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## The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation

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### Abstract

*This article evaluates the extent to which a few selected African countries have incorporated socio-economic rights in their constitutions, the mechanisms through which such rights are realised, the challenges such realisation entails and the approach taken by the courts and other human rights institutions in those countries towards the realisation and enforcement of those rights. The survey examines South Africa, Namibia, Uganda and Ghana. Apart from the logical geographical spread, all these countries enacted their present constitutions around the same time (1990 to 1996) in an attempt to transform themselves into democratic societies. In a sense, these countries can be seen as transitional societies, emerging as they have done, from long periods of apartheid and foreign domination or autocratic dictatorships. The latter is true for Uganda and Ghana while the former refers to South Africa and Namibia. The article concludes that South Africa has not only made the most advanced constitutional provision for socio-economic rights, it has also taken the lead in the judicial enforcement of such rights, an experience from which the other countries in the survey can learn.*

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## I. Introduction

There is growing international recognition of the universality, interdependence and indivisibility of human rights. Indeed the United Nations World Conference on Human Rights held in Vienna in June 1993 emphasised this recognition by proclaiming that '[all] human rights are universal, indivisible and interdependent and interrelated.'<sup>1</sup> What this means is that all human rights should apply to all persons at all times without distinction. It also means that political, economic, social and cultural differences cannot and should not be used as an excuse for the denial or violation of human rights.<sup>2</sup> In the African context, the African Charter on Human and Peoples' Rights<sup>3</sup> places special emphasis on the universality of rights and recognises in its preamble that the 'satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.' Despite such recognition, most challenges to human rights violations in most African countries tend to focus on civil and political rights even though in Africa, as elsewhere, economic and social rights are daily concerns of most people.

Over the last decade and a half, winds of democratic change have been blowing over Africa, ushering in the advent of a new constitutionalism in many countries that embraces the concept of a bill of rights. Accordingly, several African countries have recently enacted constitutions that contain bills of rights which largely protect civil and political rights, but in some form or other, also provided for the protection of certain socio-economic rights.

The purpose of this article is to evaluate, in a comparative way, the extent to which some selected African countries have incorporated socio-economic rights in their constitutions, the mechanisms through which such rights are realised, the challenges such realisation entails and the approaches taken by the courts and other human rights institutions in those countries towards the enforcement of those rights. The countries chosen for this survey are South Africa, Namibia, Uganda and Ghana. Apart from the logical geographical spread, all these countries enacted their current constitutions around the same time (1990 to 1996) in an attempt to transform themselves into democratic societies. In a sense, these countries can all be seen as transitional societies, emerging as they have done, from long periods of apartheid and foreign domination or autocratic dictatorships. The latter is true for Uganda and Ghana while the former refers to South Africa and Namibia. The article will attempt to recommend not only how the protection and realisation of socio-economic rights in the selected countries can be improved and enhanced, but also how these countries can learn from each other in terms of institutional and constitutional mechanisms of protecting the socio-economic rights of their peoples.

## II. South Africa

It is only logical that this discussion begins with the constitutional protection of socio-economic rights in South Africa as the South African Bill of Rights is generally seen as one of the most progressive in the world. This is because it contains all

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<sup>1</sup> 'Vienna Declaration and Programme of Action' (12 July 1993) UN Doc. A/CONF.157/23 art 5

<sup>2</sup> See John Cantius Mubangizi, *The Protection of Human Rights in South Africa: A Legal and Political Guide* (Juta & Co, Cape Town 2004) 4

<sup>3</sup> Also known as the Banjul Charter (adopted 17 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev 5

categories of human rights that are ordinarily included in most international human rights instruments, namely, the so-called first-generation rights (which consist of the traditional civil and political rights) and the rather controversial second and third generation rights (which consist of social, economic and cultural rights). For that reason, many commentators see South Africa as a benchmark in terms of the constitutional protection and judicial enforcement of socio-economic rights.

#### A. The socio-economic rights debate

The constitutional protection of socio-economic rights in South Africa has to be seen in the context of the debate that has often characterised the justiciability of such rights. Although the debate has now effectively come to an end, it is important to note that the inclusion of socio-economic rights in the South African Bill of Rights was not uncontested. Some argued that socio-economic rights were inherently non-justiciable and not suited to judicial enforcement.<sup>4</sup> It was further argued that the protection of such rights should be a task for the legislature and executive and that constitutionalising them would have the inevitable effect of transferring power from these two branches of government to the judiciary, which lacks the democratic legitimacy necessary to make decisions concerning allocation of social and economic resources.<sup>5</sup> Others argued however, that there was no principled objection to the inclusion of socio-economic rights in a justiciable bill of rights and that the vital issue was the extent and nature of their inclusion.<sup>6</sup>

The above arguments were considered in the First Certificate Judgement<sup>7</sup> in which the Constitutional Court held that although socio-economic rights are not universally accepted as fundamental rights, they 'are, at least to some extent justiciable; and at the very minimum can be negatively protected from invasion.'<sup>8</sup> The Court conceded that socio-economic rights might result in courts making orders that have direct budgetary implications, but hastened to point out that the enforcement of certain civil and political rights would often also have such implications.

