

REALISING THE FULL POTENTIAL OF CIVIL AND POLITICAL RIGHTS FOR MARGINALISED POPULATIONS IN AFRICAN COUNTRIES

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Introduction

Socio-economic rights have long been guaranteed under international and regional treaties. The Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly on 10 December 1948, provided for the rights to work, health, and education, among others. These rights were given more detailed content in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which came into force in 1976. Regionally, the African Charter on Human and Peoples' Rights (African Charter) guarantees a number of socio-economic rights, including the rights to work, health, and education – which are guaranteed under articles 15, 16, and 17, respectively.

Forty-eight countries in Africa have ratified the ICESCR, meaning that they have agreed to be bound by the rights guaranteed under the treaty.² Furthermore, all but one African country has ratified the African Charter.³ Despite this apparent willingness to be bound by the socio-economic rights guaranteed under international and regional treaties, very few countries in Africa provide for such rights in their constitutions.

Constitutions in African common law jurisdictions clearly provide for a range of civil and political rights – though in some cases the full realisation of those rights can be restricted. For example, in Botswana and Lesotho the right to be free from discrimination has significant exceptions.⁴ In the case of Botswana, the exceptions have been interpreted narrowly, while in Lesotho they have been interpreted broadly.⁵ However, many constitutions in Africa do not clearly provide for socio-economic rights.⁶ To the extent that they do, they are enumerated under the directive principles section, and the principles embodied in that section have been interpreted by some courts as being unenforceable.⁷

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2 Status of Ratification of the ICESCR as at 10 July 2014, Office of the High Commissioner for Human Rights, available at <http://indicators.ohchr.org/>.

3 Status of Ratification of the African Charter, available at <http://www.achpr.org/instruments/achpr/ratification/>. South Sudan has not yet ratified the African Charter.

4 See Constitution of Botswana, 1966, section 15 and Constitution of Lesotho, 1993, section 18.

5 Compare *Mmusi and Others v Ramantele and Others* Case No. CACGB-104-12 (CA) and *Masupha v Senior Resident Magistrate for Subordinate Court of Berea* Case No. 29 of 2013 (CA).

6 For a list of African countries where socio-economic rights are justiciable and where they are not, see D Chirwa *Human Rights under the Malawian Constitution* First Edition (2011) 258.

7 See Constitution of Malawi, 1994, section 13 and Constitution of the Republic of Zambia, 1991, Part IX. Section 111 of the Constitution of Zambia specifically states: “The Directive Principles set out in this Part shall not be justiciable and shall not thereby, by themselves, despite being referred to as rights in certain instances, be legally enforceable in any court, tribunal, administrative institution or entity”.

For many lawyers and advocates of marginalised populations, this lack of socio-economic rights within domestic constitutions has been seen as an insurmountable obstacle to ensuring the safety and well-being of marginalised populations. Many scholars have argued for judiciaries to provide a more robust interpretation of directive principles, while others note the difficulty in adjudicating on socio-economic issues.⁸

This paper initially discusses the false distinction between civil and political rights and socio-economic rights before reviewing cases in Africa where the courts have used civil and political rights to ensure that marginalised persons have access to healthcare. The paper will argue that although socio-economic rights are important and relevant to the strengthening of the rights of marginalised populations, courts can do much to ensure the rights of marginalised populations if they thoroughly enforce the full guarantees of civil and political rights. This paper also argues that ensuring the full enforcement of civil and political rights will often ensure the socio-economic well-being of marginalised populations.

False distinction between civil and political rights and socio-economic rights

Numerous scholars and advocates have outlined the false distinction made between civil and political rights, and socio-economic rights.⁹ This distinction appears to have been highlighted and enforced through the constitutions of many countries in southern Africa, where civil and political rights are guaranteed under the constitution, and socio-economic rights are relegated to the directive principles section of the constitution.¹⁰ These sections have often been interpreted by courts as being merely advisory and not justiciable.¹¹

The false distinction is often premised on three inter-related arguments: civil and political rights are fundamentally different from socio-economic rights; it is not the role of the judiciary to address issues of socio-economic rights, as that should be the purview of the other two branches of government; and courts are not best placed to adjudicate on socio-economic rights, as they involve questions of social policy.¹²

None of the arguments for the division between socio-economic and civil and political rights, however, stand in the face of further investigation.

