

SOCIAL ECONOMIC RIGHTS, A RIGHT OR A PRIVELEDGE?

A dissertation submitted in partial fulfillment of the Professional Bachelors of
Laws (LL B) degree

By

Alvine Mirjam Samuel

200718215

November 2011

Supervisor: Pro. N. Horn

SCHEDULE A

“I the undersigned, hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of LL.B is my own original work and that I have not used any other sources than those listed in the bibliography and quoted in the references.”

Signature: _____

Date: _____

Supervisor's Certificate

I, _____ hereby certify that the research and the writing of this dissertation was carried out under my supervision.

Supervisor's signature: _____

Date: _____

The word count of this Dissertation thus far is: 18 796 words.

ACKNOWLEDGEMENTS

I would like to thank the Almighty God for the idea of the topic as well as the strength to do the research. I would also like to thank him for being there till the end of it all. Through him I managed to get assistance from Mr. J. Nakuta who has been the backbone of my research. His guidance and assistance in the course of this research has been invaluable. Words alone cannot express how grateful I am to him. I thank God for him. I would also like to thank my supervisor, Prof. Horn, for his patience and support all the way. His guidance is highly appreciated; again I thank God for him. I would also like to take this moment to thank my big Brother, Mr. Absalom Kapenda for being an inspiration to me. I have made my way through Law school and I am writing this dissertation as part of the completion of my LLB. Today I stand as a final year LLB student because of him. All the advice, the financial and emotional support, led to my success as a law student at the University of Namibia.... he's being there in my life will always be highly appreciated. I would also like to thank Jana for the change she has brought into my life. May the Lord bless all of them and may he pour his favour upon their lives for the good people they are.

Dedication

I dedicate this research paper to Mr. Absalom K. Kapenda and Mr. John Nakuta and to all the people of Namibia that are living under bad conditions. I want them to know that they are not alone and this is a battle we will fight together till the end... Social Economic Rights are rights and not privileges.

ABSTRACT

Whenever reference is made to the promotion and protection of human rights, there is an inclination to speak about civil and political rights only. In this regard, the civil and political rights are recognized as rights in Namibia whereas ESC rights are state Policies. Because of this unfair distinction between these rights, certain human rights in Namibia are not recognized. Namibia is a signatory to the ICESCR and hence under the duty to comply with its obligation. The crux of this paper is rooted in the social economic rights such as housing and health. It is the view of the author that certain ESC rights are a prerequisite to certain rights entrenched in the constitution such as the right to life. Without health facilities and water, people will die, hence a violation of the rights to life. The right to health can be understood as the right to an effective and integrated health system encompassing health, which is responsive to national and local priorities, and accessible to all. Underpinned by the right to health, an effective health system is a core social institution, no less than a court system or a political system. It has been witnessed that some community toilets are in a deplorable state, Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights. Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights. Over one billion persons lack access to a basic water supply, while several billion do not have access to adequate sanitation, which is the primary cause of water contamination and diseases linked to water. In Namibia specifically, nothing much has been done on ESC rights, there is a very huge gap between the rich and the poor, housing conditions for the poor are worse off, and standards of living are deteriorating by the day. Of what importance is free and fair elections if there is no food on the table? How does a person fully exercise their civil and political rights if they have no place to sleep, they are sick and have no food? Hence, the yardstick for measuring the enjoyment of human rights has been the full and active participation of people in democratic processes such as elections, freedom of expression, and the right to life. However participation in the elections should not be the only human rights indicator, rather and more importantly, the indicator should be the full and equal enjoyment of social, economic and cultural rights since these are intertwined with civil and political rights and are two sides of the same coin. The interdependency, interrelatedness and indivisibility of all human rights tend to be ignored very often.

Other jurisdictions have taken ESC right serious, to the extent to which courts are involved. It is time for Namibia to follow the examples by other jurisdiction. The *Mwilima* case is also an alternative guide to the justiciability of ESC rights.

Definitions

ESCR **Economic Social and Cultural rights**

ICESCR **International Covenant on Economic, Social and Cultural rights**

ICCPR **International Covenant on Civil and Political Rights**

LAC **Legal Assistance center**

OAU **Organization of African Union**

UDHR **Universal declaration on Human Rights**

TABLE OF CONTENTS

<u>Chapter</u>	<u>page</u>
<i>Problem statement</i>	9
<i>Historical overview</i>	9
<i>Background</i>	11
<i>Significance of the study</i>	12
<i>Objective of the study</i>	12
<i>Literature review</i>	13
<i>International law perspective</i>	13
<i>African law perspective</i>	14
<i>National law perspective</i>	17
<i>Methodology</i>	20

Chapter 2

<i>Concept of the Human Rights</i>	21
<i>What are Human Rights?</i>	21
<i>The interdependence and indivisibility of Human Rights</i>	22
<i>Housing</i>	23
<i>International standards</i>	24
<i>Regional Rights instruments</i>	24
<i>National recognition</i>	24
<i>The right to housing and duties of immediate effect</i>	26
<i>The justiciability of the right to housing</i>	27

Right to health	29
<i>Status quo</i>	29
<i>Taking steps to realize the right to health</i>	35
<i>A proposed framework for indicators</i>	36
<i>Core minimum obligation</i>	36
<i>The Namibian Constitution</i>	37
<i>The African Charter on Peoples and Human Rights</i>	37
<i>The International Covenant on Economic, Social and Cultural Rights (ICESCR)</i>	37
<i>The Patient Charter</i>	38
<i>The Namibian Public Service Charter</i>	38
<i>Case law</i>	38
<i>A country's difficult financial situation does NOT absolve it from having to take action to realize the right to health</i>	40
<i>The right to health is NOT the same as the right to be healthy</i>	40
<i>The right to health in international human rights law</i>	41
<i>Declaration of Alma-Ata</i>	42
<i>Progressive realization</i>	42

Chapter 3

<i>Introduction</i>	44
<i>Nature and scope of ESC rights</i>	45
<i>The interdependency of ESC rights through civil and Political Rights</i>	46
<i>The concept of minimum core content</i>	47
<i>State obligations</i>	48
<i>Justiciability of ESC rights in the Namibian Legal system</i>	50
<i>Conclusion and recommendations</i>	53
<i>Bibliography</i>	56

CHAPTER ONE

Problem statement.

It is our rights as Namibian Citizens and most of all members of the international community to have certain entitlements or hence rights that are essential for survival. It is evident in the Namibian context that social economic rights are second generation rights. Suffice it to say that much has not been achieved in regard to the ECS rights in Namibia. Hence, social economic rights are privileges and not rights in Namibia. This is so because of a number of factors such as the non-entrenchment of ESC rights in the constitution, the way this rights have been formulated in the constitution and the dominant perception that these rights are not enforceable under the current constitutional dispensation¹. This research therefore aims to prove the extent to which the importance of the ESC rights goes in order for a person to be alive and their justiciability thereof.

Historical overview

The theory of human rights originated from western societies. This western concept of human rights is liberty-centrism-oriented. The liberty-centrism approach to human rights exclusively over-emphasized the significance of civil and political rights to the detriment of socio-economic rights.² Thus, economic and social rights where referred to *en passant* or as a supplement in that these are not rights *strict sensu*. When the Universal Declaration of Human Rights was drafted and adopted by all members of the UN in 1948, there was a general agreement that a single treaty protecting all human rights would be drafted soon after, based on the universal Declaration.³ Nearly twenty years later, the drafting was completed, and due to the ideological differences prevailing at that time between the western liberal democracies and the socialist-

¹ Nakuta, J. 2009 "Justiciability of social Economic and cultural Rights". Horn, N, Bosl, A (Eds). Human Rights and the Rule of Law in Namibia, Windhoek: Macmillan, p89.

² See Onuma Yasuaki, A Transcivilizational perspective on International Law, the Hague Academy of International Law, p. 398 -405, Martinus Nijhoff Publishers, Leiden/Boston, 2010.

³ Martin Dixon et al, 1995. *Cases and Materials on International law*, 2nd ed., Blackstone Press Ltd. p.209,

communists states, instead of a single treaty, two treaties (herein called Covenants) were created dealing with different rights. There are:

- a) The International Covenant on Civil and Political Rights (ICCPR)
- b) International Covenant of Economic, Social and Cultural rights (ICESCR)

The official position is that the above two covenants and sets of rights therein are 'universal, individual, interdependent and interrelated. The international community must therefore treat human rights globally in a fair and equal manner, on equal footing and with the same emphasis'⁴. However, this formal consensus masks a deep and enduring disagreement over the proper legal status of the economic, social and cultural rights. On the one hand, there is the argument that Socio-Economic rights are more relevant and thus superior to civil and political rights both in terms of an appropriate value hierarchy and in chronological terms. For instance, as the argument goes, of what use is the right to free speech to those who are starving, homeless and illiterate?⁵

On the other hand, there is another view that economic and social rights do not constitute rights (as properly understood) at all, and treating them as rights undermines the enjoyment of individual freedoms, distorts the functioning of free markets by justifying state intervention in the economy.⁶

Like most countries in the world, Namibia Ratified the ICESCR and is thus expect to comply with legal obligations as spelt out in the covenant. This, Namibia can do in two ways;⁷ Either by observing or respecting national laws (the Constitution and statutes) which are consistent with the obligations in the covenant, or by making these international norms part of the national legal or political order, that is, the international rules become domesticated or internalized within the Namibian legal system. This is the only way Namibian nationals can enjoy and enforce the rights contained in the ICESCR.

⁴ Vienna Declaration, para.5, supra, note 4. UDHR reflects same, but does however, not make a distinction between civil and political rights and ESC rights.

⁵ For a detailed discussion on this matter, see Henry J. Steiner et al, (2000) *International Human Rights in Context: Law, Politics and Morals*, 2nd ed. Oxford. p.237-320

⁶ *ibid*

⁷ Francois X Bangamwabo, 2008. *The Implementation of International and regional Human Rights Instruments in the Namibian Legal Framework*, in N.Horn & A. Bosl (eds), *Human Rights and the Rule of law in Namibia*: Macmillan Namibia. p.165,

Background of the study

Research has shown that poverty is still widespread in rural communities, where nearly half the households spend more than 60% of their income on food.⁸ Is it reasonable and justifiable that, in an open democratic society based on human dignity and freedom, a large majority of the population still lives in abject poverty alongside extremes of wealth? Indeed Namibia's Gini coefficient is still one of the highest in the world. Moreover, despite the fact that government spends a considerable part of its budget on basic services like education and health, the majority of the population still has insufficient access to such services. With reference to education, there is a general consensus that Namibia has made significant progress in terms of access to education. However there are still high disparities in the rate of enrolment amongst the various language groups, whereas only 18 percent of San children are enrolled in formal education, the corresponding figures for German and Owambo speaking children are 92% and 89%, respectively. Also, the quality and standard of education at state schools still remains a big challenge. Similarly, Namibia spends a considerable part of its annual budget on health, but health expenditure is highly unequal across the country. Additionally, government's current social safety measures are not succeeding in reversing the ever-widening gap between rich and poor in Namibia. Therefore additional strategies need to be devised to complement their efforts. Human Rights, specifically the ECS rights, can be one of the strategies to employ in order to achieve social justice in Namibia. The right to work, the right to fair conditions of employment, the right to form and join trade unions, the right to social security, the rights to protection of the family, the right to an adequate standard of living, the right to food, clothing, housing and water, the right to health, the right to education, and the right to culture are internationally recognized rights under the international Covenant on Economic, Social and Cultural Rights (ICESCR). In 1993 the Vienna World conference on Human Rights reiterated that *all humans' rights are universal, indivisible, interdependent and interrelated*. This means that civil and political rights have to be treated in an equal manner, on the same footing, and with the same emphasis.⁹ After Namibia had ratified the ICESCR, it entered into force for the country on the 28 February 1995. In addition, chapter 3 of the

⁸ Harris, A. 2007. *Spotlight on Development- Towards the Millennium Development Goal*. Windhoek: The NANGHOF Trust, p4.

⁹ Nakuta (2009: 91)

Namibian constitution also seeks to protect certain to protect certain ESC rights, albeit in a somewhat limited and modest fashion. Nakuta further states that in order to contribute to the debate of the De jure and de facto status and justifiability of ESC rights in Namibia, it has become imperative to critically engage the questions posed by *Cooman*¹⁰ as to whether ESC rights only exist on paper as part of treaties and constitutions to which governments often pay lip service at international for a, or whether they really mean something in practice for those who want to invoke these rights before the courts?