The other aspect of the socio-economic rights debate revolves around the fact that the protection of such rights is dependent on the availability of resources. And so it is argued that it is meaningless to provide for such rights without the resource capacity to ensure their protection. It is therefore no surprise that the issue of availability of resources has been raised in all cases that have come before the Constitutional Court involving socio-economic rights. A brief discussion of these cases will be attempted further below. Suffice here to say that although the Court initially stuttered in its decision in *Soobramoney v Minister of Health, KwaZulu-Natal*,<sup>9</sup> it was later to redeem itself in the subsequent decisions in *Government of the Republic of South Africa v Grootboom*,<sup>10</sup> *Minister of Health and Others v Treatment*

<sup>4</sup> See J De Waal, I Currie and G Erasmus, *The Bill of Rights Handbook* (4<sup>th</sup> edn Juta & Co Ltd, Kenwyn 2001) 433

<sup>5</sup> Mubangizi (n 2) 119

<sup>6</sup> See G Devenish, *A Commentary on the South African Bill of Rights* (Butterworths, London 1999) 358

<sup>7</sup> Also cited as *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa*, (1996) 1996 (4) SA 744 (CC)

<sup>8</sup> *Ibid* para 78

<sup>9</sup> 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696

<sup>10</sup> 2001 (1) SA 46 (CC)

*Action Campaign and Others*,<sup>11</sup> and *Khosa v Minister of Social Development*.<sup>12</sup> In all these cases the Constitutional Court consistently rejected the State's argument of resource constraints. In so doing the Court has tended to agree with the United Nations Committee on Economic, Social and Cultural Rights which has noted that:

In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>13</sup>

In light of the decisions of and the pronouncements by the Constitutional Court, the socio-economic rights debate in South Africa has therefore now been settled.

### B. Socio-economic rights protected in the South African Constitution

Although the South African Constitution<sup>14</sup> provides for both first-generation rights (civil and political), and the second and third generation rights (socio-economic and cultural), it does not make any differentiation between these rights in terms of their traditional division and categorisation. Nor does it provide for any hierarchy of the rights. Accordingly, the South African Bill of Rights contains a number of socio-economic rights, which appear in no particular order. They include the following:

- Rights dealing with labour relations;<sup>15</sup>
- Environmental rights;<sup>16</sup>
- Property rights;<sup>17</sup>
- The rights of access to adequate housing;<sup>18</sup>
- The rights of access to health care, sufficient food and water;<sup>19</sup>
- The right to social security;<sup>20</sup> and
- The right to basic and on-going education.<sup>21</sup>

The length and scope of this article do not lend themselves to detailed discussion of each of these rights. For our purposes, it is sufficient to note that they have important social and economic ramifications as most of them reflect specific areas of basis needs or delivery of particular goods and services.<sup>22</sup> Furthermore they tend to create entitlements to material conditions of human welfare.<sup>23</sup>

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<sup>11</sup> 2002 (5) SA 703 (CC)

<sup>12</sup> 2004 (6) SA 505 (CC)

<sup>13</sup> See General Comment 3, *The nature of States parties obligations* (Art 2 para 1 of the CESCR) (5<sup>th</sup> Session, 1990)

<sup>14</sup> Act 108 of 1996

<sup>15</sup> *Ibid* s 23

<sup>16</sup> *Ibid* s 24

<sup>17</sup> *Ibid* s 25

<sup>18</sup> *Ibid* s 26

<sup>19</sup> *Ibid* s 27

<sup>20</sup> *Ibid* s 27

<sup>21</sup> *Ibid* s 29

<sup>22</sup> Mubangizi (n 2) 118

<sup>23</sup> See D Brand, 'Introduction to socio-economic rights in the South African constitution' in D Brand and C Heyns (eds), *Socio-economic Rights in South Africa* (Pretoria University Law Press, Pretoria

Briefly, rights dealing with labour relations include the right to fair labour practices; the right to form, join and act together in trade unions; and the right to strike. Clearly these rights are primarily directed at the relationship between employers and employees. Unlike most other social and economic rights, the rights in section 23 are not directed at material state performance such as the provision of facilities and delivery of services, but at a relationship between private parties. As such, section 23 has a direct horizontal effect, unlike other socio-economic rights which mainly have vertical application due to state involvement in the relevant power relationships.

Environmental rights in section 24 comprise two important components. Firstly, under section 24(a), everyone has the right to an environment that is not harmful to their health or well-being. Secondly, section 24(b) places a duty on the state to prevent pollution and other damage to the environment, and to promote conservation and sustainable development. It could be argued that while section 24(b) creates a purely socio-economic right (or third generation right) section 24(a) has the character of both a first-generation and a socio-economic right. This is because section 24(a) creates an individual right like most first-generation rights, whereas section 24(b) belongs to the category of collective rights, which usually impose constitutional imperatives on the state to secure and provide services and other social or economic amenities.<sup>24</sup>

Of all the socio-economic rights in the South African Bill of Rights, sections 26 and 27 are the most significant. Section 26(1) provides for the right of access to adequate housing while section 27(1) provides for the right of access to health care services; sufficient food and water; and social security. The particular significance of these rights is grounded in the fact that they guarantee everyone the right of access not only to important components of an adequate standard of living but also to things that are ordinarily regarded as basic necessities of life. This has to be seen in the context of the preamble to the Constitution, which envisions the adoption of the Constitution as the supreme law of the Republic in order to, *inter alia*, 'improve the quality of life of all citizens and [to] free the potential of each person.'<sup>25</sup>

In so far as property rights are concerned, it is mainly section 25(5) that stands out as a socio-economic right. It requires the state to implement measures aimed at achieving land redistribution, thereby imposing a positive duty on the state to enhance equitable access to land. Mention may also be made of section 29 which provides for everyone's right to basic education and further education. Finally, in addition to the socio-economic rights outlined above, a few other provisions in the Bill of Rights have also been classified as socio-economic rights. These include section 28 providing for children's rights and section 35(2) (e) which guarantees the right of detained persons to be provided with adequate accommodation, nutrition, reading material and medical treatment.<sup>26</sup>

### C. Implementation and enforcement

Section 7(2) of the Constitution enjoins the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights.' The implication here is that the state must not

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<sup>24</sup> Mubangizi (n 2) 128

<sup>25</sup> See S Nadasen, *Public Health Law in South Africa* (Butterworths, Durban 2000) 80. See also Mubangizi (n 2) 132–133

<sup>26</sup> See De Waal et al (n 4) 433 and Brand (n 23) 3

only refrain from interfering with the enjoyment of rights but must act so as to protect, enhance and realise their enjoyment.<sup>27</sup> The state may do this in several ways: through the legislature by enacting the relevant enabling legislation; and through the executive and state administration by adopting the necessary policies and making the appropriate administrative decisions. However, it is mainly through judicial enforcement that the realisation and enjoyment of socio-economic rights takes place, and it is to that aspect that we now turn our attention.