8 See S Ibe “Beyond Justiciability: Realising the Promise of Socio-Economic Rights in Nigeria” (2007) 7 *Afr Hum Rts LJ* 225; RE Kapindu “Courts and the Enforcement of Socio-Economic Rights in Malawi: Jurisprudential Trends, Challenges and Opportunities” (2013) *Afr Hum Rts LJ* 125.

9 See *RM v Attorney General* (2006) AHRLR 256 (HC) where the court discusses the interdependence and indivisibility of civil and political rights and socio-economic rights.

10 See for example Constitution of Malawi and Constitution of Zambia.

11 See for example *Khathang Tema Baitokoli and Another v Maseru City Council and Others* (2004) AHRLR 195 (CA) at para. 19.

12 A Nolan *et al* “The Justiciability of Social and Economic Rights: An Updated Appraisal” (2007) *CHRGJ Working Paper* No. 15; C Soohoo & J Goldberg “The Full Realisation of Our Rights: The Right to Health in State Constitutions” (2010) 60 *Case W Res L Rev* 997.

Civil and Political Rights Are Not Fundamentally Different from Socio-Economic Rights

The argument that civil and political rights are fundamentally different from socio-economic rights is based on a number of erroneous beliefs. These include: only the enforcement of socio-economic rights have budgetary implications for government; that socio-economic rights, as opposed to civil and political rights, are vague; and socio-economic rights require courts to look at state inaction, versus civil and political rights that look at state action.

With respect to the view that only socio-economic rights have budgetary implications for government, while civil and political rights do not, this clean dichotomy does not reflect the reality of judicial decision-making. Often, ensuring the civil and political rights of prisoners and those accused of crimes has significant budgetary implications for the state. For example, in a matter of the right to a fair trial, ensuring that criminal defendants have access to a government-provided lawyer will have significant budgetary implications for the state.¹³ Similarly, cases requiring a court to determine whether minimum sentences for specific criminal offenses are constitutionally valid, will have budgetary implications for the government, as it will either increase or decrease the amount of time offenders spend in government-funded prisons. Finally, in cases involving poor prison conditions, upholding the basic right to be free from cruel, inhuman, and degrading treatment and punishment generally requires expenditure of government funds.

In terms of the argument that socio-economic rights are vague, there is no reason why socio-economic rights are any more vague than traditional civil and political rights – such as the right to be free from torture and cruel, inhuman, and degrading treatment. Domestic courts and regional and international bodies have spent considerable time outlining what constitutes torture and cruel, inhuman, and degrading treatment.¹⁴ Despite this, in the wake of the events of 9/11, the United States claimed that roundly discredited interrogation techniques – such as prolonged stress positions like forced standing, solitary confinement for 30 days, and removal of clothing – did not amount to torture.¹⁵ However, these same interrogation techniques were found to be in violation of the international prohibition on torture and cruel, inhuman, and degrading treatment by international bodies tasked with monitoring compliance with international treaties.¹⁶

Finally, the argument that socio-economic rights require courts to look at state inaction, while enforcement of civil and political rights involves state action, is not accurate. For example, in a case where a law only provides for male succession to a chieftainship, arguably in violation of the right to be free from discrimination on the basis of sex – a core civil and political right – it is the state's inaction to proactively ensure that its laws are in compliance with guaranteed civil and

13 See for example *Government of the Republic of Namibia and Others v Mwilima and Others* (2002) AHRLR 127 (SC), which discusses budgetary implications for increasing legal aid to indigent persons.

14 See Human Rights Committee, General Comment No. 20 at para. 2; *Doebbler v Sudan* Comm. No. 236/00; *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.)/Nigeria* Comm. No. 137/94-139/94-154/96-161/97; *Huri-Laws v Nigeria* Comm. No. 225/98; *Ex parte: Attorney General, In Re: Corporal Punishment by Organs of State* (1991) NASC 2.

15 Memorandum to US Secretary of Defense from General Counsel of Department of Defense, 2 December 2002, which discusses which interrogation techniques would be legal in light of the prohibition against torture, available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>.

