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## SOCIOECONOMIC RIGHTS IN THE AFRICAN CONTEXT: PROBLEMS WITH CONCEPT AND ENFORCEMENT

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The current development agenda in Ghana and many other African countries revolves around three key focal points:

- 1.) human resource development;
- 2.) private sector development; and
- 3.) good governance.

A key component of good governance is access to justice. Individuals and communities within any country must have access to the broad opportunities that make life meaningful. On a daily basis, the majority of children, women, men, communities, companies, and institutions in some African countries are denied access to justice, social services, and other essential functions of government. Often these citizens and organizations have no one to whom they can turn. Whenever justice is inaccessible, the result is injustice. Injustice leads to bitterness, anger, revolt, and ultimately political and social disintegration. In this regard, there is a real, compelling, and immediate need to eliminate barriers blocking access to justice throughout Africa. In this presentation, I shall focus on access to socioeconomic rights as an aspect of human rights.

### I. Conceptual Framework of the Discussion

For most practical purposes, the thorny problem of finding a conceptual basis for the existence of human rights was resolved with the adoption of the 1948 Universal Declaration of Human Rights, along with all the other spin-off covenants, treaties, and declarations that have followed that landmark document. However, whenever we face an intellectual challenge as to why certain rights are covered, or not covered, or ought not to have been covered by these documents, we are thrown outside the confines of these instruments and must look elsewhere to justify these human rights, or at least aspects thereof.

Human rights have, for the most part, been justified in terms of natural law and natural rights theories. But I prefer to free human rights from natural law and to ground the philosophical basis of human rights along the lines of Immanuel Kant's moral idealism, epitomized by the maxim that "man is to be treated as an end in himself, not as a means to an end."<sup>1</sup> In this sense, human rights constitute an appeal to treat humans in a certain way, and not to treat them in certain

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<sup>1</sup> IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 95 (Becktrans 1949) (1788).

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other ways, solely on the basis of their humanity. To this Kant added his categorical imperative as the ultimate ethical doctrine of fairness: “[A]ct according to a maxim which can be adopted at the same time as a universal law of human conduct.”<sup>2</sup> Other non-Kantian formulations, such as the contractarian theories of John Locke or Bruce Ackerman, or the utilitarian conceptualizations of Jeremy Bentham and John Stuart Mill, also offer respectable justificatory models outside natural law.

In regards to socioeconomic aspects of human rights in particular, I see them as part of the overall fight for social justice. In the words of David Miller, the British moral philosopher, “[s]ocial justice. . . concerns the distribution of benefits and burdens throughout a society, as it results from the major social institutions - property systems, public organizations, etc.” It deals with such matters as the regulation of wages and profits, the allocation of housing, medicine, welfare benefits, etc., through the proper allocation of the public budget.

In the received learning on human rights, socioeconomic and cultural rights typically consist of the following: the right to education; the right to work and earn a living; the right to basic medical services; the right to social security; the right to fair housing; and the right to cultural life.

The ambit of human rights, and more particularly of socioeconomic rights, has expanded considerably since the premier instrument in international human rights, the Universal Declaration of Human Rights, was adopted in 1948. It should be noted that this document contained only four articles devoted to socioeconomic rights, Articles 23 through 26.<sup>3</sup> However, by the 1960s, the world community had begun to pay more attention to the socioeconomic dimension of human rights. The UN Covenant on Economic, Social and Cultural Rights, adopted in 1966 as a twin instrument to the UN Covenant on Civil and Political Rights, contained 25 substantive articles on socioeconomic rights.<sup>4</sup> Several regional instruments were also adopted on various aspects of human rights. On the African continent, the erstwhile Organization of African Unity in 1981 adopted the African Charter on Human and Peoples’ Rights, containing several articles on socioeconomic rights as well as a people’s right to self-determination and to cultural autonomy.<sup>5</sup>

Yet in spite of the growth in the public consciousness of socioeconomic rights, the international community, particularly the United States, has displayed a disappointingly low-grade commitment to these rights. To some, particularly in the heyday of the ideological war between capitalism and communism, socioeconomic rights had a communistic flavor and were therefore dismissed as ideologically unacceptable. To others, the opposition to socioeconomic rights was

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<sup>2</sup> *Id.* at 63.

<sup>3</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at 71, arts. 23-26, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc A/2200A (Dec. 16, 1976).

<sup>5</sup> Organization of African Unity, African Charter on Human and Peoples’ Rights (ACHPR), June 27, 1981, 21 I.L.M. 58, *available at* [http://www.achpr.org/english/\\_info/charter\\_en.html](http://www.achpr.org/english/_info/charter_en.html) [hereinafter ACHPR].

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jurisprudential in that they asserted that these so-called rights were not rights at all, but mere entitlements or privileges. I shall address these arguments later on.

