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Ensuring rights make real change

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At its 36th Ordinary Session held from 23 November to 7 December 2004 in Dakar, Senegal, the African Commission on Human and Peoples' Rights (African Commission) adopted Resolution 73 on Economic, Social and Cultural Rights in Africa. One of the decisions coming from Resolution 73 was the establishment of a working group composed of members of the African Commission and non-governmental organisations (NGOs) with a mandate to develop and propose to the African Commission draft principles and guidelines on economic, social and cultural rights. These draft guidelines are now in place, and the African Network of Constitutional Lawyers' (ANCL) Working Group on Social and Economic Rights in Africa made them the focus of its workshop held on 8 and 9 September 2010 in Cape Town, South Africa.

The papers presented in this volume constitute a summary of the presentations at that workshop. Collectively, they offer an overview, albeit an incomplete one, of the protection and enforcement of socio-economic rights in Africa today.

The first three papers, by Solomon Sacco, Waruguru Kaguongo and Dejo Olowu, provide a background to and critique the draft principles and reporting guidelines.

The African regional system remains without parallel in the manner in which it protects socio-economic rights. In this system, socio-economic rights are fully justiciable, just as civil and political rights are. The African system seems to have been buttressed by subregional legal developments establishing subregional courts with jurisdiction in regional integration matters and increasingly in human rights. These courts have binding powers and their decisions can be enforced against any state that has been found responsible for a violation. It is in this light that Solomon Ebobrah and Admark Moyo examine recent jurisprudence of the Economic Community of West African States Community Court of Justice and the Southern African Development Community Tribunal, respectively.

Without domestic mechanisms, individuals cannot be guaranteed their human rights. Thus several articles in this issue provide an overview of the domestic protection of socio-economic rights in African countries. Deji Adekunle, Ben Twinomugisha and Aquinaldo Mandlate focus on West African anglophone countries, East African countries and lusophone African counties, respectively. Mugambi Laibuta examines the extent to which the newly adopted Constitution of Kenya protects these rights. With reference to the draft principles and guidelines, Linda Stewart then examines the importance of sustainability in the interpretation of the socio-economic rights that concern 'scarce natural resources'.

This workshop was intended as a mapping exercise for a bigger conference which will be held next year to examine in detail the opportunities for enforcing socio-economic rights at the regional and subregional levels in Africa and the manner in which African constitutions protect these rights. The conference will also analyse

and critique the socio-economic rights jurisprudence that African courts have produced thus far. Details of the conference will be posted on the ANCL's website.

We would like to thank all participants at the September workshop and the contributors to this issue. Our gratitude is also due to Lilian Chenwi for allowing us to publish this special issue of the *ESR Review*. This working group is an initiative of the ANCL. We would like to thank the president of the ANCL, Christina Murray, and the secretary-general, Richard Calland, for organising funding for the working group, and for their unflinching support. The ANCL's secretariat, Vanja Karth, Vanya Gastrow and Ncebakazi Jwaqu, have ensured the smooth running of the project. Lastly, we would like to acknowledge the role of Mugambi Laibuta and Lilian Chenwi, who, together with Danwood Chirwa and Kristina Bentley lead the working group.

Danwood Chirwa is an associate professor and head of the Public Law Department at the University of Cape Town, South Africa, and Kristina Bentley is a senior research officer in the Democratic Governance and Rights Unit of the Faculty of Law at the University of Cape Town.

The draft principles and guidelines can be accessed at www.peopletoparliament.org.za/focus-areas/socio-economic-rights/resources/key-documents/Draft_Pcpl%20-%20Guidelines.pdf/view

An overview of the African Commission's principles and guidelines on economic, social and cultural rights

Solomon Sacco

The African Commission on Human and Peoples' Rights (African Commission) will, at its next session, consider for adoption two documents, one a compilation of principles and guidelines on economic, social and cultural rights and the other a compilation of reporting guidelines on economic, social and cultural rights. These documents were developed by the African Commission working group created at the 36th Ordinary Session of the African Commission, held from 23 November to 7 December 2004 in Dakar, Senegal (Resolution 78.ACHPR/Res.73 (XXXVI) 04 on Economic, Social and Cultural Rights in Africa).

The mandate of the working group was to

- develop and propose to the African Commission draft principles and guidelines on economic, social and cultural rights (ESCRs);
- elaborate draft revised guidelines pertaining to ESCRs for state reporting;
- undertake, under the supervision of the African Commission, studies and research on specific ESCRs; and
- make a progress report to the African Commission at each ordinary session.

It was intended that the principles and guidelines would both provide detailed guidance to states on their drafting of development policies, human rights policies and particularly policies regarding the implementation of ESCRs, and give national, regional and international civil society, as well as monitoring bodies, benchmarks against which to assess national policies.

Process

In the implementation of its mandate, the working group held numerous meetings. The first was held on 4 and 5 August 2005 at the Centre for Human Rights at the University of Pretoria in South Africa, and the second on 6 and 7 October 2005 at INTERIGHTS in London. At the first meeting, Sandra Liebenberg and Alain Olinga were appointed as consultants to lead the drafting of the principles and guidelines. They developed a first draft, which was circulated among the members of the working group who made comments on the draft.

INTERIGHTS did further work on the draft, incorporating the inputs from the working group and adding as far as possible African sources and language, as well as some rights that had not originally been dealt with. The revised document was submitted to the working group during an informal meeting held on the margins of the 43rd Ordinary Session in Ezulwini, Swaziland. Further work was done at INTERIGHTS to finalise the incorporation of African standards and to respond to comments from the working group meeting in Swaziland. This draft was presented to the working group at a meeting held in Abuja, Nigeria, on 5 and 6 November 2008. At this point, the working group decided to open the draft for comments from civil society and state actors, and the document was placed on the African Commission's website.

The working group met from 29 September to 3 October 2009 in Nairobi, Kenya, to incorporate com-

ments from civil society (there were none from states) and to reorganise and edit the document. Finally, when the working group was satisfied with the document, it was adopted and forwarded for consideration by the Commission.

The principles and guidelines were presented to the African Commission for consideration at the 47th Ordinary Session held in Banjul, The Gambia, from 12 to 26 May 2010. The Commission decided that although the document was a very informative and useful instrument, it was too large to be used as reporting guidelines for states. It was therefore decided that guidelines for state reporting on ESCRs should be extracted from the main document so that there were two separate documents. At a meeting held from 7 to 9 July 2010, the working group developed a separate document on state reporting.

Contents of the principles and guidelines

The principles and guidelines are divided into four parts, dealing respectively with interpretation, the nature of state party obligations, other key obligations that should be considered when realising ESCRs, and individual ESCRs.

Parts two and three attempt to summarise the vast literature on the obligations of the state regarding the realisation of ESCRs and clearly cannot be considered complete and authoritative in their handling of this. (For example, there is no reference to the reasonable policy review as developed in South Africa.) However, the document does begin the process of incorporating mainly United Nations (UN) standards into the African human rights system in this regard.

Part four deals both with rights explicitly protected in the African Charter on Human and Peoples' Rights (African Charter) and with those that can, drawing from the African Commission's jurisprudence, be read into the Charter. An attempt was made to keep this to a logical formula, dealing with minimum core obligations, obligations regarding national plans, policies and systems, and obligations to vulnerable groups, equality and non-discrimination, although some rights, such as the right to health, needed more attention and broke out of this matrix. The section on each right may be considered sufficient to stand on its own and should help government departments set out government policies and assist civil society organisations in developing shadow reports or communications. The principles and guidelines are designed to allow different actors to take and use whatever is appropriate to their work.

State reporting guidelines

The draft state reporting guidelines set out in brief what each state report should contain, and then go through each right and give examples of the issues that should be specifically reported on under each. The state reporting guidelines do not attempt to be exhaustive and must be read at all times with the longer document (the principles and guidelines).

Conclusion

The principles and guidelines are intended to assist states in meeting their obligations to realise economic, social and cultural rights, and also to provide some standards against which states can be held accountable. It is perhaps in this latter function that they may be more helpful, as they help civil society organisations bring cases of violations of ESCRs to the African Commission.

Solomon Sacco is a lawyer with the Africa Programme of INTERIGHTS.

Perspectives on the African Commission's state reporting guidelines

Waruguru Kaguongo

The African Charter on Human and Peoples' Rights (African Charter) requires states to submit, every two years, reports on legislative and other measures taken to give effect to the rights protected in the Charter (article 62). To this end, the African Commission on Human and Peoples' Rights (African Commission) set up a working group tasked with drafting reporting guidelines to help states provide relevant information. The working group has recently developed draft State Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (state reporting guidelines).

This article briefly examines these guidelines with a view to assessing the extent to which they respond to the objectives sought by the state reporting process.

By way of background: the state reporting guidelines relate exclusively to economic, social and cultural rights (ESCRs) in the Charter, and are complementary

to the draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights, (principles and guidelines), a document that seeks to elaborate on the provisions in the African Charter and, in so doing, help states comply with their obligations under the Charter.

The idea behind the state reporting guidelines is to give the states parties a clearer idea of what kind of information is required of them in relation to ESCRs. While this is also described in the draft principles and guidelines, the latter are more detailed and general, and are not specifically drafted to elicit information – in particular, the information necessary for monitoring purposes. The state reporting guidelines are a summarised distillation of important points to consider when reporting and are therefore much shorter and less detailed than the principles. Having said that, however, when reporting, states will find it necessary to refer to the draft principles and guidelines, and this highlights the complementary nature of the two documents.

Main features of the state reporting guidelines

The state reporting guidelines are divided into three sections: the introduction, the general contents of state reports and the contents of individual rights.

The introduction provides a brief preamble to the state reporting guidelines and makes the link to the draft principles and guidelines.

The general contents section requires states to provide information that is, in a sense, cross-cutting in relation to all the individual rights. This information includes the laws, policies and strategies that a state has put in place to implement the rights; monitoring mechanisms, including indicators and national benchmarks; judicial and other remedies available for redress in case of violation; difficulties that a state may be encountering in realising the rights, including structural obstacles; and generally disaggregated statistical information depicting the level of enjoyment of the right among different population groups. Information on transparency, accountability and participation in priority-setting exercises, as well as on the reporting process, is also required.

The third section, titled 'content of individual rights', deals with each of the individual rights and focuses on the more specific information required in relation to each right. States are required to indicate measures taken to achieve the results stipulated in the principles as constituting the realisation of the rights. It is here that states rely extensively on the draft principles and guidelines in order to understand what the obligations and expected outcomes are.

The state reporting guidelines cover ten individual rights: those to property, work, health, education, culture, housing, social security, food, water and sanitation, and protection of the family. Of these rights, only six are explicitly provided for in the African Charter.

> The state reporting guidelines aim to give states parties a clearer idea of what kind of information is required of them.

A comparative perspective on the state reporting guidelines

It is useful to compare the state reporting guidelines with other treaty guidelines in order to gauge the strengths and weaknesses of the document. There are notable similarities and differences, both structural and substantive.

