ICESCR in its General Comment No. 4 has stated that Article 11(1) of the ICESCR 'is the most comprehensive and perhaps the most important of the relevant provisions'.<sup>45</sup> The CESCR has also noted that Article 11(1) of the ICESCR should be read as making reference not only to housing but to adequate housing.<sup>46</sup>

The right to adequate housing which is a component of the right to an adequate standard of living is also recognized in other major human rights treaties some of which are of general application while others protect the housing rights of specific groups of people. These are such as the 1989 Convention on the Rights of the Child (CRC),<sup>47</sup> the 1979 Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),<sup>48</sup> the 1965 International Covenant on the Elimination of all forms of Racial Discrimination (CERD),<sup>49</sup> the 1951 Convention Relating to the Status of Refugees<sup>50</sup> and the 1990 Convention on the Protection of all Migrant workers and

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<sup>40</sup> G A Res 217A (III), UN Doc A/810 (1948), Art 25(1).

<sup>41</sup> Art 11(1).

<sup>42</sup> G A Res 2200A (XXI), 21 UN GAOR Supp (No.16) at 52, UN Doc. A/6316 (1966); 999 UNTS, Art 17.

<sup>43</sup> Art 25(1) of the UDHR.

<sup>44</sup> Joel Audefroy 'Eviction Trends World-Wide and the Role of Local Authorities in Implementing the Right to Housing' (1994) 6 *Environment and Urbanisation* 8 at 9.

<sup>45</sup> CESCR General Comment No 4 (n 18 above) para 3.

<sup>46</sup> *Ibid* Para 7.

<sup>47</sup> UN Doc A/44/49 (1989), entered into force 2 September 1990, Art 16(1), Art 27(3).

<sup>48</sup> G A Res 45/158 (1979), entered into force 3 September 1981, Art 14(2)(h), Art 15(2).

<sup>49</sup> G A Res 2106A (XX) (1965), entered into force 4 January 1969, Art 5(e)(iii).

<sup>50</sup> Art 21.

Members of their Families.<sup>51</sup> In order to protect the right to adequate housing effectively, it is important to consider the specific situation of individuals and specific groups of people, such as children, women, homeless persons, persons with disabilities, indigenous peoples, refugees and migrant workers particularly those living in intolerable or vulnerable situations.<sup>52</sup> International human rights instruments that protect the right to housing give obligations to states which are parties to them to ensure that these individuals or groups of people are not discriminated upon in terms of adequate housing provision. States are required to tailor their housing laws and policies with special attention to those in desperate need as opposed to merely targeting majority groups.<sup>53</sup> Some provisions on adequate housing as inscribed by some major international human instruments will be considered here.

The CRC, to which Zambia is a party, requires States Parties to recognise the right of every child to an adequate standard of living.<sup>54</sup> Article 27(3) of the CRC requires State Parties in accordance with national conditions and within their means to ‘take appropriate measures to assist parents and others responsible for the child to implement this right’ and in case of need to ‘provide material assistance and support programmes, particularly with regard to ... housing’. Further, Article 16(1) of the CRC states that ‘[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation’.

CEDAW, which is the most comprehensive international instrument for the protection of women’s human rights under Article 14(2)(h) in relation to rural women, obliges State Parties to take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and in particular ensure to such women the right to enjoy adequate living conditions particularly in relation to housing, sanitation, electricity and water supply, transport and communications. As regards protection of the right to adequate housing of urban women, even though CEDAW does not have an explicit provision protecting the right to adequate housing of urban women, under the African human rights system, the African Charter on the

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<sup>51</sup> Art 43(1)(d).

<sup>52</sup> Fact No 21 (n 4 above) 16.

<sup>53</sup> Ibid.

<sup>54</sup> Art 27(1) of the CRC.

Rights of Women in Africa (African Women's Protocol)<sup>55</sup> to which Zambia is a party, guarantees all women the right to equal access to housing and to acceptable living conditions in a healthy environment.<sup>56</sup> The Women's Protocol obliges State Parties to grant to women, whatever their marital status, access to adequate housing. The Protocol therefore expands on CEDAW which refers to women's right to access housing in relation to rural women only.

The CERD, on the other hand, requires States Parties to prohibit and eliminate all forms of racial discrimination and guarantee 'the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law' in the enjoyment of the right to housing.<sup>57</sup> The Convention Relating to the Status of Refugees requires States to 'accord refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances'.<sup>58</sup> The Convention on the Protection of all Migrant Workers and Members of their Families obliges States to ensure that migrant workers 'enjoy equality of treatment with nationals of the State of employment' in terms of 'access to housing, including social housing schemes, and protection against exploitation in respect of rents'.<sup>59</sup> In addition, the Convention on the Rights of Persons with Disabilities obliges States to recognise the right of persons with disabilities to an adequate standard of living including adequate housing.<sup>60</sup>

It can be seen from the above provisions that the right to adequate housing is well established in international law. In terms of international law, everyone is entitled to enjoy the right to adequate housing. According to the United Nations the entitlements contained in the right to adequate housing include 'security of tenure; housing, land and property restitution; equal and non-discriminatory access to adequate housing and participation in housing-related decision making'.<sup>61</sup> On the other hand, the CESCR has pointed out that the right to adequate housing should be ensured to everyone regardless of their income or access to economic resources.<sup>62</sup> The CESCR has further stated that although the ICESCR makes reference to 'himself and his family'

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<sup>55</sup> CAB/LEG/66.6/Rev. 1 (2003).

<sup>56</sup> Art 16 of the African Women's Protocol.

<sup>57</sup> Art 5(e)(iii).

<sup>58</sup> Art 21 of the Convention Relating to the Status of Refugees.

<sup>59</sup> Art 43(1)(d) of the Convention on Migrant Workers.

<sup>60</sup> Art 48.

<sup>61</sup> Fact Sheet No 21 (n 4 above) 3.

<sup>62</sup> CESCR General Comment No 4 (n 18 above) para 7.

which assumption of gender roles was accepted in 1966 at the time of adoption of the covenant, the phrase cannot be read today to limit the applicability of the right to ‘individuals or female headed households or other such groups’.<sup>63</sup> The CESCR has also reiterated that the concept of ‘family’ must be understood in a wide sense.<sup>64</sup>

The right to adequate housing has also been given attention under regional human rights arrangements namely the African regional human rights system, the Inter-American system and the European system. The African Charter on Human and People’s Rights (African Charter)<sup>65</sup> which is the central document in the African regional system does not contain an explicit provision that protects the right to adequate housing. Notwithstanding, jurisprudence that emanates from the African Commission is important in relation to housing because the Commission endeavours to protect the right to housing by deriving it from other rights in the Charter. In *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*<sup>66</sup> the African Commission a quasi-judicial body vest with the mandate to interpret provisions of the African Charter and to consider individual complaints of violations of the Charter found Nigeria in violation of the right to adequate housing. The Commission found that the combined effect of Articles 14, 16 and 18(1) of the African Charter which provides for the right to property, the right to enjoy the best attainable state of mental and physical health and the protection accorded to the family respectively, read into the Charter the right to shelter or housing. Further, the African Women’s Protocol<sup>67</sup> and the African Charter on the Rights and Welfare of the Child (African Children’s Charter)<sup>68</sup> also recognise the right to adequate housing.

### **2.3 Understanding the right to adequate housing**

The CESCR in its General Comment No. 4 has underlined that the right to adequate housing should not be narrowly interpreted as merely having a roof over one’s head or as a commodity: rather, it should be seen as the right to live somewhere in security, peace and dignity.<sup>69</sup> Therefore, the concept of adequacy is significant in relation to the right to housing as it ‘serves to

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<sup>63</sup> Ibid para 6.

<sup>64</sup> Ibid.

<sup>65</sup> OAU/CAB/LEG/67/3Rev.5 (1981), entered into force 21 October 1986.

<sup>66</sup> Communication No 155/96 (2001).

<sup>67</sup> Art 16.

<sup>68</sup> OAU Doc CAB/LEG/249/4 (1990).

<sup>69</sup> CESCR General Comment No 4 para 7.

underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute “adequate housing” for the purposes of the covenant’.<sup>70</sup> According to the CESCR, aspects of the right which must be taken into account include legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.<sup>71</sup> In line with these core elements of the right to adequate housing defined by the CESCR, the first United Nations Special Rapporteur on Adequate Housing Miloon Kothari defined the human right to adequate housing as a ‘right of every woman, man, youth and child to gain a safe and secure home and community in which to live in peace and dignity’.<sup>72</sup>

Standards set by international law which States must adhere to, to ensure adequate housing for their populations as interpreted by the CESCR are for example that occupants should be able to enjoy legal security of tenure whether in public or private rented accommodation, owner occupation, emergency housing, cooperative housing or informal settlements.<sup>73</sup> Governments are obliged to ensure that everyone enjoys security of tenure which protects them from forced evictions or harassment.<sup>74</sup> In addition, for housing to be deemed adequate it must be affordable and habitable. It must protect the occupants from cold, heat, rain, damp, wind or other threats to health.<sup>75</sup> Moreover, adequate housing must be located where there is access to employment options, hospitals, schools, child-care centres and social facilities.<sup>76</sup> Adequate housing must also express cultural identity.<sup>77</sup> Further, everyone must be able to access adequate housing.<sup>78</sup>

The right to adequate housing is usually misunderstood. One of the misconceptions of the right to housing is that the State is required to build houses for the entire population. The UN has noted that although some governments actually do so, the right to housing does not oblige them to build houses for the entire population.<sup>79</sup> As already alluded to, the right to housing requires

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<sup>70</sup> Ibid para 8.

<sup>71</sup> Ibid.

<sup>72</sup> Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non- Discrimination in this Context available at [www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx](http://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx) (accessed on 3 November 2012).

<sup>73</sup> CESCR General Comment No 4 para 8.

<sup>74</sup> Ibid para 8(a).

<sup>75</sup> Ibid para 8(d).

<sup>76</sup> Ibid para 8(f).

<sup>77</sup> Ibid para 8(g).

<sup>78</sup> Ibid para 8(e).

<sup>79</sup> Fact Sheet No 21 (n 4 above) 6.

States to take measures to prevent homelessness.<sup>80</sup> Governments must provide protection from forced evictions, prohibit discrimination and focus on those in most need so that everyone enjoys security of tenure.<sup>81</sup> Intervention by the State is required from all levels of government; legislative or administrative. Further, it is worth noting that the right to housing is not the same as the right to land or the right to property.<sup>82</sup>

## 2.4 Justiciability of the right to adequate housing

Most jurisdictions regard socio-economic rights as rights which are not suitable for judicial consideration. Socio-economic rights are regarded as rights which are not capable of constitutional protection and judicial enforcement. The CESCR has rightly observed that judicial remedies are considered to be essential when it comes to violations of civil and political rights whereas the contrary assumption is made for socio-economic and cultural rights.<sup>83</sup> The placing of economic, social and cultural rights into the lower class dates back to the phase of the cold war in the early 1950s during which rights contained in the UDHR were divided into two categories.<sup>84</sup> This dichotomy was expressed by the adoption of two separate covenants namely the ICESCR and the ICCPR. The two covenants were adopted with separate implementation mechanisms.<sup>85</sup> The inferior status given to ESCR has had a negative impact on the possibility of their effective implementation both at international and domestic levels.<sup>86</sup>

The persistent preference of civil and political rights over ESCR is contrary to the principle that all human rights are universal, indivisible, interdependent and interrelated.<sup>87</sup> This fundamental principle was confirmed at the World Conference on Human Rights held at Vienna in 1993. The principle is reflected in the UN Charter<sup>88</sup> and recognized in the UDHR. Article 2 of the UDHR

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<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid at 7.

<sup>83</sup> Committee on Economic Social and Cultural Rights General Comment No 9 *The Domestic Application of the Covenant* E/C.12/1998/24 para 10.

<sup>84</sup> Abdullahi A. An-Na'im 'To Affirm the Full Human Rights Standing of Economic, Social and Cultural rights' in Yash Ghai and Jill Cottrell *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural rights* 12.

<sup>85</sup> Ibid.

<sup>86</sup> Fons Coomans 'Some Introductory Remarks on Justiciability of Economic and Social Rights in a Comparative Constitutional Context' in Fons Coomans (ed) *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* 2.

<sup>87</sup> Vienna Declaration and Programme of Action 12 July 1993, UN Doc A/CONF.157/23, para 5.

<sup>88</sup> Art 55 of UN Charter.

provides that everyone is entitled to all the rights set out in the Declaration without discrimination. Eide observes that the UDHR provides a normative system of interrelated rights as opposed to a menu from which states can pick from.<sup>89</sup> At the Vienna World Conference of Human Rights it was not only declared that all human rights are universal, indivisible, interdependent and interrelated but also that the ‘international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis’.<sup>90</sup> It was further declared that ‘it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms’.<sup>91</sup> Therefore it is not possible to claim the universality of human rights while at the same time denying the validity of a part of human rights.

In order for States to effectively fulfil their international obligations to protect ESCR, it is important that these rights are justiciable in their domestic legal systems.<sup>92</sup> Justiciability is an adequate means for effective implementation of ESCR.<sup>93</sup> The concept of justiciability refers to the ‘ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur’.<sup>94</sup> If a violation of the subjective right is found, the court must be able to provide a remedy or redress for the violation.<sup>95</sup>

Critics of justiciable socio-economic rights usually argue that if socio-economic issues are made justiciable, courts will interfere in the domain of the executive and legislative arms of government as socio economic issues relate to policy issues and resource allocation.<sup>96</sup> However, the CESCR points out that although the separation of public powers must be respected, it is important to acknowledge the important role courts play in the interpretation of matters that have resource implications.<sup>97</sup> Precluding courts from dealing with socio-economic issues makes them lack capacity to protect the rights of the disadvantaged groups in society. Therefore, justiciability

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<sup>89</sup> Eide (n 31 above) 11.

<sup>90</sup> Vienna Declaration and Programme of Action (n 3 above).

<sup>91</sup> Ibid para 5.

<sup>92</sup> CESCR General Comment No. 9 (n 82 above) para 7.

<sup>93</sup> Ibid para 7.

<sup>94</sup> Malila, (n 34 above) 130.

<sup>95</sup> Frans Viljoen ‘The justiciability of socio-economic rights’ in Yvonne Donders and Vladimir Volodin *Human Rights in Education, Science and Culture: Legal Developments and Challenges* 55.

<sup>96</sup> Lord Lester of Herne Hill QC & Colm O’ Cinneide ‘The effective protection of socio-economic rights’ in Yash Ghai and Jill Cottrell (eds) *Economic, Social and Cultural Rights in practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* 20.