### *Judicial enforcement*

According to Danie Brand, courts can protect socio-economic rights in two ways. Firstly, through their law-making powers of interpreting legislation and developing the rules of the common law, and secondly, by adjudicating constitutional and other challenges to state measures that are intended to advance those rights.<sup>28</sup> Our focus will be on the latter.

Although a significant number of cases involving socio-economic rights have come before the South African courts, particularly the Constitutional Court, the framework within which the judicial enforcement of those rights can be evaluated is mainly provided by four important Constitutional Court decisions. These are: *Soobramoney v Minister of Health, KwaZulu-Natal*,<sup>29</sup> *Government of the Republic of South Africa v Grootboom*,<sup>30</sup> *Minister of Health and Others v Treatment Action Campaign and Others*,<sup>31</sup> and *Khosa v Minister of Social Development*.<sup>32</sup>

*Soobramoney's* case involved an application for an order directing a state hospital to provide the appellant with ongoing dialysis treatment and interdicting the respondent from refusing him admission to the renal unit. The Constitutional Court held that the applicant could not succeed in his claim and found that the denial of the required treatment did not breach the section 27(1) right of everyone to have access to health care services, and the section 27(3) rights to emergency medical treatment. A number of criticisms have been levelled at the judicial reasoning and approach of the Court in this case. In fact several commentators such as Charles Ngwenya and Rebecca Cook have argued that from the standpoint of judicial precedent, *Soobramoney* did not contribute much to the understanding of socio-economic rights, nor did it really 'lay down any guidelines that could be followed when interpreting socio-economic rights so as to illuminate and indigenise jurisprudence on socio-economic rights.'<sup>33</sup>

The other three Constitutional Court decisions (mentioned above) have been hailed as torch-bearers to the judicial enforcement of socio-economic rights. In *Grootboom*, a group of adults and children had been rendered homeless as a result of eviction from their informal dwellings situated on private land earmarked for low cost housing. They applied for an order directing the local government to provide them with temporary shelter, adequate basic nutrition, health care and other social

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<sup>27</sup> See Brand (n 23) 9

<sup>28</sup> Ibid (n 23) 38–39

<sup>29</sup> See n 9

<sup>30</sup> See n 10

<sup>31</sup> See n 11

<sup>32</sup> See n 12

<sup>33</sup> See C Ngwenya and R Cook, 'Rights Concerning Health' in D Brand and C Heyns (eds), *Socio-economic Rights in South Africa* (Pretoria University Law Press, Pretoria 2005) 135 and 137

services. The Constitutional Court held that the state had failed to meet the obligations placed on it by section 26 and declared that the state's housing programme was inconsistent with section 26(1) of the Constitution. In the *Treatment Action Campaign Case* (sometimes referred to as the *Nevirapine case*) the TAC, a non-governmental organisation, in a bid to force government to provide anti-retroviral drugs under the public health care system, specifically demanded that nevirapine, a drug that could reduce by half the rate of HIV transmission from mothers to babies, be freely distributed to women infected with the virus. The Court held that the government's policy and measures to prevent mother-to-child transmission of HIV at birth fell short of compliance with section 27(1) and (2) of the Constitution and ordered the state to provide the required medication and remedy its programme. And in *Khosa*, legislation that excluded permanent residents and their children from access to social assistance was successfully challenged and found to be inconsistent with the section 27(1) right of everyone to have access to social security and assistance and also with the section 9(3) prohibition of unfair discrimination.

There are a few other cases involving socio-economic rights that have come before other courts.<sup>34</sup> Without delving into any detailed discussion of such cases, it is quite clear from the cases discussed above that the courts, particularly the Constitutional Court, can and have played an important role in the judicial enforcement of socio-economic rights in South Africa.

#### *Other mechanism of enforcement*

The protection and enforcement of human rights generally and socio-economic rights particularly are not confined to the legislature, the executive and judiciary. Chapter 9 of the 1996 Constitution establishes certain institutions supporting constitutional democracy.<sup>35</sup> Of these, the Human Rights Commission and the Public Protector are particularly significant in the protection and enforcement of socio-economic rights. The main functions of the Human Rights Commission are laid down in section 184 as follows:

- (a) promote respect for human rights and a culture of human rights;
- (b) promote the protection, development and attainment of human rights; and
- (c) monitor and assess the observance of human rights in the Republic.

In the context of socio-economic rights, section 184(3) is of particular importance. It obliges relevant organs of the State to provide the Human Rights Commission with information, on an annual basis, on the measures that they have taken towards the realisation of socio-economic rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment. The Office of the

<sup>34</sup> These include *B v Minister of Correctional Services* 1997 6 BCLR 789 (C) also cited as *Bav Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C), *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W), *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC), *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) and *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (1) BCLR 78 (CC)

<sup>35</sup> These include the Public Protector; the Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; and the Electoral Commission

Public Protector plays a more indirect but no less important role than the Human Rights Commission. A close look at section 182, which establishes this office, reveals that the functions of the Public Protector are threefold, namely, to investigate any improper conduct in state affairs or public administration, to report such conduct, and to take appropriate remedial action. Arguably, in performing these functions the Public Protector not only curbs human rights abuses resulting from state misconduct and public maladministration but also protects and enforces constitutional rights including socio-economic rights.