For purposes of this research, focus will be placed on the rights to housing, the right to health and the rights to water respectively. This research is aimed at proving how essential the right to housing, water and health are prerequisites to the right to life. Hence, how these specific social economic rights are a prerequisite to the right to life which is a fundamental right in terms of the Namibian constitution¹¹.

Significance of the study

Economic, social and cultural rights (ESC rights) should be taken as seriously as civil and political rights. ESC rights have been part of the language of international human rights since at least the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. Yet, compared to civil and political rights, there has been considerably less attention placed on the need to develop the content of ESC rights and protection mechanisms to enforce them. These gaps in the international human rights system came about for political and not for legal reasons it is argued. To a great extent, the cause of these gaps was the prominence accorded by Western countries to civil and political rights, in the context of the cold war divide. As a consequence, the notion of the justiciability of ESC rights has been neglected and largely ignored¹².

Objective of the study

Bridging the gap between the justiciability of civil and political rights and that of ESC rights is key if both sets of rights are to be considered on an equal footing. This report will demonstrate

¹⁰ Cooman, F (Ed). 2006. *Justiciability of Economic and Social rights*. Antwerp: Intersentia, p2.

¹¹ Act 1 of 1990.

¹² International commission of jurists. "Courts and the legal enforcement of Economic, Social and cultural rights" *Human rights and the rule of law Series: No.2*, Switzerland.

that; ECS rights can be adjudicated, adjudication is desirable, and adjudication is already put into practice, to varying degrees, in many courts throughout the world. Additionally, this research is aimed at proving how essential the right to housing, water and health are prerequisites to the right to life.

Literature review

Human rights and fundamental freedoms are the birthright of all of all Human beings¹³.

The Vienna declaration and programme of action (1993) clearly recognizes the interrelationship and interdependence of civil and political rights¹⁴

- **International law perspective**

The Universal Declaration of Human Rights, together with the International Covenant on Civil and Political Rights and the International Covent on Economic, Social and Cultural Right, is often referred to as the International Bill of Rights. In other words, the Declaration and the two covenants contains the basic human rights in all the various areas in which human apply i.e., civil and political, as well as economic, social and cultural rights. The international covenants on economic, social and cultural rights protects for example, the right to work, to reasonable condition of employment, to organize trade unions, to protection of family and children, to health, education and etc.

Article 11 of the ICESCR roughly states that any individual has the right to an adequate standard of living including the right to food, clothing. Article 12, on the other hand, grants individuals the right to health. The Committee on Economic, Social and Cultural Rights states in its statement on poverty and the Covenant on Economic, Social and Cultural Rights that:

“non discrimination and equality are integral elements of the international human rights normative framework, including the ICESCR. Sometimes poverty arises when people have no access to existing resources because of who they are, what they believe or where they live. Discrimination may cause poverty, just as poverty may cause discrimination. Inequality may be entrenched in institutions and deeply rooted in social values that shape relationships within

¹³ Vienna Declaration, 1993, Para 1.

¹⁴ Javaid Rheman, 2003. *International human rights law, a practical approach*: Longman

households and communities. Accordingly, the international norms of non-discriminations which demand that particular attention to be given to vulnerable groups and individuals, from such groups, have profound implications on anti-poverty strategies”.

- **African law perspective**

Although it can be argued that the situation regarding the respect for civil and political rights in Africa has improved, the same cannot be said about economic, social and cultural rights because Africa continues to face grave challenges and threats. These include, amongst others¹⁵, poverty which is recognized by Oxfam as;

‘A symptom of deeply rooted inequities and unequal power relations institutionalized through policies and practices at all levels of state, society, and households’.

Hence, therefore, poverty is seen as a violation of human rights and its reduction will contribute to the full and equal enjoyment of all human rights.

the issue at hand and what this paper seeks to address is how the AU, the various African Governments/states¹⁶ and any other relevant authority can ensure the equal recognition and relevance of social, economic and cultural rights, including their enforceability and the unnecessary distinction between civil and political rights on the one hand, and social economic and cultural rights on the other hand. Various authors have emphasized that, indeed an all-encompassing human rights approach requires that the AU and all other relevant authorities have to promote social economic and cultural rights, which embrace the rights to development as contained in the African Charter, in the same way as civil and political rights are promoted.

In light of what has been said above, the author of this paper concurs with the position of social economic and cultural rights in Africa. It is true that not much has been done to promote and protect these rights. In addition, Africa is still that continent with many social and economic issues, with poverty and diseases toping the chart. Water problems as well as housing are a great challenge to Africa as a continent.

¹⁵ Gawanas (2009:148)

¹⁶ In states which discriminate against ESC rights and recognize and uphold only civil and political rights, which Namibia is part of.

Most AU member states have adopted a bill of rights in their constitution, to guarantee fundamental Human rights and freedoms. But this pertains mostly to civil and political rights, which are regarded as enforceable. Nakuta¹⁷, however, argues that given that social, economic and cultural play a greater role in improving people's lives and standard of living, they should be justiciable. This argument is supported by the fact that in the 21st century, the challenge lies in making rights a reality for the majority of the people by addressing poverty and inequality. Since the enforcement of social, economic and cultural rights largely depend on the availability of resources, the AU will have to step up its advocacy for increased resources both internationally and domestically, not only to fulfill these rights, but also to effectively monitor compliance by member states, which should be the same approach as they do not advance civil and political rights, albeit with added methods and competencies.

The above is the theoretical aspect of the rights at hand. Fortunately the authors referred to have given a reality aspect of the ESC rights in Africa. Another practical aspect has been affirmed in the South African case of ***Soobramoney v Minister of Health, KwaZulu-Natal***¹⁸, where the appellant an unemployed man in the final stages of chronic renal failure, had approached a hospital with a view to receiving ongoing dialysis treatment in its renal unit. The hospital in question had refused him admission in its renal unit. Its reasons for doing so was said to be that it followed a set policy in regards to the use of dialysis resource and was compelled to do so because of the shortage of resources. The primary requirement was eligibility for a kidney transplant. Such persons will be provided with dialysis treatment until a donor had been found and the kidney transplant performed. To be eligible for a kidney transplant the patient had to be free of other 'significant disease'. Appellant, who suffered from other conditions including a heart disease failed to meet this requirement. The appellant had unsuccessfully approached a local division of the high court for an order directing the hospital to provide him with the treatment he desired and interdicting respondent from refusing him admission of the renal unit of the hospital. The application was dismissed. Appellant thereafter appealed to the constitutional court against the judgment of the local division. Appellant based his claim on section 27(3) of the final constitution of South Africa which provided that "no one may be refused emergency treatment" and section 11 of the said constitution which provides that "everyone has a right to life". The court found unanimously that the appeal had to fail due to alleged limited resources to fund his treatment. The provisions of the Bill of Rights should not

¹⁷ Nakuta (2008:95)

¹⁸ 1997 (12) BCLR 1696 (CC).

be interpreted in a way which results in the courts feeling themselves unduly pressurized by the fear of gambling with the lives of claimants in to ordering hospitals to furnish the most expensive and improbable procedures, there by diverting scarce medical resources and prejudicing the claims of others. In **ASK v. Bangladesh**¹⁹ that before carrying out a massive eviction from an informal settlement, the government should develop a plan for resettlement, allow evictions to occur gradually and take into consideration the ability of those being evicted to find alternative accommodation. The court also held that the authorities must give fair notice before eviction. Another important case on which the study will place focus is the **Grootboom**²⁰ case, in which A group of homeless people who had recently been evicted by a local authority from their informal settlements in Oostenberg, Western Cape, South Africa, sought an order from the High Court to oblige the State to provide them with temporary shelter until such time as they were able to find more permanent housing. The High Court granted the order, arguing that the children in the group were entitled to be provided with shelter at State cost under Section 28 (1) (c) of the South African Constitution. Furthermore, their parents had to be provided with shelter as well, since removing the children from their parents would not be in their best interest and contrary to the Section 28 requirement that the best interest of the child must be paramount in all decisions affecting children.²¹ Before the Constitutional Court heard the appeal, the plight of this particular group of claimants had been resolved, as the State had reached a settlement with them under which they were provided with temporary shelter of an acceptable standard. As a consequence, only the underlying constitutional question – whether or not, more generally, the State was obliged to provide homeless people with temporary shelter were still before the Court. Relying on the constitutional right of everyone to have access to adequate housing (Section 26(1)), the Court held that the State had to put in place a comprehensive and workable plan to meet its housing rights obligations. This case will further be discussed below.

These cases, together with a few others, give a clear recognition of ESC rights by the state. Hence it shows how insignificant these rights are to various states in Africa, such as, South Africa, Namibia, Angola, Nigeria etc.

¹⁹19 BLD (1999) 488, July 29. 2001.

²⁰ Constitutional Court of South Africa, *The Government of the Republic of South Africa and others v. Irene Grootboom and others*, 2001 (1) SA 46 (CC), October 4, 2000.

²¹*Grootboom v. Oostenberg Municipality* (2000) 3 BCLR 277 (C).

- **National law perspective**

The rights found in Article 95 are regarded as Second Generation Rights, these according to Ruppel (2009:13) contain social, economic and cultural rights, but for the purpose of this discussion we will narrow it down to economic and social rights. Under Chapter 11 titled 'Principles of State Policy', these rights are dependent on availability of resources and are not legally enforceable by any court, but serve as guidance for government in constructing and applying to give effect to the fundamental objectives of principles contained in the constitution. Thus Article 101 declares that Courts are entitled to have regard to the said principles in interpreting any law based on them. The principles listed in Chapter 11 cannot be categorized as constitutional rights *strictu sensu* but can properly be described as societal goals (Naldi, 1995:99). The economic and social entitlements are still as of yet not regarded as legal rights in themselves in Namibia. It comes as no surprise therefore, that a disproportionate number of people in the country still live in abject poverty, do not enjoy an adequate standard of living, unemployed, are extremely poor and live squalid living conditions in informal settlements. This is because they are instead, treated as goals, policies and programmes of the government and not as legal rights on their own. In order for the principles entrenched in Article 95 to be enforced under our constitution, there must be a causal link or relationship between the said principles and the rights entrenched in the Bill of Rights. Many of the rights in Article 95 are linked to rights entrenched in Chapter 3 such as Article 6, 8 and 10 as will be outlined below. The right to life shall be respected and protected as highlighted in Article 6. According to Parker (2002), *the right to life is at the very root of human rights because, after all, persons have this right and other human rights simply because they exist as human beings*. In ***Brugdacy v Secretary of the State***²², Lord Bridge approved the basic and critical principle that 'the most fundamental of all human rights is the individual's right to life. The right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot be properly understood in a restricted manner, and the protection of this right requires that the Namibian government and institutions adopt positive proactive steps to support the right to life. Therefore, the explicit right to life as guaranteed by our constitution must be interpreted to include the right to sufficient water at appropriate quality and quantity to sustain life. The Namibian Constitution does not

²² 1987 (1) ALL E.R 940.

explicitly guarantee the 'right to water'. However, Article 95(j) enjoins the government to actively promote and maintain the welfare of the people by adopting inter alia policies aimed at the consistent planning to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people and to improve public health.

However, with regard to the above, this does not mean that these unremunerated rights cannot be granted. In **S v Acheson**²³ it was held that, "the Namibian Constitution is not simply a statute mechanically defining structures of the Government and relations between government and the governed. It is a mirror reflecting the national soul, identifying ideals and aspirations of the nations. The spirit and tenor of the constitution must preside over and permeate process of judicial interpretation and discretion. Further on, in the case of **Minister of Defense v Mwandingi**²⁴ Constitution should not be interpreted so as to ascribe to a narrow and pedantic meaning to words used therein in interpreting it , the courts must also take into account the norms and aspirations of the Namibian people²⁵.