The structure of the state reporting guidelines differs from that of the guidelines issued by the United Nations (UN) treaty bodies, which are consolidated guidelines. In other words, the UN guidelines are part of a single document that contains a section setting out the introductory aspects of state party reports and then subsequent sections detailing the substantive rights provided for in each of the individual human rights treaties. The idea is to identify general information that is relevant for all rights and that remains the same regardless of the treaty, and to ensure it is provided in a consistent manner. The state reporting guidelines generally adopt the same format by requesting general information relating to the national framework law, policies and strategies around the implementation of each right, monitoring mechanisms, available remedies, and statistics and information about procedural issues relating to the development of national plans and policies, as well as the state report.

The difference between the two sets of guidelines is that the general section in the state reporting guidelines requires more information than the equivalent part of the UN guidelines, such as details of structural or significant obstacles that impede the realisation of the rights. By contrast, the UN guidelines specifically require this information in respect of each right. Although the state reporting guidelines request statistics on the enjoyment of each right, this is done without reference to specific rights or aspects of rights. The difference between the two approaches is that the UN approach will tend to elicit more precise information on difficulties or gaps in the enjoyment of rights than the more general approach by the state reporting guidelines. Arguably, the broad purpose of the state reporting guidelines is to identify and highlight these difficulties so that they can be redressed.

On the other hand, the state reporting guidelines emphasise national plans and policies and how these are formulated, a concern that is not addressed in the UN guidelines. Recognising the role that national plans and policies play in facilitating the enjoyment of rights, and the need

for the citizenry to be involved in determining development priorities, is important. This enquiry is appropriately situated in the general section of the state reporting guidelines.

In terms of the substantive rights and the content of the state reports in this regard, the UN guidelines ask a mix of specific and open-ended questions. This means that questions are aimed at eliciting fairly exact information on the status quo and also require information broadly on steps that a state is taking. By contrast, the state reporting guidelines do not place much emphasis on establishing the status quo in relation to particular rights. Thus, for example, statistics are requested as general information and not in relation to particular aspects of rights. Most of the information required by the state reporting guidelines relates to the measures and steps the state is taking to achieve certain results. Presumably the state will indicate, in the process, how close it is to achieving these results.

This approach can also be contrasted with the Guidelines for Preparation of Progress Indicators in the area of Economic, Social and Cultural rights in the Inter-American System (IACHR guidelines). The IACHR guidelines were not developed exclusively for the preparation of state reports, but they are very useful for this purpose. As the title of the IACHR guidelines suggests, their emphasis is on the measurement of progress in the realisation of rights, which is done through the development of indicators. The point is made that the purpose of the monitoring exercise is not to assess the quality of the public policies of states, but rather to monitor compliance or otherwise with legal obligations under the Protocol of San Salvador. A particular emphasis is therefore placed on establishing a baseline from which progress is then measured. The progress indicators also presume that the state will develop goals for the performance of obligations in a given time frame which can then be reviewed through the indicators.

The draft principles and guidelines take cognisance of the need for indicators and benchmarks in the design and implementation of national policies and place the responsibility for developing these indicators and benchmarks on the state. No similar recognition is contained in the state reporting guidelines, through which, ideally, a state can be assessed on progress made in achieving the goals it has set out for itself, and also whether these goals are acceptable and in line with the African Charter. Nevertheless, this point again illustrates the complementarity between the draft principles and guidelines and the draft state reporting guidelines.

This comparison with the UN and IACHR guidelines highlights certain strengths and weaknesses of the state reporting guidelines.

With respect to the strengths, firstly, one of the reasons why they were drafted was to provide a user-friendly document that would make it easier for states to understand the kind of information required to monitor ESCRs. This is achieved in that the state reporting guidelines are summarised, but still linked back to the principles and guidelines with sufficient clarity to provide additional guidance on the nature of information required.

> States are required to provide statistics on the enjoyment of each right on an annual comparative basis covering the previous five years.

Secondly, the state reporting guidelines have the advantage of encouraging states to provide a wealth of information on the measures they are taking to realise the rights. On one hand, this is beneficial. On the other, though, it has the potential to burden the African Commission with information that may be useful in other contexts, but perhaps does not immediately reveal whether a state is making progress in realising socio-economic rights. This can, however, be remedied in the course of the constructive dialogue that takes place during the consideration of the state reports, where a state could be given an opportunity to focus on specific aspects of a right. The focus could also be narrowed down by shadow reports sent in by other entities within the state with particular areas of interest.

Thirdly, the inclusion of implied rights means that states will consider and implement rights that are not explicitly in the Charter, but are just as important.

As for shortcomings, the first, already alluded to, is the lack of a progressive outlook in the state reporting guidelines, because no baseline is established that can be used as a reference point in assessing subsequent reports for progress in realising rights. This could result in a lot of repetition in the reporting process, since there is little reference to time frames and achievements resulting from the steps and measures taken by states over time. States are required to provide statistics on the enjoyment of each right on an annual comparative basis covering the previous five years, but there is no correlation with any indicators or benchmarks in order to evaluate how well the state is meeting standards and goals. In addition, the amount of data required to meet this obligation may be onerous in many countries where data collection and management is still not well developed.

Although reference is made to initial and periodic reports, there is no distinction in terms of the kind of information that would be relevant to the two sets of reports, although, presumably, this is not relevant for states that have already reported under the general reporting guidelines.

Secondly, although state reporting is not entirely about identifying violations of rights, it is an important component of ensuring that rights are guaranteed to all. The draft state reporting guidelines do not place any particular emphasis on identifying violations of rights, and, in fact, information provided may relate to social and economic conditions and not specifically to the state of rights realisation. For example, the statistics that are most prevalent in most countries relate to development indicators and not necessarily human rights indicators. So a question relating

to legislative and administrative steps taken to ensure that all children enjoy free and compulsory primary education does not tell us how many children actually enjoy this right as a result of the measures, and which children do not have access to this right and why. Statistical information may provide an indication of the magnitude of the problem, but may not indicate in all respects the degree to which obligations have been met to ensure that children enjoy their right to education. A deliberate effort needs to be made, given the questions in the state reporting guidelines, to adopt a human rights perspective that will go beyond simply stating measures and steps taken without further assessment of effectiveness.

Thirdly, it is important to note that the state reporting guidelines are to be used in conjunction with the 1989 Guidelines for National Periodic Reports under the African Charter. It is not clear to what extent the 1989 guidelines should be used. It would therefore be useful if the points of divergence between the two sets of guidelines, the value added and how the two complement each other were made clear. Further, the African Commission has adopted reporting guidelines in relation to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the kinds of information required for the two sets of guidelines may overlap. It is not clear how these overlaps should be addressed in order to make the process simpler for states.

Conclusion

In conclusion, the state reporting guidelines do serve to raise the profile of economic and social rights in state reporting, especially since they are linked with the principles and guidelines on the implementation of ESCRs. But in order to exploit the full potential of the state reporting guidelines, a number of issues need to be further clarified: for instance, how do these guidelines relate to and interface with existing state reporting guidelines developed by the African Commission? If the idea is to use them all in a complementary fashion, then it would have to be made clear how this complementarity is achieved so that states know how and when to use the two documents.

An appropriate balance needs to be struck between the need to summarise the guidelines to make them user-friendly and the importance of eliciting information not only on measures, but also on the effectiveness of those measures, as well as the progressive realisation of rights. If issues such as these are resolved, the state reporting guidelines could considerably improve the way in which state parties report on ESCRs.

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A critique of the African Commission's draft principles and guidelines on economic, social and cultural rights in the African Charter

Dejo Olowu

After a chequered era of inertia and jurisprudential inconsistency, the African Commission on Human and Peoples' Rights (African Commission), through its Working Group on Economic, Social and Cultural Rights in Africa, has eventually come up with two instruments aimed at charting pathways to the implementation of the economic, social and cultural rights (ESCRs) components of the African Charter on Human and Peoples' Rights (African Charter), as well as guidelines to moderate the dissonance of states parties' approaches to their reporting obligations under the African Charter. These two instruments, namely, the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights (principles and guidelines) and the draft State Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter (state reporting guidelines), indeed constitute a remarkable milestone in elevating the otherwise subdued status of ESCRs in the African Charter.

Commendable as these instruments are, however, I contend that they both lack the character that gives the African Charter its uniqueness as a human rights treaty. I contend, in particular, that the employment of the language and approach of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) in interpreting the International Covenant on Economic, Social and Cultural Rights (ICESCR) exposes the efforts of the African Commission's working group to inescapable criticism. Based on the *travaux préparatoires* of the African

> There is a dissonance between the intentions of the original drafters of the African Charter and the intentions of those who drafted these two later instruments.

Charter, the textual content and nature of the African Charter as a binding treaty, and the volumes of the works of African human rights scholars and jurists, I propose a reconsideration of the processes involved in the formulation of both guidelines before they are adopted by the African Commission.

A fundamental philosophical problem

From the pronouncements of the African Commission in many of its decisions as well as the views of some commentators on the ESCRs contained in the African Charter, it is obvious – regrettably, though – that these rights are yet to be accepted as fully justiciable rights. This is what I consider to be the impediment with the principles and guidelines and the state reporting guidelines as they stand.

A rigorous reading of the text of the two instruments reveals a dissonance between the intentions of the original drafters of the African Charter and the intentions of those who drafted these two later instruments. First, it is instructive to note that the interdependence and indivisibility principles of the African Charter's contents predate the Vienna Declaration on Human Rights of 1993. Having acknowledged that the concept of 'progressive realisation' was alien to the African Charter (para 15, footnote 37, of the principles and guidelines), the working group nevertheless proceeded to establish it as having become part of the African Charter's framework and philosophy.

By what modality did the working group come to this conclusion? Was it simply because the CESCR had applied it in its various general comments? Does the adoption of this 'alien' concept lay to rest our quest for a unique jurisprudence on ESCRs as envisaged by the African Charter?

The concern with this uncritical adoption and application of the philosophy of the ICESCR to the African Charter's ESCRs norms is that it may unintentionally give African governments the leeway to avoid compliance with these norms. What happens in the case of African states that have adopted laws, policies, programmes and incentives that set a higher threshold for their performance than what the progressive realisation standard prescribes? Rather than weakening the integrative philosophical outlook of the African Charter towards *all* human rights, it is my opinion that the working group should reopen its consideration of these instruments and fashion a remedial approach to ESCRs under the African Charter.

A tale of curious and fatal omissions

A quick survey of the mandate, history and operations of the working group reveals some inexplicable omissions in its final outcome as encapsulated in the two draft instruments.

The African Commission established the working group at its 36th Ordinary Session in Dakar, Senegal, in December 2004 (Resolution 78.ACHPR/Res.73 (XXXVI) 04, 07 December 2004). The working group was mandated to, among other things, (i) develop and propose draft principles and guidelines on ESCRs and (ii) elaborate draft revised guidelines on ESCRs for state reporting.