### III. Namibia

Among all the countries in this survey, Namibia was the first to enact a constitution containing a Bill of Rights. Chapter 3 (Articles 5 – 25) of the Constitution of the Republic of Namibia is devoted to the protection of fundamental human rights and freedoms. It also addresses the enforcement and the curtailment in exceptional circumstances of such rights. In addition to a Bill of Rights, the Constitution of Namibia contains other elements which enhance fundamental rights and freedoms.<sup>36</sup> Importantly, as with the case of South Africa, the rights in the Namibian Constitution are largely, but not exclusively, derived from the 1948 Universal Declaration of Human rights and other relevant international human rights instruments. In that regard, both traditional civil and political (first generation) rights and the socio-economic (second and third) generation rights are contained in the Namibian Constitution. However, the form and extent to which socio-economic rights are provided for tend to be a source of considerable interest as discussed below.

#### A. Socio-economic rights in the Namibian Constitution

Although the extent to which socio-economic rights are incorporated in the Namibian Bill of Rights is a matter of fact and not of opinion or conjecture, different commentators have expressed divergent views in that regard. According to Gretchen Carpenter:

The rights enumerated in the [Namibian Bill of Rights] are confined to the so-called first-generation or traditional human rights. The second and third generation rights do not feature in the Constitution, but only as principles of state policy (in chapter 11) and not as judicially enforceable rights.<sup>37</sup>

Gino Naldi on the other hand, states as follows:

Chapter 3 of the [Namibian] Constitution is not solely concerned with civil and political rights but also seeks to protect certain economic, cultural and social rights, generally referred to as second generation

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<sup>36</sup> See GJ Naldi, 'Some Reflections on the Namibian Bill of Rights' (1994) *African Journal of International and Comparative Law* 45, 46

<sup>37</sup> See G Carpenter, 'The Namibian Constitution – *ex Africa Aliquid Novi* After All?' in Dawid Hercules van Wyk, Marinus Wiechers and Romaine Hill (eds), *Namibia: Constitutional and International Law Issues* (VerLoren van Themaat Centre for Public Law Studies, University of South Africa, Pretoria 1991) 32



rights in international law, albeit in a somewhat limited and modest fashion.<sup>38</sup>

The fact is that indeed the Namibian Bill of Rights pays very scant attention to socio-economic rights, only confining itself in this regard to children's rights<sup>39</sup> and the rights to education.<sup>40</sup> Property rights<sup>41</sup> might also be included. According to Frederick Fourie, 'the authors of the constitution chose to handle economic [and social] matters outside the rights context and specifically as policy goals.'<sup>42</sup> Accordingly, what would ordinarily be categorised as socio-economic rights are stipulated as policy objectives in Chapter 11 of the Constitution entitled 'Principles of State Policy'. Article 95 in particular requires the state to actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at:

- Ensuring that the health and strength of the workers are not abused;
- Ensuring that citizens are not forced by economic necessity to enter vocations unsuited to their age and strength;
- Actively encouraging the formation of trade unions to protect workers' rights and interests;
- Promoting sound labour relations and fair employment practices;
- Ensuring that every citizen has a right to fair and reasonable access to public facilities and services;
- Ensuring that senior citizens receive pension adequate for the maintenance of a decent standard of living;
- Providing just and affordable social benefits for the unemployed, incapacitated and disadvantaged;
- Ensuring that workers are paid a living wage adequate for the maintenance of a decent standard of living;
- Raising and maintaining an acceptable level of nutrition and improving public health; and
- Maintaining the ecosystems, essential ecological processes and biological diversity, and utilizing living natural resources on a sustainable basis.

Although most of the principles listed in Article 95 constitute the so-called second and third generation rights in international human rights law, they cannot, strictly speaking, be categorised as constitutional rights. Rather, they can be described as policy or societal goals that have no force of law. Accordingly, Article 101 makes it clear that the principles 'shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles.' Article 101 further states that the Courts are only 'entitled to have regard to the said principles in interpreting any laws based on them.'

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<sup>38</sup> See GJ Naldi *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights* (Juta & Co Ltd, Ndabeni, South Africa 1995) 96

<sup>39</sup> Art 15

<sup>40</sup> Art 20

<sup>41</sup> Art 16

<sup>42</sup> See F Fourie, 'The Namibian Constitution and Economic Rights' (1990) 6 *South African Journal on Human Rights* 363, 365

It is clear then, that the only constitutional socio-economic rights in the Namibian Constitution that can be categorised as such are the right to education, and to some extent, children's rights and property rights. In so far as the right to education is concerned, it can be said that the Namibian provision is actually more comprehensive and assertive than its South African counterparts. While section 29 of the South African Bill of Rights only provides for everyone's right to basic education and to further education, section 20 of the Namibian Constitution provides that all persons shall have the right to education<sup>43</sup> and that primary education should be compulsory and free of charge.<sup>44</sup>

In addition to those few socio-economic rights that are explicitly provided for, there are a few other references in the Namibian Bill of Rights that could be interpreted as socio-economic rights. One such reference is contained in Article 21(1)(e) which provides for freedom of association that includes 'freedom to form and join associations or unions, including trade unions ...' In addition, Article 21(1)(f) provides for the right to withhold labour without being exposed to criminal penalties. It is unclear whether these provisions could be interpreted to include the right to strike. Another relevant reference is contained in Article 23(2) which is a qualification to the equality and non-discrimination clause contained in Article 10. It allows for the adoption of legislation and implementation of policies and programmes aimed at redressing social, economic and educational imbalances arising out of past discrimination. The extent to which this may be seen as a socio-economic right may well depend on how far one is prepared to stretch one's imagination.

It should be evident from the above discussion that in comparison, the Constitution of Namibia does not go quite as far as its South African counterpart in protecting socio-economic rights. How this comparison is reflected in the implementation and enforcement mechanisms is what we now turn our attention to.

## B. Implementation and enforcement

As with South Africa, the implementation and enforcement of human rights generally takes place through the legislature by the enactment of the necessary enabling legislation, through the executive and state administration by the adoption of the appropriate policies and through the judiciary by interpreting and making the relevant orders of enforcement. In the context of Namibia, this position is reflected in Article 5 of the Constitution which provides as follows:

'The fundamental rights and freedoms enshrined in this Chapter [3] shall be respected and upheld by the Executive, Legislature and Judiciary ... and shall be enforceable by the Courts ...'