Dignity is regarded by the Committee on Economic, Social and Cultural Rights as the source of human rights law. Dignity is inherent to each and every person simply because of his or her being human. As such, dignity is a category of being, not just of having. Indeed, human dignity cannot be limited to something that people have. *Article 8(1)* states that dignity of all persons shall be inviolable and *Article 8(2) (b)* further provides that no person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. According to **Namunjepo & Others v Commanding Officer, Windhoek Prison and another**²⁶ the word "inhuman" was defined as destitute of natural kindness or pity, unfeeling. While on the other "to degrade" was defined as to lower in estimation, to bring into dishonor or contempt to lower in character or quality or to debase. The above is basically the theoretical aspect of the position of ESC rights in Namibia. But is that really the reality? Is that what is practically happening on the ground? This question will be answered in a form of a scenario, a case study conducted by the author of this paper. A lady who lives in a remote shack area in Windhoek was sick and approached the katutura state hospital for treatment. She did not have any money, she was told to go and get money or else she will not get treatment. Another scenario that the author of this paper picked up in the course of trying to find out more about the practical standi of ESC rights in remote areas is where an

²³ 1991 NR 1 HC.

²⁴ 1993 NR 63 (SC).

²⁵ Ex parte Attorney General In Re: The Constitutional Relationship between the Attorney General and the Prosecutor General 1998 NR 35 (SC).

²⁶ 1999 NR 271 (SC).

old lady who lives in Hakahana by the name Nambahu was terminally ill and it was discovered that the cause of her illness was poor living conditions and lack of proper sanitation. It has come to the attention of the author that this condition has affected a few others. It is a sad reality that water in these remote areas is limited to a few liters a day per household, in addition to that, there is only one water source or hence tap for a large number of people in a given remote area. One of the people in the area, during our informal discussion mentioned that they pay more for water and receive less of it. He however did not give reasons as to why they apparently do. The issue will further be investigated by the author and a report to this will be incorporated in the chapters to come. The living conditions in the above scenarios have both direct and indirect affect to their rights to dignity. In this sense dignity is regarded as the main right from which other rights and freedoms such as freedom of speech and freedom of movement are derived. Thus one cannot allege that the above persons are exercising their right to dignity due to the fact their living conditions are not up to a reasonable standard and the fact that they receive only a few liters of water for the daily consumption per household.

Article 10 of the Namibian Constitution²⁷ grants every person equality before the law and freedom from discrimination on the ground of sex, color, race, ethnic origin, religion, creed or social or economic status. In light of the above mentioned article, suffice it to say that it is *prima facie* evident that the persons in the above scenarios are being unfairly discriminated against on the basis of their social and economic status. Because they live in Hakahana which is an informal settlement does not mean they should be subjected to inadequate living conditions. It is the believe of the author of this paper that each and every individual is entitled to a humane living standard and proper sanitation regardless of where he or she lives.

Viewing essential human needs as the right of every individual is in itself of great importance, along with the recognition that all human rights are universal, interdependent and interrelated²⁸. It is unacceptable to justify a human rights violation by claiming to be fulfilling another. Human rights are essentially about governance, what the state must and must not do, and which methods are acceptable or prescribed. For socio-economic rights, the rule of law is thus essential.²⁹ A rights-based approach – rather than a charitable or developmental or an approach based on Gross National Product (GNP) necessarily entails that the government must be transparent and accountable, that there is no discrimination on grounds of gender, race,

²⁷ Act 1 of 1990.

²⁸ Vienna convention

²⁹ Shadrack, T.2009. "Water; Fundamental Human Rights or commodity". *The Namibia*, page 15.

economic or social status, that the Government is taking steps towards achieving the full enjoyment of everyone in the country of their human rights with specific emphasis on socio-economic rights – that there are legal remedies available and that people are allowed to organize to claim their rights³⁰. The Economic, Social and Cultural Rights are sine qua non for improving peoples' lives and standard of living human rights, specifically ESC rights, can be one of the strategies to employ in order to achieve social justices in Namibia. After Namibia has ratified the ICESCR, it is regarded as the principal legal source of ESC rights.

Methodology

The author of this paper has envisaged using the qualitative method of research under which data collection and desktop research will be the main methods. Additionally, social science research methods will be employed considering the fact that the study has social science elements in it, these are mainly qualitative in which 'why', 'what', and 'where' questions will be asked and answered. Another element is one which employs the focal group discussion, which will be picked up above. Documentation and structured interviews will also be used.

Case law, as seen above, international conventions will also be used in compiling this paper.

³⁰Shadrack, (2009:15)

CHAPTER TWO

Introduction

Human rights are considered as one of the major achievements of modern philosophy. The focus of human rights is on the right to life and dignity of human beings. The primary objective of human rights is to protect the dignity of its citizens. The state has to provide human rights which belong to all human beings and further protect those rights. Human rights must be effectively protected and that must be done in accordance with the rule of law which is an indispensable precondition of a modern state.³¹

What are Human Rights?

Human rights are those Fundamental rights which empower human beings to shape their lives in accordance with the liberty, equality and respect for human dignity. Taken from a legal point of view, human rights are sums of civil, political, economic, social, cultural and collective rights laid down in international and regional human rights instruments and in the constitutions of states. From a philosophical approach, human rights are the only recognized value system under present international law comprising elements of liberalism, democracy, popular participation and social justice, the rule of law and good governance. Furthermore, the existential rights provide a nucleus from which a number of other rights have been created such as an equal right and equality before the law, equal protection before the law, economic right, right to own property, right to housing, right to work or collective rights, for example of the people to self-determination and right to development.³²

The Universal Declaration on human Rights³³ in its preamble recognizes the inherent dignity and the equal and inalienable rights of the human family as being the foundation of freedom, justice and peace in the world. In addition, article (1)³⁴ goes further to state that all human beings are born free and equal in dignity and rights and that they are endowed with reason and

³¹ Makanza, J.(2010) "An Analysis of the right to Housing in Namibia Under the laws of Namibia and international Conventions". *Bachelor of law (LLB) Dissertation*. University of Namibia: Windhoek.

³² Makanza (2010:4)

³³ Universal declaration of human rights of 1948 (UNDR),

³⁴ Article 1 of the UNDR

conscience and as such should act towards one another in the spirit of brotherhood. In addition, the UNDHR extends to the explanation that when it comes to 'all humans for all' this refers to the indivisibility and interdependent of all such human rights, economic, social, cultural rights are therefore just as necessary as civil and political rights. According to Nowak³⁵ real human rights protection can only be achieved through a well balanced mixed as different human rights take into account the rights of an individual to non interference and positive state action immanent.

The interdependence and indivisibility of Human Rights

The right to land and the rights to housing are universally recognized human rights as stated above, and they are both interdependent and indivisible. What this simply means is that in achieving both rights, it is inevitable that either right may at one point or another appear to be more important than the other. The major international instruments prescribe a wide range of human rights. Assuming they are all universally applicable, or is there an overt or covert hierarchy? Are some rights more important than others? The importance ascribed to rights is a matter of individual preference, for example people suffering in the aftermath of catastrophe natural emergency will most likely prioritize clean water and food over the right to democratic election. The principle of interdependence and indivisibility is clothed in the Vienna Declaration and programme of Action.³⁶ In terms of the Vienna Declaration all human rights are universal, indivisible, and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. The most significant categorization of rights is that between civil and political rights and ESC rights, as most authors have pointed out in the literature review. The factor to be considered here is the overlapping rights and interdependence of all rights for development the result is in access to the rights to adequate standards of living, right to housing, freedom from poverty. For example the right to development alone would not be sufficient to ensure that all the elements of the right are adequately achieved. On the other hand, full implementing the rights to adequate standard of living would require the right to development. Below is a discussion of the right to housing, water and health, their importance and how they are a prerequisite to the right to life.

Housing

³⁵ Nowak, M. 2003. *Introduction to the International Human Rights Regime*. Leiden: Martinus Nijhoff Publishers.

³⁶ The World Conference on Human Rights, held in Vienna 1993, dealt extensively with the right to development. It adopted the Vienna Declaration and Programme of Action which recognizes that democracy, development and respect for human rights and fundamentals and freedoms are interdependent and mutually reinforcing.

Very few people have access to adequate housing in Namibia. The poor live in Shacks or hence 'slams' at the outskirts of town in the Cities, the situation in villages is also not better off. Their living conditions are unbearable. Water and sanitation becomes a serious issue which will be discussed below. Very few people have access to electricity for either lightning, heating or cooking. Slightly more Namibians use candles for lighting than those who use electricity. Wood is the cooking fuel of most Namibians and 90% of severely poor and poor households use wood for cooking and this requires walking kilometers to collect and to carry the wood back home.³⁷ It should also be understood that the right to housing³⁸ is not the same thing as the right to adequate housing. An attempt will be made below to establish the right to Adequate Housing as the case may be.

Adequate housing encompasses more than just the four walls of a room and a roof over one's head. Housing is essential for normal healthy living. It fulfils deep-seated psychological needs for privacy and personal space; physical needs for security and protection from inclement weather; and social needs for basic gathering points where important relationships are forged and nurtured. In less developed communities, a house also serves as an important function as an economic centre where essential commercial activities are performed³⁹. In terms of the Normative content of the right to housing, adequate housing that is, mention must be made to the fact that housing as a basic human right is legally instrumented in international Human rights law.

Under this topic, housing will be discussed as a human right in light of the applicable international and regional instruments. The right to adequate housing is firmly entrenched within the international, regional and national human rights corpus.

International standards

The UNDHR⁴⁰ as the mother body of all instruments, the ICESCR,⁴¹ In addition to the above is the UN Guidelines on Development-based Displacements, CESCR General Comments in the

³⁷ Walters J.R. *A Situational Analysis of the Status of Economic, Social and Cultural Rights in Namibia*: unreported. A paper delivered at the HRDCs conference on Clarifying Economic, Social and Cultural Rights in Namibia; 18-19 July 2011.

³⁸ Any kind of shelter on top of someone's head can be regarded as a house. Shacks and 'slams' may also be referred to as houses, but that is, however, not sufficient for a dignified standard of living. The requirement in this regard is Adequate Housing.

³⁹ Morka. F. *the Human Right to adequate housing, International and national perspective on Implementation*: Conference on Economic, Social and Cultural Rights, University of Namibia. July 18, 2011.

⁴⁰ Article 25(1),

Right to Adequate Housing (No.4) and last but not least, CESCR General comments on the right to adequate Housing (Forced Eviction) (No.7). The preamble of the UNDHR makes provision for the fact that all human rights are inalienable and as such must be respected by all.

Regional Rights instruments

The African Charter of Human and Peoples rights⁴², The European Social Charter, European Convention on Human Rights and Fundamental freedoms, the Charter on the Organization of American States (OAS)⁴³ are all focused on the notion that the state parties must recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of the living conditions. It should also be noted that although African charter on Human and People's Rights did not expressly recognize the right to housing, the Commission has interpreted as recognizing that human right in the Nigerian case of *SERAC v Nigeria*.

National recognition

In most constitutions housing is not recognized as a human right, rather, along with other ESC rights, it is classified as an objective under the *Fundamental Objectives and Directive principle of State Policy*. An example of such constitutions is the Constitution of the Republic of Namibia⁴⁴ and the constitution of the Federal Republic of Nigeria⁴⁵ to mention a few. South Africa on the other hand, the right to adequate housing is expressly recognized as a Human right in the Bill of rights⁴⁶.

In light of the above, it appears evident that housing is seen to fall under the umbrella of human rights, and as such, international and regional instruments have made provisions for housing

⁴¹ Article 11(1), which states that “state parties recognize the right of everyone to an adequate standard of living for himself and his family, including adequate housing and to the continuous improvement of living conditions”

⁴² The African Charter on Human and People's rights also provide that African states should realize that the right to adequate housing that they have recognized at international level, by accepting the international covenant on Economic, Social and Cultural Rights (article 60 of the charter). This all those states that have accepted the African charter and the ICESCR rights are under obligations to take measures to realize the right of their people to adequate housing.

⁴³ Article. 31(K).

⁴⁴ Chapter 11

⁴⁵ 1999 (chapter)

⁴⁶ Article 26, SA Constitution.

and state parties of the instrument are therefore required to comply with the specifications of the instruments. The main regional treaties protecting civil and political rights are the European Convention on human Rights, the American convention on Human Rights, the African Charter on Human and Peoples Rights. These instruments all recognize the right to life, the right to not be subjected to cruel, inhumane or degrading punishment, and the right not to be subjected to arbitrary or illegal interference in one's private or family life or in ones' home. These civil and political rights guarantee a partial protection of the right to adequate housing; the same can be said with regard to water and health. Some more regional treaties that also recognize the right to adequate housing are the European Social charter, the African Charter on rights and wellbeing of the Child and the Protocol of the African Charter of Human and people's rights on the rights of Women in Africa. However for purposes of the topics at hand, the UNDHR, ICESCR and African Charter on human and peoples' rights shall be discussed. Everyone is entitled to the right to housing; the right of vulnerable groups, including women, children, the aged, internally displaced persons, refugees and the poor to housing is affirmed under international human rights law. Discrimination in access to housing against vulnerable groups is specifically prohibited. Suffice it to say that the above mentioned are the beneficiaries of the right to housing.