<sup>97</sup> CESCR General Comment No 9 (n 83 above) para 1.



of ESCR is crucial for States to effectively to fulfil their international obligations to ensure protection of ESCR.

## **2.5 Zambia's obligations in international law vis-à-vis protecting the right to adequate housing**

The CESCR in its General Comment No 14 has underlined that human rights impose three types of States' obligations namely the obligations to 'respect', 'protect', and fulfil human rights.<sup>98</sup> By virtue of being a party to the ICESCR and other international instruments that guarantee the right to adequate housing, Zambia is obliged under international human rights law to respect, protect and fulfil the right to adequate housing. It is important that Zambia provides adequate housing for its population based on international standards. The ICESCR which is the most important international instrument for the protection of the right to adequate housing under Article 2 obliges each State Party to the Covenant to undertake to take steps 'individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources with a view to achieving progressively the full realisation of the rights' recognised in the covenant.

The ICESCR acknowledges that States may have resource constraints as regards fulfilling rights enshrined in the covenant. This is the case for Zambia which grapples with poverty.<sup>99</sup> Therefore, the Covenant recognises that full realisation of all economic, social and cultural rights will generally not be able to be achieved by states in a short period of time, thus the Covenant obliges State Parties to achieve rights contained therein progressively.<sup>100</sup> Even though not all components of the right to adequate housing can be realised immediately, the State must show at a minimum that it is making every effort to give effect to the right within its available resources. It must endeavour to guarantee minimum essentials of the right. In essence as pointed out by the CESCR, despite the status of a country in terms of development, there are certain steps that it

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<sup>98</sup> UN Committee on Economic Social and Cultural Rights *The Right to the Highest Attainable Standard of Health* General Comment No. 14 UN Doc E/C.12/2000/4, para. 33.

<sup>99</sup> 'Zambia Economic Brief' available at [www.worldbank.org](http://www.worldbank.org) accessed on 10 February 2013.

<sup>100</sup> Art 2(1) of the ICESCR.

must take immediately.<sup>101</sup> In light of the foregoing, there is therefore no justification for a non-justiciable right to adequate housing in the Zambian Constitution.

Further, in line with the wording of the Covenant, States' available resources include resources available in a State and resources from the international community. Therefore, it can be said that Zambia is obliged to channel a portion of resources obtained as grants from the international community towards providing adequate housing for its people.

We now discuss Zambia's obligations under international human rights law as regards ensuring enjoyment of the right to adequate housing for its people.

### 2.5.1 The duty to respect

The obligation to respect the right to adequate housing requires the State 'to refrain from interfering directly or indirectly with the enjoyment of the right'.<sup>102</sup> For instance, States are required to refrain from carrying out forced evictions and demolishing homes.<sup>103</sup> They are also required to refrain from imposing discriminatory practices that limit the enjoyment of the right to housing with regard to specific groups.<sup>104</sup> Under the duty to respect, States are also obliged to desist infringing on the right to privacy of the home and should not deny housing restitution to particular groups<sup>105</sup> or pollute water resources.<sup>106</sup>

Article 2(2) of the ICESCR obliges State Parties to guarantee all rights in the Covenant without discrimination of any kind. At the same time, Article 3 of the ICESCR requires State Parties to ensure the equal right of men and women to the enjoyment of all rights set forth in the Covenant. It is worth noting that the UN has noted that although certain components of the right to adequate housing may be realised progressively, some State obligations such as States' undertaking that fulfilment of the right to adequate housing would be exercised without discrimination are of immediate effect.<sup>107</sup> Therefore, Zambia is obliged to ensure that its people enjoy the right to adequate housing without discrimination. Ensuring enjoyment of the right to adequate housing

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<sup>101</sup> CESCR General Comment No 4 (n 18 above) para 10.

<sup>102</sup> CESCR General Comment No 14 (n 98 above) para 33.

<sup>103</sup> UNHCR/UNHABITAT Fact Sheet No 21 (n 4 above) 33.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (n 66 above).

<sup>107</sup> UNHCR/UNHABITAT Fact Sheet No 21 (n 4 above) 29.

without discrimination of any kind is in line with the State's obligations under international law to respect the right to adequate housing.

### **2.5.2 The duty to protect**

The duty to protect the right to adequate housing requires the state to take measures that prevent third parties from interfering with the right.<sup>108</sup> The obligation to protect the right to adequate housing requires Zambia to ensure that non-state actors do not infringe upon the right to housing. In essence, Zambia is obliged to ensure that third parties do not negatively interfere with the enjoyment of the right to adequate housing. It is important that Zambia adopts measures that would compel private actors such as landlords and property developers to comply with international human rights standards in relation to adequate housing provision. For example, in order to ensure that the right to adequate housing benchmark namely; affordability of housing is met, the State is required to protect individuals from being exploited by landlords who demand rent in excess of the standard rent. Further, it is cardinal that the State regulates housing and rental markets so as to protect and promote enjoyment of the right to adequate housing.<sup>109</sup>

Also, the obligation by States to protect the right to adequate housing requires States to prevent discriminatory practices such as for instance in relation to inheritance so that the right to adequate housing is protected.<sup>110</sup> In this respect for example, intense sensitisation is needed so that practices that affect women's access to and control over housing are eliminated.<sup>111</sup> Widows are usually victims of these practices. This is common especially in the form of property grabbing.

In addition, the State is obliged to put up measures that prevent third parties from carrying out forced evictions.<sup>112</sup> Protection of individuals from forced evictions is an important aspect of the right to adequate housing. It is therefore argued that a justiciable right to adequate housing enshrined in the Constitution is paramount. It would make the State more proactive in the provision of adequate housing and in regulating non-state actors so that they do not infringe on the right. It would also be an important tool in the interpretation of housing statutes.

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<sup>108</sup> CESCR General Comment No 14 (n 98 above) para 33.

<sup>109</sup> UNHCR/UNHABITAT Fact Sheet No 21 (n 4 above) 33.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

### 2.5.3 The duty to promote and fulfil

According to the CESCR in its General Comment No. 14, the obligation to fulfil a right ‘requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of the right’.<sup>113</sup> The obligation to fulfil contains obligations to facilitate, provide and promote.<sup>114</sup> For example, States are required to formulate national housing policies which focus on the disadvantaged and marginalised groups<sup>115</sup> or national housing plans or programmes which provide for relief for the homeless or people in housing crisis situations.<sup>116</sup> In accordance with States’ obligation to fulfil, it is crucial that the State takes measures to provide affordable housing. The State is also required to take measures to provide adequate housing to those in desperate need by implementing measures such as housing subsidies.<sup>117</sup>

Also in order to fulfil the right to housing the State must be able to identify available resources and a cost effective way of using them.<sup>118</sup> Under the obligation to fulfil, the State is also required to provide infrastructure requisite for housing to be considered adequate such as taking steps to ensure universal access to electricity, adequate sanitation services, safe drinking water and provision of refuse collection services.<sup>119</sup> The survey on living conditions conducted by the Republic of Zambia Central Statistical office in 2010 showed that at national level 62 per cent of households in Zambia had access to safe drinking water and 63 per cent had access to improved water.<sup>120</sup> The survey showed that there was an increase in the proportion of rural households accessing safe drinking water to 50 per cent in 2010 from 42 per cent in 2006.<sup>121</sup> However, in relation to electricity provision, the survey showed that only 5 per cent of households in rural areas had connection to electricity compared to 53 per cent of their urban counterparts.<sup>122</sup> Statistics at provincial level indicate that the Lusaka Province had the highest proportion of

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<sup>113</sup> CESCR General Comment No 14 (n 98 above) para 33.

<sup>114</sup> *Ibid.*

<sup>115</sup> UNHCR/UNHABITAT Fact Sheet No 21 at 24.

<sup>116</sup> *Ibid* at 23; *Government of the Republic of South Africa v Grootboom* 2001(1) SA at 99.

<sup>117</sup> UNHCR /UNHABITAT Fact Sheet No 21 at 24.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> Republic of Zambia Central Statistical Office Living Conditions and Monitoring Survey Report 2006 & 2010 223.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid* at 228.

households with electricity connection at 61 per cent followed by the Copperbelt province that had 45 per cent of households connected to electricity.<sup>123</sup> The rest of the provinces' rates of electricity connection were below 20 per cent.<sup>124</sup> This is another challenge for Zambia to take measures to ensure universal access to electricity so that adequate housing is a reality to all. Further, the State must be able to provide remedies where there are violations.<sup>125</sup> According to Brand, the State breaches the duty to fulfil 'when it does nothing, or does not do enough, or does not do the appropriate things' to fully realise the right.<sup>126</sup>

## 2.6 Conclusion

This chapter showed that the right to adequate housing is extensively addressed in international law. A number of treaties have given protection to the right in the UN system. It was also seen that at the regional level, regional arrangements for human rights protection endeavour to recognise the right to adequate housing. International treaties have set standards as to how States should protect the right to housing, if they are to do so effectively. It is expected that States should provide adequate housing based on these standards. Therefore, as a party to the ICESCR and other international and regional instruments that protect the right to adequate housing, Zambia is obliged under international law to respect, protect and fulfil the right. It must be able to provide an enabling environment for the realisation of the right to adequate housing according to international standards. In order for the State to be committed to these obligations, it is argued that it must entrench a justiciable right to adequate housing in the constitution. If the people of Zambia are to fully enjoy the right to adequate housing, they should be able to approach the courts in the event that this right is violated. The constitution will therefore oblige the state at all levels to endeavour to provide adequate housing. It is argued that giving the right to adequate housing constitutional protection as well as the capability of being legally enforced is the sustainable way to ensure that the right to adequate housing is fully realised by the Zambian people.

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<sup>123</sup> Ibid.

<sup>124</sup> Ibid at 229.

<sup>125</sup> UNHCR/UNHabitat Fact Sheet No 21 (n 4 above) 24.

<sup>126</sup> Danie Brand 'Socio-economic Rights and the Courts in South Africa. Justiciability on a Sliding Scale' in Fons Coomans (ed) *Justiciability of Economic and Social Rights: Experiences from domestic Systems* (2006) 219.

## CHAPTER THREE

### PROTECTION OF THE RIGHT TO ADEQUATE HOUSING IN ZAMBIA: AN ASSESSMENT OF THE ZAMBIAN LAW AND HOUSING POLICY

#### 3.1 Introduction

This chapter will begin by giving the historical background of housing in Zambia. It also gives the constitutional background *vis-a-vis* the right to adequate housing. The chapter will thereafter examine the Zambian legal framework in relation to housing in order to assess to what extent it gives protection to the right to adequate housing. The inadequacies or limitations of the Constitution as well as housing legislation in making provision for the realization of the right to adequate housing will be highlighted in order to show why it is imperative that the right to adequate housing is protected in the justiciable part of the Constitution, the Bill of Rights. The Zambia National Housing Policy as well as the housing finance options available will also be examined and critiqued.

The previous chapter established that in order for the right to adequate housing to be effectively protected, it is crucial that specific situations of specific groups of people such as the homeless, children, women or those in desperate need are considered. Thus, this chapter will also assess to what extent Zambia protects the right to adequate housing in respect to vulnerable groups such as children, women and the poor. The most deprived and vulnerable people do not only need civil and political rights but also socio-economic and cultural rights in order for them to fully enjoy their essential human entitlements. Realisation of the right to adequate housing ensures human dignity and eliminates housing poverty. Chirwa rightly observes that socio-economic rights are ‘a key to breaking the downward spiral of entrapment in poverty’.<sup>127</sup> Reducing poverty and economic inequality among the population is one of the major challenges facing Zambia.<sup>128</sup>

In this Chapter, international law as well as the right to adequate housing indicators or benchmarks underlined by the Committee on Economic, Social and Cultural Rights in its General Comment No. 4 on the right to adequate housing namely legal security of tenure,

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<sup>127</sup> Danwood M Chirwa ‘Combating Child Poverty: The Role of Economic, Social and Cultural rights’ in Julia Sloth-Nielsen (ed) *Children’s Rights in Africa: A Legal Perspective* 92.

<sup>128</sup> Zambia Central Statistical Office Living Conditions Monitoring Survey Report (n 120 above).

availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy<sup>129</sup> will be used in order to evaluate to what extent Zambia fulfils its international obligations to ensure the right to adequate housing is realized by its citizens.

## Part A

### 3.2 Brief historical background of housing in Zambia

Housing in Zambia has evolved in three stages namely the pre-colonial period, the colonial period and the post colonial period. The inhabitants of pre-colonial Zambia were a product of different waves of migration into the territory of today Zambia.<sup>130</sup> The Bantu speaking peoples who came to Zambia during the first century are the ancestors of the majority of the Zambian people.<sup>131</sup> These Bantu speaking peoples introduced the Iron Age. They also drove away the San people whom they found already occupying the territory into drier areas further South. The second wave of migration which started around the Twelfth Century until the Sixteenth Century was dominated by people who came from the North. These people desired to make settlements and establish kingdoms.<sup>132</sup> The people who came to settle in Zambia following Shaka's wars in Natal represent the third wave of migration. Thereafter, Zambia was exposed to external influences of Arabs and the Portuguese who were involved in slave trade and human trafficking.<sup>133</sup> It is worth noting that slave trade was a catalyst of internal conflicts among African tribes as some of the tribes acted as intermediaries of the slave traders. Therefore, the pre-colonial period was characterised by housing which was semi-permanent. Most of the housing constructed in this era was constructed with temporary building materials such as mud and thatch.<sup>134</sup>

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<sup>129</sup> CESCR General Comment No 4 (n 18 above) para 8.

<sup>130</sup> Human Rights Commission: State of Human Rights Report in Zambia 2009 *Right to Adequate Housing with a Perspective from Selected Areas in Zambia* 17.

<sup>131</sup> *Ibid* at 17.

<sup>132</sup> *Ibid*.

<sup>133</sup> *Ibid*.

<sup>134</sup> *Ibid*.