16 Human Rights Committee, Concluding Observations (United States), CCPR/C/USA/CO/3/Rev.1, 18 December 2006.

political rights that the courts must address when assessing the constitutionality of the law.¹⁷ In other instances, such as the forced sterilisation of women living with HIV, it is the state's action of forcing women to agree to sterilisation that impugns their access to adequate healthcare, a core socio-economic right.¹⁸

Role of the Judiciary in Enforcing Socio-Economic Rights

The argument that it is not the role of the judiciary to adjudicate on socio-economic rights – as that should be the purview of parliament or the executive branch – similarly cannot stand. The primary concern is that issues related to socio-economic rights have budgetary implications and thus should be determined by the elected branches of government, and the failure to do so would violate the doctrine of separation of powers. The inaccuracy of how only the enforcement of socio-economic rights has budgetary consequences, and not the enforcement of civil and political rights, is addressed above. This argument was also rejected by the Malawi High Court in *Masangano v Attorney General and Others*, when the following was stated:

[I]t is clear that the arguments are reminiscent of the long-established principle that prison authorities possessed complete discretion regarding the conditions of confinement of prisoners and that the courts had no authority, not even jurisdiction, to intervene in this area. But that principle belongs to the old days when the human rights culture was in its rudimentary stages of development. In the present day and age, where we have new constitutional orders deeply entrenching human rights and where the human rights culture is fully fledged and continues to bind all public institutions, courts cannot stand by and watch violation of human rights in prison, as complained of by prisoners.¹⁹

Capacity of Courts to Address Socio-Economic Rights

The argument that courts lack the capacity and knowledge to adjudicate on socio-economic rights, while they do have the capacity to adjudicate on civil and political rights, similarly reflects a misunderstanding of courts and court processes. Courts have numerous mechanisms by which to ensure they have all the necessary evidence – before making needed determinations. For example, courts can ask for the intervention of *amici curiae*, friends of the court, to provide key specialised information. In addition, courts are required to make determinations on issues outside of their expertise in cases involving civil and political rights as well. For example, in the case of *Hoffmann v South African Airways*,²⁰ the South African Constitutional Court was required to determine whether South African Airways (SAA) could deny employment to an HIV-positive applicant, solely on the basis of his HIV status. SAA put forward detailed medical arguments for why it would harm the health of the employee and put others at risk of HIV should such a person be hired. The Constitutional Court relied heavily on *amicus curiae* submissions to parse out the medical

17 *Masupha v Senior Resident Magistrate for Subordinate Court of Berea* Case No. 29 of 2013 (CA).

18 *LM and Others v Namibia* (2012) NAHC 211.

19 MWHC Constitutional Case No. 15 of 2007, 28. This case is also discussed in KT Manda "Overcrowding and its Effects on the Health of Prisoners in Malawi: A Role for the Malawian Courts?" in this publication.

20 (2000) ZACC 17. This case is also discussed in MD Mambulasa "The Ambit of Prohibited Grounds of Discrimination: Comparative Jurisprudence on HIV Status and Sexual Orientation" and C Bandawe & A Meerkotter "Developing a Conceptual Framework against Discrimination on the Basis of Gender Identity" in this publication.

arguments, and finally determined that denying employment to an individual solely due to his HIV status violated the right to be free from discrimination and the right to human dignity. In making its finding, the Court outlined the progression of HIV, noting that people living with HIV can live long and healthy lives; described how HIV is transmitted, finding that it was not a highly transmittable disease; and recounted the state of HIV treatment at the time of the ruling. This detailed understanding of the medical nature of HIV, how it is transmitted, and how it is treated, were critical to the Court's decision.

The stark distinction often drawn between socio-economic rights and civil and political rights is a fallacy, and often leads courts to limit themselves when addressing claims seen as impacting the socio-economic sphere. However, throughout Africa, there are a number of courts that have acknowledged the fallacy of the distinction between socio-economic and civil and political rights, and which have ensured that marginalised populations have access to fundamental rights, including the right to adequate healthcare.

Case examples from Africa

Courts throughout Africa have used civil and political rights to ensure that marginalised persons have access to healthcare.²¹ Four case examples are discussed below from Namibia, Malawi, Nigeria, and Botswana.