There are certain key features of the right to housing. The United nations Committee on ESCR has affirmed a view of the right to housing as the right to live somewhere in dignity, peace and security. Further, that right must be accorded to all persons without discrimination of any kind, including sex, race, religion, culture or economic status. With regard to the aforementioned however, there appears to be misconception which have been clarified by the UN Special Rapporteur on the Right to Adequate Housing. It has thus come to the knowledge of the author of this paper, in the course of her research that the state actually has an obligation to build or give housing to everyone. Housing has to be provided free of charge to everyone, or the state must discharge all of its legal obligations immediately on ratification of the ICESCR or the state should meet all of the associated obligations by itself or through an unregulated market, or the right to adequate housing will manifest in exactly the same manner in all circumstances or locations. The obligations of the state will further be discussed in the following chapters.

The core content of the right to Adequate Housing, active wording to the committee on ESCR, the concept of minimum core obligation denotes a duty to satisfy, at the very least, minimum essential levels of the rights recognized in the covenant. The core content of a right refers to its constitutive elements without which the right is hallow and meaningless. It represents the

threshold or baseline entitlements comprised in the right that must be fulfilled by all states parties irrespective of their peculiar economic, social, political or other contexts⁴⁷. Moreover, satisfaction of the minimum core content of a right by itself does not equate to fulfill compliance with the covenant; rather, it provides a basis for the performance on the full range of obligations imposed in relation to recognized Human rights⁴⁸.

The right to housing and duties of immediate effect

A number of courts have felt able to give effect to the principle of duties of immediate effect. Judicial protection against forced eviction is a good example. The right to adequate housing includes positive duties to make housing accessible to people in need, which could require progressive implementation over a period of time. But the State also has an immediate negative duty to refrain from forcefully evicting persons from their housing without legal justification.⁴⁹ Even where justified, eviction is prohibited without due compliance with procedural guarantees. The Supreme Courts of India and of Bangladesh have issued significant decisions in this regard, underscoring the importance of the State's procedural duties which must be complied with as a prerequisite to a lawful eviction. For instance, the Supreme Court of Bangladesh held, in *ASK v. Bangladesh* that “*before carrying out a massive eviction from an informal settlement, the government should develop a plan for resettlement, allow evictions to occur gradually and take into consideration the ability of those being evicted to find alternative accommodation*”. The court also held that the authorities must give fair notice before eviction.

The justiciability of the right to housing.

Grootboom⁵⁰: the right to adequate housing

A group of homeless people who had recently been evicted by a local authority from their informal settlements in Oostenberg, Western Cape, South Africa, sought an order from the High Court to oblige the State to provide them with temporary shelter until such time as they were able to find more permanent housing. The High Court granted the order, arguing that the

⁴⁷ Moroka. F. the *Human Right to adequate housing, International and national perspective on Implementation: Conference on Economic, Social and Cultural Rights*, University of Namibia. July 18, 2011.

⁴⁸ Ibid.

⁴⁹ This is practiced in Namibia. It is reported most times of the year that the municipality of a certain town is auctioning a house taken away from a certain family because their water bill is in arrears.

⁵⁰ *Grootboom v Oostenberg Municipality* (2000) 3 BCLR 277 ©.

children in the group were entitled to be provided with shelter at State cost under Section 28 (1) (c) of the South African Constitution. Furthermore, their parents had to be provided with shelter as well, since removing the children from their parents would not be in their best interest and contrary to the Section 28 requirement that the best interest of the child must be paramount in all decisions affecting children.⁵¹ Moreover, the Court held that the State had to put in place a comprehensive and workable plan to meet its housing rights obligations. Thus the Court established that in deciding how to comply with these obligations, three elements must be considered by the authorities:

- The need to take reasonable legislative and other measures;
- The need to achieve the progressive realization of the right; and
- The requirement to use available resources.

In ***Jaftha v Schoeman and Van Rooyen v Stoltz***,⁵² the Constitutional Court decided that Provisions of the Magistrates' Courts Act that allowed, without adequate judicial oversight, the sale of a person's home to make good a judgment debt, breached the duty to respect the right of everyone to have access to adequate housing. Similarly, an Argentine State Supreme Court decided that provisions of the local Administrative Code that granted the State the authority to automatically evict tenants of State owned housing were unconstitutional, breaching the right to due process and the right to housing. The court explicitly linked the right to due process, the right to legally challenge eviction orders and the right to adequate housing. The judgment referred specifically to CESCR's General Comment 4 (on the right to adequate housing) and General Comment 7 (on forced evictions).

In the ***Social and Economic Rights Action/Centre for Economic and Social Rights v. Nigeria***⁵³ (SERAC and CESR) case, the African Commission on Human and Peoples' Rights endorsed the notion of duties to respect the enjoyment of ESC rights.⁵⁴ The Commission stated:

"The obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources,

⁵¹ Grootboom v Oostenberg Municipality (2000) 3 BCLR 277 ©.

⁵² Jaftha v Schoeman; Van Rooyen v Stoltz 2005 1 BCLR 78 (CC) October, 8, 2004.

⁵³ SERAC and CESR v Nigeria, Communication No 155/96, October 12- 27, 2001

⁵⁴ SERAC and CESR v Nigeria, Communication No 155/96, October 12- 27, 2001

*and liberty of their action. With respect to socio-economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs”.*⁵⁵

Reference must also be made to the case of Constitutional Court of South Africa, ***the Government of the Republic of South Africa and others v. Irene and Grootboom and others***⁵⁶.

In light of the above, the question of justiciability is no longer an issue; other jurisdictions have made it possible for their citizens to seek redress when their ESC rights are violated. They have made it an obligation on the state to provide adequate housing to their citizens. Namibia can therefore take an example from the above mentioned countries or hence from their courts. In addition, the approach taken in Namibia to recognize civil and political rights in the Caprivi High Treason Case⁵⁷ is the same approach that can be adopted in regard to the justiciability of social economic rights.

Right to health⁵⁸

Health is not only a basic need but a fundamental right that is crucial to the existence of the people in Namibia. Improving life expectancy from the recent 49 years to the previous 61 years and higher can only happen if quality health and social care services are provided to citizens.

⁵⁵ Ibid. para. 45.

⁵⁶ 2001 (1) SA 46 (CC), October 4, 2000.

⁵⁷ Mwilima and others,

⁵⁸ **International human rights treaties recognizing the right to health:** The 1965 International Convention on the Elimination of All Forms of Racial Discrimination: art. 5 (e) (iv), The 1966 International Covenant on Economic, Social and Cultural Rights: art. 12, The 1979 Convention on the Elimination of All Forms of Discrimination against Women: arts. 11 (1) (f), 12 and 14 (2) (b), The 1989 Convention on the Rights of the Child: art. 24, The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: arts. 28, 43 (e) and 45 (c), The 2006 Convention on the Rights of Persons with Disabilities: art. 25. In addition, the treaty bodies that monitor the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child have adopted general comments or general recommendations on the right to health and health-related issues. These provide an authoritative and detailed interpretation of the provisions found in the treaties. Numerous conferences and declarations, such as the International Conference on Primary Health Care (resulting in the Declaration of Alma-Ata), the United Nations Millennium Declaration and Millennium Development Goals, and the Declaration of Commitment on HIV/AIDS, have also helped clarify various aspects of public health relevant to the right to health and have reaffirmed commitments to its realization.

According to Walters JR⁵⁹, The provision of quality health and social health care services to all Namibians can only be achieved if there are enough qualified human resources, uninterrupted supplies of medicines and pharmaceutical, well constructed and maintained health facilities, good information systems, sufficient health financing and good policies, laws and guidelines. The health system of health care and quality services delivery are expensive to address but unavoidable.

Status quo

The Health situation in Namibia is quite bad. There are 3 regional referral hospitals around the country, one national referral hospital, 30 district hospitals, 38 health centers and 269 clinics providing institutional medical and nursing care. There are also 844 private health facilities in the country. The costs of running a health facility are very high given Namibia's low population density of about 2 km². This makes it difficult to get health facilities closer to the people. It has also been reported that government has responded to this issue by establishing 1,150 outreach service/ mobile clinics managed by district hospitals and health centers to communities lacking access to fixed health facilities.

Namibia has a large private health care sector with roughly the same number of health care professionals as the public sector. It is estimated that there are 8 private health care professionals per 1000 of the population it serves. For the public sector the ratio of the health care professionals to population served is 2, which will certainly address the shortages of medical doctors in the near future. HIV/AIDS remains one of the top 5 leading causes of death in the country. Survey results indicate that knowledge on HIV has increased and is relatively high in Namibia, but there are hardly possible signs towards behavior change. There has been a successful roll out of Anti retroviral treatment (ART) to all 37 hospitals country wide targeting people with HIV /AIDS.⁶⁰

A general concern is a lack of health care workers in rural areas. A shortage of staff means that only one nurse per clinic, for example the situation in the Okavango region. Understaffing at clinics leaves gaps in services, e.g. rural clinics are closed after hours and over weekends. That therefore means that people in rural areas have limited access to health services. A concerted

⁵⁹ Ombudsman, Republic of Namibia at a conference: clarifying Economic, Social and Cultural Rights: 18-19 July, Safari Hotel.

⁶⁰ Children and adolescents in Namibia 2010: A Situation Analysis

effort should be made to renovate and maintain existing hospitals and clinics at acceptable levels.⁶¹

The right to health can be understood as the right to an effective and integrated health system encompassing health, which is responsive to national and local priorities, and accessible to all. Underpinned by the right to health, an effective health system is a core social institution, no less than a court system or a political system.⁶² What the right to health means is that the government has the responsibility to (and therefore must) put in place conditions in which you can be as healthy as possible. Examples of such conditions include making sure that adequate health services or health care (medical, preventive and mental) is available; that there are healthy and safe working conditions at your workplace; and making sure that there is enough housing and nutritious food for their citizens. Government can do this by putting in place policies and action plans which will lead to available and accessible health care for everyone.⁶³ When we talk about the right to health we are not just talking about the physical or mental well-being of a person. The right to health involves many other things without which you cannot enjoy good health. The most authoritative interpretation of the right to health is outlined in Article 12 of the International Covenant on Economic, Social & Cultural Rights (ICESCR) and has been ratified by Namibia and many other countries. In May 2000, the Committee on Economic, Social and Cultural Rights, which monitors the Covenant, adopted a General Comment on the right to health. The general comment recognized the fact that the right to health is closely related to and dependent on the realization of other human rights, such as the right to; housing, access to sufficient health care (medical, preventative, and mental), nutrition, sanitation. It is also important to note that, when speaking about the right to health, there are other main important rights at issue. These rights include;

The right to life⁶⁴.the right to health is a prerequisite to the right to life. Without the highest standards of health, the life expectancy of people will be low and thus an infringement to the right to life. In addition, non affordability of medication, lack of hospitals and health care and treatment may also result to the death of a person, hence an infringement of the right to life.

⁶¹ *ibid*

⁶² United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 2006.

⁶³ Legal Assistance Centre, The right to Health, A Publication of AIDS law unit.

⁶⁴ Article 6 of the Namibian Constitution, Act 1 of 1990.

The right to the highest possible standard of physical health⁶⁵. This is a claim to a set of social arrangements norms, laws, and an enabling environment that can best secure the enjoyment of this right. The right covers mental health, reproductive health and sexual health.

The right to adequate standard of living and housing. The right to adequate standard of living comprises, *inter alia*, three rights that are relevant to the environment context namely: the right to adequate food, the right to adequate water and the right to adequate housing⁶⁶.

The right to equal distribution of food. The right to adequate food does not mean that government will be responsible for giving food to its citizens. Rather it means that government has a duty to facilitate efforts to meet food needs for its people by creating an economic, political, and social environment that will allow you to achieve food security. Only when one does not have the capacity to meet their food needs for reasons beyond your control e.g. disaster, famine, age and handicap, does the right to food imply that government physically provide food.