There is no doubt that the courts should and do play a more prominent role in this regard. In the particular context of socio-economic rights however, the Namibian courts are, by virtue of Article 101, precluded from enforcing the principles stipulated in Article 95, which as was seen earlier, are the equivalent of the socio-economic rights contained in the South African Constitution and other international human

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<sup>43</sup> Art 20(1)

<sup>44</sup> Art 20(2)

rights instruments. As a result, there have not been any reported cases in Namibia involving socio-economic rights, apart from a few cases dealing with expropriation of land.<sup>45</sup> The absence of such socio-economic rights jurisprudence is in stark contrast with South Africa. The point needs to be made here that unlike South Africa, Namibia does not have a specialised Constitutional Court. Constitutional matters fall under the jurisdiction of the High Courts with the Supreme Court being the highest court dealing with such matters, an aspect that inevitably has a significant bearing on the nature and extent of constitutional and human rights litigation.

It was seen earlier that the extra-judicial institutional mechanisms for the protection and enforcement of socio-economic rights in South Africa include the Human Rights Commission and the Office of the Public Protector. Namibia does not have such institutions, but instead it has an Ombudsman.<sup>46</sup> The functions of the Ombudsman are set out in Article 91 of the Constitution. It should be noted that the Namibian Ombudsman has extensive powers, and in addition to the examination of the administrative conduct of the government and its organs, the ombudsman has the mandate to investigate complaints of human rights violations by both government officials and private persons or entities. The human rights and fundamental freedoms that can be investigated by the Ombudsman are not only those contained in Chapter 3 but include a variety of civil, political, economic, social and cultural rights.<sup>47</sup>

The role of the Ombudsman in the protection and enforcement of socio-economic rights in Namibia is evident from the volume and nature of complaints that it deals with. In 1998 for example, the Namibian Ombudsman received 1,111 complaints.<sup>48</sup> The largest percentage of those complaints related to unfair dismissals (21%), followed by complaints about remuneration/salaries (13%) and pension funds (12%).<sup>49</sup> These are all issues of a socio-economic nature, indicating therefore, the important role the Ombudsman plays in protecting and enforcing socio-economic rights in Namibia. This role has to be seen in the context of the fact that the role of the Namibian courts in enforcing socio-economic rights is effectively limited by the Constitution.

#### IV. Uganda

Uganda's present constitution was enacted in 1995 after decades of military dictatorships and autocratic excesses mainly characterised by gross violations of human rights. Prior to 1995, Uganda had three constitutions<sup>50</sup> none of which satisfactorily addressed the needs and aspirations of the people in so far as the

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<sup>45</sup> One such case is *Rehoboth Bastergemeete and Another v Government of the Republic of Namibia and Others 1995* (9) BCLR 1158 (NmH) in which the High Court considered the question whether the transfer of land from the Rehoboth – a community which had settled in Namibia during the 19<sup>th</sup> century – amounted to expropriation without compensation. The court held that the facts did not constitute expropriation but rather a transfer of state assets from a tier of government which had ceased to exist.

<sup>46</sup> The office of the Ombudsman is established and provided for under Chapter 10 of the Constitution.

<sup>47</sup> See LC Reif, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard Human Rights Journal* <<http://www.law.harvard.edu/students/orgs/hrj/iss13/reif.shtml>> accessed 12 January 2006

<sup>48</sup> *Ibid*

<sup>49</sup> *Ibid*

<sup>50</sup> The 1962 Independence Constitution and the 1966 and 1967 Constitutions

promotion and protection of human rights were concerned. Interestingly, the 1962 Independence Constitution contained a chapter protecting a number of human rights and freedoms.<sup>51</sup> Due to the political instability pertaining at the time, the 1966 Constitution watered down the Bill of Rights that had originally been included in the 1962 Constitution. This watered-down version was carried over to the 1967 Constitution.

All the three Constitutions mentioned above contained mainly civil and political rights with no mention of socio-economic rights besides the right to property. It has been argued that the right to property was guaranteed because it was considered central to the development of the capitalist economy which was intended to drive the development of post-colonial Uganda.<sup>52</sup> Oloka-Onyango argues that moreover, 'the manner in which property rights were articulated was clearly not intended to cover those most in need of it .... Rather, it was inserted in the Constitution in order to protect the property of the nationals of the departing colonial power and to ensure that in the event of expropriation, prompt and adequate compensation would be guaranteed.'<sup>53</sup>

#### A. Socio-economic rights in the 1995 Constitution

Like its predecessors, the 1995 Constitution of the Republic of Uganda was drafted to include a Bill of Rights. This Bill of Rights is contained in Chapter Four entitled 'Protection of Fundamental and other Human Rights and Freedoms'. As with the Namibian Constitution, the bulk of the rights contained in Chapter 4 of the Ugandan Constitution are mainly civil and political (first generation) rights. These are rights generally included in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Uganda endorsed the UDHR and is a party to the ICCPR.