The colonial period on the other hand brought about a racially divided society between the white settlers and the African majority.<sup>135</sup> Zambia was colonised by the British South Africa Company (BSA) on behalf of the British Government. John Cecil Rhodes, who was instrumental in the final colonisation of Zambia, prevented the territory from being taken away by other colonisers such as the Germans, Belgians, Portuguese or Boers on economic grounds; mainly to secure the mineral wealth of the territory for the BSA.<sup>136</sup> The colonial masters constructed a railway line and alienated enormous chunks of land along the line of rail to the white settlers. The colonialists also acquired mining rights and introduced a British legal system. They also imposed hut taxes to force Africans to seek wage employment.<sup>137</sup>

In addition, the colonial masters developed administrative centres, areas along lines of rail and mining centres into urban areas. The African majority were confined in rural areas where they engaged in subsistence farming as peasant production of crops for commercial purposes was discouraged.<sup>138</sup> A few Africans who went to the urban areas got jobs on commercial white farms and in the mines. Others became clerks, domestic workers in white households, artists, teachers, evangelists and so on.<sup>139</sup> Noteworthy is that during the colonial era there was residential segregation with Africans being restricted from white neighbourhoods and excluded from accessing decent housing. Pursuant to the colonial Urban African Housing Ordinance of 1948, African housing consisted of one or two bedrooms, a small kitchen and pit latrine.<sup>140</sup> Most of these structures were temporary. This is partly because Africans were not considered permanent residents in urban areas. Where they were given permanent residence because their labour was needed, African workers' housing was still small single quarters with communal toilets and water points.<sup>141</sup> Houses for the settlers on the other hand were built out of proper materials; burnt brick, concrete floor, galvanised roofing sheets and were provided with running water and electricity whenever this was possible.

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<sup>135</sup> Ibid.

<sup>136</sup> Ibid at 20.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid at 20.

<sup>141</sup> Ibid.



After independence, there was rapid urbanisation as a number of migrants anticipated better housing opportunities and better jobs in the urban areas.<sup>142</sup> Pressure on the existing housing stock led to the formation of squatter settlements.<sup>143</sup> It must be noted that most post colonial decent housing was tied to formal employment. Employers provided decent housing for their employees or rented housing for them or paid them housing allowance to cater for their housing costs.<sup>144</sup>

### **3.3 Legal framework for the protection of the right to adequate housing in Zambia**

#### **3.3.1 Constitutional background and the right to housing**

This section gives a brief constitutional history of Zambia and then highlights the current developments in Zambia's constitutional making processes in order to shed light on the constitutional developments and the right to housing.

##### **3.3.1.1 The colonial constitutions**

During the colonial period, there was no democratic self-government therefore Northern Rhodesia as Zambia was then called, did not have a constitution.<sup>145</sup> However, there existed a series of structural arrangements decreed by the British Government that were loosely termed 'constitutions'.<sup>146</sup> These structural arrangements were enacted through Orders-in-Council and were designed to promote governance by the white settlers and for the Africans to accept.<sup>147</sup> These constitutions were flexible in the sense that they could be amended in response to pressure.<sup>148</sup> In 1958, Africans were allowed limited franchise. Franchise for Africans became substantial in 1962 and full suffrage to Africans only came in January 1964. That year's elections saw the victory of the United National Independence Party (UNIP) and its leader Kenneth David Kaunda who became the Prime Minister of the last government of Northern Rhodesia.<sup>149</sup>

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<sup>142</sup> Karen Tranberg Hansen 'Gender and Access to Housing in Zambia' in Ann Schlyter (ed) *A Place to Live: Gender Research on Housing in Africa* (1996) 129.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> Muna B Ndulo and Robert B Kent 'Constitutionalism in Zambia: Past, Present and Future' (1996) 40 *Journal of African Law* 256 at 259.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid.

### 3.3.1.2 The independence constitution of 1964 – The First Republic

Following negotiations which were held in London in May, the final Order-in-Council came later in 1964.<sup>150</sup> Schedule II of the Order set forth the Constitution of Zambia which was accompanied by an Act of Independence by the British Parliament.<sup>151</sup> The effective date of the independence Constitution was 24 October, 1964. Like the Colonial Constitutions before it, the Independence Constitution detailed the structure of government briefly and had the look of ordinary legislation.<sup>152</sup> However, it was a flexible document and made provision for its own amendment by processes similar to the enactment of ordinary legislation. Section 32 of the Constitution stated that ‘the first President shall be Kenneth David Kaunda’. Ndulo and Kent explain that this did not infer that Kenneth Kaunda was simply a handpicked choice of the British Government. Rather, this was because of Kenneth Kaunda and his Party’s victory at the 1964 polls.<sup>153</sup> Therefore, all political parties saw no need for elections the same year and it was agreed that the Independence Order names him as the first President.<sup>154</sup>

The President’s powers under the 1964 Independence Constitution were enormous. The President acquired great power as commander in chief of the armed forces and had power to veto legislation. Even when it had support of the requisite two-thirds majority of parliament, he could prevent it from becoming law by dissolving parliament.<sup>155</sup>

In relation to rights, the 1964 Independence Constitution contained an extensive Bill of Rights.<sup>156</sup> The Bill of Rights did not contain an explicit provision protecting the right to adequate housing nor did it contain ESCR generally. However, it entrenched a number of fundamental freedoms that were relevant to the enjoyment of the right to housing such as the right to life, freedom for the privacy of the home and freedom from deprivation of property without compensation.<sup>157</sup> Rights contained in the Bill of Rights were however not absolute. They were subject to limitations in the form of claw back clauses. Grounds for the limitations included public interest or that the freedoms should not prejudice enjoyment of the rights of others. According to Ndulo

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<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid at 260.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid at 261.

<sup>156</sup> Chapter III of the 1964 Constitution.

<sup>157</sup> Arts 13 to 25 of the 1964 Constitution.

and Kent, these claw back clauses were normally used by the ‘government to tamper with individual rights’.<sup>158</sup> A significant limitation was in relation to the non-discrimination clause. Although the Constitution outlawed discriminatory laws, protection in this regard did not extend to customary law in respect of a particular race or tribe.<sup>159</sup> In effect, the root cause of discrimination suffered by Zambian women was exempted from the Bill of Rights.<sup>160</sup>

In addition, under the 1964 Constitution at least seven Members of Parliament could challenge a bill for being inconsistent with the provisions of the Constitution which protected fundamental rights of the individual.<sup>161</sup> Where such a challenge was necessary, the Members of Parliament could ask the Speaker to refer the matter to a tribunal. Thereafter, the Chief Justice would be required to appoint a tribunal to report whether the provisions of the Bill violated the Constitution. However, this process was not used throughout the life of the Independence Constitution of 1964.<sup>162</sup> Despite the foregoing and also the issue about limitations discussed above, fundamental rights were legally enforceable. Where a person alleged that his/her fundamental rights were being violated, the person could apply to the High Court for redress.<sup>163</sup> The 1964 Constitution also provided for judicial review.<sup>164</sup>

### **3.3.1.3 The 1973 Constitution: The Second Republic – One-party state constitution**

In 1973, the UNIP led government turned Zambia into one a party state. The Government stated that this was ‘in the interest of unity and economic development’.<sup>165</sup> A Constitutional Commission was appointed in 1973 chaired by Mainza Chona to recommend the form of the single party system. The Chona Commission made wide recommendations in the area of human rights.<sup>166</sup> The One party Constitution was enacted by the National Assembly and assented to by the President. On 25 August 1973, the Second Republic came into being.<sup>167</sup> Closely linked to the right to housing, the 1973 Constitution recognised the right to life, property, expression and

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<sup>158</sup> Ibid at 263.

<sup>159</sup> Art 25(4)(c)(d)(e).

<sup>160</sup> Ndulo and Kent (n 145 above) 263.

<sup>161</sup> Ibid at 262.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid at 264.

<sup>164</sup> Ibid.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid at 265.

<sup>167</sup> Ibid.

association. Under the 1973 Constitution, rights were rendered meaningless in a one party state with enormous executive powers. Freedom of Assembly for example could only be exercised within the party.<sup>168</sup>

#### **3.2.1.4 The 1991 Constitution –The Third Republic**

Dissatisfaction from all quarters caused by one party rule compelled Kaunda to appoint a Constitutional Commission which was headed by Patrick Mvunga to restore multi-party democracy.<sup>169</sup> The 1991 Constitution re-introduced multi-party politics. Like its predecessor, the 1991 Constitution protected fundamental rights and freedoms of the individual with limitations. For example, the non-discrimination clause was still subject to the application of customary law and therefore continued to disadvantage women. Despite the above, the clause to the effect that Part III which contained Fundamental Rights and Freedoms of the Individual could not be amended without a national referendum approval was re-introduced in the 1991 Constitution.<sup>170</sup> The elections that were held after enactment of the 1991 Constitution saw the victory of the Movement for Multi-party Democracy (MMD) and Fredrick Chiluba was elected president.

#### **3.2.1.5 The 1996 Constitution**

Before being elected into power, the MMD during its campaigns stated that once it was elected it would replace the 1991 Constitution with one that strengthened protection of human rights.<sup>171</sup> This was one of the terms of reference for the Constitutional Review Commission that was appointed to review the constitution.<sup>172</sup> It was headed by John Mwanakatwe. The Mwanakatwe Commission's draft Constitution contained a chapter on Directive Principles of State Policy (DPSP) which were meant to guide all branches of government. It also recommended the creation of a human rights commission which would investigate human rights violations out of its own initiative or as a result of complaints.<sup>173</sup> The 1996 Constitution is the first Zambian Constitution to include socio-economic rights although these have been entrenched as principles

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<sup>168</sup> Ibid at 266.

<sup>169</sup> Ibid at 268.

<sup>170</sup> Art 79(3) of the 1991 Constitution.

<sup>171</sup> Ndulo and Kent (n 145 above) 271.

<sup>172</sup> Ibid.

<sup>173</sup> Report of the Mwanakatwe Constitution Review Commission paras 8.1-8.5.

of state policy<sup>174</sup> and are non-enforceable.<sup>175</sup> The principle of state policy to the effect that the State shall endeavour to provide decent shelter is contained under Article 112(d).

### **3.2.1.6 Further developments in the constitutional making process**

In 2003, the third Republican President Levy Mwanawasa initiated the fourth constitutional review process. Wila Mung'omba was the chair of the Constitution Review Commission. The Mung'omba Commission produced a progressive draft Constitution. The Mung'omba draft Constitution included socio-economic rights.<sup>176</sup> Following disagreements on the mode of adoption, as well as other issues, this constitution making process was suspended.

Popularly construed as a fifth constitutional making process, pursuant to the National Constitutional Conference Bill, the National Constitution Conference (NCC) was tasked in 2007 to review the Mung'omba draft Constitution and thus draft a new constitution for Zambia.<sup>177</sup> The NCC undertook its task and presented the Constitution of Zambia Draft Bill to government. However, the Bill failed to become law as it was rejected in Parliament.

In 2011, Michael Sata assumed power and has appointed a Technical Committee of Experts to draft the Constitution. The Committee of Experts has since come up with the first draft of the constitution which is also very progressive. The first draft has also entrenched socio-economic rights in the Bill of Rights including the right to accessible and adequate housing.<sup>178</sup> Considering the failed attempts since 2003 to have a constitution that will stand the test of time, it is only hoped that these progressive provisions would be retained.

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<sup>174</sup> Part IX of the 1991 Constitution of Zambia as amended in 1996.

<sup>175</sup> Art 111 of the Constitution of Zambia.

<sup>176</sup> Arts 62 to 71 of Mungomba Draft Constitution.

<sup>177</sup> Constitutional history of Zambia: Supporting Constitution builders globally, available at [www.constitutionnet.org/country/constitutional.history-zambia](http://www.constitutionnet.org/country/constitutional.history-zambia) (accessed on 11 February 2013).

<sup>178</sup> Art 62(1)(b) of the First Draft Constitution of Zambia.

## Part B

### 3.3 The status of international human rights law in the current Constitution of Zambia 1996

The Constitution of Zambia does not contain a clause stating the status of international law. This is generally governed by common law.<sup>179</sup> Zambia is a typical dualist jurisdiction.<sup>180</sup> In countries with a dualist system such as Zambia, although an international treaty may be ratified or acceded to, specific legislation may be needed to give that international treaty force of national law.<sup>181</sup> As the Government of Zambia pointed out in its periodic report to the UN Committee against Torture<sup>182</sup> international instruments ratified by Zambia are not self-executing at the domestic level. They require enabling legislation to be enforceable.<sup>183</sup> Thus, treaties ratified by Zambia must be transformed into national law before they can form part of Zambian law.<sup>184</sup> Zambia has ratified a number of treaties that protect the right to adequate housing. These are such as the ICESCR (10 April 1984), ICCPR (10 April 1984), CERD (4 Feb 1972), CEDAW (21 June 1985), CRC (6 December 1991), CRPD (1 February 2010), Convention relating to the Status of Refugees (24 September 1969), ACHPR (10 January 1984)<sup>185</sup> and the African Women's Protocol (2 May 2006). Therefore, since international treaties are non-self-executing in Zambia, it is important that provisions in international law protecting the right to housing are domesticated.

In addition, due to the doctrine of separation of powers which is implicit in the Zambian Constitution which gives separate powers and functions to the three arms of government namely the Executive, Legislature and the Judiciary,<sup>186</sup> the responsibility and power to make laws is vested in the legislature<sup>187</sup> and consequently that function is deemed to be a preserve of the legislators. According to Thiele, in dualist systems, victims of human rights violations, including

<sup>179</sup> Michelo Hansungule 'Domestication of International Human Rights Law in Zambia' in Magnus Killander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 71.

<sup>180</sup> Robyn Layton, 'When and How Can Domestic Judges and Lawyers Use International Law in Dualist Systems' available at [http://training.itcilo.it/ils/cd\\_use.../dualist%20systems-Layton.pdf](http://training.itcilo.it/ils/cd_use.../dualist%20systems-Layton.pdf) 12 (accessed on 15 October 2012).

<sup>181</sup> Malila (n 34 above) 152.

<sup>182</sup> UN Doc CAT/C/47/Add.2.

<sup>183</sup> Ibid at para 8.

<sup>184</sup> Hansungule (n 179 above) 71.

<sup>185</sup> University of Minnesota Human Rights Library 'Ratification of International Human Rights Treaties- Zambia' available at <http://www1.umn.edu/humanrts/research/ratification-zambia.html> (accessed on 20 February 2013).

<sup>186</sup> See Parts IV, V and VI of the Zambian Constitution.