The right to access safe drinking water and sanitation. Everyone requires access to adequate amounts of clean water. The water must be available in sufficient amounts, safe to use, and accessible to all who require it. The human right to water only applies to “basic needs” for drinking, cooking and fundamental domestic use. It does not mean that a person has a right to an unlimited amount of water.

The right of equal access to health care regardless of sex, race, or other status: one should be able to easily get to the health facility; should be treated without any form of discrimination; should be able to get health information without any difficulty; and be able to afford paying for the treatment received.

The right to a safe and healthy environment: In the realization of the right to health, government has a duty to take necessary steps for improvement of all aspects of environmental and industrial hygiene. Environmental hygiene covers all environmental factors that may affect your health such as pollution of water sources that limit access to clean water, unsafe disposal of human excrete, sewage and other refuse, global warming and its effects on human health causing skin disorder and eye damage.

⁶⁵ Referred to as the right to Health.

⁶⁶ As discussed above.

The right to a safe and healthy workplace, and proper protection for pregnant women in work that can be harmful to them: If someone is pregnant, there are certain things, which can harm them or their unborn baby. For instance certain chemicals can increase the risk of a miscarriage or of someone having a baby with a birth defect. One should therefore ensure that their work environment does not constitute a health risk to themselves or their unborn baby.

The right to freedom from discrimination and discriminatory social practices: Examples of discriminatory social practices include female circumcision, the choosing of the sex of a baby before birth and the killing of female foetuses. Patients suffering from mental illness or people living with HIV and AIDS are often vulnerable to discrimination. These impacts negatively on their ability to access proper treatment and care; and the stigma associated with mental illness results in their experiencing discrimination in other aspects of their lives e.g. their rights to employment, adequate housing, and education among others.

The right to information on health, sexual and reproductive health: Everyone has a right to access health-related education and information on sexual and reproductive health. An example of such information includes but is not limited to contraceptives and family planning; abortions and the health risks of using abortion as a method of birth control. Examples of reproductive health rights of people living with HIV and AIDS are; not to be subjected to forced sterilization but to have the right to chose whether or not to have children provided that they receive sufficient information on the implications of doing so.

In discussing the right to health, we also need to incorporate the minimum requirements for this specific right, also provided by The Namibian Constitution, The African Charter on Peoples and Human Rights, The International Covenant on Social, Economics & Cultural Rights (ICESCR), The Patient Charter and The Namibian Public Service Charter.

When we say that there are some minimum requirements for right to health, what we mean is that there are some basic requirements which government must provide its citizens with. The following are the minimum requirements that government should provide to its citizens.

Availability

Government must ensure that people have enough functioning hospitals, clinics and nursing homes. This also includes clean drinking water, sanitation facilities, which are enough, essential drugs and trained medical and support staff receiving relatively good salaries; an ambulance, laboratory service among others. This should also include the underlying determinants such as safe water and adequate sanitation.

Accessibility

Citizens should be able to easily get these health facilities, goods and services. Health care must be easy to get for everyone without discrimination. Accessibility has four overlapping dimensions:

1. Non-discrimination

Citizens should be able to see a doctor, be examined, and get their drugs without being discriminated against on the basis of race, gender, religion, age, sex, social standing, or other status. The young and old, both of who have special needs are especially vulnerable to the effects of poor health care. They are often unable to recognize or protest when their rights to care are violated. Without family support, they may not receive care from the government. Discrimination and stigma against people living with HIV and AIDS is a major contributing cause to people not seeking healthcare services.

2. Physical accessibility

Hospitals, clinics, doctors and medicines among others must be within safe physical reach for anyone who is feeling sick. This is especially so for weak or marginalized people.

3. Economically affordable

Getting treatment from a doctor or nurse from a hospital or clinic, and thereafter buying the drugs must not be so expensive that citizens cannot afford it. Right to health also means that health-care services whether privately or publicly provided, should be affordable for all. In many countries, the poor are often denied health care because they cannot afford it.

4. Information accessibility

The government has a duty to provide citizens with education on current health problems and emphasize health promotional activities. They should be able to seek, receive and pass on information and ideas about health matters⁶⁷.

From the international instruments mentioned above, countries, by ratifying and signing them create obligations on their governments that the citizens are entitled to. As with every human right, the right to health entails certain obligations on the government. A governments' obligation is a duty or responsibility that the government owes its citizens. The government has the right to respect. Government must not act directly counter to the human rights standard. It must avoid doing anything, which can interfere with the enjoyment of the right to health. For example, government cannot introduce a policy or law, which will interfere with the enjoyment of the right to health. In the case of the ***Islamic Community in Bosnia and Herzegovina***⁶⁸ the Human Rights Chamber for Bosnia and Herzegovina found that the State authorities, in destroying and removing the remains of mosques and desecrated graveyards, and denying the Muslim community the ability to rebuild the destroyed mosques, breached the community's religious and property rights. In addition to that, it also has the right to protect. Government must act to stop others from violating the human rights standard. Moreover, it has an obligation to fulfill. Government has an affirmative duty to take appropriate measures to ensure that the right to health of everyone is realized. The extent to which government can fulfill this obligation will depend on available resources. While the concept of progressive realization applies to all rights under the Covenant, some obligations are *of immediate effect*, in particular the undertaking to guarantee that all rights are exercised on the basis of *non-discrimination* and the obligation to *take steps* towards the realization of the rights, including the right to health, which should be concrete, deliberate and targeted. In this regard, retrogressive measures are not permissible, unless a State can demonstrate that it has made every effort to use all resources at its disposal to meet its obligations.

Taking steps to realize the right to health

⁶⁷ Legal Assistance center, (2009). *The Right to Health*.

⁶⁸ The Islamic Community in Bosnia and Herzegovania v the Republika Srpska, June 11, 1999.

Taking steps to realize the right to health requires a variety of measures. As the most feasible measures to implement the right to health will vary from State to State, international treaties do not offer set prescriptions.

The International Covenant on Economic, Social and Cultural Rights in article 2 (1) simply states that the full realization of the rights contained in the treaty must be achieved through “all appropriate means, including particularly the adoption of legislative measures.” The Committee on Economic, Social and Cultural Rights has underlined that States should, at a minimum, adopt a national strategy to ensure to all the enjoyment of the right to health, based on human rights principles which define the objectives of that strategy. Setting indicators and benchmarks will be decisive in the formulation and implementation of such a strategy. Indeed, the right to health being subject to progressive realization, what is expected of a State will vary over time. So a State needs a device to monitor and measure these variable dimensions of the right to health. Indicators, especially when disaggregated, provide useful information on how the right to health is realized in a particular country. OHCHR has been developing a conceptual and methodological framework for such indicators.⁶⁹

A proposed framework for indicators⁷⁰

For a human right, the identified indicators help to assess the steps taken by a State in meeting its obligations—from acceptance of international human rights standards⁷¹ to efforts being made by the State to meet the obligations that flow from these standards⁷², onto the results of those efforts from the perspective of the population (*outcome* indicators). Indicators that illustrate the right to the highest attainable standard of health are, for instance, the number of international human rights treaties relevant to the right to health that the State has ratified⁷³, the proportion of births attended by skilled health personnel and maternal mortality ratio.⁷⁴ It is also crucial that indicators be disaggregated by relevant population group and possible ground of discrimination.

⁶⁹ Office of the United Nations High Commissioner for Human Rights. *The Right to Health*. World Health Organisation; Fact Sheet No. 31.

⁷⁰ See “report on indicators for monitoring compliance with international human rights instruments” (HRI/MC/2006/7), available at <http://www.ohchr.org>. This framework is being validated through expert consultations and workshops in 2007-2008.

⁷¹ “Structural indicators”

⁷² “process indicators”

⁷³ “Structural indicators”

⁷⁴ “outcome indicator”

Core minimum obligation⁷⁵

The Committee on Economic, Social and Cultural Rights has also stressed that States have a *core minimum obligation* to ensure the satisfaction of minimum essential levels of each of the rights under the Covenant. While these essential levels are, to some extent, resource-dependent, they should be given priority by the State in its efforts to realize the rights under the Covenant. With respect to the right to health, the Committee has underlined that States must ensure: The right of access to health facilities, goods and services *on a non-discriminatory basis*, especially for vulnerable or marginalized groups; Access to the *minimum essential food* which is nutritionally adequate and safe; Access to *shelter, housing and sanitation* and an adequate supply of *safe drinking water*; The provision of *essential drugs* and last but not least, *Equitable distribution* of all health facilities, goods and services. This will again be discussed below.

We are human beings and as such we have rights, which must be retained at all times. The enjoyment of these rights is guaranteed and enshrined in numerous international and regional human rights treaties as well as national constitutions all over the world. In Namibia, we get the right to health from the following national, international and regional human rights instruments;

The Namibian Constitution⁷⁶

There is no clear right to health in the Namibian Constitution. But under the Article 95 of the Namibian Constitution that deals with Principles of State Policy, the Namibian Constitution states “*the state shall enact legislation to ensure consistent planning to raise and maintain an acceptable standard of living for the country’s people and to improve public health*”. To this end, the Namibian Government has come up with the policies such as; National Policy on HIV/AIDS, Patient Charter and others. At the same time Article 144 of the Namibian Constitution states that “*the general rules of public international law and international agreements binding upon Namibia form part of the law of Namibia*”. This means that all the international agreements that Namibia signed become part of the law of our law⁷⁷.

⁷⁵Will be discussed in depth in the next chapter.

⁷⁶ Act 1 of 1990

⁷⁷ Legal Assistance Centre, *The right to Health*, A Publication of AIDS law unit. P. 18

The African Charter on Peoples and Human Rights⁷⁸

The Government of Namibia signed the African Charter on Peoples and Human Rights, which states that “*every individual shall have the right to enjoy the best attainable state of physical and mental health*” and that “*state parties to the present charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick*”. In the Namibian context, this means that the government will put in place well equipped hospitals with fully qualified doctors to ensure that anyone who falls sick can and does get treatment. The right to health is provided for in Article 16 of the charter.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷⁹

The Namibian government also signed the International Covenant on Economic, Social and Cultural Rights – (ICESCR) 12 (1), which provides that the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Steps for realizing this right include measures by the Government of Namibia for the prevention and treatment of diseases; and the creation of conditions, which would ensure that all those people who are sick receive medical attention.

The Patient Charter⁸⁰

A Charter is a document from the sovereign power of a country, which gives certain rights and privileges to a person or the people. The Ministry of Health and Social Services of Namibia wrote the Namibian Patient Charter. It was written for any person who gives or receives a health service. It recognizes and protects the integrity and dignity of patients and clients. It sets out patients’ rights and entitlements. It is also a yardstick to measure the quality of health care services provided at the health care institutions. The question is however, whether the ministry abides to this charter?

⁷⁸ Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982), entered into force 21 October 1986.

⁷⁹ 1966

⁸⁰ Government of the Republic of Namibia, July 1998. The Patient Charter of Namibia. Windhoek: Ministry of Health and Social Services. Primary Health Care and Nursing Services Directorate.
<http://www.healthnet.org.na/policiesguidelines/policies/patient%20Charter.pdf> (accessed May 1, 2006).

The Namibian Public Service Charter⁸¹

The Namibian Public Service Charter is a document written by the Government of Namibia. It was written with a view to improving the quality of services delivered to all those people who live in or are visiting Namibia. The General Principles of the Namibian Public Service Charter are part of a wider reform programme, designed to provide efficient, effective and economic public services. According to these principles, the government is supposed to provide quality service that is efficient and affordable to the people.⁸²

Case law and the right to health

In a similar vein to the *Grootboom* case, the South African Constitutional Court decided another important case involving the right to health. In *the South African Minister of Health v. Treatment Action Campaign* case⁸³, the Court decided that the exclusion from public health care services of a drug that had been shown to reduce the transmission of HIV from mothers to children was unreasonable.

Following *Grootboom's* precedent, the Court in *TAC* trumpeted its institutional incompetence to decide the minimum core, and it also disclaimed its effect on the budgeting process by claiming that effect is merely incidental to determining “reasonableness”.

Determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. Widespread use poses to the development of resistant HIV strains. But the Court answered each objection. First, it determined the issue of fact with respect to efficacy: Obviously, it would be desirable, commendable, and, presumptively, constitutionally permissible for the government to provide above and beyond what the order requires. The selective order in *TAC* brings into relief the “minimum obligation” effect of the Court’s decision: access to the barest PMTCT protocol is deemed, in effect, a more basic concern than some components of a basic public health program.

A number of Argentinean cases have addressed the duty to protect, in the context of the right to health. In *Etcheverry v. Omint*,⁸⁴ the Supreme Court decided that a refusal by a private health insurance fund to maintain the membership of an HIV-positive client amounted to a breach of

⁸¹ 10 October 2005

⁸² Legal Assistance Centre, *The right to Health*, A Publication of AIDS law unit.

⁸³ *South African Minister of Health v Treatment Action Campaign*, 2002 (5) SA 721, July 5, 2002.

⁸⁴ *Etcheverry, Roberto E v Omint Sociedad Anonima v Servicio*, Attornet General’s brief of December 17, 1999.

the right to health. The plaintiff had been a member of the health plan as part of his employment benefits. When he became unemployed, he sought to continue the policy privately. After the plaintiff had tested HIV-positive, the health insurance company refused to maintain his membership in the health plan. The Supreme Court, following the Attorney General's opinion, stated that private health insurance companies had special duties towards their customers that extended beyond a mere commercial deal. They stressed that health insurance companies carry duties to protect the right to health, as provided for by international Human rights treaties. Thus, they bear "*a social pledge to their users*". The Court ordered the health insurance company to maintain the plaintiff as its client.

From the above, it shows how other jurisdictions have taken ESC right serious, to the extent to which courts are involved. Again the issue of justiciability is addressed. Like other countries, Namibia can and must thus take steps to fully recognize the ESC rights and make them justiciable. Civil and political rights and ESC rights are interdependent and indivisible. What Namibia is doing is turning a blind eye on the nature of their indivisibility and interdependency, and thus completely ignoring the status of the living conditions of most of its citizens.

A country's difficult financial situation does NOT absolve it from having to take action to realize the right to health.⁸⁵

It is often argued that States that cannot afford it are not obliged to take steps to realize this right or may delay their obligations indefinitely. When considering the level of implementation of this right in a particular State, the availability of resources at that time and the development context are taken into account. Nonetheless, no State can justify a failure to respect its obligations because of a lack of resources. States must guarantee the right to health to the maximum of their available resources, even if these are tight. While steps may depend on the specific context, all States must move towards meeting their obligations to respect, protect and fulfill.

The right to health is NOT the same as the *right to be healthy*.⁸⁶

⁸⁵ Office of the United Nations High Commissioner for Human Rights. *The Right to Health*. World Health Organisation; Fact Sheet No. 31.

⁸⁶ Ibid.

A common misconception is that the State has to guarantee us good health. However, good health is influenced by several factors that are outside the direct control of States, such as an individual's biological make-up and socio-economic conditions. Rather, the right to health refers to the right to the enjoyment of a variety of goods, facilities, services and conditions necessary for its realization. This is why it is more accurate to describe it as the right to the *highest attainable standard* of physical and mental health, rather than an unconditional right to be healthy.

The link between the right to health and other Human rights⁸⁷

Human rights are interdependent, indivisible and interrelated. This means that violating the right to health may often impair the enjoyment of other human rights, such as the rights to education or work, and vice versa. The importance given to the “underlying determinants of health”, that is, the factors and conditions which protect and promote the right to health beyond health services, goods and facilities, shows that the right to health is dependent on, and contributes to, the realization of many other human rights. These include the rights to food, to water, to an adequate standard of living, to adequate housing, to freedom from discrimination, to privacy, to access to information, to participation, and the right to benefit from scientific progress and its applications. It is easy to see interdependence of rights in the context of poverty. For people living in poverty, their health may be the only asset on which they can draw for the exercise of other economic and social rights, such as the right to work or the right to education. Physical health and mental health enable adults to work and children to learn, whereas ill health is a liability to the individuals themselves and to those who must care for them. Conversely, individuals' right to health cannot be realized without realizing their other rights, the violations of which are at the root of poverty, such as the rights to work, food, housing and education, and the principle of non-discrimination.

The right to health under International Human Rights Law⁸⁸

The right to the highest attainable standard of health is a human right recognized in international human rights law. The International Covenant on Economic, Social and Cultural Rights, widely

⁸⁷ Ibid.

⁸⁸ Office of the United Nations High Commissioner for Human Rights. *The Right to Health*. World Health Organisation; Fact Sheet No. 31.

considered as the central instrument of protection for the right to health, recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. It is important to note that the Covenant gives both mental health, which has often been neglected, and physical health equal consideration. International Covenant on Economic, Social and Cultural Rights, article 12⁸⁹ has reference. Subsequent international and regional human rights instruments address the right to health in various ways. Some are of general application while others address the human rights of specific groups, such as women or children.

Declaration of Alma-Ata⁹⁰

The Declaration affirms the crucial role of primary health care, which addresses the main health problems in the community, providing promotive, preventive, curative and rehabilitative services accordingly.⁹¹ It stresses that access to primary health care is the key to attaining a level of health that will permit all individuals to lead a socially and economically productive life⁹² and to contributing to the realization of the highest attainable standard of health. The right to health is also recognized in several regional instruments.⁹³ Finally, the right to health or the right to health care is recognized in at least 115 constitutions. At least six other constitutions set out duties in relation to health, such as the duty on the State to develop health services or to allocate a specific budget to them.

Progressive realization

Through their ratification of human rights treaties, States parties are required to give effect to these rights within their jurisdictions. More specifically, article 2 (1) of the International Covenant

⁸⁹ 12(1) the states parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical health. 12(2) the steps to be taken by the states Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

⁹⁰ Declaration of Alma- Alta, International Conference on Primary Health care, Alma-Ata, USSR, September 1978.

⁹¹ Article VII

⁹² Article V

⁹³ See footnote 1.

on Economic, Social and Cultural Rights underlines that States have the obligation to progressively achieve the full realization of the rights under the Covenant. This is an implicit recognition that States have resource constraints and that it necessarily takes time to implement the treaty provisions. Consequently, some components of the rights protected under the Covenant, including the right to health, are deemed *subject to progressive realization*.

Not all aspects of the rights under the Covenant can or may be realized immediately, but at a minimum States must show that they are making every possible effort, within available resources, to better protect and promote all rights under the Covenant. Available resources refer to those existing within a State as well as those available from the international community through international cooperation and assistance, as outlined in article 2 (1).

The role of international assistance and cooperation is reflected in other instruments as well, such as the Charter of the United Nations, the *Universal Declaration of Human Rights* and the *Convention on the Rights of the Child*.⁹⁴ It is not a substitute for domestic obligations, but it comes into play in particular if a State is unable to give effect to economic, social and cultural rights on its own, and requires assistance from other States to do so. International cooperation is particularly incumbent upon those States that are in a position to assist others in this regard. States should thus have an active programme of international assistance and cooperation and provide economic and technical assistance to enable other States to meet their obligations in relation to the right to Health.⁹⁵

In its general comment N° 14, the Committee on Economic, Social and Cultural Rights also stressed that States parties should prevent third parties from violating the right to health in other countries. It further noted that, when negotiating international or multilateral agreements, States parties should take steps to ensure that these instruments do not have an adverse impact on the right to health.

Soobramoney v. Minister of Health, KwaZulu-Natal,⁹⁶ a case decided by the South African Constitutional Court, is sometimes presented as a case demonstrating the limits of the justiciability of ESC rights. In this case, an elderly person with kidney failure needed dialysis treatment, normally provided by the State. In an attempt to rationalize the use of scarce

⁹⁴ Charter of the United Nations, Arts 1(3), 55 and 56; UDHR, Arts 22 and 28 and Convention on the rights of the Child, Article 4 and 24.

⁹⁵ Committee on Economic, Social and Cultural Rights, General comment NO3 (1990) on the nature of states parties obligations and general comment NO 14, Paras 38-42.

⁹⁶ 1998 (1) SA 765 (CC) November 27, 1997.

resources, the medical authorities had declared him ineligible for the treatment. The Court upheld the decision; the patient did not receive the treatment and subsequently died. However, the Court did not argue that the right to health is not justiciable: rather it maintained that the state was not covered by the duty to provide emergency treatment enshrined in the South African Constitution. The case revolved, therefore, around the right to health, also guaranteed in the Constitution. The Court had no hesitation in finding the case justiciable. Their approach was to apply a 'reasonableness' test to the regulations that governed the provision of the dialysis service (and who had access to it) and found that the criteria advanced by the government were acceptable in that they fell within the scope of what was reasonable. The Court felt at ease in scrutinizing how the medical authorities justified their distribution of scarce medical resources in beyond emergency cases.

CHAPTER THREE

Introduction.

The respect for and protection of human rights is one of the major developments of contemporary international law in the aftermath of World War II. True, the concept of united human rights was almost unknown in the pre war era. However the drafters of the United Nations Charter at the conference in San Francisco in 1945 felt that the maintenance international peace and security could not be achieved without the respect for, and observance of fundamental human rights and freedoms. Thus the preamble to the United Nations (UN) Charter begins with the following words:

*“We the people of the United Nations determined..... to reaffirm faith in the fundamental human rights, dignity and worth of the human person, in the equal rights of men and women...”*⁹⁷

According to *Bangamwabo*⁹⁸ the above wording is buttressed by article 1 which lays down the purpose of the UN, inter alia the promotion of and encouragement for respect of human rights and fundamental freedoms without distinction as to race, sex, language and or religion. There is now a common consensus that the respect for human rights and fundamental freedoms contributes to the stability and well being necessary for peaceful and friendly relations among nations.

The International Covenant of Economic Social and cultural rights and the International Covenant on civil and Political Rights are universal, individual and interdependent and interrelated. The international community must therefore treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. *Bangamwabo* states that this formal consensus however, masks a deep and enduring disagreement over the proper legal status of the economic, social and cultural rights. On the one hand there is the argument that socio-economic rights are more relevant and thus superior to civil and political rights both in terms of an appropriate value hierarchy and in chronological terms. For instance as the argument goes, of what use is the right to freedom of speech to those who are starving, homeless and illiterate? On the other hand, there is also another view that ESC rights don not constitute rights at all, and treating them as rights undermines the enjoyment of individual

⁹⁷ See Preamble to the UN Charter, 1945.

⁹⁸ Bangamwabo F.X. The Justiciability of Socio-Economic Rights in Namibia: Legal challenges and opportunities.

freedoms, distorts the functioning of free markets by justifying state intervention in the economy⁹⁹.

Like most countries in the world, Namibia ratified the ICESCR and is thus expected to comply with legal obligations as spelt out in the covenant. *Bangamwabo* opined that this Namibia can do it in two ways; either by observing or respecting national laws (the constitution and statutes) which are consistent with the obligations in the covenant, or by making these international norms part of the national legal or political order, that is, the international rules become domesticated or internalized within Namibian legal system.¹⁰⁰

This chapter will cover the scope nature of ESC rights, obligations of the state created by these rights and the covenants. Is there really a place of ESC rights in Namibia and are these rights justiciable in the Namibian context? Are questions that this chapter will seek to address?

Nature and scope of ESC rights

The Covenant on Socio-economic rights entered into force on January 3, 1976. Article 2 of the covenant describes the nature of the general legal obligations undertaken by states parties to the covenant. Article 6 to 15 set out the economic, social, and cultural rights which are protected by the covenant. These are: the rights to protection of the family¹⁰¹, rights to adequate standard of living¹⁰², right to physical and mental health¹⁰³, right to education¹⁰⁴, right to social security¹⁰⁵, the right to take part in cultural life, benefit from scientific progress and protection of copy rights¹⁰⁶ amongst others.

There have been several arguments against the justiciability¹⁰⁷ of ESC rights, one of them being that these rights are vague or uncertain in that their content cannot easily be ascertained or defined. As a result, such rights are impossible to adjudicate. For instance, it is frequently said

⁹⁹ Henry J. Steiner et al.^{2nd}ed, *International Human Rights in Context: Law, Politics and Morals*: Oxford, pp. 237-320

¹⁰⁰ Francois-X. Bangamwabo, The implementation of International and regional Human Rights Instruments in the Namibian Legal Framework, in N. Horn & Bosl A (eds), *Human Rights and the Rule of law in Namibia*, p 165, Macmillan Namibia, 2008.