At its first meeting in Pretoria, South Africa, in August 2005, the working group considered the enumerated and protected ESCRs in the African Charter, namely, article 14 (right to property), article 15 (right to work), article 16 (right to health), article 17 (right to education), article 18 (sanctity of family), article 21 (right of peoples), article 22 (right to development) and article 24 (right to a satisfactory environment).

At the same meeting, the working group considered some unenumerated rights deemed incorporated into the African Charter. These were the rights to housing, food, water and social security. Three other meetings followed: in London, United Kingdom, in October 2005; Ezulwini, Swaziland, in May 2008; and Abuja, Nigeria, in November 2008.

After the first meeting, three core ESCRs in the African Charter fell off the agenda of the working group. They were article 21 (right of peoples); article 22 (right to development) and article 24 (right to a satisfactory environment). These enumerated and protected rights in the African Charter were omitted in both the principles and guidelines and the state reporting guidelines.

How did this happen? By what modalities did the working group arrive at what we now have as the draft instruments? It is submitted that the two instruments are by no means a holistic rendition of the ESCRs enunciated in the African Charter. The working group had wandered away from the original road map conceived at the very outset.

It is further submitted that omitting these core ESCR norms from any interpretive or reporting instrument is a disservice to all the struggle rendered and gains recorded by Africans at the United Nations in the adoption of the Charter of Economic Rights and Duties of States in 1974 and the United Nations Declaration on the Right to Development of 1986, and all the efforts culminating in the Rio Earth Summit Declaration of 1992.

Conclusion

In the 21st century, human rights development on the African continent should not be subjected to retrogressive thought, but rather sustained by efforts that enhance its relevance in the broader struggle for human development and stability of governance in the region.

In the final analysis, therefore, this paper earnestly exhorts the African Commission not to be stampeded into acceding to the principles and guidelines and the state reporting guidelines as they stand. Rather, the African Commission should summon the courage to reopen a wider consultative process that will ensure that whatever instruments are to be adopted in the interpretation of the ESCRs contents of the African Charter and the obligations of African governments are of utmost benefit to the African regional human rights system, in the shorter and longer term.

Dejo Olowu is a professor of law at North-West University, South Africa.

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Subregional mechanisms for the protection of socio-economic rights in Africa

Reflections on the budding jurisprudence of the ECOWAS Court

Solomon Ebobrah

In 1993, member states of the Economic Community of West African States (ECOWAS) adopted a revised treaty to replace the original founding treaty of 1975. One of the high points of the 1993 revised treaty was the enactment of article 4(g), which introduced the idea of 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights' as a fundamental principle of ECOWAS integration. Article 4(g), read together with certain provisions in the preamble and the body of treaty, has become the legal foundation upon which a promising human rights regime is being built on the ECOWAS framework.

Like the continental structures of the older African human rights system, the ECOWAS human rights regime has created some potential for the judicial and non-juridical realisation of socio-economic rights. There are at least two main reasons for this. Firstly, the ultimate objective of ECOWAS as contained in the revised treaty is to 'raise the living standards of its people'. This objective arguably coincides with the aims of individual socio-economic rights as well as the all-encompassing right to development as contained in international instruments. Accordingly, this objective of ECOWAS can only be realised if the socio-economic rights of the citizens of its member states are guaranteed. Secondly, the ECOWAS regime is developing a strongly bonded attachment to the African Charter on Human and Peoples' Rights (African Charter). Consequently, the regime cannot escape the African Charter's integrated approach to the recognition of all categories of human rights.

Although the realisation of human rights in the ECOWAS framework is multifaceted, in the sense that both judicial and non-judicial organs and institutions of the community engage in some forms of human rights activities, the focus in this paper will be on the judicial aspect of socio-economic rights realisation. The aim is to undertake a concise analysis of issues arising from the newly emerging socio-economic rights jurisprudence of the ECOWAS Community Court of Justice (ECCJ or ECOWAS Court).

Human rights in the ECOWAS Court

The ECCJ was conceived as 'the Tribunal of the Community' in the 1975 ECOWAS Treaty, but came into existence in its present form through a 1991 protocol adopted by the ECOWAS heads of state and government (Protocol of the Community Court of Justice, Doc. A/P1/7/91, adopted on 6 July 1991 and entered into force on 5 November 1996). The ECCJ is currently established by articles 6 and 15 of the 1993 Revised ECOWAS Treaty. Under the 1991 protocol, the ECCJ was only competent to 'ensure the observance of

> The sense that emerges from the jurisprudence of the ECCJ is that the African Charter occupies a central place in its practice.

law and of the principles of equity in the interpretation and application of the provisions of the Treaty', and access to the ECCJ was only available to ECOWAS member states. By amendments introduced to the 1991 protocol via a 2005 supplementary protocol, the jurisdiction of the ECCJ was enlarged to cover cases alleging human rights violations in member states.

In addition to creating a human rights jurisdiction for the ECCJ, the 2005 supplementary protocol expanded access to the Court by allowing individuals to approach it to seek relief for violations of human rights. Individual access to the ECCJ is permitted on two conditions: that the application is not anonymous and that the same matter is not pending before another international court. Because the ECOWAS Court currently receives cases without requiring local remedies to have been exhausted, it is becoming increasingly popular as its jurisprudence grows.

Against a background of well-documented challenges associated with the domestic litigation of socio-economic rights in West Africa, the potential for these rights to be litigated before the ECCJ is significant. This is even more so in view of the prevailing limitations of the judicial and quasi-judicial structures of the African human rights system. However, socio-economic rights litigation before the ECCJ is still in its infancy and only a limited ECCJ jurisprudence exists in the area.

The socio-economic rights jurisprudence of the ECOWAS Court

Based on the understanding that human rights are interdependent and interrelated, socio-economic rights have appeared in different forms before the ECCJ. From a strictly technical perspective, however, there are currently two cases in which socio-economic rights have come before the ECCJ. These cases offer some material for analysing socio-economic rights litigation before the Court.

In 2007, the ECCJ delivered its judgment in the case of *Essien v the Gambia* Unreported Suit no. ECJ/CCJ/APP/05/07 (*Essien* case). The main issue before the Court was whether engaging a person as a technical consultant on terms similar to a previous engagement funded by an international organisation without paying such a person an equal or equivalent salary amounted to economic exploitation and a violation of article 15 of the African Charter. Article 15 provides for the right to work under equitable and satisfactory conditions and to receive equal pay for equal work. Upon the facts, the ECCJ found that there was no violation, as holding otherwise in the circumstances of the case would be discriminatory. The *Essien* case was the first real opportunity to test the potential for the judicial protection of socio-economic rights before the ECCJ.

The ECCJ was also faced with a claim for socio-economic rights in the more recent case of *Registered Trustees of the Socio-Economic Rights Accountability Project (SERAP) v Nigeria and Another* Unreported Suit No. ECW/CCJ/APP/08/08 (*SERAP* case). In this case (which is ongoing), the Court has been approached to determine whether the defendants violated 'the right to quality education, the right to dignity, the right of peoples to their wealth and natural resources and the right of peoples to economic and social development' guaranteed in the African Charter. At the preliminary stage of the case, the ECCJ had to address the question of whether socio-economic rights could be claimed before the Court against a state with constitutional limitations on the justiciability of this category of rights. In its ruling, the ECCJ concluded that notwithstanding the existence of constitutional limitations, the Court was competent to receive such claims. This ruling indicates the ECCJ's readiness to position itself as a forum for socio-economic rights litigation in West Africa.

Dilemmas in ECOWAS socio-economic rights adjudication

Despite the apparent ease with which the question of the justiciability of socio-economic rights has been addressed in the ECOWAS regime, dilemmas have emerged from the process. Some relate to challenges already identified in the vast literature on the issue of socio-economic rights enforcement, while others are associated with the nature of the ECOWAS human rights regime.

Competence without a catalogue

An important point to note about the ECOWAS human rights regime is the fact that there is no regime-specific human rights catalogue upon which claims can be based. The sense that emerges from the jurisprudence of the ECCJ is that the African Charter occupies a central place in its practice. Further, the Universal Declaration of Human Rights (UDHR), or any other international or regional instrument ratified by a given ECOWAS member state, can be the source of a claim before the ECCJ. Hence all rights of a socio-economic nature contained in the African Charter can be claimed before the ECCJ.

The Court has also shown a willingness to admit claims based on instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR). In relation to the African Charter, one question that arises is whether socio-economic rights read in following the *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication No. 155/96 decision by the African Commission can also be claimed before the ECCJ. It is debatable whether rights of

a socio-economic nature contained in the UDHR can, and legally should, be claimable before the Court. From the *Essien* case and the *SERAP* case, claims before the ECCJ are currently limited to the express socio-economic rights provisions in the African Charter.

The sovereignty tension

A survey of constitutions in West Africa will show that there are very few national constitutions with a complete catalogue of justiciable socio-economic rights. In some extreme cases, the closest to socio-economic rights in national constitutions are non-justiciable provisions classified as directive principles of state policy. In such extreme cases, especially where the trend in a given national legal system is to interpret the constitution as prohibiting the justiciability of socio-economic rights, claims before the ECCJ could be considered as being in conflict with the national constitution. In other words, there is the possibility of tension between a member state's claim to sovereignty and its obligation to ECOWAS. This tension is exemplified in the preliminary objection raised by Nigeria in the *SERAP* case.

The response of the ECCJ to such tension appears to depend on the principle that states cannot rely on provisions in national law to avoid international responsibility. (See article 27 of the Vienna Convention on the Law of Treaties.) However, this approach does not address the problem of enforcement, especially as the regime depends on national procedures for enforcement.

It is possible to argue that there is no conflict, and therefore no tension, with national constitutions if it is considered that the constitutional provisions in question are couched in a manner that suggests a claim restriction rather than a norm restriction. The difference would be that even though a constitution may exclude its national courts from entertaining claims hinged on certain constitutional provisions, it does not thereby exclude other procedures, including international courts, from addressing claims of normative rights of a particular nature – in this case, socio-economic rights norms.

Issues of legitimacy, claim imprecision and challenging remedies

A third dilemma associated with the ECCJ's protection of socio-economic rights relates to the traditional arguments that this category of rights is imprecise and that courts lack the legitimacy and technical competence to redistribute resources. In relation to the imprecise nature of socio-economic rights, the responding argument that negative as well as positive obligations exist in all categories of rights cannot be ignored. In this regard, the ECCJ appears to be on safe ground in that it adopted a non-discrimination analysis in the *Essien* case. In doing so, the Court may have carefully avoided putting itself in a position where it had to reassign resources to satisfy a claim. At a more general level, if the Court restricts itself to determining whether a state has interfered with the enjoyment of a given socio-economic right rather than whether a state has failed to provide for rights, the dilemma can be downplayed. It remains to be seen whether the ECCJ will be able to avoid a resource-redistributory role in the *SERAP* case.

> A forum such as the ECCJ may not need the type of legitimacy that national courts claim to adjudicate as SER cases.