With respect to socio-economic rights, Uganda's position is similar to that of Namibia and in contrast to that of South Africa. Just like the Namibian Bill of Rights, Chapter 4 of the Ugandan Constitution pays minimal attention to such rights. In spite of Uganda's obligation to the International Covenant on Economic, Social and Cultural Rights (ICESCR) to which it is a party, the only socio-economic rights provided for under the Ugandan Bill of Rights are: protection from deprivation of property,<sup>54</sup> the right to education,<sup>55</sup> the right to work and participate in trade union activity<sup>56</sup> and the right to a clean and healthy environment.<sup>57</sup> Other social and economic rights that should ordinarily be included in the Bill of Rights are laid down in the preamble to the Constitution under a section entitled 'National Objectives and Directive Principles of State Policy'. This section contains a set of objectives and principles intended to guide all organs of the state and non-state actors 'in applying or interpreting the constitution or any other law and in taking and implementing any

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<sup>51</sup> Ch 3

<sup>52</sup> See J Oloka-Onyango, 'Economic and Social Human Rights in the Aftermath of Uganda's Fourth Constitution' (Working Paper No 88/2004, Centre for Basic Research, Kampala) 11

<sup>53</sup> Ibid 10

<sup>54</sup> Art 26

<sup>55</sup> Art 30

<sup>56</sup> Art 40

<sup>57</sup> Art 39

policy decisions for the establishment and promotion of a just, free and democratic society.<sup>58</sup>

Although the National Objectives deal with many and varied aspects, with respect to socio-economic rights, the following are specifically provided for:

- protection of the aged;
- provision of adequate resources for the various organs of government;
- prioritising the right to development;
- recognition of the rights of persons with disabilities;
- promotion of free and compulsory basic education;
- ensuring the provision of basic medical services;
- promotion of a good water management system; and
- encouraging and promoting proper nutrition and food security.

In a nutshell therefore, the rights to health, water, food, natural resources, education and, arguably, development are covered in this section of the preamble. Although the enforcement and implementation of socio-economic rights in the Ugandan Constitution will be discussed further below, the presence of most of these rights in the preamble puts their justiciability in doubt. Fortunately, a few of them are also set forth in the body of the Constitution where their justiciability is more certain.<sup>59</sup>

#### B. Implementation and enforcement

Just as in South Africa and Namibia, both the legislature and executive in Uganda play an important role in the legislative and administrative enforcement of human rights generally. With regards to judicial enforcement, the role of the Ugandan courts has been less than adequate. As with Namibia, this might well be attributed to the absence of a specialised Constitutional Court to deal exclusively with constitutional and human rights litigation. Although Article 137(1) of the Constitution provides that ‘any question as to the interpretation of the Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court’, it is submitted that this rather unique phenomenon of the Appeal Court doubling up as a Constitutional Court limits the traditional role of the Constitutional Court in the enforcement of human rights.

As a result, since the enactment of the 1995 Constitution, very few cases involving socio-economic rights have come before the Ugandan courts, and even then the judgements in some of those cases have left a lot to be desired. In *Byabazaire Grace v Mukwano Industries*<sup>60</sup> for example, the court surprisingly stated that before the totality of the right to a healthy environment could be determined, the National Environment Management Authority had to establish air quality standards. However, in *Joseph Eryau v Environmental Action Network*,<sup>61</sup> Justice Ntagoba declared that smoking in a public place constituted a violation of

<sup>58</sup> See preamble to the Constitution (National Objectives and Directive Principles of State Policy).

<sup>59</sup> See L Sewanyana and T Awori, ‘Uganda: The Long and Uncertain Road to Democracy’ in Abd Allah Ahmed Naim (ed), *Human Rights Under African Constitutions* (University of Pennsylvania Press, Philadelphia 2003) 390

<sup>60</sup> Miscellaneous Application No 909 of 2000

<sup>61</sup> Miscellaneous Application No 39 of 2001

the rights of non-smokers thereby denying them the right to a clear and healthy environment in terms of Article 39 of the 1995 Constitution.

In *Dimanche Sharon v Makerere University*,<sup>62</sup> the Court was called upon to consider certain aspects of the right to education. The case concerned a claim by Seventh Day Adventist students that the University was violating their rights by holding classes and conducting other academic activities on Saturday (their Sabbath). Lady Justice Kikinyogo held that the respondent's policy did not prohibit the petitioners from practicing or participating in any religious activities and that their right to education had not been violated. Unfortunately, the Court did not elaborate on what the right to education entailed and an opportunity was lost for the Court to give content to a right that is couched in rather broad and general terms in the Constitution.

In terms of judicial precedent, the above decisions are not at all helpful in the interpretation and enforcement of socio-economic rights in the Ugandan Constitution. This goes to show the dearth of socio-economic rights litigation and the lack of judicial powers in enforcing such rights in Uganda, as opposed to South Africa where, as we saw earlier, the Constitutional Court has been more innovative and assertive in that regard.

Apart from judicial enforcement as exercised by the courts, there are other institutional mechanisms for the enforcement of human rights under the Ugandan Constitution. As with South Africa, Uganda has certain constitutional institutions that play an important role in that regard. These include the Uganda Human Rights Commission, the Office of the Inspector-General of Government, the Electoral Commission and the National Planning Authority. In the context of the enforcement of socio-economic rights, the Uganda Human Rights Commission is the most important.

Established under Article 51(1) of the Constitution, the Commission effectively began its operation in 1997. The functions of the Commission are spelt out under Article 51(2) to include, *inter alia*:

- Investigating complaints relating to violations of human rights;
- Establishing a continuing programme of research, education, and information to enhance respect for human rights;
- Recommending to Parliament effective measures to promote human rights;
- Creating and sustaining within society, awareness of the constitution and the law of the country;
- Educating and encouraging the public to defend the constitution against all forms of abuse and violation; and
- Monitoring the Government's compliance with international treaty and convention obligations on human rights.

It is significant to note that over and above these functions, the Commission has the powers of a Court and indeed since its inception, it has exercised those judicial powers by making decisions regarding claims of human rights violations.<sup>63</sup> In the particular context of socio-economic rights, a couple of decisions may help to illustrate the approach of the Commission. In *Emmanuel Mpondi v The Chairman*,

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<sup>62</sup> Constitutional Cause No 01 of 2003

<sup>63</sup> See Oloka-Onyangou (n 52) 39

*Board of Governors, Ngwana High School and Others*,<sup>64</sup> the Commission dealt with the right to education. Mpondi, a student at the respondent's school had been severely punished by two teachers. After hospitalization and treatment, he returned to school only to be sent back home to collect school fees. His sponsors however refused to pay the fees until the school administration had either punished the teachers, or clearly indicated the specific action that would be taken against them. As a result, Mpondi was forced to leave school for good. In dealing with the issue of his right to education, the Commission held that the claimant's education had been interfered with and, on a balance of probabilities, his right to education had been violated by the respondents.