¹⁰¹ Article 10

¹⁰² Article 11

¹⁰³ Article 12

¹⁰⁴ article 13

¹⁰⁵ Article 9

¹⁰⁶ Article 15

¹⁰⁷ The term "justiciability" means that people who claim that their rights have been violated are bale to file a complaint before an independent and impartial body in order to seek remedies. If a violation has occurred, or is likely to occur, than such remedies shall be granted and subsequently enforced.

that the right to health or the right to housing have no clear meaning since they do not offer no clear standards by which one can determine whether an act or omission confirms to or violates the rights in question.¹⁰⁸ Certainly, without clear requirements for the content and scope of a given right, judicial enforcement of such a right would be difficult and problematic. Hence the need to understand the content and scope of ESC rights as this is a *condition sine qua non* for their justiciability. In order to overcome challenges and problems relating to the content and scope of ESC rights, courts in various jurisdictions have resorted to different mechanisms¹⁰⁹ which will be discussed below.

The interdependency of ESC rights through civil and Political Rights

To date, there is a general agreement that all human rights are interdependent and indivisible and therefore should be judicially protected. In some cases, violations of ESC rights may entail violations of civil and political rights.¹¹⁰ This is so because duties stemming from both ESC rights and civil political rights may overlap. Thus, in some jurisdictions where ESC rights are not given same and equal treatment, the indirect protection of ESC rights has been made possible through the judicial enforcement of duties arising from civil and political rights. *Bangamwabo* stated that this approach is however not without shortcomings since not all aspects of ESC rights can be framed in terms of civil and political rights. Thus, indirect judicial protection of the “right to health” has been achieved through the right to life, the right to respect of private and family life, the right to be free from torture or cruel, inhumane and degrading treatment. In this regard, the Indian Supreme Court the right to primary health care is implied in the constitutional right to life, at least in cases of emergencies.¹¹¹ Additionally, the European Court of Human Rights stressed the *nexus* between the maintenance of health care services and the prohibition of cruel, inhumane and degrading treatment.

In *D v the United Kingdom*¹¹² the European Court therefore held that the deportation of a prison inmate who was benefiting from an HIV treatment to a country where such treatment was not

¹⁰⁸ International Commission of Jurists, Courts and the Legal Enforcement of Economic, Social and Cultural rights, (2006) Comparative experiences of Justiciability.

¹⁰⁹ Francois-X. Bangamwabo. *The Justiciability of socio-economic rights in Namibia: Legal Challenges and Opportunities*. Speech delivered at the Conference on Clarifying Social Economic and Cultural rights: 12-19 July 2011.

¹¹⁰ *Ibid.*

¹¹¹ Columbian Constitutional Court: T-484/1992, August 12, 1993.

¹¹² European Court of Human Rights, *D v. United Kingdom*, May 2, 1997, paras. 51-53.

available amounted to a violation of the right to be free from inhumane or degrading treatment or punished as provided for in the European Convention on Human Rights.

In *Moiwana Community v. Suriname*¹¹³, The 'rights to housing' has also been read into civil and political rights. The Inter- American Court of Human Rights has thus decided that forced evictions and displacements, and the destructions of homes constitute a violation of the right to private property, the right to privacy, and the freedom of residence and movement. Likewise, the European Court of Human Rights has arrived at the same conclusions in cases of forced evictions, forced displacements and destructions of homes.¹¹⁴

In the Indian case of *Olga Tekkis et als. V. Bumbay Municipal Corporation et als.*¹¹⁵, the Supreme court of India decided that the eviction of payment and slum dwellers violated the petitioners' fundamental right to life which is protected by *Article 21* of the *Indian Constitution*. *In casu*, the Supreme Court reasoned that such removals and evictions would lead to the deprivation of livelihood and consequently, a violation of the fundamental right to life. According to the same court, the right to livelihood is an important facet of the constitutional right to life in that no person can live without means of living that is the means of livelihood.

The concept of minimum core content

The concept of minimum core obligation is very essential for the understanding of these rights and also to help determine their justiciability thereof.¹¹⁶ According to this concept, in any right, there is an absolute minimum which is needed, without which the right in issue would be meaningless.¹¹⁷ To ascertain the minimum core obligation, which is contained in a given right, the courts normally use the threshold of human dignity or the vital minimum or 'survival kit' approach. Thus, in relation to some rights such as the rights to education, there is a widespread consensus on the minimum core content of the services to be provided by the state, that is, the universal free and compulsory education.¹¹⁸ The Constitutional court of Germany has used the

¹¹³ July 15, 2005, paras. 127-135. See also *Ituango Massacres v Colombia*, 1 July 2006, Paras 175- 188.

¹¹⁴ *Aakdivar and Others v. Turkey*, September 16, 1996, para. 88. See also *Yoyler v. Turkey*, May 10, 2001, paras 74-76.

¹¹⁵ Supreme Court of India, July 10, 1985.

¹¹⁶ This concept is also referred to as 'core obligation', 'essential content', 'vital minimum 'or existenzminimum'

¹¹⁷ International Commission of Jurists, *Courts and Legal Enforcement of Economic, Social and Cultural Rights, Comparative Experiences of Justiciability*.

¹¹⁸ *ibid*

concept of '*existenzminimum*' to give effect to and determine the content of ESC rights.¹¹⁹ On numerous occasions, the Constitutional Court has held that assistance to the people in need is surely among the evident among the obligations of a welfare state. The state must therefore ensure persons the minimum existential conditions to the needy persons, is grounded in the principle (the right) to Human dignity which is protected by article 1(1) of the German Basic Law.¹²⁰ In applying the doctrine of Vital minimum, the German constitutional Court has held inter alia that 'the state must provide social assistance to those who face difficulties in their personal and development and are not in position to take care of themselves'. Rather than a privilege it is a duty upon any welfare state to provide such social services or benefits. In most cases, the vital minimum will be understood as comprising access to food, medical treatment, housing and any other social assistance to persons in need. This concept has been used by courts in Latin America¹²¹ to define the scope of ESC rights as well as Swiss Courts.

State obligations

This is one of the most fundamental part of this chapter. The whole system of International Law is based on Consent.¹²² This is so because international obligations are created through either treaties which are freely concluded between states or state practice which may give birth to rules of customary international law. Unlike national legal systems which operate vertically, international legal order is horizontal and the bulk of its obligations are fulfilled through the principle of '*pacta sunt servanda*' and 'good faith'. The obligations contained in the ICESCR are therefore treaty-based norms which were freely and consensually laid down by states parties that signed and ratified or accessed to the Covenant.¹²³ Article 2(1) of the ICESCR lays down the core obligation to the observance and realization of ESC rights by member states.

Article 2(1) is a pillar to the Covenant in that it describes the nature of general legal obligations undertaken by states. This article must be seen as having a dynamic relationship with all other provisions to the ICESCR. A careful reading of the wording of Article 2(1) shows that it creates various obligations some of which may be termed 'duties of immediate effect' and others which

¹¹⁹ [BV erfGE 40, 121(133)]

¹²⁰ The right to human dignity, which is provided for in Article 8 of the Namibian Constitution Act 1 of 1990.

¹²¹ Brazilian Federal Supreme Court, the Supreme Court of Argentine etc.

¹²² Francois-X. Bangamwabo. *The Justiciability of socio-economic rights in Namibia: Legal Challenges and Opportunities*. Speech delivered at the Conference on Clarifying Social Economic and Cultural rights: 12-19 July 2011.

¹²³ Ibid.

are qualified by the 'concept of progress realization'.¹²⁴ Thus the use of the phrase 'to take steps' means that while full realization of some ESC rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the covenant has entered into force in respect with a given state. The obligation to '*take steps*' is not qualified or limited by any other consideration. In addition, such steps shall be deliberate, concrete and targeted towards the meeting the obligations as spelt out in the Covenant.¹²⁵

The ICESCR however acknowledges full realization of some rights contained therein may require 'progressive' and gradual implementation. This would give some leeway to states parties in deciding the proper timeframe and allocation of resources according to their available resources. While duties of immediate effect can easily be assessed by adjudicatory bodies, duties linked with progressive realization are subject to a less stringent and possibly, less coercive standard of scrutiny.¹²⁶ The CESCR has made it clear that 'progressive realization' shall not be misinterpreted so as to deprive the obligations of all meaningful content. The phrase must be read in the light of the overall objective and the *raison d'être* of the Covenant.¹²⁷

Other duties of Immediate effect under the Covenant include 'the duty to take steps' by 'all appropriate means' in putting in place not only some legislation but also the provision of judicial remedies, and the adoption of administrative, financial, educational and social measures.¹²⁸

The obligation to take steps also includes the duty to draft and adopt a detailed plan of action for progressive implementation. Equally, the CESCR has stated that some provisions of the Covenant are capable of immediate application by judicial organs in national legal systems.¹²⁹

Concerning duties relating to progressive realization of the ESC rights, it is important to note that adjudication may not be the best way of monitoring their evolution and realization¹³⁰. Some of the recent developments in this area concern the establishment of indicators and benchmarks to assess the improvement, stability or deterioration of the enjoyment of rights or the goals enshrined in the covenant. Corollary to 'the concept of progressive realization' is the 'prohibition

¹²⁴ *ibid*

¹²⁵ General Comment No.3, Para. 2.

¹²⁶ Francois-X. Bangamwabo. *The Justiciability of socio-economic rights in Namibia: Legal Challenges and Opportunities*. Speech delivered at the Conference on Clarifying Social Economic and Cultural rights: 12-19 July 2011.

¹²⁷ *Supra*.

¹²⁸ General Comment No.3, paras, 3, 4, 5, and 7.

¹²⁹ Article 3, 7(a) (i), 8, 10(3), 13(2) (a), (3) and (4) and 15(3). Should be considered as self-executing within domestic law.

¹³⁰ Bangamwabo: 18-19 July 2011

of retrogressive measures'. The prohibition of retrogression means that any measure adopted by the state that suppresses, restricts or limits the content of the rights already guaranteed by law constitutes a *prima facie* violation. This process entails a comparison between the previously existing legislation, regulations or practices and the newly passed legislation or adopted measures or policies, so as to assess their retrogressive character.¹³¹ Domestic courts in some jurisdictions have used the 'prohibition of retrogression' while determining the compliance or otherwise of the ESC rights.¹³²

In light of *Article 2(1)*, the obligations of the states are clear. Namibia, as a signatory to the Covenant is obliged to fulfill and perform the obligations as discussed above. Namibia has not been assessed with the progressiveness or improvement of its standards seeing as it does not submit the report to the ICESCR committee since 1995. The first report is still being drafted but there is no guarantee that it will be submitted this year. Namibia as a state party must use all the means at its disposal to give effect to the rights recognized in the covenant. Thus, it must recognize the covenant norms in appropriate ways within the Namibian domestic legal order, appropriate means of redress or remedies must be available to any aggrieved individual or group.

Justiciability of ESC rights in the Namibian Legal system¹³³

Namibia ratified the ICESCR in February 1995. To enable Namibian nationals to seek judicial enforcement of the rights contained in the Covenant before Namibian Courts, the ICESCR should operate directly and immediately within the Namibian legal order.¹³⁴ Furthermore, to properly and adequately give effect to the rights guaranteed in the covenant, Namibia is expected to modify its laws which may be in conflict with the Covenant's provisions. This is so because a state party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty obligation.¹³⁵ The Place and relevance of the ICESCR within Namibian law can only be ascertained from the reading of the Namibian Supreme law, the constitution. This is so because the covenant does not stipulate the specific means by which it is to be domesticated or internalized within national legal systems. *Article 144* of the Namibian

¹³¹ International Commission of Jurists Report: p. 27.

¹³² Ibid, p. 29.

¹³³ Can article 95 rights be enforced?

¹³⁴ General Comment No.9, para. 4.

¹³⁵ Article 7 of the Vienna Convention on the Law Of trustees, 1969.

Constitution determines the place and relevance of international law in Namibia. This article provides that:

“Unless otherwise provided by this constitution or act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this constitution shall form part of the law of Namibia”.