Although the ECCJ has not addressed the question of resource distribution, there is very little chance that the Court will claim more legitimacy than national courts of member states. From another perspective, the argument has been made that socio-economic rights compel a political enforcement process rather than a strictly legal enforcement process (Roach, 2009). According to this argument, the fact that the enforcement of international law depends on persuasion rather than compulsion creates room for dialogue that is suitable to meet the challenge of socio-economic rights implementation. From this perspective, a forum such as the ECCJ may not need the type of legitimacy that national courts claim in order to adjudicate on socio-economic rights cases.

Conclusion

The realisation of socio-economic rights through the judicial process is a complex issue that invites diverse and increasingly innovative approaches. The involvement of the ECCJ in this field is not without its complications, yet there is potential for the regime to be positively explored if the Court is creative in addressing some of the dilemmas it faces.

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The protection and promotion of socio-economic rights in the SADC region

Admark Moyo

Since the turn of the century, international human rights discourse has tended towards an approach that transcends the traditional divide between socio-economic and cultural rights on one hand, and civil and political rights on the other. The winds of change also appear to have blown in Southern Africa.

This paper traces the protection and promotion of socio-economic rights in the Southern African Development Community (SADC) region. It analyses the strengths and weaknesses of protocols that affect the promotion of socio-economic rights in the SADC region. The jurisprudential trajectory of the SADC Tribunal in two key cases explored below is commended, and the paper argues that although court proceedings were not instituted as socio-economic rights claims, the findings of the Tribunal indirectly contributed to the protection of socio-economic rights.

Codification in regional instruments

The founding SADC Treaty (1992/1993) does not entrench individual rights and civil liberties. Instead, it binds member states to act in accordance with, among other standards, the principles of human rights, democracy and the rule of law (article 4). Fortunately, the SADC Tribunal has interpreted this principle to mean that it is seized with the jurisdiction to entertain all matters that raise human rights issues. (See *Tembani v Zimbabwe* (SADC T 2009) Case No. SADC 7/2008 and *Mike Campbell (PVT) Limited and Others v The Republic of Zimbabwe* Case No. SADC (T) 11/08.) Further, article 5, which spells out the objectives of SADC, implies the obligation to respect, protect and fulfil social and economic rights. States parties undertake to combat HIV and AIDS and other communicable diseases and to promote sustainable socio-economic development that will ensure poverty alleviation, enhance the standard and quality of people's lives and support the socially disadvantaged through regional integration (article 5(1)(a) and (i)). While these and other objectives do not necessarily create directly enforceable legal obligations, they entrench the aspirational ideals that should inspire the conduct and law of all member states.

Article 6(1) commits states to pursuing the objectives in article 5:

> Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.

Clearly, member states bear not only the positive obligation to promote the achievement of the objectives of SADC, but also the negative obligation to refrain from taking any measure likely to endanger the achievement of these objectives and the sustenance of the principles of human rights, democracy and the rule of law.

Further, several protocols have been adopted pursuant to articles 21 and 22 of the Treaty, which provide respectively for areas of cooperation and for the conclusion of protocols in the areas of cooperation. The SADC Charter on Fundamental Social Rights (Social Charter) is one of the most relevant treaties.

The SADC Charter on Fundamental Social Rights

According to article 3(1), the SADC Social Charter

> embodies the recognition by governments, employers and workers in the Region of the universality and indivisibility of basic human rights proclaimed in instruments such as the United Nations Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, the Constitution of the ILO, the Philadelphia Declaration and other relevant international instruments.

Clearly, all the human rights codified in these instruments are directly transported to the subregion through this clause. Further, the words 'such as' and 'other relevant international instruments' show that the list of international instruments referred to is by no means intended to be exhaustive. As a result, the rights entrenched in other important instruments such as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights fit within the ambit of article 3(1) of the SADC Social Charter.

While the Social Charter covers the protection and promotion of socio-economic rights in the subregion, its main goal is to govern labour relations between the employer and the employee and to locate the state's role in regulating horizontal employment relationships. (See articles 10(1), 11, 12 and 14.) This limits the Social Charter's potential to empower unemployed persons – who live in extreme poverty – to make rights-based claims against the state and other social actors.

However, article 10(2) of the Social Charter extends the right 'to receive sufficient resources and social assistance' to persons who have been unable to enter or re-enter the labour market and have no means of subsistence. A wide reading of the right 'to receive sufficient resources and

social assistance' would embrace rights of access to food, water, housing, health care services and social security. Unfortunately, there is scant or no subregional jurisprudence on what the right 'to receive *sufficient resources* and social assistance' concretely entails. Hence it is unclear whether this right requires states parties to take reasonable legislative and other measures to realise this right progressively within their available resources or to provide socio-economic goods on demand or to ensure the provision of the bare essentials each poor citizen needs to live a minimally decent life. However, given that every indigent person is entitled to 'receive sufficient resources and social assistance', states parties should at least be obliged to ensure the positive provision of these resources, where available, to everyone in need of them. Where these resources are needed but unavailable, states parties are duty-bound to take positive steps to ensure that 'sufficient resources and social assistance' are provided to those who desperately need them.

Besides the protection and promotion of socio-economic rights in the Social Charter, several subregional protocols have been adopted to address specific and diverse aspects of socio-economic rights in Southern Africa.

SADC Protocol on Education and Training

Under the preamble of this Protocol, which was adopted and signed on 8 September 1997 and entered into force on 31 July 2000, states parties recognise that 'the development of human resources is the [means] for tackling socio-economic problems facing the Region; ... that high literacy and numeracy are the major contributory factors to the achievement of sustainable development; ... [and] that socio-economic and technological research is crucial for sustainable development'. One of the objectives of member states is 'to work towards the reduction and eventual elimination of constraints to better and freer access, by citizens of Member States, to good quality education and training opportunities within the Region' (article 3(f)). This recognises the fact that although member states have an obligation to ensure freer, better and universal access to 'good quality education', real access to 'good quality education' remains a dream for the majority of people in the subregion.

SADC Protocol on Gender and Development

States parties are bound to ensure that children have equal access to education and health care, and are not subjected to any treatment that causes them to develop a negative self-image (article 11(1) (b) and (2)). States parties should ensure that children have access to information, education, services and facilities on sexual and reproductive health and rights (article 11(1)(e)). States parties are required to enact, by 2015, laws that promote equal access to and retention in primary, secondary, tertiary, vocational and non-formal education in accordance with the Protocol on Education and Training and the Millennium Development Goals (article 14(1)).

> States parties should ensure that children have access to information, education, services and facilities on sexual and reproductive health and rights.

Article 8 of this Protocol provides for the right to marry and to establish a family, and embodies the most comprehensive regulation of family relationships at the subregional level; recognising, among other things, the reciprocal rights and responsibilities of spouses towards their children and declaring that the best interests of the child are paramount in all matters concerning children.

This Protocol also governs matters relating to health and HIV/AIDS. Under article 26, states parties undertake to adopt and implement, by 2015, legislative frameworks, policies, programmes and services to enhance gender-sensitive, appropriate and affordable quality health care. States parties are bound to enact legislation that addresses the prevention and treatment of HIV/AIDS and the care and support of those living with or affected by HIV/AIDS (article 27). States parties must, by 2015, (a) develop gender-sensitive strategies to prevent new infections and (b) ensure universal access to HIV and AIDS treatment for those infected by the pandemic.

These and other provisions represent concrete obligations and targets. It is therefore easy to evaluate states parties' compliance or non-compliance with the obligations imposed on them by the Protocol. However, the fact that the required two thirds of member states have not deposited instruments of ratification limits the Protocol's usefulness.

SADC Protocol on Health

The SADC Protocol on Health, which was adopted and signed on 18 August 1999 and entered into force on 14 August 2004, does not expressly recognise individuals' right of access to health care services or to essential medicines. Instead, it bluntly observes in its preamble that a healthy population is a prerequisite for sustainable human development and increased productivity in member states, and that close cooperation in the area of health is essential for the effective control of diseases and for remedying general health concerns in the region.

Article 19 requires states parties to explore and share experience concerning (a) alternative and effective strategies for the mobilisation of sustainable funding for health services, particularly additional sources of revenue, and (b) optimal and efficient mechanisms for the allocation, utilisation and monitoring of health resources. Thus, states parties are obliged to engage others in the process of

searching for additional financial capital to acquire medicines, technology and other resources needed by their citizens. Further, states parties are required to take measures to ensure that the mechanisms used for allocating, utilising and monitoring health resources are efficient, cost-effective and fair.

The right to health in the context of HIV/AIDS

SADC has put a concerted effort into curbing the HIV and AIDS epidemic by adopting the SADC Code on HIV/AIDS and Employment (1997), the SADC Protocol on Health (1999) and the Maseru Declaration on the Fight against HIV/AIDS in the SADC Region (SADC Declaration on HIV/AIDS), adopted in Maseru on 4 July 2003. The region appears to be cognisant of the huge challenges HIV/AIDS and other epidemics pose to sustainable economic, social and human development.

Article 4 of the SADC Declaration on HIV/AIDS lists the ways in which the region should mobilise resources for the health needs of the population. It also reaffirms the sub-region's commitment to implementing the Abuja Declaration, which declares that at least 15% of the states parties' annual budgets should be allocated for the improvement of the health sector. Whether this is actually being done is another issue. It is worth mentioning the Model Law on HIV in Southern Africa, adopted in 2008, which is a guide to legislative efforts on HIV-related issues in the region and is intended to serve as a useful yardstick for legislative review and to inspire further legislative reform.

The model law aims to bring the laws of member states into conformity with international human rights law and to impose on member states specific obligations to provide medicinal and other resources to persons infected and affected by HIV/AIDS. Persons living with or affected by HIV/AIDS have the right to sexual and reproductive health; to family; to access to health care services, including antiretroviral treatment and the management of opportunistic infections; to retirement, insurance and social security; to education, including the allocation of bursaries and scholarships; and to work (sections 18–23). Prisoners living with HIV are entitled to free health care services including antiretroviral therapy and medication for the management of all opportunistic infections (section 31).

States parties must take all relevant measures to provide access to affordable, high-quality antiretroviral therapy and prophylaxis to treat or prevent HIV or opportunistic infections for people living with HIV, including children living with HIV and members of vulnerable and marginalised groups (section 36(10)). To meet the medicinal needs of their populations, member states must, among other things, encourage the local production of medicines. Further, states parties must ensure that post-exposure prophylaxis and treatment of sexually transmitted infections and psychological support are available *without delay and free of charge* for all rape survivors (section 36(2)). All states parties to the model law are bound to ensure that the population is adequately protected against counterfeit medicines and treatments (section 36(4)).

The model law clearly enshrines individual rights and the specific obligations they impose on states parties. The fact that some of the provisions of the law are to be observed on pain of criminal sanctions reflects the commitment and seriousness with which society must respect the individual rights entrenched in it. However, the model law's empirical significance remains to be seen, as it needs to be adopted by national legislatures to acquire the force of law.