In Namibia, the High Court was confronted with a case of three HIV-positive women who were sterilised at public hospitals, without their informed consent, in *LM and Others v Government of Namibia*.²² The failure to obtain a woman's informed consent – meaning that she should be informed, at a minimum, of the nature and risks of the procedure in a language in which she is comfortable, informed of the fact that it is irreversible, and given the option of refusing the procedure – results in the woman receiving inadequate medical care. For a patient to receive adequate care, her informed consent must have been obtained prior to any medical procedure, such as a sterilisation, being performed.

The Constitution of Namibia provides for a range of civil and political rights, including the right to be free from discrimination; the right to equality; the right to be free from cruel, inhuman, and degrading treatment; and the right to found a family. However, it does not provide for the right to health.

The applicants – the three women – had argued that the treatment they experienced violated their constitutional right to life; right to liberty; right to human dignity; right to found a family; and right to equality and freedom from discrimination. They also argued that it violated their rights under common law.

The High Court held that the three women were sterilised without their consent in violation of the laws of Namibia. The Court clearly held that this violated their rights under common law. The

21 See for example *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* (2005) AHRLR 151 (HC). For a more detailed discussion on ensuring the health of prisoners in Malawi, see KT Manda "Overcrowding and its Effects on the Health of Prisoners in Malawi: A Role for the Malawian Courts?" in this publication.

22 (2012) NAHC 211.

Court did not provide clarity on whether being sterilised without their informed consent violated their constitutional rights. However, despite a failure to have a right to health provided for under the Constitution, the Court was able to ensure that the three women's right to adequate healthcare was upheld.

In *Masangano v Attorney General and Others*,²³ the High Court – sitting with a panel of three judges – was confronted with a case brought by a prisoner, Masangano, who was held in Domasi prison. He brought his suit on behalf of all prisoners in Malawi. In the lawsuit, he alleged that his and other prisoners' right to be free from torture and cruel, inhuman, and degrading treatment or punishment was violated due to the treatment and conditions in prison. Among the treatment he highlighted was that prisoners received insufficient food, contrary to prison regulations; prisoners received insufficient clothing; over-crowding in the prison resulted in a lack of space; prisoners were not allowed to communicate with their families; prisoners were harassed and physically tortured in front of their families; prisoners without money had no means of communicating; and prisoners were denied access to medical care.

The claims that prisoners were denied access to medical care and “are even asked the offence they committed before receiving any medical attention and are even sometimes given wrong dosage”,²⁴ and the lack of adequate food, are the focus of this discussion.

The government argued, in part, that these claims were not justiciable, as they required an inquiry into the allocation of public resources and courts were ill-equipped to deal with such inquiries.²⁵ In responding to this argument, the Court clearly rejected it, noting that the argument limits citizens' access to courts. The Court found that “[t]he judiciary must prioritise private rights over political concerns and maintain access to the courts”.²⁶ Furthermore, the Court specifically addressed the argument that in matters of allocation of resources, the judiciary was ill-equipped to make determinations in that sphere. The Court held that, when it comes to the rights of prisoners, the courts cannot stand back when fundamental rights are being trampled. Finally, the Court noted that there is no reason to assume that it was not competent to address socio-economic issues.²⁷ Pointing to a decision by the Lesotho Court of Appeal,²⁸ which ordered prison walls to be painted, windows washed, and water toilets to be made available in the cells, the Court found that “no part of [the] Constitution [was] a no-go area for the courts”.²⁹

In ascertaining whether the lack of adequate medical care and food in prisons violated the rights enshrined in the Constitution, the Court held that the amount of food provided to each prisoner under the prison regulations should be increased and that every prisoner had a right to medical treatment. The Court concluded its decision by informing parliament to provide the government with the necessary resources to ensure minimum standards of care were provided to prisoners.

23 MWHC Constitutional Case No. 15 of 2007.

24 *Id* 5.

25 *Id* 18.

26 *Id* 28.

27 *Id* 32.

28 *Mothobi v Director of Prisons and Another* (1996) LSCA 92.

29 *Masangano v Attorney General and Others* MWHC Constitutional Case No. 15 of 2007, 35.