<sup>187</sup> Art 62 of the Zambian Constitution.

abuses of housing rights are often unable to avail themselves of the judicial system in order to enforce or seek redress for the violations especially where international law has not been given the force of national law.<sup>188</sup> The CESCR in its General Comment No. 9 has emphasised that it is important that States translate socio-economic rights into national law so as to give effect to their obligations in international human rights law<sup>189</sup> and also to enable individuals to enforce their rights before national courts and tribunals.<sup>190</sup>

Although Zambian courts have in some cases given judicial notice to international instruments which Zambia has ratified,<sup>191</sup> Zambia has been hesitant to give international instruments force of law at national level. Thus, as already indicated treaties ratified by Zambia have no status in the country until they are domesticated into enabling legislation. The Zambian Government has explained this to various UN treaty bodies. The Government in its National report to the Human Rights Council Working Group on the Universal Periodic Review explained that:

Further, Zambia has ratified regional instruments for the protection and promotion of human rights and fundamental freedoms. It is worth noting that international instruments are not self-executing and require legislative implementation to be effective in Zambia as law. Thus an individual cannot complain in a domestic court about a breach of Zambia's international human rights obligation unless the right has been incorporated into domestic law.<sup>192</sup>

In view of the foregoing, it is imperative that the right to adequate housing is domesticated and enshrined as a justiciable right in the Zambian Constitution so that anyone whose housing rights are infringed upon can be able to approach the courts to seek redress. Courts would also be able to make use of the explicit provision when determining cases where housing rights violations have occurred.

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<sup>188</sup> Bret Thiele 'The Human Right to Adequate Housing: A Tool for Promoting and Protecting Individual and community health' (2002) 92 *American Journal of Public Health* 712 at 714.

<sup>189</sup> CESCR General Comment No 9 (n 83 above) para 3.

<sup>190</sup> *Ibid* para 4.

<sup>191</sup> National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1 Zambia Human Rights Council Working Group on the Universal Periodic Review Second Session Geneva, 5-16 May 2008; See *Sara Longwe v Intercontinental Hotels* 1992/HP/765; [1993] 4 LRC 221.

<sup>192</sup> *Ibid* at para 6.

## Part C

### 3.4 Assessment of the Zambian legal and policy frameworks in protecting the right to adequate housing

#### 3.4.1 The Constitution of Zambia 1996

The Zambian Constitution does not contain an explicit provision providing for the right to adequate housing in its Bill of Rights which is a part that contains fundamental rights and freedoms of the individual.<sup>193</sup> Notwithstanding, Article 112(d) which falls under Part IX of the Constitution which outlines the Directive Principles of State Policy and Duties of a Citizen provides that the State shall endeavour to provide decent shelter for all persons and take measures to improve such amenities or facilities. The Constitution further states that the State shall strive to provide a clean and healthy environment for all.<sup>194</sup>

Although the Zambian Constitution does not explicitly recognize the right to adequate housing, some sections in the Bill of Rights can be construed to protect aspects of the right to housing. These are such as Article 12 of the Zambian Constitution, which provides for the right to life. The right to life is a right to live in a manner consistent with human dignity<sup>195</sup> and therefore can be said to encompass the right to shelter.<sup>196</sup> This is premised on the recognition that housing forms an indispensable part of ensuring human dignity. The notion of human dignity is often construed as the underlying concept of human rights generally.<sup>197</sup> For example, the Indian Supreme Court has on diverse occasions relied on Article 21 of the Indian Constitution which provides for the right to life to imply a range of socio-economic rights. In the case of *Francis Coralie Mullin v The Administrator, Union Territory of Delhi*<sup>198</sup> the court has interpreted the right to life as including ‘the right to live with human dignity and all that goes with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and

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<sup>193</sup> See Part III of the Zambian Constitution Cap 1 of the Laws of Zambia.

<sup>194</sup> Art 112(h) of the Zambian Constitution.

<sup>195</sup> Jill Cottrell and Yash Ghai ‘The Role of the Courts in the Protection of Economic, Social and Cultural Rights’ in Yash Ghai & Jill Cottrell (eds) *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* 74.

<sup>196</sup> Ibid at 72.

<sup>197</sup> Ibid at 74.

<sup>198</sup> (1981) 2 SCR 516 at 529.



commingling with fellow human beings'. In the case of *Olga Tellis v Bombay Municipal Corporation*<sup>199</sup> the court derived the right to a livelihood from the right to life and protected the right of pavement and slum dwellers to procedural due process while facing forced eviction.

However, it is argued that the right to life has limitations as regards protecting the right to adequate housing as it is generally interpreted as prohibiting the arbitrary deprivation of a person's life.<sup>200</sup> Moreover, it has to take a creative court to interpret the right broadly as encompassing other rights like the Indian Supreme Court did. Thus, using civil and political rights to claim socio-economic rights is not the best option. Judicial creativity has to be employed in order for courts to imply socio-economic rights from civil and political rights<sup>201</sup> which rights have little or no controversy as to their justiciability such as the right to life.<sup>202</sup> Rights cannot properly be called as such if they cannot be claimed. It is argued in this thesis that in order to reinforce the universality, interrelatedness and indivisibility of human rights, socio-economic rights should be regarded at par with civil and political rights and must be capable of enjoyment and enforcement in their own right.

Therefore there is need for an explicit provision providing for a justiciable right to adequate housing in the Constitution of Zambia for better protection of the right. A specific provision will make it easy for courts to legitimately refer to it without being accused of breaching the separation of powers. Further, the populace will be able to obtain redress or reparation from courts of law in the event that their rights to adequate housing are infringed upon.<sup>203</sup> In addition, the government will be obliged to make clear budgetary allocations in the national budget to meet housing needs.<sup>204</sup> An explicit provision to rely on would also make work easy for lawyers who would want to take up public interest litigation cases on housing rights on behalf of disadvantaged groups.

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<sup>199</sup> (1985) 3 SCC 545.

<sup>200</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982, available at <http://www.unhcr.org/refworld/docid/45388400a.html> accessed 3 November 2012.

<sup>201</sup> S Muralidhar 'Economic, Social and Cultural Rights: An Indian Response to the Justiciability Debate in Yash Ghai and Jill Cottrell (ed) *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* 24.

<sup>202</sup> Viljoen (n 95 above) 55.

<sup>203</sup> Simon Mwale, 'Zambia's Economic, Social and Cultural Rights: Why Should They Be in the New Constitution' Research Report of the Jesuit Centre for Theological Reflection available at [www.jctr.org.zm](http://www.jctr.org.zm) (accessed on 15 October 2012).

<sup>204</sup> Ibid.

Article 20(1) of the Zambian Constitution, which guarantees protection of freedom of expression, and Article 21(1), which guarantees protection of freedom of assembly and association, are cardinal in the realization and enjoyment of the right to adequate housing. According to the CESCR, the right to freedom of expression and the right to freedom of association such as in the case of tenants and other community based groups are indispensable if the right to adequate housing is to be realized and maintained by all groups in society.<sup>205</sup> Although freedom of expression and association are important for the enjoyment of the right to housing, the limitation of these rights is that they cannot fully protect the component elements of the right to adequate housing and thus the need for an explicit clause for a justiciable right to adequate housing in the Constitution.

Further, the Constitution of Zambia guarantees protection for the privacy of the home and other property under Article 11(C). In addition, Article 16(1) guarantees protection from deprivation of property without compensation. The protection of the right to privacy and the right to protection from deprivation of property in the Constitution encompasses the right to housing as freedom from arbitrary or unlawful interference with privacy, family, home and correspondence as well freedom from forced evictions are constituent elements of the right to adequate housing.<sup>206</sup> For example the African Commission derived the right to adequate housing out of other rights in the Banjul Charter such as the right to property and protection accorded to the family.<sup>207</sup>

However as stated above, the African Commission in this case was innovative in deriving the right to housing from other rights in the African Charter. More conservative courts or tribunals who read the law according to its letter will be reluctant to construe the right from other rights existing in an instrument. In Zambia, courts have been reluctant to make use of international human rights instruments<sup>208</sup> as these require enabling national legislation to be enforceable. Therefore, for courts to have a provision to refer to and for individuals to have some form of certainty as regards the outcome of their cases, it is vital that the right to adequate housing is enshrined as a justiciable right in the constitution.

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<sup>205</sup> CESCR General Comment No. 4 (n 18 above) para 9.

<sup>206</sup> Ibid para 9.

<sup>207</sup> *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (n 65 above).

<sup>208</sup> Hansungule (n 179 above) 71.

In addition, in as much as the rights to privacy of the home and the right not to be deprived of property give protection to housing rights to some extent, these rights have limitations as regards sufficiently providing for the right to adequate housing. The right to adequate housing means more than having privacy or being in possession of a property. The Committee on Economic, Social and Cultural Rights in its General Comment No. 4 has underlined that the right to housing should not be narrowly interpreted as merely having a roof over one's head or as a commodity, rather it should be seen as the right to live somewhere in security, peace and dignity.<sup>209</sup> Therefore, the concept of adequacy is significant in relation to the right to housing as it 'serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute "adequate housing" for the purposes of the covenant'.<sup>210</sup> Aspects of the right which must be taken into account include legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.<sup>211</sup> The right to adequate housing means entitlement to secure and peaceful, dignified, legally protected, affordable and habitable housing.

In addition, Article 23(1) of the Constitution refers to the principle of non-discrimination. Article 23(1) prohibits enactment of discriminatory laws. It provides that no person shall be treated in a discriminatory manner. This means that Article 23(1) promotes women's rights. It guarantees them protection from discriminatory laws and consequently the right to access adequate housing on the basis of equality of women and men and without discrimination. However, Article 23(4) of the Constitution authorizes discrimination in regard to laws in respect to marriage, divorce and devolution of property upon death or other matters of personal law<sup>212</sup> and also for the application of customary law.<sup>213</sup> This leaves open the possibility of enactment of laws or the condoning of practices that discriminate against women such as property grabbing of housing from women upon death of their husbands which is a common practice in Zambia.

The practice of not giving a share of the matrimonial property in this case housing to women married under customary law upon dissolution of a marriage is also rampant. In essence, Article 23(4) authorizes discrimination in the areas of customary law and family law. Consequently,

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<sup>209</sup> CESCR General Comment No 4 (n 18 above) para 7.

<sup>210</sup> Ibid para 8.

<sup>211</sup> Ibid.

<sup>212</sup> Art 23(4)(c) of the Constitution of Zambia.

<sup>213</sup> Art 23(4)(d) of Constitution.

Article 23(4) discriminates against women. In the case of *Mwiya v Mwiya*<sup>214</sup> where the Appellant appealed to the High Court following her unsuccessful appeal to the Magistrate Court because of a Local Court decision which granted an order for her divorce but declined to give her ancillary relief. The High Court also took into consideration the custom of the Lozi people of Western Zambia when arriving at its decision and held that the Lozi custom does not compel a man to give a share of the matrimonial property to his divorced wife. Research has shown that both Zambian statutory and customary laws related to inheritance, maintenance, family and gender violence fall short of minimum international standards.<sup>215</sup>

Zambia is a party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>216</sup> The Committee on the Elimination of All Forms of Discrimination against Women which monitors the implementation of CEDAW in its Concluding Observations on Zambia<sup>217</sup> has expressed concern why Article 23 of the Zambian Constitution has not been amended despite the Committee's numerous requests in previous Concluding Observations to have the said provision amended.<sup>218</sup> The Committee further expressed concern that the said Article was retained in the new Draft Constitution text and urged Zambia to ensure that CEDAW provisions are reflected in the proposed new draft constitution.<sup>219</sup>

Further, shortages of affordable and suitable housing constitute serious obstacles for women attempting to escape from violent domestic situations.<sup>220</sup> The discrimination clause in Article 23(4) of the Constitution coupled with the non-justiciable status of socio-economic rights in the Constitution further disadvantages the socio-economic situation in which women live. A justiciable right to adequate housing enshrined in the Bill of Rights will therefore afford women an opportunity to seek recourse from the courts if their right to adequate housing is violated. Further if the right to housing is enshrined in the Bill of Rights the State will be obliged to provide adequate housing.

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<sup>214</sup> 1977 ZR 113.

<sup>215</sup> Mwale (n 203 above) 7.

<sup>216</sup> GA Res 34/180, 34 UN. GAOR Supp (No 46) at 193, UN Doc A/34/46, *entered into force* 3 September 1981.

<sup>217</sup> Concluding Observations on the Committee on the Elimination of Discrimination Against Women Zambia Forty-ninth session 11-29 July 2011.

<sup>218</sup> CEDAW Concluding Observations on Zambia 2011 para 13.

<sup>219</sup> *Ibid* para 14.

<sup>220</sup> Committee on Economic, Social and Cultural Rights CESCR General Comment No 7, Forced Evictions Art 11.1 (*Right to Adequate Housing*).

### 3.4.1.2 Directive principles of state policy

There are two main forms by which socio-economic rights can be included in the constitution. They can be in the justiciable part, that is, they can form part of the Bill of Rights or chapter on fundamental rights of the constitution or they can be provided as Directive Principles of State Policy (DPSP). In the second scenario, DPSP are not justiciable but serve as a guide to the executive and the legislature.<sup>221</sup> They can also serve as a guide for the interpretation of the Constitution and other laws.<sup>222</sup> In *Morebishe v Lagos State House of Assembly*,<sup>223</sup> the Nigerian High Court in Lagos State reiterated that DPSP are non-justiciable but maintained that they are pillars of guidance for all levels of government. Zambia is among the countries that have included socio-economic rights in the part of the constitution that provides for DPSP. The DPSP set out in Part IX of the constitution seek to serve as a guide to the three arms of government namely the executive, legislature and the judiciary<sup>224</sup> in the development of national policies,<sup>225</sup> implementation of national policies,<sup>226</sup> making and enactment of law<sup>227</sup> and the application of the Constitution and any other law.<sup>228</sup> Article 110(2) of the Constitution provides that the application of the DPSP may be observed in so far as State resources are able to sustain their application, or if the general welfare of the public so unavoidably demands, as may be determined by the cabinet. The Constitution further states that the DPSP shall not be justiciable and shall not thereby, by themselves, despite being referred to as rights at times be legally enforceable in any court, tribunal or administrative institution or entity.<sup>229</sup> The Directive to the effect that ‘the State shall endeavour to provide clean and safe water, adequate medical and health facilities and decent shelter for all persons, and take measures to constantly improve such facilities and amenities’<sup>230</sup> is a Principle of State Policy and thus not justiciable.<sup>231</sup>

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<sup>221</sup> Viljoen (n 95 above) 58.

<sup>222</sup> Ibid.

<sup>223</sup> (2000) 3 WRN 134, 150.

<sup>224</sup> Art 110(1) of the 1991 Constitution of Zambia as amended in 1996.

<sup>225</sup> Art 110(1)(a) of the Constitution of Zambia.

<sup>226</sup> Art 110(1)(b) of the Constitution of Zambia.

<sup>227</sup> Art 110(1)(c) of the Constitution of Zambia.

<sup>228</sup> Art 110(1)(d) of the Constitution of Zambia.

<sup>229</sup> Art 111 of the Constitution of Zambia.

<sup>230</sup> Art 112(d) of the Constitution of Zambia.