In light of the above, *article 144* makes international law directly applicable in the national legal order without a need for any domestic implementing legislation. Hence international law is directly applicable within the national legal system. From the above stated it is thus evident that all human rights instruments or any international treaty ratified or accessed to by Namibia form part of its domestic law and should be applied as such, unless they are in conflict with an existing act of parliament, or where they are not in conformity with the spirit and tenure of the constitution. It should also be mentioned that in terms of *article 144* Namibia has adopted the monist approach which considers international and national law as part of a single legal order. Hence there is no need for any domestic implementation legislation. International law is immediately applicable in national law. Thus there is no doubt that the obligations and norms contained in the covenant are part of Namibian law.

Having said the above, suffice it to say that ESC rights do not receive the same treatment as that of the civil and political rights within Namibia. Whilst all civil and political rights as spelt out in the ICCPR are provided in the bill of rights, *chapter 3* of the Namibian constitution¹³⁶ and thus justiciable. The ESC rights are included in *chapter 11* are referred to as ‘state policies’. It is generally accepted in Namibia that the justiciability or the judicial enforcement of civil and political rights is essential, whereas the contrary assumption is often made in relation to ESC rights. ESC rights are contained in articles 6-15 of the Covenant and are repeated almost verbatim in *article 95* of the Namibian constitution. *Article 101* of the constitution on the other hand, makes it piercingly clear that the ‘state policies’ as contained in the constitution are not enforceable or justiciable by any court. Courts may however use these policies as interpretative instruments. This is rather a sad reality. ESC rights are undermined to the extent to which they may be used as ‘interpretative instruments’ as opposed to being important rights for the wellbeing of the people. Can the Namibian state continue to hide under this article to avoid or violate its international obligations as contained in the Covenant which it freely and voluntarily ratified? *Article 27* of the Vienna Convention on the Law of Treaties of 1969 would be violated.

¹³⁶ Act 1 of 1990

Furthermore, the use of article 101 to deny would-be-victims from seeking remedies were their ESC rights have been allegedly violated, would amount to a gross violation of the fundamental right to a remedy or redress as provided in *article 8* of the UDHR.¹³⁷

ESC rights are and should be justiciable within Namibian legal order subject to some exceptions, i.e. ‘the doctrine of progressive realization’ according to *Bangamwabo*. He continues to state that the ESC rights’ status in Namibian legal system is not unique. In fact, most common law jurisdictions have adopted the same approach as Namibia. We have also seen above how Courts in other jurisdictions have invented some ingenious mechanisms so as to give effect to the rights contained in the covenant. Both regional and foreign domestic courts have thus come up with concepts such as: ‘core content’ or ‘core obligation’ and indirect protection of ESC rights through civil and political rights. The author further contends that the Namibian judiciary should not therefore shy away from following the very same approach. Without judicial enforcement in Namibia, the realization of ESC rights would be left the discretion of the political authorities, as the case is today.

The widespread argument that judges lack practical legitimacy to implement ESC rights is not valid.¹³⁸ In this regard the CESCR’s are noteworthy:

*“While the general approach of each legal system needs to be taken into account, there is no covenant right which could not [b]e considered to possess at least some significant justiciable dimensions. [w]hile the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resources implications. The adoption of a rigid classification of ESC rights which put them beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society”.*¹³⁹

The question is not whether the Namibian judiciary should have some role in the implementation of public policies; rather the fundamental question is what role the Namibian courts should have

¹³⁷ Francois-X. Bangamwabo. *The Justiciability of socio-economic rights in Namibia: Legal Challenges and Opportunities*. Speech delivered at the Conference on Clarifying Social Economic and Cultural rights: 12-19 July 2011.

¹³⁸ Francois-X. Bangamwabo. *The Justiciability of socio-economic rights in Namibia: Legal Challenges and Opportunities*. Speech delivered at the Conference on Clarifying Social Economic and Cultural rights: 12-19 July 2011.

¹³⁹ CESCR, General Comment No.9, para. 10.

to supervise the implementation and realization of these policies in accordance with national laws as well as international law.

Conclusion and recommendations

ESC rights have traditionally been assumed to be mere aspirations and goals, and not real rights. However, they are human rights inherent in human freedom and dignity. The right to livelihood is an important facet of the constitutional right to life in that no person can live without means of living. Other jurisdictions such as India, Turkey, South Africa have all confirmed to the Justiciability of ESC right in their courts, Namibia can also do that. The argument that it is still developing holds no water, according to the author of this paper. Why then should the state spend on civil and political rights and not on social economic rights? The gap between the rich and the poor is amongst the highest in the world; hence decentralization of wealth could be the first step to take in recognizing and implementing these rights. Being a state party to the Covenant, Namibia is obliged to submit state reports to the committee on Economic, Social and Cultural rights. Namibia's initial 1st and 2nd periodic reports are outstanding for quite some time. That means that Namibia has since 1995 not account to the committee whether or not or in which way the covenant has been implemented. Namibia has not yet submitted herself to international scrutiny. Consequently there are no concluding observations or recommendations to guide the government in improving the human rights situation and the implementation of the covenant at a national level, for that reason the situation is as it is today. It is thus recommended by the author of this paper that since the principle of progressive realization acknowledges that Namibia may not have adequate resources to immediately realize these rights, but clear steps towards realization of effective exercise of these rights must be taken by the government.¹⁴⁰ The role of the government is to ensure liberty and freedom so that people can meet their own needs. Moreover, the reality of the matter is that the government is duty bound to provide for those who cannot afford.

Furthermore the Judiciary must be open minded in terms of these rights. Accepting them as Human rights just as any other rights fit to be adjudicated is a move forward. Once a judge has determined and defined the content of any right, be it civil, political, economic, social or cultural, and the right holder, same judge should be in a position to decide upon matters relating to its

¹⁴⁰ Vision 2030, National Development plans (NDPs) and the Millennium Development Goals (MDGs) are some of the attempts of the government, but more needs to be done.

violation or otherwise and subsequently order appropriate remedies or compensation. A right is just a right, be it a civil or political right or ESC right. The Covenants on human rights drew no distinction, making some less than others.

It is also being submitted herein that civil society organizations need to be implemented and thus compel the judicial system to act. Public interest litigation was also one of the aspects explored in the quest of realizing ESC rights. Though the issue of *loci standi* may be an obstacle, it is not a challenge we cannot win.¹⁴¹ South Africa has changed some of these things, so can Namibia. We should not take international covenant for granted, they are instruments drafted on compromise for the good of all.

How does one partake in political activities such as voting if they are hungry or sick? How can the right to freedom of expression be exercised if there is lack of education? How does one's right to life be fully implemented if their standards of living are inadequate, water and sanitation is polluted, health facilities are not necessarily available, affordable and accessible? These are some of the questions the Government of the Republic of Namibia needs to Address. How is it that the gap between the rich and the poor is amongst the highest in the world? How much authority do courts have in the adjudication and protection of Human rights? Can we really say that Human rights in Namibia are protected? In light of the scenarios and case studies provided in the course of the research paper, we will not be doing justice to ourselves as Namibians if we say the status quo is just fine. Moreover Namibia as a state party must use all the means at its disposal to give effect to the rights recognized in the covenant. Thus, it must recognize the covenant norms in appropriate ways within the Namibian domestic legal order, appropriate means of redress or remedies must be available to any aggrieved individual or group. The question is not whether or not ESC rights are enforceable; ESC rights are human rights by virtue of fact that they provide basic Human dignity. It is about access to justice.¹⁴²

In the paper the right to water, housing and health have been explored, their relevance, indivisibility and interdependence to the right to life as well as to civil and political rights; why they are essential and the legal position and status quo of these ESC rights in Namibia. Legal challenges have been also looked at, the opportunities relating to the judicial enforcement of

¹⁴¹ Reference must be made to the TCL case.

¹⁴² H.E Gawana Defines justice as "what is fair to a person living in Eros park, should be the same to the person living in Havannah, and not whether or not they can afford to go to court": quoted from a speech delivered at a conference; Clarifying Social Economic Rights at Safari Hotel 18-19 July2011, held by University of Namibia Human rights Documentation Center.

ESC rights have been shown to be highly positive; the Namibian judiciary to learn from other jurisdictions in terms of the mechanisms used and experiences. Furthermore, The Namibian courts should take account of the covenants rights where this is necessary to ensure that Namibia's conduct is consistent with its obligations under the covenant. ESC rights are and should be justifiable. There is really no excuse for so many people in our countries and continent to live the way they do when there are so many resources. South Africa gave ESC rights its rightful place in the Bill of Rights, Zambia followed the same approach. It is now time for Namibia to implement same.

Bibliography

Textbooks.

- Cooman, F (Ed). 2006. *Justiciability of Economic and Social rights*. Antwerp: Intersentia
- Francois-X. Bangamwabo, Unreported. *The Justiciability of socio-economic rights in Namibia: Legal Challenges and Opportunities*. Speech delivered at the Conference on Clarifying Social Economic and Cultural rights at Safari Hotel: 12-19 July 2011.
- Francois-X. Bangamwabo, *The Implementation of International and regional Human Rights Instruments in the Namibian Legal Framework*, in N.Horn&Bosl A (eds), *Human Rights and the Rule of law in namibia*, p 165, Macmillan Namibia, 2008.
- Gawanas, B.2009 “The African Union: Concepts and Implementation Mechanisms relating to Human Rights”. Bosl, A, Diescho, J (Eds). *Human Rights in Africa: Legal perspective on their Protection and Promotion*, Windhoek: Macmillan Education Namibia
- Henry J. Steiner et al. 2nded, *International Human Rights in Context: Law, Politics and Morals*: Oxford, pp. 237-320
- International commission of jurists. “Courts and the legal Enforcement of Economic, Social and cultural rights” *Human rights and the rule of law Series: No.2*, Switzerland.
- International Commission of jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural rights*, (2006) *Comparative experiences of Justiciability*
- Martin Dixon et al, 1995. *Cases and Materials on International law*, 2nd ed. Blackstone Press Ltd. p.209

- Nakuta, J. 2009 “Justiciability of social Economic and cultural Rights”. Horn, N, Bosl, A (Eds). Human Rights and the Rule of Law in Namibia, Windhoek: Macmillan
- Onuma Yasuaki, 2010. *A Transcivilizational perspective on International Law, the Hague Academy of International Law*, Martinus Nijhoff Publishers: Leiden/Boston, p. 398 -405
- Shadrack, T.2009. “Water; Fundamental Human Rights or commodity”. *The Namibia*

International instruments.

- African Charter on Human and people’s rights (1981)
- International Covenant on Economic Social and Cultural rights (1966)
- General Comment on International Convention on Economic Social and Cultural rights No.3
- General Comment on International Convention on Economic, Social and Cultural rights, No.9
- International Covenant on Civil and Political Rights (1966)
- Universal declaration on Human Rights (1948)

Statutory legislation

- Namibian constitution Act 1 of 1990
- The Patient Charter
- The Namibian Public Service Charter

Case law

- Aakdivar and Others v. Turkey, September 16, 1996
- *ASK v. Bangladesh* 19 BLD (1999) 488, July 29, 2001.
- *Brugdacy v Secretary of the State* 1987 (1) ALL E.R 940.
- European Court of Human Rights, D v. United Kingdom, May 2, 1997
- Etchevery, Roberto E v Omint Sociedad Anonima v Servicio, Attornet General's brief of December 17, 1999
- Grootboom v. Oostenberg Municipality (2000) 3 BCLR 277 (C).
- Ituango Massacres v Colombia, 1 July 2006
- *Jaftha v Schoeman and Van Rooyen v Stoltz* 2005 1 BCLr 78 (CC) October, 8, 2004
- *Minister of Defense v Mwandingi* 1993 NR 63 (SC)
- *Moiwana Community v. Suriname* July 15, 2005
- *Namunjepo & Others v Commanding Officer, Windhoek Prison and another* 1999 NR 271 (SC).
- *Olga Tekkis et als. V. Bumbay Municipal Corporation et als* Supreme Court of India, July 10, 1985.
- South African Minister of Health v Treatment Action Campaign, 2002 (5) SA 721, July 5, 2002.
- Soobramoney v. Minister of Health, KwaZulu-Natal, 1998 (1) SA 765 (CC) November 27, 1997

- *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC).
- *S v Acheson* 1991 NR 1 HC
- SERAC and CESR v Nigeria, Communication No 155/96, October 12- 27, 2001
- The Islamic Community in Bosnia and Herzegovania v the Republika Srpska, June 11, 1999.
- Yoyler v. Turkey, May 10, 2001