Promoting socio-economic rights by the SADC Tribunal: An appraisal

In both the *Campbell* and *Tembani* cases, one of the matters that had to be decided was whether the SADC Tribunal had procedural and subject matter jurisdiction. The applicants in *Campbell* were 78 white farmers whose land had been compulsorily acquired by the Zimbabwean government. In *Tembani*, the applicant was an owner of a farm that he had offered as security to acquire a loan in an agreement in which he agreed to forfeit his right of access to court. When he defaulted repaying the loan, his farm was seized and sold without giving him recourse to any court of law. In both cases, the applicant(s) had not exhausted local remedies, in the sense that they had launched proceedings in the High Court and had chosen not to wait for the outcome of their appeals to the Supreme Court of Zimbabwe. Under the respondent's Constitution, the local courts' competence to entertain matters arising out of the compulsory acquisition of land or sale in execution of a debt had been ousted.

The SADC Tribunal held, in both cases, that it had the jurisdiction to entertain the matter under the principles of human rights, democracy and the rule of law as stated in article 4(c) of the founding SADC Treaty. While these cases were not typical socio-economic rights cases and were not even expressly argued as such, the orders made by the Tribunal in both cases had implications for the protection and promotion of socio-economic rights at the subregional level.

In *Campbell,* the Tribunal found the respondent to be in breach of its obligations under article 4(c) and directed it to take all necessary measures, through its agents, to protect the possession, occupation and ownership of the lands of the applicants. Further, the respondent had to take all appropriate measures to ensure that no action was taken, pursuant to Amendment 17, to evict the applicants from the farms, or interfere with their peaceful residence there. (Amendment 17 is the law under which the respondent had purportedly acquired the applicants' farms compulsorily without paying compensation.) The respondent was also ordered to pay compensation to those who had been evicted from their farms during the compulsory acquisition thereof.

In *Tembani,* the respondent was held to be in breach of its obligations under article 4(c). The sale in execution and subsequent transfer of the applicant's property was held to be illegal and void, and the applicant's title to the property was held to remain valid. The respondent was directed to take all necessary measures to refrain from (i) evicting the

applicant or his family from the property; (ii) interfering with the applicant's use and occupation of the property; and (iii) subjecting the property to any further sale, disposal, transfer, encumbrance or similar limitation of proprietary rights or permitting any other person or body to do so, pending the proper determination of the applicant's debt by an independent and impartial court or tribunal.

The orders made in the two cases have serious implications for states parties' duty to respect, protect and promote their citizens' right of access to adequate housing, water and sanitation. The orders clearly show that states parties cannot take regressive measures in contravention of the Treaty – or, at the very least, cannot violate their obligation to respect not only the right of access to housing, but also the right to a family and to family life. The Tribunal in *Tembani* stated explicitly that in enacting section 16(7)(d) of the Zimbabwean Constitution and section 38 of the country's Agricultural Finance Cooperation Act, which ousted the jurisdiction of the court, the respondent had offended against articles 4(c) and 6(1) of the SADC Treaty. It will be recalled that under article 6(1), states parties are bound 'to refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty'.

Conclusion

The omission of fundamental human rights from the Treaty establishing SADC should not hamper the protection and promotion of socio-economic rights in Southern Africa. First, the SADC Social Charter, through article 3, imports into Southern Africa all fundamental rights enshrined in international human rights instruments. Second, several protocols protect diverse aspects of socio-economic rights. Third, the approach to interpretation emerging from the SADC Tribunal suggests that the terms 'human rights' and 'the rule of law' will be invoked to widen the jurisdiction of the Tribunal to entertain all human rights – including socio-economic rights – issues brought to it by litigants.

However, some factors still hamper the protection of social and economic rights in Southern Africa. While the region has adopted many protocols, the ratification of these protocols has been slow, and this has had the effect of denying citizens the opportunity to claim remedies for breach of their rights. Where ratified, these protocols are implemented slowly, or not at all. Lastly, the comprehensive poverty in most of the countries in the region, the devastating impact of HIV/AIDS, weak economic conditions and the absence of appropriate human resources and proper institutional frameworks further impede the fuller realisation of socio-economic rights in Southern Africa (Olivier and Mpedi, 2009: 60).

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Domestic protection of socio-economic rights

Case studies on the implementation of socio-economic rights in the domestic systems of three West African countries

Deji Adekunle

In this review of the domestic enforcement of socio-economic rights (SERs) in the West African states of Nigeria, Ghana and the Republic of Benin, I examine the constitutional status and justiciability of SERs, judicial enforcement, extra-judicial measures (legislative and executive) and common challenges to implementation.

Benin

Economic, social and cultural rights are covered generally by Title II of the 1990 Constitution. Of note also is article 7 of the Constitution, which incorporates the African Charter on Human and Peoples' Rights as an integral part of the Constitution. This suggests that SERs are enforceable by the courts. However, there is scant evidence of direct application of SERs by domestic courts, suggesting low awareness on the part of courts and magistrates or reticence on the part of agencies. Benin's Constitutional Court has, on the other hand, rendered many decisions on civil and political rights in the Constitution.

There are, however, legislative and executive instruments that have been enacted under article 13 of the Constitution, which provides for free and compulsory schooling up to primary school level. Using such a strategy for implementing this right is addressed in a 2005 education policy paper entitled 'Universal Education by 2015'. In October 2006, the Beninese state declared public primary education free of charge. Support measures have been put

in place to make this decision effective and to promote access to education and schooling for all.

As for the right to health, notwithstanding legislation and policy documents on access to health, high maternal and infant mortality rates are prevalent, as many women and girls have limited access to reproductive health services and antenatal assistance in rural areas.

> Many women and girls have limited access to reproductive health services.

Ghana

Ghanaian law is noteworthy in at least two important respects. The first is the inclusion of some SERs under the scheme of fundamental and directly enforceable rights in Chapter 5 of the 1992 Constitution. In addition, article 33(5) provides for the incorporation of other fundamental rights not specifically mentioned in Chapter 5. Secondly, Chapter 6 of the Constitution characterises some SERs as fundamental objectives and directives for the guidance of government. The question that arises is whether rendering these rights as objectives to be aspired to by the state makes them enforceable. This question has come up in countries with similar provisions in their constitutions. Significantly, however, the Ghanaian Constitution provides tools for monitoring the progress of the state in pursuing these aspirations by authorising the courts to be guided by them in interpreting the Constitution or any law and also by obliging the President of Ghana to issue a report at least once a year on the progressive realisation of these objectives.

The justiciability of the principles in Chapter 6 was settled by the Supreme Court decision in *Ghana Lotto Operators Association and 6 Others v National Lottery Authority* [2007 – 2008] SCGLR 1088, which held that that Chapter 6 principles did not only constitute guidelines for government organs, but were also directly enforceable unless the Constitution provided otherwise. The case concerned the constitutionality of the National Lotto Act 2006, which sought to regulate lotto businesses. The applicants challenged the Act as being *inter alia* in conflict with the right to participate in economic opportunities under article 36 in Chapter 6 of the Constitution. Although the Court found that the applicants had failed to show that the Act had breached the Constitution, it held that a presumption of justiciability applied to Chapter 6 of the Constitution. This was imperative in order to strengthen the legal status of rights in terms of the International Covenant on Economic, Social and Cultural Rights in Ghana and, more importantly, to comply with article 34(1) of the Constitution, which provides that the directive principles should guide the court in the interpretation and application of the Constitution.

Another important institution in Ghana responsible for resolving human rights violations is the Commission on Human Rights and Administrative Justice, which is a quasi-judicial body also serving as an ombudsman and anti-corruption agency.

Nigeria

Economic, social and cultural rights are covered generally by Chapter II of the 1999 Constitution. A separate chapter of the Constitution (Chapter IV) covers civil and political rights. Chapter II is titled 'Fundamental objectives and directive principles of state policy'. Notwithstanding the aspirational form in which the provisions are cast, the Constitution provides expressly that provisions in Chapter II are not justiciable. Judicial authorities have therefore declined to apply or enforce any of the principles in Chapter II directly, save where they are incorporated in legislative or executive action (*Attorney General Ondo State v Attorney General of the Federation* (2002) FWLR 1972), or the action or policy affects a constitutionally guaranteed right.

The African Charter on Human and Peoples' Rights has been domesticated by Nigeria and forms an integral part of national legislation. In *Sanni Abacha v Gani Fawehinm* (2000) 6 NWLR (pt 600) 228, the Supreme Court held that the effect of the domestication of the Charter was to make it binding and enforceable by national courts in the same manner as domestic laws. The import of domesticating the Charter has not been fully appreciated by Nigerian courts, but a high court held that legislation which permitted the continued flaring of gas in Nigeria was inconsistent with the applicant's rights under the Constitution (rights to life and human dignity) and the Charter (rights to a good quality of health and a satisfactory environment). However, the Court did not consider the fact that these rights had been formulated as directive principles and objectives in Chapter II; nor did it expressly consider whether the rights in the Charter could be applied by virtue of the constitutional provisions enjoining legislative measures to implement the principles in the Charter.

Conclusion

Apart from a lack of sufficient resources, other common implementation problems facing West African countries include reluctance or incapacity on the part of victims of abuses to approach the courts; a disparity in SER policies regarding social security, housing and employment between the formal and informal sectors; and poor coordination between federal and state governments of policies or initiatives where concurrent action is required under the Constitution.

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The constitutional protection of socio-economic rights in East Africa

Ben Twinomugisha

Over the years, there has been increased international recognition of the universality, indivisibility and interdependence of civil, social, political and economic rights. This means that the neglect or violation of one right may impact negatively on another.

Most African countries, including those in East Africa, have assumed obligations under human rights treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples' Rights (ACHPR) to respect, protect and fulfil socio-economic rights. The national constitutions of these countries also either explicitly recognise socio-economic rights in a bill of rights or include them in the preamble or in a section on directive principles of state policy (DPSPs).

In spite of this recognition, the violation of civil and political rights continues to attract more attention than that of socio-economic rights, which are the daily concerns of most people, especially the poor and disadvantaged groups of society. Like most of sub-Saharan Africa, East African countries have experienced the socio-economic challenges of poverty, such as environmental degradation and inadequate access to health care, education, housing, and social security. There are also the related challenges of gender inequality and homophobia, which are largely experienced by women and sexual minorities.

It should be noted at the outset that, within the domestic context, socio-economic rights can be given effect to 'by all appropriate means' in order to ensure governmental accountability (Committee on Economic, Social and Cultural Rights, General Comment 9: The domestic application of the Covenant, UN doc. E/C.12/1998/24). This may be achieved through constitutional protection, legislative promotion and/or judicial enforcement. Thus East African countries are obliged to use all means at their disposal to ensure the protection and realisation of socio-economic rights. This contribution will particularly focus on the constitutional protection of socio-economic rights in East Africa.