In *Kalyango Mutesasira v Kunsu Kiwanuka and Others*,<sup>65</sup> the Commission dealt with a claim against the Government for the payment of pensions. The Commission took the opportunity to outline the legal basis on which it derived its powers to investigate human rights violations and to award remedies in the event of a violation. The Commission went on to hold that a person who qualified for pension could claim it as a right. The refusal, neglect or delay in the payment of pensions was therefore a human rights violation. This decision has to be seen in the context of the fact that the Constitution does not categorically provide for the right to social security. It goes to show, therefore, that the Uganda Human Rights Commission is more innovative and assertive than the courts in the enforcement of socio-economic rights, even going beyond those rights contained in the Constitution. In so far as the protection and enforcement of socio-economic rights are concerned, the Uganda Human Rights Commission compares favourably with the South African Human Rights Commission and the Namibian Ombudsman.

## V. Ghana

The political and constitutional history of Ghana is almost similar to that of Uganda. Both countries were colonies of the British Empire, and after independence, both countries went through periods of military dictatorships and autocratic regimes (though Ghana did not suffer the indignity of two devastating wars like Uganda did). Those periods were characterised by gross violations of human rights. Another important similarity is that although the present Ghanaian government under John Kuffour and the present Ugandan government under Yoweri Museveni have generally been regarded in international circles as acceptable, human rights abuses still abound in both countries. The other similarity, as mentioned earlier, is that in the early 1990s both countries enacted new constitutions in an effort to democratise their societies. Ghana's present Constitution was enacted in 1992.

### A. Socio-economic rights in the Constitution of Ghana

The 1992 Constitution of Ghana (The Fourth Republic Constitution as it is sometimes referred to) provides for the traditional civil and political (first generation) rights and some economic, social and cultural (second and third generation) rights. These are contained in Chapter 5 entitled 'Fundamental Human

<sup>64</sup> Complaint No. 210 of 1998

<sup>65</sup> Complaint No 501 of 2000

Rights and Freedoms'. This constitutional Bill of Rights provides the fundamental legal framework for the protection of human rights in Ghana.

Although the Ghanaian Constitution provides for certain socio-economic rights, it does not do so as extensively as the South African Constitution does. The similarity however, is that the socio-economic rights protected are contained within the body of the Bill of Rights and not as policies or principles as in the case with Namibia and Uganda. This means that the justiciability of socio-economic rights is more certain in Ghana than in Namibia and Uganda.

Article 20 of the Ghanaian Constitution provides for freedom from deprivation of private property. It protects the rights to adequate compensation where property is compulsorily acquired and such acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning ...<sup>66</sup> In addition, Article 22 protects the property rights of spouses. This provision is intended to be 'mindful of certain cultural practices which do not recognize the marital rights and contribution of wives to husbands' estates.'<sup>67</sup>

The rights of workers (employment rights) are provided for under Article 24. These include the right to work under satisfactory, safe and healthy conditions; the right to equal pay for equal work; the right to a reasonable number of working hours and holidays as well as remuneration for public holidays.<sup>68</sup> Workers also have the right to form or join trade unions of their choice.<sup>69</sup> The only justifiable restrictions on the right to join trade unions are those imposed by law in the interest of national security, public order and the protection of the rights of others.<sup>70</sup> Comparatively speaking, Ghana's constitutional position on the rights of workers is closer to that of South Africa and Uganda than it is to that of Namibia.

Article 25 of the Ghanaian Constitution provides for 'the right to equal educational opportunities and facilities with the view to achieving full realization of that right.'<sup>71</sup> Article 25 also provides for the availability of free and compulsory basic educational and the general availability and accessibility of secondary and higher education.<sup>72</sup> The right of individuals to establish and maintain private schools is also guaranteed. In many respects this constitutional provision is similar to that of South Africa and Namibia in that both provisions attempt to explain what is included in the right to education. The Ugandan Constitution on the other hand simply states that all persons have a right to education, without mentioning what that right entails.<sup>73</sup>

Unlike South Africa, the Ghanaian Bill of Rights does not provide for the right to health. It only mentions under Article 30 that a person acting on behalf of a sick person cannot deny that person the right to medical treatment, education or any other social or economic benefit on grounds of religion or other beliefs. As with Uganda and Namibia, the Ghanaian Constitution only acknowledges the rights to

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<sup>66</sup> Art 20(1)(a)

<sup>67</sup> See N K A Busia Jr, 'Ghana: Competing Visions of Liberal Democracy and Socialism' in Abd Allah Ahmed Naim (ed) *Human Rights Under African Constitutions* (University of Pennsylvania Press, Philadelphia 2003) 67

<sup>68</sup> Art 24(1) and (2)

<sup>69</sup> Art 24(3)

<sup>70</sup> Art 24(4)

<sup>71</sup> Art 25(1)

<sup>72</sup> Art 25(1)(a), (b) and (c)

<sup>73</sup> See Art 30 of the Ugandan Constitution



health as one of the goals and objectives of the government as laid down in the Directive Principles of State Policy.<sup>74</sup>

In addition to the rights mentioned above, there are a number of other provisions in the Ghanaian Bill of Rights that have a socio-economic bearing. These include Article 27 protecting the rights of women, Article 28 protecting children's rights and Article 29 protecting the rights of disabled persons. Moreover, it is interesting to note that Article 33(5) seems to give a *carte blanche* to the inclusion of other socio-economic rights in the Bill of Rights. It states that:

The rights, duties, declarations and guarantees relating to fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