<sup>231</sup> Art 111 of the Constitution of Zambia.

Therefore, it can be clearly seen from the foregoing provisions that the Constitution of Zambia fails to recognize ESCR as rights that should be justiciable. The constraints of a legal system like that of Zambia which fails to recognize ESCR as rights that are capable of being enforced hampers the realization of the rights as victims of ESCR violations are denied the opportunity to obtain redress or compensation for the violations. In addition, Zambia's failure to recognize ESCR as justiciable rights raises questions as regards the country's efforts towards fulfilling its international obligations to undertake to take steps to achieve progressively the full realization of socio-economic rights as required by the ICESCR.<sup>232</sup>

The existence of the principles of State policy in relation to provision of shelter in the Constitution of Zambia does not seem to be helpful. Despite the existence of the Directive Principles of State, the Government is not doing much to improve the housing situation in most parts of the country. The situation is worsened by the fact that the principles of state policy are aspirations of the State and thus not justiciable as dictated by the Constitution therefore precluding victims of housing violations from seeking redress. In rural Zambia for example, large numbers of children have to walk long distances to school. Despite the Government policy of universal free primary education, walking long distances to school coupled with hunger, forces many children to drop out of school thereby failing to enjoy their right to education. Surveys on living conditions conducted by the Zambia Central Statistical Office in 2006 and 2010 indicate that in both years the figures of children who left school in rural areas were higher than those in urban areas.<sup>233</sup> For the right to adequate housing to be enjoyed, housing should be in a location which allows access to schools, child care centres and other social facilities.<sup>234</sup> This is true for both rural and urban areas where transport costs to get to and from school can be strenuous on the budgets of poor households. The United Nations has noted that the quality of housing in which children live deeply influences their educational advancement, health and general well-being.<sup>235</sup> Lack of adequate housing, forced evictions or homelessness adversely affect children greatly due to their special needs. They affect their growth, development and

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<sup>232</sup> Art 2(1) of the ICESR.

<sup>233</sup> Zambia Central Statistical Office Living Conditions and Monitoring Survey Report (n 120 above) 275.

<sup>234</sup> CESCR General Comment No 4 (n 18 above) para 8(f).

<sup>235</sup> UNHCR/UNHABITAT Fact Sheet 21 (n 4 above) 18.

enjoyment of a range of human rights such as the right to education, health and personal security.<sup>236</sup>

In addition, housing must be in a location which allows access to employment options and health care services.<sup>237</sup> However, in Zambia the lack of employment opportunities in the rural areas led to rural-urban migration as people left rural areas for the cities in search for jobs thereby making Zambia one of the most urbanised countries.

Also, adequate housing should have access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, means of food storage and sanitation and washing facilities.<sup>238</sup> It is worth to note that inadequate housing conditions can disproportionately affect women. For example, collection of water for household use is often the responsibility of women. They have to walk long distances to fetch water, queue for it and carry it home.

Further, the liberalization of the country's economy which has led the Government to pursue liberal economic policies and privatise government entities has had a negative effect on the socio-economic situation in the country as government subsidies have been removed on services such as health and environmental programmes such as collection of household waste.<sup>239</sup> This has resulted in environments which are unclean and unsafe in some residential areas.<sup>240</sup> Furthermore, poor urban living conditions which are characterized by overcrowding and poorly constructed houses in some townships which have led to increases in outbreaks of disease such as respiratory diseases coupled with HIV/AIDS are a clear indicator of the failure of the Directive Principles of State Policy.<sup>241</sup> In order to be meaningful it is therefore important that the right to adequate housing is enshrined in the Bill of Rights as a justiciable right. The government will then be obliged to set aside resources for adequate housing provision as opposed to the status quo.

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<sup>236</sup> Ibid.

<sup>237</sup> CESCR General Comment No. 4 (n 18 above) para 8(f).

<sup>238</sup> Ibid para 8(b).

<sup>239</sup> Land Tenure, Housing Rights and Gender- National and Urban Framework: *Zambia Law, Land Tenure and General Review Series: Southern Africa* 82.

<sup>240</sup> Ibid.

<sup>241</sup> Ibid.

### 3.4.2 Housing legislation

Domestic legislation is an important source for accessing possible recourse for housing rights violations. According to Viljoen, domestic legislation provides ‘an important first port of call for the realization of socio-economic or cultural rights’.<sup>242</sup> In the Indian case of *Bandhua Mukti Morcha v Union of India*<sup>243</sup> the Indian Supreme Court underlined the importance of legislation in the realization of ESCR. Also, the Committee on Economic, Social and Cultural Rights in its General Comment No. 3<sup>244</sup> recognized that ‘in many instances legislation is highly desirable and in some cases may even be indispensable’. National legislation may make provision for basic services and security of tenure for occupants.

Domestic legislation may also be the basis of review of a government programme or policy.<sup>245</sup> In addition, individuals can obtain remedy from the courts where there is failure to implement the provisions in a statute. For instance in relation to social security, in the South African case of *Nonthemiso v The Member of the Executive Council of the Dept of Welfare, Eastern Cape*<sup>246</sup> an action was brought before the court when a provincial government failed to timely apply social security legislation. We now assess Zambia’s housing legislation *vis-a-vis* protecting the right to adequate housing.

#### 3.4.2.1 Housing (Statutory and Improvements Areas) Act

The Housing (Statutory and Improvement Areas) Act<sup>247</sup> 1974 is an Act that provides for the control and improvement of certain housing areas.<sup>248</sup> The Act provides for the improvement and upgrade of certain residential areas which were occupied before being legalised as residential areas. The establishment of most of these settlements was as a result of shortage of housing or legalised land for housing construction. Thus the Act gives power to the Minister to declare an illegal or informal settlement as an improvement area thereby making it possible for local

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<sup>242</sup> Viljoen (n 95 above) 57.

<sup>243</sup> (1984) 3 SCC 161.

<sup>244</sup> CESCR General Comment No 3 *The Nature of State Parties Obligations* (Art 2, para 1) 12/14/1990 para 3.

<sup>245</sup> Viljoen (n 95 above) 57.

<sup>246</sup> 2004 JDR 429 (SE).

<sup>247</sup> Chapter 194 of the Laws of Zambia.

<sup>248</sup> Preamble of the Housing Act.



authorities to regularize the area<sup>249</sup> so that it is open for provision of services such as maintenance of roads, pathways, electricity, water, drainages and sewerage.<sup>250</sup> Previously, the official policy was to have all illegal and informal settlements demolished.<sup>251</sup>

The Act also gives the occupiers of these settlements security of tenure by making provision for the grant of Occupancy Licences.<sup>252</sup> The Act also ensures security of tenure to plot owners in housing areas that are declared as statutory housing areas by the Minister by providing that they be issued with Certificates of Title.<sup>253</sup> As was stated in the previous chapter, States are expected to ensure security of tenure to those that do not have such protection.<sup>254</sup>

### 3.4.2.2 Town and Country Planning Act

The Town and Country Planning Act<sup>255</sup> provides that acceptable standards of constructing housing should be employed and that permission should be obtained from the Planning Authority prior to construction.<sup>256</sup> This ensures that housing is habitable thereby complying with the habitability of housing benchmark prescribed by the CESCR for determining housing adequacy. The Act provides for planning, grant of planning permission and control of development in main cities and towns.

The Town and Country Planning Act however has been denounced for being archaic and rigid as it was enacted before independence and therefore fails to address contemporary housing issues such as affordable local building materials, participatory planning approaches, integrated planning methodologies<sup>257</sup> among others. Also, the habitability aspect of housing is not met in some unplanned settlements as these lack services such as drainage provision and thus housing in these areas is prone to floods.

It is clear that this Act is inadequate as regards making provision for the elements that determine habitability, decency, accessibility and adequacy of housing. In addition, it has been indicated

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<sup>249</sup> Sec 37(1) of Housing (Statutory and Improvement Areas) Act Cap 194 of the Laws of Zambia.

<sup>250</sup> Section 38(C) of Housing Act Cap 194 of the Laws of Zambia.

<sup>251</sup> Zambia- UN UPR Submission (21 above) 1.

<sup>252</sup> Section 39(2) of Housing Act Cap 194 of the Laws of Zambia.

<sup>253</sup> Ibid Section 7(1).

<sup>254</sup> CESCR General Comment No. 4 (n 18 above) para 8(a).

<sup>255</sup> Chapter 283 of the Laws of Zambia.

<sup>256</sup> Part V of the Town and Country Planning Act .

<sup>257</sup> Zambia- UN UPR Submission (n 21 above) 3.

that this piece of legislation will be replaced by the Regional Planning Bill, therefore reinforcing the vulnerabilities of legislation to easily be changed. It is therefore argued that constitutional protection of the right to adequate housing is the sustainable way of protecting the right.

### 3.4.2.3 The Rent Act

The right to adequate housing benchmarks namely affordability and security of tenure are found in the provisions of the Rent Act.<sup>258</sup> The Rent Act is an act to ‘make provision for restricting the increase of rent, determining the standard rent, prohibiting the payment of premiums and restricting the right to possession of dwelling-houses’.<sup>259</sup> It also makes provision for ‘other purposes incidental to and connected with the relationship of landlord and tenant of a dwelling house’.<sup>260</sup>

Despite the fact that the Rent Act seeks to protect tenants from undue demands for high rents in excess of the standard rent<sup>261</sup> and provides for security of tenure by requiring that the landlord-tenant relationship should be contained in a written agreement,<sup>262</sup> on the ground, instances of threats of eviction or demands by landlords for increased rents are common.<sup>263</sup> Rent controllers prescribed by the Act to enforce the provisions of the Act<sup>264</sup> are also conspicuously absent.<sup>265</sup>

Therefore, although national legislation is important as regards providing for protective measures, remedies,<sup>266</sup> and entitlements such as security of tenure like the Housing (Statutory and Improvement Areas) Act has endeavoured to do; constitutional enforceability of socio-economic rights is cardinal. This is due to the fact that legislation can be changed easily as opposed to constitutional guarantees therefore risking reduction in the levels of protection. For instance, it has been indicated that the Urban and Regional Planning Bill will replace the Housing (Statutory and Improvement Areas) Act and the Town and Country Planning Act when

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<sup>258</sup> Chapter 206 of the Laws of Zambia.

<sup>259</sup> Preamble of Rent Act.

<sup>260</sup> Ibid.

<sup>261</sup> Section 9 of the Rent Act.

<sup>262</sup> Section 23(1) of Rent Act.

<sup>263</sup> Human Rights Commission Report Zambia 2009 (n 130 above) 35.

<sup>264</sup> Article 30 of Rent Act.

<sup>265</sup> Human Rights Commission Report Zambia 2009 (n 130 above) 35.

<sup>266</sup> Coomans (n 86 above) 7.

it becomes law.<sup>267</sup> It is only hoped that the Bill will take into consideration the housing needs of the Zambian people.

In light of the above, it is submitted that constitutional protection of the right to adequate housing is cardinal in order for the constitution to guide legislation. In addition, constitutional norms are more superior and may be used to interpret statutory provisions.<sup>268</sup> Moreover, legislation can be invalidated by the constitution. Article 1(3) of the Constitution of Zambia provides that the Constitution is the supreme law of Zambia and if any other law is inconsistent with the Constitution that other law shall be void. Since constitutional guarantees are more secure and superior, it is therefore of paramount importance that an enforceable right to adequate housing is enshrined in the Bill of Rights of the Constitution.

### **3.4.3 Zambia National Housing Policy**

Zambia's first National Housing Policy was formulated in 1996.<sup>269</sup> Its main goal was to provide adequate and affordable housing for all income groups in Zambia.<sup>270</sup> The Policy was awarded a 'scroll of honour' by the UN-Habitat following the participatory and innovative way in which it was formulated.<sup>271</sup> In order to achieve its main goal of providing adequate affordable housing for all income groups in Zambia, some of the Policy's objectives are as follows:<sup>272</sup>

- Allocation of a minimum of 15 per cent of the national budget to housing to support a sustainable housing development programme;
- Making serviced land available for housing development and streamlining the land allocation system;
- Assisting the poor to acquire decent shelter through alleviation of their affordability problems.

However, the aims of the Policy have not largely been implemented. This is evidenced by the fact that in many areas in the country, land for housing development is not serviced. In addition

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<sup>267</sup> Zambia Urban Housing Sector Profile (n 16 above).

<sup>268</sup> Viljoen, supra note 10 at 59.

<sup>269</sup> Zambia National Housing Policy 1996 (n 1 above) 1.

<sup>270</sup> Ibid at 15.

<sup>271</sup> Zambia- UN UPR Submission (n 7 above) 3.

<sup>272</sup> Zambia National Housing Policy (n 1 above) 15.

the poor are still grappling with housing poverty as they cannot afford to buy or rent decent shelter.

In addition, housing development programmes have not been sustainable. Implementation of the National Housing Policy in this regard, started in 1998 with the formulation of the Presidential Housing Initiative (PHI).<sup>273</sup> The PHI was set up as an implementation unit under the National Housing Authority (NHA) a quasi-public company that engages in construction of dwelling houses for sale to individuals. It was set up to revive housing construction, upgrade unplanned settlements and create employment in the construction sector.<sup>274</sup> However in practice, the PHI operated separately and had its own management. It was dissolved in 2002 following corruption allegations<sup>275</sup> and its assets and functions were passed on to the NHA.<sup>276</sup> Noteworthy is that housing that was constructed by the PHI was only affordable to the middle and high income groups.<sup>277</sup> Similarly, houses built by the NHA are only accessible to the middle and high income groups and are not affordable to the low income groups.<sup>278</sup>

Under these policy programmes, the poor are completely excluded from accessing adequate housing. In some cases, children whose guardians do not have shelter have taken to the streets. This coupled with the effects of losing parents to the HIV/AIDS pandemic, it is estimated that 75,000 children live on the streets in Zambia.<sup>279</sup> As was established in the previous chapter, the CRC obliges State Parties to recognize the right of every child to an adequate standard of living<sup>280</sup> and requires States Parties to take measures to assist parents and others responsible for the child to implement this right and in case of need, to provide material assistance and support programmes with regard to housing.<sup>281</sup> The Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights in their Concluding Observations<sup>282</sup> on Zambia have expressed their concern over the issue of street children in Zambia and have

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<sup>273</sup> Zambia Urban Housing Profile (n 25 above) 27.

<sup>274</sup> Ibid.

<sup>275</sup> Financing Urban Shelter: Global Report on Human Settlement available at [www.Unhabitat.org](http://www.Unhabitat.org) (accessed on 17 December 2012) 58.