Tanzania

Aside from the right to work, which is expressly recognised in the Bill of Rights of the Constitution of Tanzania (article 22), socio-economic rights are outlined in Part II, which deals with DPSPs. The state is enjoined to uphold the principles of social justice and ensure, *inter alia*, that 'the use of national wealth places emphasis on the development of the people and in particular is geared towards the eradication of poverty, ignorance and disease' (article 9(j)). The state is also required to make appropriate social welfare provisions for the sick, elderly and disabled (article 11(1)).

The DPSPs also guarantee every person 'the right to access education' (article 11(2)) and the freedom 'to pursue education in a field of his choice up to the highest level according to his merits and ability' (article 11(2)). Even though all organs of the state, including the legislature, executive and judiciary, are obliged to take cognisance of, observe and apply the DPSPs (article 7(2)), the Constitution renders these objectives and principles non-justiciable. In this respect, the Constitution expressly provides as follows:

> The provisions of this Part of this Chapter are not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law or judgment complies with the provisions of this Part of this Chapter (article 7(2)).

It is important to note that the Bill of Rights contains certain provisions that could be applied – by a sufficiently creative court – to protect socio-economic rights. For example, the Constitution guarantees the right to life (article 14) and respect for human dignity (article 12(2)). The Constitution provides as follows: 'Every person has the right to live and to the protection of his life by the society in accordance with the law'. The words 'right to live' may be interpreted to include basic entitlements such as access to food, water, education, shelter and a decent environment.

Kenya

In a referendum earlier this year, Kenyans approved a Constitution with a progressive Bill of Rights that is meant to form 'an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies' (article 19(1)). (The paper by Laibuta on page 20 outlines this process in detail and offers further reflections on the Kenyan case.) It can be argued that this provision obliges those making and implementing policy in Kenya to be guided by a rights-based approach in the development of socio-economic policy frameworks. The Bill of Rights explicitly recognises most of the socio-economic rights contained in the ICESCR and other relevant international instruments. According to the Constitution, every person has the right 'to the highest standard of health, which includes the right to health services, including reproductive health care' (article 43(1)(a)). The Constitution also guarantees every person the right 'to accessible and adequate

> The Constitution also guarantees every person the right to a clean and healthy environment.

housing, and to reasonable standards of sanitation' (article 43(1)(c)) and 'to be free from hunger, and to have adequate food of acceptable quality' (article 43(1)(c)). Other rights are those 'to clean and safe water in adequate quantities' (article 43(1)(d)), to social security (article 43(1)(e)) and to education (article 43 (1)(f)). The Constitution provides that 'no person shall be denied emergency medical treatment' (article 43(2)).

The Constitution builds on the jurisprudence of the Committee on Economic, Social and Cultural Rights (CESCR) and provides that where the state claims that it does not have the resources to implement any of these socio-economic rights outlined in article 43, the onus is on it to prove that the resources are not available (article 20(5)(a)). The state has to show that in allocating resources, it has given priority to ensuring the widest possible enjoyment of a socio-economic right 'having regard to prevailing circumstances, including the vulnerability of particular groups or individuals' (article 20(5)(b)). However, the court 'may not interfere with a decision by a state organ concerning the allocation of resources, solely on the basis that it would have reached a different decision' (article 20 (5)(c)).

The Constitution enjoins the state to put in place affirmative action programmes for the purpose of ensuring minorities and marginalised groups, *inter alia*, participation in government interventions; special opportunities in educational and economic fields; access to employment; and reasonable access to water, health services and infrastructure (article 56(a)–(e)). The Constitution also guarantees every person the right to a clean and healthy environment (article 42). A person who alleges that this right 'has been, is being or is likely to be, denied, violated, infringed or threatened' may apply to a court for redress (article 70(1)). The court may order or give directions

(a) to prevent, stop or discontinue any act or omission that is harmful to the environment;
(b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
(c) to provide compensation for any victim of a violation of the right to a clean and healthy environment (article 70 (2)).

Where an applicant alleges violation of this right, he/she 'does not have to demonstrate that any person has incurred loss or suffered injury' (article 70(3)). It is important to note that the Constitution here tackles the question of *locus standi* and introduces the concept of public interest litigation. A person is thus not required to have a personal interest or injury before lodging an application or petition alleging a violation of other people's rights (article 22(2)(a)–(d))

Previously, courts in Kenya adopted a rather restrictive approach to standing in matters of environmental law. For example, in *Wangari Maathai v The Kenya Times Media Trust* ([1989] KLR 267), the Court held that the applicant had no standing because she had not alleged that 'the defendant company [was] in breach of any rights, public or private in relation to the plaintiff nor [had] the company caused damage to her'. However, in *Rodgers Muema Nzioka and Others v Tiomin Kenya Ltd* (Mombasa High Court, Civil Suit No. 97 of 2001), the Court held that where a person sought to vindicate his or her right to a clean and healthy environment, he/she did not need to demonstrate a right or interest in the land alleged to have been invaded.

It should be noted that the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights require states parties to the ICESCR to provide effective remedies against the violation of economic, social and cultural rights. To this end, the Kenyan Constitution provides for a number of remedies, including declaratory orders, injunctions and compensation. In addition to these remedies, a person who alleges that his/her right to a clean and healthy environment has been or is likely to be denied, violated or threatened may apply to the court for orders or directions 'to prevent, stop or discontinue any act or omission that is harmful to the environment' (article 70(2)). The applicant may also ask the court 'to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment' (article 70(2)(b) and 'to provide compensation for any victim of a violation of the right to a clean and healthy environment' (article 70(2)(c)).

Rwanda

The Constitution of the Republic of Rwanda guarantees human dignity and personal freedom and provides that the human being shall be sacred (article 12) and all citizens shall be equal before the law without any discrimination (article 16). The family shall be protected (article 24) and marriage must be monogamous (article 25). The Constitution guarantees 'the liberty of teaching' (article 26), and primary education is mandatory and free (article 27). The Constitution also guarantees every person the right to work, to freely choose his/her work, to have equitable and satisfying working conditions (article 30) and to form and join trade unions (article 31).

Uganda

The Ugandan Constitution provides for the majority of socio-economic rights, which 'shall guide all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promo-

> The state has a number of obligations in respect to the right to adequate food.

tion of a just, free and democratic society'. According to the Constitution, the state shall endeavour to ensure that 'all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits'. The state is enjoined to take all practical measures to 'ensure the provision of basic medical services to the population' and to 'promote a good water system at all levels'.

The state has a number of obligations in respect to the right to adequate food. It shall 'take appropriate measures to encourage people to grow and store adequate food'. The state is also enjoined to establish national food reserves and 'encourage and promote proper nutrition through mass education and other appropriate means in order to build a healthy State'.

Socio-economic rights explicitly recognised in the Bill of Rights are the right to education (article 30), women's rights (article 33), children's rights (article 34), rights of persons with disabilities (article 35), minority rights (article 36), the right to a clean and healthy environment (article 39), protection from deprivation of property (article 26) and economic rights (article 40).

According to the Constitution, any person who claims that any constitutional right or freedom 'has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation' (article 50(1)). The Constitution has relaxed the rules of standing and permits any person or organisation to 'bring an action against the violation of another person's or group's human rights' (article 50(3)). For example, in *The Environmental Action Network Ltd v Attorney General and NEMA* (Misc. Application No. 39 of 2001), the applicant, a public interest litigation group, filed the application in its own behalf and on behalf of non-smoking members of the public under article 50(2) of the Constitution, to protect their right to a clean and healthy environment, their right to life and the general good of public health in Uganda. The state attorney raised a preliminary objection that the applicant could not claim to represent the Ugandan public. The judge held that an organisation could bring a public interest action on behalf of groups or individual members of the public although the applying organisation has no direct individual interest in the infringing acts it seeks to have addressed.

Like elsewhere in East Africa, the adjudication of cases in the area of socio-economic rights has been inadequate. However, in *Dimanche v Makerere University* (Constitutional Case No. 1 of 2003), the Constitutional Court considered aspects of the right to education. The petition was brought by Seventh-Day Adventist students of Makerere University who alleged that by conducting lectures and examinations on Saturday (their Sabbath), the university had violated their right to education. The Court held that the respondent was a secular university whose policy did not prohibit the petitioners from practising or participating in any religious activities, and that their right to education had not been violated. It should be noted, however, that the Court did not elaborate on the nature and content of the right to education, partly because the petitioners' advocates did not address the court on what the right entailed.

The Uganda Human Rights Commission, which is a constitutional quasi-judicial organ, has also considered a number of cases with a bearing on socio-economic rights. For example, in *Kalyango Mutesasira and Others v Kunsa Kiwanuka and 3 Others* (Complaint UHRC 501/2001), the complainants alleged a failure to pay their pensions and sought the enforcement of the payment. It was held that there had been a violation of the complainants' rights to property and social security.

Conclusion

There are many constitutional opportunities through which the East African states can be held accountable for violations of socio-economic rights. Because of the interdependence and indivisibility of rights, the courts in countries where socio-economic rights are not entrenched in a bill of rights can import notions of these rights into the meaning of civil and political rights protected under the various constitutions. Courts can also invoke the provisions of international human rights law. The Ugandan Constitution recognises those rights and freedoms, which are not explicitly recognised under Uganda's Bill of Rights (article 45). It can thus be argued that socio-economic rights that are contained in international instruments to which Uganda is a party are implicitly recognised by that country's Constitution. The Kenyan Constitution also expressly provides that the general rules of international law are applicable in Kenya.

Courts can also draw guidance from national case law in other jurisdictions that have adjudicated on socio-economic rights. Courts should also devise ways of rendering DPSPs justiciable. However, there is a need for concerted efforts by civil society organisations and public-spirited individuals to bring actions to court and quasi-judicial bodies such as human rights commissions challenging violations of socio-economic rights by the state and non-state actors.

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Socio-economic rights in Kenya's new Constitution

First steps to the future

Mugambi Laibuta

Agitation for institutional and constitutional change in Kenya has being going on for well over 60 years. In the 1950s this came from the Mau Mau, who fought the colonial British administration. In the early 1960s, the political elite went on to the Lancaster House talks in London that produced the independence Constitution in 1963. Since then, numerous amendments have been made to the Constitution, most of them aimed at marshalling power.

The 1963 Constitution was a federal one that included a Bill of Rights specifically providing for civil and political rights. The 1964 constitutional amendment made Kenya a republic. Kenya became a de facto one-party state in 1969 and, in 1982, a de jure one-party state. Multiparty politics was introduced in 1991.

In 1997, constitutional amendments put forward by the Inter-Parliamentary Party Group (IPPG) radically reformed the electoral laws to ensure greater integrity in the electoral processes. In 2005, a referendum was held on a proposed draft constitution, but the draft was rejected by the electorate. Following the botched 2007 general election and the violence that ensued, consultative negotiations between the political protagonists gave birth to the Agenda Four reforms. Among the long-term solutions proposed were constitutional and institutional reforms. Through the Constitution of Kenya Review Act No. 9 of 2008, a comprehensive constitutional review process was born, which ultimately resulted in a new constitution.