#### B. Implementation and enforcement

Quite apart from the legislature and the executive (or administration), the judiciary in Ghana (as in other countries discussed in this article) plays a pivotal role in the enforcement of socio-economic rights. In that regard, courts are constitutionally mandated with the competence not only to interpret the rights in the Bill of Rights but also to entertain and adjudicate over rights claims where such rights are justiciable. It is important to note that, unlike South Africa, Ghana does not have a specialised Constitutional Court. Rather, the Supreme Court and the High Court have concurrent but shared jurisdiction on human rights matters.<sup>75</sup> It is important to point out that unlike Uganda and Namibia, the enforceability of socio-economic rights in Ghana is not limited to those that are contained in the Bill of Rights. It may in fact extend to those laid out in the Directive Principles of State Policy. This is according to *New Patriotic Party v Attorney General*<sup>76</sup> which held, *inter alia*, that although the Directive Principles of State Policy are not in themselves legally enforceable by the courts, there are exceptions to this principle in that where the Directive Principles are read together with other enforceable parts of the Constitution they then in that sense become enforceable.<sup>77</sup>

Issues of socio-economic rights provisions in the 1992 Ghana Constitution have not come before the courts for determination. One of the reasons for this is the existence of the Commission on Human Rights and Administrative Justice (CHRAJ). Established under Article 216 of the Constitution, the Commission possesses quasi-judicial powers to entertain human rights claims. According to Article 218 the functions of the Commission include the following:

- To investigate complaints of human rights violations, injustices, corruption, or abuse of power;
- To investigate complaints concerning the functioning of certain organs of state;

<sup>74</sup> Art34(2)

<sup>75</sup> See Art 130(1)

<sup>76</sup> (1996–97) SCGLR 729

<sup>77</sup> Ibid 788

- To investigate complaints concerning actions by persons, private enterprises and other institutions where human rights violations are alleged to have occurred; and
- To take appropriate remedial and corrective action and reversal of instances specified in complaints investigated.

It is quite clear from the objectives outlined above that the CHRAJ combines the characteristics of an ombudsman and a Human Rights Commission. Ghana is one of the few countries in the world to have adopted this innovative approach. In that regard, the Ghana CHRAJ is rather similar to the Ugandan Commission on Human Rights but fundamentally different from the South African Human Rights Commission and the Namibian Ombudsman.

In its capacity as a quasi-judicial body, the CHRAJ has handled several cases involving socio-economic rights, quite a number of which involved the right to education. These include the *Parent-Teacher Association of Ghana International School v Attorney-General* and *Alpha Beta Educational Complex v Ghana Education Service*.<sup>78</sup> In the context of labour relations, cases that have come before the CHRAJ include *Abu v Ghana Education Service and Ashong Posts and Telecommunications Corporation*.<sup>79</sup> Also relevant in this regard is the case of *Gabor v Ghana Reinsurance Co Ltd*<sup>80</sup> in which the CHRAJ held that the employer could not suspend an employee unless it was expressly or impliedly provided for in the contract of employment or by statute.

The critical role of the Ghanaian Commission on Human Rights and Administrative Justice in the protection of human rights can be gleaned from the number of complaints the Commission handles. As of December 2002 for example, the Commission had received 64,805 complaints since its inception, out of which it had successfully resolved 51,932 representing 80.1 per cent of the total number of complaints.<sup>81</sup> In 2002 alone, the CHRAJ received 12,381 complaints out of which 9,496 were resolved.<sup>82</sup> It is not exactly clear how many of these complaints involved socio-economic rights, but the sheer volume of complaints received and successfully resolved is a clear indication of the role the Commission plays in the protection of human rights, including socio-economic rights.

## VI. Conclusion

As mentioned earlier, many African constitutions tend to recognise civil and political rights while generally disregarding socio-economic rights. Among all the countries surveyed in this study, only South Africa has made the most advanced constitutional provision for socio-economic rights. Ghana comes in as a poor second. The constitutions of the other countries discussed (Namibia and Uganda) mainly include socio-economic rights in 'Directive Principles of States Policy'. As such, the justiciability of those rights tends to be uncertain.

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<sup>78</sup> See Busia (n 67) 81

<sup>79</sup> See Commission on Human Rights and Administrative Justice, 'Landmark Cases' <<http://www.chrajghana.org/index?articleId=1125675475816>> accessed 6 February 2006

<sup>80</sup> Ibid

<sup>81</sup> See Commission on Human Rights and Administrative Justice, '2002 Annual Report' <<http://www.chrajghana.org/index?articleId=1125671479069>> accessed 6 February 2006

<sup>82</sup> Ibid

With respect to mechanisms of implementation and enforcement, South Africa again takes the lead, particularly with regards to the extent of judicial enforcement. The number of decided cases involving socio-economic rights is testimony to this. The existence of a specialised constitutional court, a feature unique to South Africa in comparison to the other three countries, has a lot to do with this. Indeed in the other three countries, there have only been a few, if any, reported cases relating to socio-economic rights. Although both the Namibian Ombudsman and the Ghanaian Commission on Human Rights and Administrative Justice have had to deal with many complaints relating to socio-economic rights, it has to be remembered that the Namibian Ombudsman has no judicial powers while the Ghanaian Commission on Human Rights and Administrative Justice possesses only quasi-judicial powers that lack full judicial force.

There is no doubt that the level of the realisation of socio-economic rights in any country is indirectly influenced by the level of its economic development. This is because, as mentioned earlier, these rights have important social and economic dimensions as most of them reflect specific areas of basic needs or delivery of particular goods and services.<sup>83</sup> For that reason, even South Africa that provides extensive constitutional protection for such rights still makes them subject to progressive realisation. Although the other three countries in this study do not compare favourably with South Africa in terms of the level of economic development, they have a lot to learn from the South African experience which, as expressed by the South African Constitutional Court, is that socio-economic rights should be ‘at least to some extent justiciable; and at the very minimum be protected from invasion.’<sup>84</sup>

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<sup>83</sup> Mubangizi (n 2) 118

<sup>84</sup> First Certification Judgement, *Ex parte* (n 7) para 78