When confronted with a similar issue to the *Masangano* case, the Nigerian High Court in *Odafe and Others v Attorney General and Others*³⁰ addressed whether prisoners living with HIV and awaiting trial were entitled to medical treatment – specifically treatment for HIV. The prisoners had been awaiting trial for more than two years. In response to arguments regarding the cost of providing medical treatment to prisoners, the Court held that:

The Court is enjoined to ensure the observation of these rights. A dispute concerning socio-economic rights, such as the right to medical attention, requires the Court to evaluate state policy and give judgment consistent with the Constitution. I therefore appreciate the fact that the economic cost of embarking on medical provision is quite high. However, the statutes have to be complied with and the state has a responsibility to all the inmates in prison, regardless of the offence involved, as in the instant case where the state has wronged the applicants by not arraigning them for trial before a competent court within a reasonable time and they have been in custody for not less than two years suffering from an illness.³¹

The Court found that denying medical treatment amounted to a violation of the right to be free from torture.

Most recently, in Botswana, the High Court ordered the government to provide anti-retroviral treatment to non-citizen prisoners. In *Tapela and Others v Attorney General and Others*,³² two Zimbabwean prisoners living with HIV and the Botswana Network on Ethics, Law and HIV/AIDS – a non-governmental organisation advocating for the rights of people living with and affected by HIV – challenged the Botswana government’s policy of denying foreign prisoners access to free HIV treatment. The prisoners argued that the denial of HIV treatment violated three constitutional rights: the right to life; the right to non-discrimination; and the prohibition on inhuman and degrading treatment.

The Court held that the denial of life-saving HIV treatment violated all three constitutional rights, namely the right to life, the right to non-discrimination, and the right to be free from inhuman and degrading treatment. In reaching its decision, the Court rejected the government’s argument that providing HIV treatment to non-citizen prisoners would be too costly. The Court further held that in order to make such an argument, the government would have to provide evidence to that effect, and merely stating the proposition would not be enough. The Court stated:

The respondents have, despite the cardinal importance of the medical officer’s input not availed to the court any information about his findings on the circumstances connected with the treatment of the applicants and neither have they presented to the court any information that could, on a balance of probabilities, support their argument to the effect that the provision of HAART³³ to non citizen inmates will place an undue strain on their budget. Singularly lacking is also any information on the number of none [*sic*] citizen inmates that require HAART enrolment and the costs associated with such enrolment ...³⁴

30 (2004) AHRLR 205.

31 *Id* at para. 38.

32 Case No. MAHGB 57/2014. The Attorney General has since appealed the High Court judgment and, at the time of publication, the appeal has not been decided in the Court of Appeal.

33 Highly Active Antiretroviral Therapy [HIV treatment].

34 *Tapela and Others v Attorney General and Others* Case No. MAHGB 57/2014, at para. 32.

In addition to the cases outlined above, there is currently another case awaiting judgment in the High Court of Zambia, which similarly relies on civil and political rights to ensure access to healthcare for marginalised populations.

In *Mwanza and Another v Attorney General*,³⁵ an HIV-positive prisoner had approached the High Court challenging current prison conditions and seeking adequate nutrition to ensure the full efficacy of his HIV treatment. There are three main issues before the Court. First, the prisoner claimed that he is denied adequate food, in terms of both quality and quantity. According to the prisoner's testimony, he receives only two meals a day, making it impossible for him to take his regular HIV treatment. In addition, he testified that the food he does receive is often of such poor quality that he cannot eat it. Second, he alleged that he has inadequate access to HIV treatment, as often there are no prison officials available to accompany him to the clinic to obtain his medication. He claimed that in those cases he misses doses of his treatment, putting him at risk of becoming resistant to first-line HIV treatment. Finally, he testified that the overcrowding and poor ventilation in the prison put him at higher risk of opportunistic infections. The Court took judicial notice of the poor prison conditions during the trial. The prisoner alleged that this treatment violated his right to life and right to be free from inhuman and degrading treatment, both guaranteed under the Constitution. The trial was concluded in September 2013 and legal arguments were filed in late 2013. As of September 2014, a judgment has yet to be issued.

Conclusion

The distinction that legal scholars and members of the judiciary often make between civil and political rights and socio-economic rights is not only wrong, but further impedes access to justice for marginalised populations. This can be addressed by a robust interpretation of existing fundamental rights guaranteed in constitutions throughout Africa. Indeed, the above case examples show that even without guaranteed socio-economic rights in domestic law, it is still possible for courts to ensure access to core socio-economic needs – including access to adequate healthcare – by developing existing fundamental rights.