The clamour for constitutional change arose mainly from a desire to do away with the dictatorial impunity that had prevailed since independence, and had occasioned tribal clashes, corruption, poverty, a lack of democratic space and the infringement of basic human rights.

Socio-economic rights before 2010

Efforts have been made over the years to enhance socio-economic rights in Kenya. These have come in the form of international instruments, regional law, legislative pronouncements, the decentralisation of resources and policy. Kenya is a state party to the International Convention on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the African Charter on Human and Peoples' Rights. Notwithstanding these commitments, Kenya did not constitutionalise socio-economic rights until 2010. I discuss below the various initiatives undertaken to enforce the largely non-justiciable socio-economic rights.

Constituency Development Fund

The fund was established in 2003 by the Constituency Development Fund Act (Gazette Supplement No. 107 (Act No. 11) of 9 January 2004). The Act was aimed at correcting imbalances that had been occasioned by oppressive regimes tethering socio-economic development to political loyalty. Now 2.5% of the national budget is allocated annually to the fund, and then transferred to constituencies.

The fund has been used to develop infrastructure and improve basic social services like health, education, access to clean water and the preservation of the environment. However, just as was the case with previous financing mechanisms, this fund has been plagued with allegations of corruption, fraud, nepotism, poor planning in the selection of projects, and problems in monitoring and oversight. In general, it suffers from a lack of accountability, as there is no regulatory framework governing the allocation of these funds, nor are there standardised criteria for financial or performance reporting on their use.

Vision 2030

The Vision 2030 blueprint was developed with the aim of transforming Kenya into a middle-income state. The blueprint is based on three pillars: economic, social and political. Socio-economic rights fall under the social pillar, which seeks to ensure a just and cohesive society enjoying equitable social development in a clean and secure environment. Socio-economic rights highlighted include education and training, health care delivery, water and sanitation, environmental management, housing and urbanisation, social equity and poverty reduction.

The new Constitution

During the recently concluded constitutional review process under the auspices of the Constitution of Kenya Review Act, 2008, there was much agitation for the inclusion and protection of socio-economic rights in the new constitution. This was with a view to ensuring that Kenya met its international obligations whilst also improving standards of living for its citizens.

The constitutionalisation of socio-economic rights is fashioned under article 43 of the new Constitution, which provides that:

> (1) Every person has the right —
> (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
> (b) to accessible and adequate housing, and to reasonable standards of sanitation;
> (c) to be free from hunger, and to have adequate food of acceptable quality;

(d) to clean and safe water in adequate quantities;
(e) to social security; and
(f) to education.

(2) A person shall not be denied emergency medical treatment.

(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.

The drafters of the Constitution realised that socio-economic rights needed to be progressive, and to that end drafted article 21(2), which provides that the state 'shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43'.

Article 20(5) emphasises the need for the state to demonstrate greater commitment to constitutional rights via the allocation of resources for their implementation. It provides that if the state claims that it does not have the resources to implement an article 43 right, a court, tribunal or other authority shall be guided by the following principles:

(a) it is the responsibility of the State to show that the resources are not available;
(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
(c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

A significant provision here is article 22 of the Constitution, which makes it easier to institute public interest litigation by reducing the burden of strict court procedures. With this provision in place, the main challenge is enforcement. It is of great importance for the Kenyan populace and the state to understand the implications of having justiciable socio-economic rights. During the drafting process, the state seemed to show less enthusiasm towards easily enforceable socio-economic rights by putting forward the idea of progressive realisation (which was later cured by article 43). Furthermore, different levels of the state have different functions and powers, as enumerated in the Fourth Schedule of the Constitution. The onus is on both national and county governments to ensure the full realisation of socio-economic rights.

The matter of adequate resources being channelled towards socio-economic rights is covered by provisions that ensure an equitable distribution of resources (article 202). An equalisation fund has been established to enable the national government 'to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible' (article 204(2)).

> The new Constitution realises a separation of powers, while demanding greater accountability for state officers.

The judiciary

The role of the judiciary cannot be gainsaid. The new Constitution realises a separation of powers, while demanding greater accountability for state officers (Chapter 6: Leadership and integrity). The independence of the judiciary is guaranteed, to some extent, through a more inclusive appointment process. The jurisprudence that will come from the courts will be crucial in enforcing the rights. What remains to be seen is what kind of judiciary the new constitutional dispensation will produce. The Sixth Schedule provides for the rigorous vetting of the current judiciary, a process that may result in the removal and reappointment of judges, or the appointment of new judicial officers. What has to be ensured is that the persons appointed or reappointed are progressive enough to protect the enforcement of socio-economic rights.

Recourse to international tribunals

With international law forming part of the Kenyan law, international tribunals will offer appropriate recourse for aggrieved persons who have exhausted the local remedies available. Articles 2(5) and (6) provide as follows:

(5) The general rules of international law shall form part of the law of Kenya.
(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

Conclusion

Kenya's new constitutional dispensation has provided the impetus towards a new socio-economic rights order. Though the provisions cannot be seen as instant solutions, they do oblige the state to ensure the protection and enforcement of socio-economic rights. The debate is at an early stage in the case of Kenya, but time will eventually reveal how these core rights are enhanced.

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Agenda Four reforms: www.dialoguekenya.org/docs/S_of_P_with_Matrix.pdf

Vision 2030: www.youthagenda.org/pdf/VISION_2030.pdf

The protection and enforcement of socio-economic rights in lusophone countries in Africa

Challenges in Angola, Cape Verde and Mozambique

Aquinaldo Mandlate

The debate regarding the implementation of socio-economic rights in national jurisdictions is growing. At the international level, states parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) are required to take steps to achieve the progressive realisation of these rights. At the regional level, states parties to the African Charter on Human and Peoples' Rights (African Charter) have to adopt measures to implement the rights contained in the Charter. These include the right to work, the right to health and the right to education (articles 1, 15, 16 and 17).

Many other global and regional human rights instruments place obligations on states to protect and advance socio-economic rights. However, the effective implementation of socio-economic rights requires states to recognise these rights as justiciable or enforceable at the national level (Brand and Heyns, 2005: 3; Chenwi and Hardowar, 2010: 3–4; Mubangizi, 2007).

This contribution explores the extent to which three lusophone countries in Africa – Angola, Cape Verde and Mozambique – have incorporated socio-economic rights into their constitutions. It also seeks to enumerate the challenges facing the realisation or enforcement of these rights. An important point to note is that these countries have all ratified the ICESCR and the African Charter, save for Mozambique, which has not ratified the ICESCR. In particular, three issues are discussed: (1) the constitutional entrenchment of the rights in question; (2) the judicial enforcement of socio-economic rights; and (3) challenges facing the enforcement of the rights in the selected jurisdictions. The significant steps taken by South Africa towards the promotion and protection of socio-economic rights can be used as lessons to further the implementation of socio-economic rights in the case study countries.

Constitutional entrenchment

Angola, Cape Verde and Mozambique, former colonies of Portugal, all gained independence in 1975. They belong to a tradition of civil law that does not oblige courts to follow precedents arising from previous decisions. Upon independence, their legal systems inherited certain colonial laws aimed at preserving political power and controlling the economy. The first postcolonial constitutions were more concerned with granting minimal civil liberties than advancing socio-economic rights, and most constitutions prior to the 1990s did not guarantee economic, social and cultural rights (Chirwa, 2001). However, on the brink of independence, Angola and Mozambique had included a few provisions in their constitutions relating to socio-economic rights. While the right to work and to education featured in the 1975 Mozambican Constitution (articles 29, 31, and 32), the 1975 Angolan Constitution entrenched provisions that dealt with the right to medical health care (Chirwa, 2001: 9).

As was the case in most African countries, the desire to include socio-economic rights in the constitutions of Angola, Cape Verde and Mozambique gained momentum in the 1990s. In most cases, the ratification of, or intention to ratify, the ICESCR motivated the entrenchment of these rights. By the 1990s, Cape Verde, Mozambique, and São Tomé and Príncipe had elaborate constitutions setting out economic and social rights (Chirwa, 2001: 9). The 1992 Constitution of Cape Verde included the right to work (articles 58–64), to health, to housing and to a healthy environment (articles 65–72), and to education (articles 73–78). The 1990 Constitution of Mozambique entrenched the right to work (articles 88–91), to education (article 93), and to medical and health care (article 94). Although Mozambique had not ratified the ICESCR by 1990, the inclusion of socio-economic rights in its 1990 Constitution was influenced by the provisions in the treaty.

The countries under study have each had at least two constitutions or have amended their constitutions more than once. Thus far, Angola has enacted three constitutions: in 1975, 1992 and most recently in 2010. Mozambique has also had three constitutions, enacted in 1975, 1990 and 2004. Cape Verde has only had two, enacted in 1975 and 1999, with amendments introduced in 1980 and 1992. These constitutional reviews tended to include more socio-economic rights.

At present, all of the constitutions of these countries include either a title, section or chapter on economic, social and cultural rights, with far more elaborate provisions than the previous constitutions (Viljoen, 2007: 573). In all cases, socio-economic rights are justiciable and are given the same protection as civil and political rights. Also, citizens have a right of recourse to courts against acts that breach their constitutionally protected rights and legitimate in-

> The new Constitution realises a separation of powers, while demanding greater accountability for state officers.

terests. (See article 62(1) of 2004 Constitution of Mozambique and article 43 of 1992 Constitution of Angola.) In Mozambique, public interest litigation can be brought to courts in line with article 81, which permits *acção popular*, or popular action.

Notably, the constitutions of Angola, Cape Verde and Mozambique have some limitation or clawback clauses, which limit the enjoyment of socio-economic rights (Viljoen, 2007). For example, article 89 of the 2004 Constitution of Mozambique states: 'All citizens have the right to medical and health care, within the terms of the law.' This reinforces the idea that constitutionally entrenched socio-economic rights require enabling legislation to give effect to them (Nhampossa, 2009). However, it can be argued that where such enabling laws have not been enacted, socio-economic rights are still justiciable, provided they are constitutionally entrenched in the country's bill of rights. Furthermore, the absence of enabling laws could be seen as amounting to a violation of constitutionally protected rights. Where enabling laws have been enacted, their contents must be in line with the constitution and with the international norms that inspire the constitution. Despite these legislative complications, it is important to note that the constitutions of Angola, Mozambique and Cape Verde directly protect socio-economic rights (Chirwa, 2001: 7). The primary concern, in fact, relates to the practical enforcement of socio-economic rights.

Judicial enforcement

In other jurisdictions, courts have been commended for the role they play in promoting and protecting human rights in general, and in particular socio-economic rights. In South Africa, for example, courts have been applauded for engaging in socio-economic rights adjudication and for playing a key role in interpreting socio-economic rights provisions in the Constitution and other legislation (Mubangizi, 2007).