<sup>276</sup> Zambia Urban Housing profile 27.

<sup>277</sup> Human Rights Commission 2009 Report 129.

<sup>278</sup> Ibid at 39.

<sup>279</sup> Zambia Urban Housing Profile at 18.

<sup>280</sup> Article 27(1) of the CRC.

<sup>281</sup> Art 27(3).

<sup>282</sup> Concluding Observations of the CESCR on Zambia 2005 para. 46; CRC/C/15/Add 206, para 69.

requested Zambia to provide street children with housing. Furthermore, the Committee on the Rights of the Child has recommended that State Parties must ensure that domestic adjudicating bodies are able to give full justiciability to economic, social and cultural rights of children in order to ensure full realization of these rights.<sup>283</sup>

### 3.4.3 Housing finance

The banking sector is well regulated in Zambia. However, housing finance services are offered mainly through mortgages. The interest rates upon obtaining these mortgages are quite high. Although, the micro-finance industry is rapidly growing in Zambia very few of these institutions lend for housing.<sup>284</sup> Until recently, the interest rates by bank institutions were mostly above 20% and a deposit of at least 10% is required prior to obtaining a mortgage.<sup>285</sup> Therefore, most Zambians cannot afford these loans.<sup>286</sup> As a measure to lower the cost of borrowing, the Bank of Zambia Zambia's Central Bank has introduced a cap on the effective annual lending interest rates for bank institutions. It has declared that the maximum annual lending interest rate to be imposed by commercial banks should be 18.25%. On 3 January 2013 pursuant to circular No. 08 of 2012 the Central Bank also introduced a cap on the effective annual lending interest rates which non-bank financial institutions can charge their customers. Therefore, micro-finance service providers are with immediate effect required to charge their customers a maximum annual lending interest rate of not more than 42%.<sup>287</sup> This measure has been put in place in order to make borrowing affordable for vulnerable micro-borrowers served by this sector.<sup>288</sup> The measures on commercial banks as well as non-bank financial institutions are aimed at reducing the cost of borrowing so as to make borrowing more equitable and affordable.<sup>289</sup> However, a rate of 18.25% still remains high for many Zambians to afford and is not equitable when compared with the interest rates that commercial banks pay to their individual account holder customers.

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<sup>283</sup> CRC Committee 'Day of General Discussion on Resources for the Rights of the Child – Responsibility of States' 46<sup>th</sup> Session, 17 September – 5 October 2007 para 44.

<sup>284</sup> Ibid.

<sup>285</sup> Zambia Urban Housing Profile (n 25 above) 3.

<sup>286</sup> Ibid.

<sup>287</sup> Bank of Zambia Circular No 8/2012.

<sup>288</sup> Bank of Zambia Press Release 3 January 2013.

<sup>289</sup> Ibid.

The Zambia National Building Society (ZNBS) which was established by the Building Societies Act<sup>290</sup> is engaged in property financing. The ZNBS was established to increase housing stock by providing house loans and engaging in housing construction projects. However to be eligible for a ZNBS mortgage an applicant must be in formal employment and must be a holder of a ZNBS account for a period of not less than six months.<sup>291</sup> Thus low income groups and the poor cannot afford ZNBS financing services. Constitutional entrenchment of the right to adequate housing will thus compel the State to move quickly to formulate policies and legislation that will extend to the low income groups and the poor so that they can also be able to access adequate housing. This is crucial for development and poverty reduction.

### 3.5 Conclusion

In this chapter, it was seen that the current Zambian Constitution has limitations as regards providing for full and effective protection of the right to adequate housing in Zambia due to the fact that it does not contain an explicit provision that protects the right to adequate housing. It was also seen that the housing legislation in theory endeavours to provide for adequate housing since it seeks to provide for aspects that determine adequacy of housing as underlined by the Committee on Economic, Social and Cultural namely habitability of housing, legal security of tenure, affordability, availability of services, materials, facilities and infrastructure, accessibility, location and cultural adequacy of housing. In reality however, the vulnerabilities that exist in relation to security of tenure and building standard enforcement and the spontaneous increase in unplanned settlements<sup>292</sup> among other things evidence the failure of legislation.

It was also seen in this chapter that the Housing Policy has in reality not met the expectations it raised. The policy has not largely been implemented and its promises to ensure affordable housing for the poor have proved to be empty. The poor still cannot access adequate housing evidencing the failure of the Housing Policy.

We also saw in the chapter that Housing Finance institutions are also not helpful in alleviating the plight of the poor and low income groups as the low income groups cannot afford loans offered by these institutions for construction of housing due to high interest rates. Therefore, the

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<sup>290</sup> Chapter 420 of the Laws of Zambia.

<sup>291</sup> Zambia Urban Housing Profile 23.

<sup>292</sup> Human Rights Commission State of Human Rights Report in Zambia 2009 (n 130 above) 34.

services of the housing finance institutions exclude the low income groups and the poor who constitute the majority of the population.

It is thus submitted that in order to ensure that funds for catering for the country's housing needs are included in the national budget, and if they are included, to ensure that programmes for such funds reach the intended beneficiaries, it is imperative that the right to adequate housing is enshrined in the Bill of Rights of the Constitution. Constitutional protection will ensure that the resources reserved for housing are secured for the intended purpose that is; poverty reduction. In addition, when the right to adequate housing is justiciable in the Constitution, Judges will have an explicit provision to legitimately rely on when adjudicating on housing issues without being accused of encroaching on the separation of powers. Also, when there is an explicit right to housing enshrined in the Bill of Rights of the Constitution, litigants will be able to ascertain the outcome of their cases.

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## CHAPTER FOUR

### JUSTICIABILITY OF THE RIGHT TO ADEQUATE HOUSING IN ZAMBIA

#### 4.1 Introduction

It was established in chapter 2 that the inferior status attached to socio-economic rights has had a negative impact on the possibility of their effective implementation both at international and domestic levels.<sup>293</sup> As already alluded to, in Zambia, the non-justiciable status of the right to adequate housing as with other socio-economic rights is expressly stated in the Constitution. The Constitution of Zambia explicitly provides that socio-economic rights shall not be justiciable or legally binding in any court, tribunal, administrative institution or entity.<sup>294</sup> Civil and political rights on the other hand are contained in the Bill of Rights and are enforceable.

The resistance to include socio-economic rights in the Bill of Rights of the Zambian Constitution has been witnessed during the country's various Constitutional Review Commissions. The debate about including economic, social and cultural rights in the Bill of Rights also took central stage in the country's recent and fourth Constitutional review process which was headed by Wila Mung'omba. The debate on justiciability of ESCR was also heated at the deliberations of the National Constitution Review Conference (NCC) which was established to review the Mung'omba Draft Constitution.

It was also established in chapter 2 that the persistent preference of civil and political rights over ESCR is contrary to the principle that all human rights are universal, indivisible, interdependent and interrelated. This fundamental principle is recognised in the UN Charter<sup>295</sup> as well as in the UDHR.<sup>296</sup> The principle was also confirmed at the Vienna World Conference of Human Rights in 1993. At the Vienna World Conference of Human Rights, it was declared that human rights must be treated in a 'fair and equal manner, on the same footing and with the same emphasis'.<sup>297</sup>

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<sup>293</sup> Coomans (n 85 above) 2.

<sup>294</sup> Art 111 of the Zambian Constitution CAP 1 of the Laws of Zambia.

<sup>295</sup> Art 55 of the UN Charter.

<sup>296</sup> Art 2 of the UDHR.

<sup>297</sup> Vienna Declaration and Programme of Action (n 3 above) para 5.



This chapter of the study will discuss the importance of the role of the courts and thereafter examine and critique the arguments advanced for the non-justiciability of socio-economic rights such as the right to adequate housing in the Zambian context.

#### **4.2 Justiciability of the right to adequate housing and the role of the courts**

The purported incapacity of the courts to determine matters of a socio-economic nature is the central argument against justiciability of socio-economic rights. It has been argued that socio-economic issues relate to policy issues and resource allocation and thus should be left as the province of the political bodies. It is argued that courts lack the democratic competence and legitimacy to deal with socio-economic issues as these should be left for the legislature and the executive.<sup>298</sup> In essence, it is argued that the involvement of the courts in socio-economic matters by way of adjudicating over these issues infringes on the doctrine of separation of powers. It is also argued that the courts are at risk of being politicized if they are left to make decisions on key economic issues.<sup>299</sup>

However, this argument ignores the fact that the separation of public powers is not an end in itself. It is a tool for keeping the government in check to ensure protection of rights.<sup>300</sup> Judicial review serves as a check on the political branches to ensure that they are responsive to the constitutional rights of the underprivileged in society.<sup>301</sup> In essence, the courts keep the plight of the populace on the political agenda. The courts have an important role to play where there is gross failure to uphold basic socio-economic rights. In addition, Woods rightly observes that the courts, more so where legal aid is available, are more accessible than the executive or the legislature.<sup>302</sup>

Further, the UDHR under Article 8 stipulates that everyone has the right to an effective remedy by a national court or tribunal of competent jurisdiction if he/she has suffered violations of his/her fundamental rights. The Committee on Economic, Social and Cultural Rights in its General Comment No. 9 stated that the 'adoption of a rigid classification of economic, social and

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<sup>298</sup> Coomans (n 86 above) 5.

<sup>299</sup> Lord Lester of Herne Hill QC & O'Conneide (n 96 above) 20.

<sup>300</sup> Jeanne M. Woods 'Justiciable Social Rights as a Critique of the Liberal Paradigm' (2003) 38 *Tex International Law Journal* 763 at 65.

<sup>301</sup> *Ibid* at 773.

<sup>302</sup> *Ibid*.

cultural rights which puts them, by definition, beyond the reach of the courts' is 'arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent'.<sup>303</sup> Further, the non-justiciability of socio-economic rights makes the courts lack capacity to protect the rights of the poor and disadvantaged groups in society.<sup>304</sup>

### **4.3 Arguments for and against justiciability of the right to adequate housing in Zambia**

In the Zambian context, the debate as to whether socio-economic rights should be legally enforceable becomes more heated when the subject matter is their inclusion in the Bill of Rights of the Constitution. This has been witnessed during the debates that took place during the country's Constitutional Review Commissions' information gathering stages.<sup>305</sup> According to Malila, 'a flawed conception of economic, social and cultural rights is responsible for the misconception of the State's obligations in regard to these rights'. It is the reason for the resistance to view socio-economic rights as rights that can be given constitutional protection.<sup>306</sup> In Zambia, one of the major arguments against the justiciability of socio-economic rights has been that the State lacks the capacity to fulfil them because they are costly.<sup>307</sup>

We now consider the arguments usually advanced against justiciability of ESCR in the context of Zambia and provide the responses thereto in order to show why there is no justification for the reluctance by Zambia to grant the right to adequate housing the status of being capable of judicial enforcement.

#### **4.3.1 The right to adequate housing is costly**

One of the arguments that have been advanced against justiciability of socio-economic rights in the Zambian context has been that these rights are expensive to implement.<sup>308</sup> For instance, during the Mung'omba Constitutional Review Process, two major camps were involved in the justiciability debate. In response to the recommendations made by the Mung'omba Constitution Review Commission and its draft constitution to the effect that ESCR should be included in the constitution as justiciable rights, the camp led by the Government argued that Zambia cannot

<sup>303</sup> CESCR General Comment No. 9 (n 83 above) para 10.

<sup>304</sup> Ibid para 10.

<sup>305</sup> Malila (n 34 above) 107.

<sup>306</sup> Ibid.

<sup>307</sup> Ibid at 111.

<sup>308</sup> Ibid at 151.

afford to include rights on social issues such as housing in the Bill of Rights of the Constitution.<sup>309</sup> The Government stated that such rights should not be entrenched in a constitution of a poverty stricken country like Zambia<sup>310</sup> because they are costly. Civil Society Organisations, on the other hand, were of the view that it is important that ESC rights are included in the Bill of Rights. They argued that the absence of justiciable ESCR in the constitution causes the Government to fail to commit itself as regards honouring basic rights such as adequate housing.<sup>311</sup> We agree with this position. This is due to the fact that Zambia endeavours to provide costly civil and political rights such as the right to vote and to a fair trial. Therefore, on the basis that all rights are interdependent and indivisible, it is argued that the similar commitment can be undertaken for socio-economic rights.

In addition, the notion that socio-economic rights such as the right to adequate housing are costly has led to the view that socio-economic rights are programmatic in nature and are thus not capable of immediate realization. Arguably, this dichotomy is false because a wide array of civil and political rights impose positive obligations on the State. For example, the right to a fair trial which involves the right to trial within a reasonable time, to be presumed innocent, the right to an interpreter in criminal proceedings<sup>312</sup> and to free legal aid in the case of indigent criminal defendants entails a significant expense on the part of the State. In the Indian case of *Khatari (II) v State of Bihar*<sup>313</sup> the court found that the State could not avoid providing free legal aid on the basis of financial constraints. Providing prisoners with decent prisons also has a cost. In *Kelly v UK*,<sup>314</sup> the European Court of Human Rights, found that the right to life, another civil and political right, imposes an obligation on the State to investigate killings<sup>315</sup> which undertaking also has resource implications.

The South African case of *August v Electoral Commission*<sup>316</sup> illustrates how the right to vote a classic civil and political right entails an expense on the part of the State to ensure that infrastructure is in place for realization of the right. In this case, some prisoners brought an

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<sup>309</sup> Zambia – UN UPR submission (n 21 above).

<sup>310</sup> Ibid.

<sup>311</sup> Ibid.

<sup>312</sup> *Gosselin v Quebec (Attorney General)* [2002] 2 SCR 429, 2002 SCC 84.

<sup>313</sup> (1981) 1 SCC 627.

<sup>314</sup> ECHR, May 2001.

<sup>315</sup> *Kelly v UK* ECHR, May 2001.

<sup>316</sup> 1999 (3) SA 1 CC.

action before court that they were being disenfranchised as no arrangements were made to enable them to vote. Even though putting in place such infrastructure would give rise to financial implications, the court held that the State was obliged to set up the infrastructure to enable the prisoners to exercise their right to vote.