In lusophone countries, however, courts have not yet adjudicated socio-economic rights. In Angola, for instance, there is concern that no courts have applied the provisions of the ICESCR (Committee on Economic, Social and Cultural Rights, UN doc. E/C.12/AGO/CO/3(2008), para 9). The situation in Cape Verde and in Mozambique is no different. The courts in these countries have not adjudicated any cases involving socio-economic rights. Besides the fact that cases are not reported, they are often dealt with on the level of administrative courts, which address complaints related to the conduct of public authorities. These courts do not adopt a rights-based approach, even in matters involving socio-economic rights. There are many other reasons for the undermining of socio-economic rights adjudication by courts, including lack of knowledge and a poor understanding of human rights law among lawyers and magistrates as is discussed below.

It is extremely important to bring cases before the courts, even when the remedy sought may not be granted, as it helps to educate the citizenry and raise public awareness of the instruments protecting and advancing socio-economic rights.

Challenges affecting the enforcement of socio-economic rights

As stated above, one of the factors that affect the protection of socio-economic rights in the selected countries is the lack of interest in taking a rights approach to cases that involve socio-economic rights. The lack of knowledge and understanding of human rights law among lawyers, judges and magistrates is a challenge facing the enforcement of socio-economic rights. Limited financial capacity is also a factor.

Human and financial capacity

The courts lack magistrates with a deep understanding of human rights law. Moreover, the majority of practising lawyers in the three countries have not had adequate human rights training. Generally in these countries, tertiary and legal training institutions relegate human rights education to the back seat. The situation is worsened by a lack of qualified staff to teach relevant courses. (For instance, at some institutions lecturers with only bachelor's degrees pass as 'doctors'.) Post-independence civil wars have also affected the training of staff and the quality of education at universities and other institutions. In June 2010, 610 lawyers were registered with the Mozambican Bar Association, as against a total population of 22.5 million (Timbane, 2010). This figure corresponds to a ratio of one lawyer to 36 885 people. In Angola, there are only 630 registered lawyers for an estimated population of 13 million. Notwithstanding its much smaller population, Cape Verde is in a similar position.

The poverty afflicting these countries also affects the enforcement of socio-economic rights. Most of the literature indicates that socio-economic rights involve complex issues related to the allocation of resources (James, 2007). However, many people cannot afford the legal representation fees required to litigate complicated matters. Furthermore, the free legal aid bodies established in these countries lack skilled staff to litigate socio-economic rights cases.

> Where the provisions of constitutions are not clear, they can be interpreted in accordance with relevant ratified international law.

Corruption

Corruption and the mismanagement of public funds also undermine the effective implementation of socio-economic rights (Mubangizi, 2007:12–13; Nhampossa, 2009). In the Angolan context, government officials have reportedly misappropriated state funds and spent foreign investment revenues (from the country's oil and diamond reserves) on their own personal interests rather than investing in social welfare. (See CIFP, 2005.) Nhampossa (2009: 29) has pointed out examples of corruption involving senior government officials in Mozambique, including Mozambique's former Minister of the Interior and the former executive director of the Mozambique Airport Company.

Conclusion

Clearly, there is much potential for advancing socio-economic rights in lusophone countries, and in particular Cape Verde, Angola and Mozambique, which have incorporated justiciable socio-economic rights into their constitutions. Where the provisions of constitutions are not clear, they can be interpreted in accordance with relevant ratified international law. It is therefore important for these countries to ratify major international law instruments that set out socio-economic rights. For instance, ratification of the ICESCR and its Optional Protocol would be of great benefit to Mozambique.

These countries must also consider enacting legislation to fill in gaps in their constitutions, which leave an array of loopholes in the protection of socio-economic rights. These include clawback clauses that place conditions on the enjoyment of socio-economic rights.

Further, human rights education and training for magistrates, judges, lawyers and the citizenry is indispensable. People must know what rights they are entitled to and how to protect and advance them. Lessons can be drawn from South Africa and other jurisdictions and applied in Angola, Cape Verde and Mozambique. In this regard, the role played by the South African Constitutional Court is of paramount importance to the courts in lusophone countries. These countries should also address corruption, poverty and other factors that hamper the enjoyment of socio-economic rights.

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Considering sustainability when evaluating the right to water as a scarce natural resource right in the African Charter

Linda Stewart

Many Africans struggle daily to get the minimum amount of water they need for daily household and sanitation use. Africa is the second-driest continent in the world, and water is a scarce and limited natural resource. This is partly because of the uneven distribution of water and the lack of proper management of existing supplies (UN-Water/Africa, 2006: 3–4).

Water can make an immense difference to Africa's development if it is managed well and used wisely. Given clear policies and strategies and real commitments to implementation, we can use water to help eradicate poverty, reduce water-related diseases and achieve sustainable development (UN-Water/Africa, 2006: vi).

Realising the right to water for domestic and sanitation purposes is further complicated by increasing demands and pressure due to competing uses of water for agricultural and industrial production. In South Africa, for example, the main application of water is agriculture, amounting to 60% of the available water resources; industry and manufacturing combined with mining and energy consume over 15%, which leaves less than 25% for the exercise of the right to water and sanitation (Tewari, 2009: 33).

There is no explicit right to water in the African Charter on Human and Peoples' Rights (African Charter). The draft Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter (principles and guidelines) indicate that the right to water and sanitation is implied in the protections on the rights to life, to dignity, to work, to health, to economic, social and cultural development and to a satisfactory environment (para 87). Other rights also closely related to the right to water are the rights to property, housing and food (*Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication No. 155/96). The principles and guidelines therefore make explicit reference to the right to water and sanitation, and the content and obligations in terms of that right, in a separate section (paras 87–92).

The purpose of this paper is to examine the role sustainability should play in the interpretation of a socio-economic right to a scarce natural resource. It will argue that when 'available resources' are measured to establish whether a state party has complied with its obligations in terms of the right to water and sanitation, the process should include the social and environmental availability of the resource, and not only its financial or economical availability. This calls for a holistic approach when states parties plan and implement legislative and other measures to respect, protect and fulfil the right to water and sanitation.

Article 1 of the African Charter requires states parties to adopt legislative or other measures to give effect to the rights in the Charter. Although the African Charter makes no reference to 'available resources', the right to health in article 16 has been read to include an obligation on each state party to 'take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind' (*Purohit and Moore v The Gambia* Communication No. 241/2001, para 84). The principles and guidelines (paras 13–15) accept this interpretation as a confirmation of the limitation of resources and recognise that socio-economic rights are dependent on available resources. In the absence of the African Charter referring explicitly to 'available resources', the meaning and content of this concept are unclear. Similarly, the principles and guidelines give no clear explanation of what constitutes 'available resources'.

It appears as if the concept is used to refer mainly to possible financial or economic measures a state party is obligated to take. The principles and guidelines state, for example, that 'states need sufficient resources to progressively realise economic, social and cultural rights. There are a variety of means through which states may raise these resources, including taxation' (para 15).

The principles and guidelines require, among other things, that state parties should promote the *sustainable* use of water resources (para 92(vi)). 'Sustainability' is described in the Brundtland Report as 'those paths of social, economic and political progress that meet the needs of the present without compromising the ability of future generations to meet their own needs' (WCED, 1987: 52). The Food and Agriculture Organization's *Voluntary guidelines* stress the importance of water as follows:

States should strive to improve access to, and promote the sustainable use of, water resources and their allocation among users giving due regard to efficiency and the satisfaction of basic human needs in an equitable manner and that balances the requirement of preserving or restoring the functioning of ecosystems with domestic, industrial and agricultural needs, including safeguarding drinking-water quality (FAO, 2005: para 8.11).

It is important to note that sustainability comprises three interdependent and mutually reinforcing components, namely environmental sustainability (which requires that natural capital remain intact), social sustainability (which requires that individual needs be met) and economic sustainability (which requires that both environmental and social sustainability be economically feasible) (Herzenberg, 2002: 12; Stewart and Horsten, 2009: 486–505).

The preamble of the principles and guidelines explicitly recognises the commitment of the African Union to pro-

moting the sustainable development of Africa and to the principles of gender equality, democracy, human rights, the rule of law and good governance, and the promotion of social justice to ensure balanced economic development. 'Sustainable development' is a method or policy paradigm to realise human rights in a sustainable manner. It refers to any actions taken to help reach a state of sustainability such as (i) balancing economic growth and social needs with the natural environment; (ii) ensuring that growth in the present does not adversely sacrifice future opportunities; and (iii) applying this approach successfully within a local area and at a global level. Therefore sustainable development (in the context of the sustainable use of limited resources) is perceived as not an end in itself, but a means of realising human rights. Poverty eradication should be placed at the centre of these efforts to achieve sustainable development (UN, 2002).

The United Nations *African water development report* (UN-Water/Africa, 2006: 11) recognises that the general socio-economic development of African countries depends, to a large extent, on the ability of these countries to use their water resources effectively to solve their people's water and sanitation needs. The guidelines for the achievement of this goal are contained in the Africa Water Vision and the Millennium Development Goals, which acknowledge the central and cross-cutting role of water in achieving these targets for a society, with reduced poverty, hunger and preventable diseases, while maintaining environmental sustainability.

In most Millennium Development Goals assessment reports, it is emphasised that water is directly or indirectly crucial to all targets (UN-Water/Africa, 2006: 18). As such, the improvement of access to water supply and sanitation and the harnessing of Africa's water resources for food security are recognised as prerequisites for poverty reduction and sustainable development (UN-Water/Africa, 2006: 18). The essential role of water in socio-economic development requires the appropriate management of water resources to achieve not only environmental, but also economic and social goals for sustainable development.

The reference to 'available resources' in the principles and guidelines should therefore not only include considerations pertaining to the economical viability of the right to water, but also embrace the equitable distribution of the right among the rich and the poor and the carrying capacity of the right as a natural resource. The need to preserve water should, however, not fundamentally compromise the health and well-being of the poor in Africa. In formulating policy, states should therefore not compromise the needs of the poor by adhering only to the needs of their more affluent customers, who can afford to pay and subsequently make unrestricted use of a limited resource. In this context, the obligation to protect the right to water as formulated by the principles and guidelines requires member states

> to take positive measures to ensure that non-state actors such as multi-national companies, corporations, private persons, bodies, armed groups, etc. do not violate economic, social and cultural rights. This includes regulating the commercial and other activities of non-state actors that affect people's access to and equal enjoyment of economic, social and cultural rights. This implies an obligation to monitor their impact on people's access to quality services, and ensuring the effective implementation of relevant legislation and programmes' (para 7).

To conclude, in the context of respecting, protecting and realising the right to water in the African Charter, reference to resources and their availability should not only relate to financial or economical means, but also include environmental and social considerations. These considerations should be incorporated into the national plans of action that states are supposed to formulate as part of their immediate obligation in terms of socio-economic rights. (See paras 16, 17 and 18 of the principles and guidelines.) The considerations should also be employed as part of the suggested reasonableness review when states attempt to justify retrogressive measures (see para 20(a)), or indicate that they took reasonable and measurable steps as part of their obligation to progressively realise the right to water (para 14).

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