#### **4.3.2 The right to adequate housing and availability of resources**

Another objection to the justiciability of the right to adequate housing in Zambia and socio-economic rights in general which also arose during deliberations at the National Constitutional Conference has been that Zambia lacks the capacity not only to fulfil these right but also that the State does not have resources to satisfy claims that may arise from endless litigation caused by the justiciable status of these rights.<sup>317</sup> During Zambia's fourth Constitutional Review Process also, in response to the Mung'omba Constitution Review Commission which recommended that ESCR should be justiciable in the Zambian Constitution, the Government indicated that Zambia is too poor to afford recognizing social rights like housing as justiciable rights.<sup>318</sup> The executive arm of government described the recommendations for inclusion of legally enforceable socio-economic rights in the constitution as unrealistic and utopian.<sup>319</sup> The assertion that enforceable socio-economic right can lead to endless litigation is rebutted by the fact that a number of jurisdictions are adopting constitutions with justiciable economic and social rights and these have not brought chains of litigation.<sup>320</sup>

Adjacent to that, citing lack of resources without taking any steps to ensure realization of the right is not an acceptable excuse for denying people their basic need to decent shelter. For instance in *Ex Parte Chairman of Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*<sup>321</sup> the South African Constitutional Court rejected similar concerns about resource constraints. In this case, the court reiterated the fact that many civil and political rights like socio-economic rights have budgetary implications. The court held that:

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<sup>317</sup> Malila (n 34 above) 149.

<sup>318</sup> UN UPR submission on Zambia (n 21 above) 1.

<sup>319</sup> Government's Reaction to the Recommendations of the Mung'omba Constitution Review Report.

<sup>320</sup> Malila (n 34 above) 164.

<sup>321</sup> 1996 (4) SA 744 (CC).

many of the civil and political rights ... will give rise to budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum socio-economic rights can be negatively protected from improper invasion.<sup>322</sup>

It is therefore submitted that if Zambia can promote, respect and fulfil civil and political rights with its available resources, it can undertake the similar commitment for socio-economic rights. Like the case with civil and political rights it must be able to recognize the right to adequate housing as justiciable. As it was shown in Chapter 2 herein, Zambia being a party to the ICESCR is obliged under international law to promote, respect and fulfil the right to adequate housing. Therefore, it is crucial that it protects respects and within its available resources fulfils the right to adequate housing.

The Covenant under Article 2(1) obliges each State party to take necessary steps to the maximum of its available resources to achieve progressively the full realization of the rights contained therein. As already alluded to, the CESCR has acknowledged that the concept of progressive realization contained in Article 2(1) of the ICESCR constitutes a recognition of the fact that unlike the obligation of States with regard to civil and political rights,<sup>323</sup> full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.<sup>324</sup> Nevertheless, the Committee has underlined that a minimum core obligation to ensure the satisfaction of at the very least, minimum essential levels of socio-economic rights is incumbent upon every State party.<sup>325</sup> The CESCR has stated that regardless of the state of development of a country, there are certain steps that it must take immediately.<sup>326</sup> The Committee on Economic, Social and Cultural Rights in its General Comment No. 3 has stated that:

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 available resources it must demonstrate that

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<sup>322</sup> Ibid at para 78.

<sup>323</sup> Art. 2 of the ICCPR.

<sup>324</sup> CESCR General Comment No. 3 (n 244 above) para 9.

<sup>325</sup> Ibid para 10.

<sup>326</sup> CESCR General Comment No. 4 (n 18 above) para 10.

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.<sup>327</sup>

#### **4.3.3 The right to adequate housing is vague and imprecise to be a justiciable right**

It has been argued that socio-economic rights cannot be made justiciable because they are vague and lack precision to be legally enforceable. During Zambia's Constitutional Review Commissions, it was argued that the imprecision of socio-economic rights makes it difficult for individuals to know exactly what they can rely on or the State to know exactly what it is required to do. An argument that took the day has been that the citizenry would misunderstand what they are entitled to as a result of the imprecision of these rights. They might demand for housing to be provided for them in luxurious neighbourhoods.

An argument not akin to Zambia alone, against justiciability of socio-economic rights in general, has been that civil and political rights are regarded as negative rights thus their legal objects are generally easy to determine since the State is required to refrain from acts that would violate these rights.<sup>328</sup> Further, it is argued that unlike socio-economic rights, civil and political rights have the wealth of political and historical knowledge, experience and significance behind them that makes their normative core to be easily ascertained.<sup>329</sup> However, it can be argued that the failure to constitutionalise socio-economic rights and hence their exclusion from judicial interpretation is the cause of lack of clarity as to the content and scope of these rights.<sup>330</sup> Without judicial review, socio-economic rights such as the right to adequate housing continue to remain underdeveloped and undefined.<sup>331</sup>

Notwithstanding, it must be noted that similar difficulties of imprecision exist even with civil and political rights. Viljoen observes that terms synonymous with civil and political rights such as 'unfair', 'undue', 'reasonable', 'inhuman', 'degrading' and 'dignity'<sup>332</sup> contradict the assertion that civil and political rights are devoid of uncertainty.<sup>333</sup> Although questions arise as to what

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<sup>327</sup> Ibid para 10.

<sup>328</sup> Erika de Wet *The Constitutional Enforceability of Economic and Social Rights: The Meaning of the German Constitutional Model on South Africa* (1996)41.

<sup>329</sup> Ibid.

<sup>330</sup> Viljoen (n 95 above) 96.

<sup>331</sup> Woods(n 300 above) 771.

<sup>332</sup> Viljoen (n 95 above) 96.

<sup>333</sup> Ibid.

constitutes the right to adequate housing, judges elsewhere have ably dealt with cases of a civil and political nature and have determined what constitutes a fair trial, torture or arbitrary or unlawful interference with privacy.<sup>334</sup>

In addition, the UN treaty body in charge of monitoring State compliance with the ICESCR, the CECR endeavours to interpret and clarify provisions of the covenant through its general comments.<sup>335</sup> Further, a jurisprudence defining the normative content of socio-economic rights is steadily emerging from creative and progressive domestic courts such as those of South Africa and India among others. At the regional level, creative case law is also emerging from the African Commission on Human and People's Rights providing an interpretative and clear content of these rights.<sup>336</sup>

#### **4.3.4 Entrenchment of the right to adequate housing in the Bill of Rights can generate unreasonable expectations from the public**

It has also been argued that if socio-economic rights such as the right to adequate housing are entrenched in the Bill of Rights unreasonable expectations will arise on the part of the poor based on the constitutional provisions. During the National Constitutional Conference deliberations one Commissioner was quoted saying that 'even a mad man might demand housing and the Government's ability to pay for these rights just does not exist'.<sup>337</sup> De Wet is also of the view that if social and economic rights are entrenched in the constitution as fundamental rights, people would be under an impression that when these rights are enforced, they would receive something from the State such as a home.<sup>338</sup> De Wet argues that '[i]t would be extremely disillusioning if the members of the public were to find out that their constitutional right was, in fact, only a right to judicial review'.<sup>339</sup>

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<sup>334</sup> Key Concepts on ESCRs – Can Economic, Social and Cultural Rights be Litigated at Courts available at [www.ohchr.org/EN/issues/ESCR/Pages/CanESCRbelitigatedatcourts.aspx](http://www.ohchr.org/EN/issues/ESCR/Pages/CanESCRbelitigatedatcourts.aspx) accessed on 14 January 2013.

<sup>335</sup> See for example CESCR General Comment No. 4 sixth session 13 December 1991 interpreting the right to adequate housing.

<sup>336</sup> See for example the decision of the African Commission in the case of *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication (n 65 above) discussed in Chapter 3 herein.

<sup>337</sup> Malila (n 34 above) 149.

<sup>338</sup> De Wet (n 328 above) 99.

<sup>339</sup> Ibid at 98.

It is submitted that instead of being discouraged, litigants would be more sophisticated when fashioning their economic and social rights claims.<sup>340</sup> Moreover, there is nothing wrong if people feel they are entitled to these rights. As tax payers, people should be able to get from their government what they consider vital.<sup>341</sup>

#### 4.4 Conclusion

In this chapter it was seen that a number of arguments are usually advanced for the resistance to regard socio-economic rights as rights that can be legally enforced. Most of these arguments are however rebutted on understanding of the State's obligations as regards realisation of ESCR as stated in the covenant and interpreted by the CESCR. Therefore, as it was shown, there is no justification for the failure by Zambia to include justiciable socio-economic rights and in particular the right to adequate housing in Bill of Rights of the Zambian Constitution. The principle of the interdependence and indivisibility of human rights requires that all rights, civil and political, economic, social and cultural, be treated in the same manner and on the footing as reiterated in the Vienna Declaration. When civil and political rights as well as economic, social and cultural rights are guaranteed, the vulnerable groups in society would also be able to enjoy their human entitlements. Further the important role of litigation in the realisation of socio-economic rights such as the right to adequate housing cannot be over-emphasised. Victims of housing rights violations would be able to claim compensation or restitution from the courts.

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<sup>340</sup> Woods (n 300 above) 775.

<sup>341</sup> Herman Schwartz 'Economic and Social Rights' (1992-1993) 8 *American University Journal of International Law and policy* 551 at 563.



## CHAPTER FIVE

### COMPARATIVE STUDY

#### 5.1 Introduction

The issue of justiciability of economic and social rights is no longer a subject of debate in countries that have recognised these rights as justiciable. These are such as South Africa, Colombia and Argentina.<sup>342</sup> In these countries socio-economic rights are not only justiciable but are usually dealt with by the courts.<sup>343</sup> Also, after the cold war many African countries became democratised and adopted new constitutions to embrace democratic principles.<sup>344</sup> Unlike the constitutions before them, the constitutions that were adopted in these countries after democratisation give recognition to economic, social and cultural rights.<sup>345</sup> Some of these countries have gone a step further and have entrenched justiciable economic, social and cultural rights in the Bill of Rights of their national constitutions.<sup>346</sup> For example, the Constitutions of Algeria, Benin, Burkina Faso, Cape Verde and Mozambique also include socio-economic rights.<sup>347</sup> However, only a few Constitutions provide for the right to housing.<sup>348</sup>

Although Zambia on the other hand endeavours to improve the socio-economic situation in the country in relation to housing through enactment of legislation and formulation of housing policies among others as indicated in Chapter 3 of this thesis, it is imperative that it includes the right to adequate housing as a justiciable right in the Bill of Rights. That way, the right to adequate housing will cease to be a mere aspiration of the state as is the status quo. Rights need to be translated into practice in order for them to be truly enjoyed. It is thus important that Zambia looks to other jurisdictions with progressive constitutions which recognise a justiciable right to housing for good practice examples.

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<sup>342</sup> Brand (n 126 above) 207.

<sup>343</sup> Ibid.

<sup>344</sup> Danwood Mzikenge Chirwa 'A Full Loaf is Better than Half: The Constitutional Protection of Economic, Social and Cultural Rights in Malawi' (2005)49 *Journal of African Law* 207.

<sup>345</sup> Ibid.

<sup>346</sup> Ibid.

<sup>347</sup> Frans Viljoen '*International Human Rights Law in Africa*' 573.

<sup>348</sup> Ibid at 573.

The example of South Africa will be used as the South African Constitution<sup>349</sup> entrenches a range of justiciable socio-economic rights. Although South Africa is not a party to the ICESCR,<sup>350</sup> it contains a robust system for the realisation of socio-economic rights. The right to housing is entrenched in the South African Constitution<sup>351</sup> and is judicially enforceable.<sup>352</sup> The other reason for the choice of the South African example is because an extensive jurisprudence has developed from the South African courts which endeavour to give meaning to the right to access adequate housing. Other examples will also be discussed.

## 5.2 The South African example

The South African Constitution in section 26 guarantees everyone the right to have access to adequate housing. The Constitution requires the State to take action towards fulfilling the right to access adequate housing and obliges the State to ‘take reasonable legislative and other measures, within its available resources, to achieve progressively realisation’ of the right.<sup>353</sup> The Constitution also provides for children’s right to shelter.<sup>354</sup> Notably, as with other social and economic rights in the South African Constitution, the right to access adequate housing is judicially enforceable. South African courts enjoy a wide array of powers conferred upon them by the Constitution to interpret and resolve disputes arising from the right. This is unlike the Zambian Constitution which expressly provides that the right to shelter is not justiciable as it is a mere directive principle of state policy.<sup>355</sup> Moreover, the South African Constitution obliges the courts to consider international law when interpreting the right to access adequate housing.

Section 38 of the South African Constitution confirms the justiciability of the right to access adequate housing as with all the other rights entrenched in the Bill of Rights. Section 38 provides for the right of anyone who alleges that a right contained in the Bill of Rights has been infringed or threatened to approach a court of competent jurisdiction for relief. Further, section 38 does not

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<sup>349</sup> Constitution of the Republic of South Africa Act, 1996.

<sup>350</sup> Shivani Verma ‘The International Council on Human Rights and Policy Review Meeting: Rights and Responsibilities of Human Rights Organisations. Justiciability of Economic Social and Cultural Rights Relevant Case Law’ (2005) 42.

<sup>351</sup> See Sec 26 of the South African Constitution.

<sup>352</sup> See Sec 38 of the South African Constitution.

<sup>353</sup> Sec 26(2) of the South African Constitution.

<sup>354</sup> Sec 28(1)(c) of the South African Constitution.

<sup>355</sup> Art 111 of the Zambian Constitution.

limit the issue of *locus standi* to the aggrieved persons only. Apart from individuals acting in their own interest,<sup>356</sup> anyone acting on behalf of another person, or acting in the interest of a group or class of persons or in the public interest<sup>357</sup> may approach the court. Under the Zambian Constitution, the position is different. For instance, if one intends to enforce the right to shelter on behalf of another by deriving it from the rights contained in the Bill of Rights, they would not be able to do so because they would lack *locus standi*. Under the Zambian Constitution, *locus standi* is limited only to the person who alleges a violation of the rights in the Bill of Rights in relation to him.<sup>358</sup> This means that only the victims of human rights violations can seek recourse from the courts of law. Other persons without direct interest are excluded. This disadvantages the poor who cannot afford legal representation or litigation costs. *Locus standi* should have been extended to persons without direct interest in the matter so as to enable non-governmental organisations concerned with human rights or public interest groups to approach the courts on behalf of the poor. However, it is worth noting that, the issue of locus standi has been addressed in Zambia's Draft Constitution drafted by the Technical Committee of Experts appointed by President Sata. The First Draft Constitution has extended locus standi to any organisation or person who may wish to bring an action against the violation of another person's or a group's human rights and freedoms.<sup>359</sup> It is hoped that the Draft Constitution will be adopted into law and not suffer the fate of the Constitution of Zambia Bill which was rejected by parliament.

Further, section 7(2) of the South African Constitution imposes obligations on the State to 'respect, protect, promote and fulfil the rights in the Bills of Rights'. Arising from the capability of judicial enforcement, jurisprudence is being created in South Africa which interprets the right to housing and the state's obligations in the realisation of the right. Section 26(3) of the South African Constitution explicitly prohibits arbitrary evictions in order to give full effect to the right to housing. When arriving at a decision whether to order an eviction or otherwise, in proceedings where people would be left homeless if they are evicted, the court will have regard to the obligation of the State to respect the right to housing.<sup>360</sup> The court may stay the eviction to a

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<sup>356</sup> Sec 38(a) of the South African Constitution.

<sup>357</sup> See sec 38 of the South African Constitution.

<sup>358</sup> See Art 28(1) of the Zambian Constitution.

<sup>359</sup> See Art 72(2) of the First Draft Constitution of Zambia.

<sup>360</sup> Geoff Budlender 'Justiciability of Socio-economic rRights: Some South African Experiences' in Yash Ghai and Jill Cottrell (eds) *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural rights* (2004) 34.

specified date to enable the evictees find an alternative place to live, or it may order an eviction on condition that the State first finds the evictees an alternative place to settle<sup>361</sup> before the eviction is effected as was held in *Modderfontein squatters v Modderklip Boerdery (PTY) Ltd.*<sup>362</sup> In the case of *Baartman & others v Port Elizabeth Municipality*,<sup>363</sup> the municipality applied to court for the eviction of people who were unlawfully living on privately owned land on which land they had lived for a substantial period of time. The municipality did not identify an alternative piece of land where these people could go if they were evicted. The Supreme Court of Appeal held that the eviction order should not have been made because as opposed to being made by the owners of the land, the application was made by a state organ which has an obligation pursuant to section 26. The Supreme Court of Appeal also took into consideration the issue of security of tenure which is cardinal in relation to enjoyment of the right to adequate housing. The Supreme Court held that the High Court should not have granted the eviction order without assurance from the municipality that the appellants would be given alternative land to settle where they would enjoy security of tenure. This position was also upheld by the Constitutional Court.

Moreover, based on the constitutional provisions which protect the right to housing, South African Courts are able to hear matters regarding challenges as to the constitutionality of any rule of statutory, common or customary law.<sup>364</sup> In *Jaftha v Schoeman; Van Rooyen v Stoltz*,<sup>365</sup> the question arose whether a law which permits the sale in execution of people's houses because they have not paid their debts, thereby removing their security of tenure violates the right to have access to adequate housing protected in section 26 of the South African Constitution. In this matter, a firm of attorneys obtained judgments on behalf of their clients against poor debtors in respect of very small amounts of money. When executing the judgments, the firm had the debtors' houses sold. The houses were sold at substantially less their value. The poor applicants were thus rendered homeless as a consequence of small debts. In this case it was contended that the section in the Magistrates' Courts Act<sup>366</sup> which permitted the sale of immovable property in order to satisfy a judgment debt where the debt is trifling or where there are less invasive ways of

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<sup>361</sup> Ibid.

<sup>362</sup> 2004 6 SA 40 (SCA) (*Modderklip (SCA)*).

<sup>363</sup> Supreme Court of Appeal Case No 446/2002.

<sup>364</sup> Brand (n 126 above) 208.

<sup>365</sup> 2005 (1) BCLR 78 (CC).

<sup>366</sup> Act 32 of 1944, sec.66(1)(a) and 67.

satisfying the judgment debt, is inconsistent with the state's obligation to respect the right to housing. The Constitutional Court found that the provisions of the Magistrates' Courts Act which allowed the sale in execution of a person's home in order to make good a judgment debt without the exercise of judicial discretion was in breach of the state's duty to respect the right to housing.

Therefore, it can be seen that when the right to adequate housing is justiciable the courts are not only able to interpret legislation to protect the right to adequate housing but can also develop the common law in the course of ordinary litigation.<sup>367</sup> Further, the state's duty to promote the right to housing created under section 7(2) of the South African Constitution is of relevance to the decisions of administrative bodies. In *Minister of Public Works v Kyalami Ridge Environmental Association*,<sup>368</sup> the state decided to establish a settlement camp for flood victims on land which it owned. The neighbouring property owners challenged the decision on grounds that it would adversely affect the value of their properties and also disturb their peaceful neighbourhood. They applied to court for the setting aside of the government's decision. The court found that the victims of the flood who were homeless had the right to housing.

Another important case from the South African Courts that recognises the right to housing and relevant to this discussion is the celebrated case of *Government of the Republic of South Africa v Grootboom*.<sup>369</sup> In this case, the court held that the state had an obligation to provide shelter to homeless people. The court found the State's housing programme inconsistent with the right to access adequate housing protected under section 26 of the constitution as the programme failed to make reasonable provision for people who were homeless and who were living in intolerable conditions or crisis situations.<sup>370</sup>

The jurisprudence from the South African Courts is witness to the fact that the right to adequate housing is capable of being adjudicated upon by the courts. Although it has been contended that despite the socio-economic promises of the South African constitution, most South Africans still live in socio-economic deprivation including inadequate housing,<sup>371</sup> it is no doubt that the South African Constitution and the case law by the South African courts on the right to housing do not

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<sup>367</sup> Brand (n 126 above) 217.

<sup>368</sup> 2001 (3) SA 1151 (CC).

<sup>369</sup> 2001 (1) SA 46 (CC).

<sup>370</sup> Ibid at 99.

<sup>371</sup> Karin Lehmann 'In Defence of the Constitutional Court: Litigating Social-economic Rights and the Myth of the Minimum core' (2006-2007) 22 *American University Journal of International Law and Policy* Rev 163 at 164.

only serve as a model for Zambia to also take steps towards the realisation of the right to adequate housing but to the international community at large.

### 5.3 Other examples

Other African Constitutions that entrench the right to housing are those of Cape Verde, Sao Tome and Principe<sup>372</sup> and Mozambique.<sup>373</sup> The Constitution of Cape Verde provides for the right to shelter and obligates the State to gradually promote the creation of appropriate institutional, legal and infrastructural conditions in accordance with national development.<sup>374</sup> The Constitution also obliges the State to support initiatives of the local communities and promote development of private housing.<sup>375</sup> The Constitution of Sao Tome and Principe places the responsibility of planning and execution of a housing policy on the State.<sup>376</sup> The Constitution of Mozambique contains the most comprehensive provision for housing.<sup>377</sup> It provides for the right of everyone to a suitable home and obliges the State to create the appropriate institutional, normative and infrastructural conditions.<sup>378</sup> Further, the Mozambican Constitution obligates the State to fund and support initiatives of the local authorities, the communities and the people so as to promote private and cooperative construction and accessibility of home ownership.<sup>379</sup>

### 5.4 Conclusion

The South African jurisprudence on the right to housing has shown that courts have an important role to play in the realisation of the right to access adequate housing. As the South African jurisprudence has shown, if the right to adequate housing is constitutionally protected and made judicially enforceable in Zambia, then the courts would compel the state to provide adequate housing.

This thesis argues that in order for Zambia to be more accountable and to fulfil its international obligation to provide adequate housing for its citizens, it must begin by giving the right to

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<sup>372</sup> Christof Heyns and Waruguru Kaguongo 'Constitutional human rights law in Africa' (2006) 22 *South African Journal on Human Rights* 673 at 711.

<sup>373</sup> Viljoen (n 347 above) 573.

<sup>374</sup> The Constitution of Cape Verde, Art 69.

<sup>375</sup> Ibid Art 69.

<sup>376</sup> Heyns and Kaguongo (n 360 above) 711.

<sup>377</sup> Viljoen (n 347 above) 575.

<sup>378</sup> Constitution of Mozambique Art 91(1).

<sup>379</sup> Constitution of Mozambique Art 91(2).

adequate housing constitutional enforceability. This way, its citizens would be able to obtain judicial remedies if their housing rights are violated. Domestic enforcement of the right to adequate housing through judicial mechanisms is crucial for obtaining remedies if violations to the right to adequate housing occur. Individuals who are arbitrarily or unlawfully deprived of housing should be able to approach judicial bodies for restitution or compensation. This should work to reverse the status quo where the Constitution expressly prohibits individuals from enforcing their rights to shelter in any court, tribunal, administrative institution or entity. The United Nations has pointed out that, in terms of administrative, political and policy mechanisms, the inclusion by a state of the right to adequate housing in its national constitution and its allocation of a sufficient share of the public expenditure towards social or community housing are indicators that the State is addressing its international obligations to provide adequate housing to its population.<sup>380</sup>

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<sup>380</sup> Fact Sheet No 21 OHCHR/UNHABITAT (n 4 above) 39.

## CHAPTER SIX

### CONCLUSION AND RECOMMENDATIONS

Zambia is a party to the ICESR and other international treaties that guarantee the right to adequate housing. The legal implication of subscribing to these international instruments is that Zambia has assumed responsibilities to provide adequate housing for its people in accordance with the standards set by these instruments. Chapter 1 highlighted the housing situation in Zambia and showed that there is need for intervention in the form of a sustainable solution to the housing problems of the Zambian people. Chapter 2 discussed the sources of the right to adequate housing in international law. It showed that international human rights instruments define the norms and also set the standards by which States are required to protect the right to adequate housing. Chapter 2 further discussed the obligations of States in international law to protect the right to housing. It was seen that generally States have obligations to respect, protect and fulfil the right to adequate housing. States are required to take up measures to ensure their citizens realisation of the right to adequate housing.

Chapter 3 gave a brief historical background of housing in Zambia. It was seen in chapter 3 that the effects of colonialism contributed to the current trend of rampant urbanisation in Zambia. Chapter 3 also discussed the position of international law in Zambia and it was concluded that in order for international law to have force of law and thus effective in the realisation of the right to adequate housing, it is important that the state domesticates the provisions of international human rights instruments which protect the right to adequate housing into enabling legislation.

Chapter 3 also assessed the extent to which Zambian law and policies protect the right to adequate housing. Chapter 3 showed that the protection by Zambia of the right to adequate housing leaves much to be desired. It showed that Zambia's housing legislation in its current form is inadequate as regards making sufficient provision for the right to adequate housing and therefore the need for legal reform. It was stated that if a justiciable right to adequate housing is enshrined in the constitution, the constitution would be able to play an important role in the interpretation of housing legislation. Chapter 3 also showed that even though legislation is important, constitutionalising the right to housing is important as legislation can easily be changed as opposed to constitutional guarantees. Moreover, the constitution can invalidate legislation.



Also, it was discussed in chapter 3 that housing which can be described as adequate is expensive either for rent or for purchase and is thus not affordable to the low income groups. In addition, it was seen that housing finance options are not available to the poor. This is because interest rates for obtaining loans demanded by financial lending institutions are high. Moreover, the poor do not have property to give as collateral to banks for loans. This is a challenge because on the other hand, financial institutions feel that it is not good for business to lend for housing to low income groups because they would not generate profits and this group may have difficulties with repayment terms. The construction industry too avoids building low cost houses for sale to low income families for fear of loss of profits. It was therefore concluded that there is need for state intervention. Therefore it is important that the state takes measures such as subsidies and affordable housing provision programmes in order to ensure that the housing needs of the poor and marginalised groups in society are met. However, the starting point should be a constitutional provision which would oblige the State to take up measures to provide adequate housing.

Besides that, it was seen in Chapter 3 that the national housing policy though promising has not been implemented in order to improve the housing situation in the country. The author is of the view that in order for the status quo to improve in relation to housing, the right to adequate housing must be enshrined in the constitution as a justiciable right so that it can be capable of being enforced in courts of law. That way, the state will be compelled by the courts to implement housing policies or programmes. The State would also be obliged to fulfil its duty to provide adequate housing as required by international law. Zambia is classified as a poor country. Therefore, the state's realisation of ESCR such as the right to adequate housing is crucial for poverty reduction.

Chapter 4 was a discussion on justiciability of the right to adequate housing in Zambia. It was seen in the discussion that the right to adequate housing can be better realised if it is justiciable. It showed that contrary to the views by critics of justiciable socio-economic rights that the right to adequate housing should not be made justiciable because it is imprecise among other reasons, the right to adequate housing is a right which is capable of being constitutionally enforced because it is clear and the benchmarks for its realisation have been elaborated by the Committee on Economic Social and Cultural Rights the body in charge of monitoring state party compliance

to the ICESCR. It was shown in Chapter 3 that since the right to adequate housing will require the State to set aside resources for its realisation, the right can be realised progressively. The State must be able to show that it is doing everything within its available resources in order to realise the right.

Chapter 5 of the study reiterated the need for Zambia to be in compliance with international standards in protecting the right to adequate housing as dictated by the ICESCR and other international instruments. The starting point would be to have a constitution which guarantees a right to adequate housing. Chapter 5 recommended that Zambia looks to other jurisdictions which have justiciable socio-economic rights in their national constitutions in order to emulate good practices from those jurisdictions. The South African Constitution was selected for this purpose. Although South Africa is not a party to the ICESCR, as was shown, the right to housing is justiciable in the South African Constitution. As a result, there is jurisprudence on the right to housing steadily emerging from South African courts based on the constitutional provisions which recognise the right to housing. Zambia will take a step in the right direction when it enshrines the right to adequate housing in its Constitution so that the Zambian courts can be able to refer to the provision and also legitimately hand down decisions on the right to adequate housing without being accused of infringing on the separation of powers. In addition, jurisprudence would be developed for the protection of the right which would be useful as precedent.

Constitutional enforcement of the right to adequate housing is cardinal if all segments of society in the country are to enjoy the right. Justiciability of the right to adequate housing may not be the only way to ensure realisation of the right to housing but is crucial in order for all stake holders to be fully involved in the realisation of the right. When the right is justiciable in the constitution and couched on international standards, not only will judges be able to hand down decisions on housing rights without being accused of encroaching in the domain of the legislators or policy makers but victims of housing rights violations would be able to obtain recourse from the courts and Counsel will be able to argue their cases based on international law. This would be a landmark progress in Zambia's Constitution as the status quo where the Constitution precludes individuals from seeking redress in relation to the right to shelter would be reversed.

In addition, when the right to adequate housing is justiciable it would stimulate government action to provide adequate shelter thereby improving the current housing situation. Government would be obliged by the Constitution to take measures such as allocating funds for housing in the national budget, increasing the threshold of resources to be channelled to the provision of housing as well as intervening whenever need occurs to make housing affordable for all. This is crucial for development. In order for the right to adequate housing to be a reality for the Zambian people, it is hoped that the clause in the draft Constitution of Zambia spearheaded by the Technical Committee of Experts appointed by President Michael Sata to draft a constitution for Zambia, to the effect that a person has the right to accessible and adequate housing will be retained and that the said draft will eventually be enacted into law and not suffer the fate of the Constitution of Zambia Draft Bill which was submitted to government by the National Constitution Conference but failed to pass in parliament in 2010.

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