The absence of a common language with respect to socioeconomic rights meant in theory that it was possible for the governments concerned to deny responsibility for delivering public goods and services - often without political and legal consequences. In the United States, as recently as 1993, no less a person than the former executive director of Human Rights Watch, was bold enough to state, "I am on the side of the spectrum which feels that the attempt to describe economic concerns as rights is misguided. I just don't think that it's useful to define them in terms of rights."<sup>6</sup> Happily for us all, Human Rights Watch subsequently embraced the principle of the indivisibility of human rights.

You can already see why the enforcement of socioeconomic rights has been particularly difficult. However, efforts are being made around the globe to make the enjoyment of such rights a reality, and to put them on par with the status civil and political human rights are afforded. This is an important crusade, as most of the rights of the seriously disadvantaged in our society - women, children, the physically challenged - fall into the category of socioeconomic rights.

Let me now confront the notions that first, so-called socioeconomic rights are not rights at all, but mere entitlements, privileges, or aspirations; and second, that because they are not rights, one cannot pursue them in the courts or quasi-judicial bodies. In other words, they are not justiciable.

I am sure some of you lawyers and law students, in your jurisprudence courses, will remember Wesley Hohfeld's tortuous analysis of fundamental legal conceptions as applied in judicial reasoning, including the true meaning of rights, in his book, *Fundamental Legal Conceptions as Applied in Legal Reasoning*.<sup>7</sup> Hohfeld thought of fundamental legal conceptions in terms of their opposites and correlatives. In the case of rights, he claimed that there could be no true right, *right stricto sensu*, without a correlative duty on some other person or entity to recognize and enforce that right, or at least to allow its vindication. If no such duty could be discerned, then the so-called right is not really a right, but a mere privilege whose correlative is a no-right. Hohfeld was determined to make these distinctions because, in his own words, "chameleon-hued words are a peril both to clear thought and to lucid expression."<sup>8</sup> The term "right" could, in his view, be a chameleon-hued word or mere rhetoric.

The confinement of rights to Hohfeldian rights, or rights *stricto sensu*, could pose conceptual problems for the enforcement of rights such as the collective right to the environment, and for individual socioeconomic rights. In these areas, the nature or extent of the Hohfeldian duty borne by the other party might be unclear or even unknown. What is worse, the identity of that other party might itself be in question.

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<sup>6</sup> Aryeh Neier, Remarks at the Harvard Law School East Asia Legal Studies & Human Rights Symposium: Human Rights and Foreign Policy (May 8, 1993).

<sup>7</sup> WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING* (W.W. Cook ed., 1923).

<sup>8</sup> *Id.* at 35.

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As a former professor of jurisprudence, I concede that Hohfeld's analytical jurisprudence might have utility in some contexts. However, as a judge, I am now tempted to collapse his distinction between rights and privileges into a composite test of justiciability, with the judge serving as the determiner of justiciability in concrete situations. In other words, it is my hypothesis that a claimed right embodied in an instrument might be deemed as justiciable even if it sounds like a privilege (a "no-right") or an entitlement in Hohfeldian terms.

Justiciability is concerned with the amenability of a cause or matter to litigation; for example a determination that a claimed right is cognizable in the courts or quasi-judicial bodies, and with the willingness of the legal system to protect that claimed right using the normal procedures of litigation. Black's Law Dictionary defines a justiciable controversy as "a question as may properly come before a tribunal for decision. . . a real and substantial controversy which is appropriate for judicial determination, as distinguished from dispute or difference of contingent, hypothetical or abstract character."<sup>9</sup> In the case of human rights enforcement, I consider it appropriate to widen justiciability in order to include the possibility of bringing complaints before international quasi-judicial organs such as the African Union Human Rights Commission under the African Charter of Human and Peoples' Rights, and the Human Rights Committee under the UN Covenant on Civil and Political Rights, using the formal procedures laid down by those bodies.

With regards to socioeconomic rights, the basic dilemma facing its justiciability stems from two problems; a problem of measurement, and a more general problem of material means for the rights realization. For example, how does one measure decent shelter for child and mother so as to make such a right enforceable in a court of law? What index of decency should a court use? Secondly, if the implementation of state or community obligations, such as the provision of basic education and health care, simply assumes the existence of the material means of the state, can one responsibly encourage litigation against the state based on the non-realization of such rights in conditions of slow economic growth, no growth, or sustained underdevelopment?

I believe that these rights may be justiciable under certain circumstances. First, the potential beneficiaries of concrete programs or projects underwritten by a statute or subsidiary legislation, such as a new school building or basic children's hospital, may be able to show that material means are indeed available within the system, but the authorities are either sitting on the funds or diverting them to their preferred projects or programs, such as the refurbishment of a first-class university research hospital. Under such circumstances, it may be appropriate for a judicial or quasi-judicial body to ask the authorities to show cause why that particular school or hospital cannot be built within the expected time frame.

In the second circumstance, where a socioeconomic right is expressed in the Constitution, it is not simply a duty or aspiration or a mere policy guidance for state authorities as might be the case in some Directive Principles of State Policy, but a substantive provision of fundamental human rights, such as Article 25(1)(a)

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<sup>9</sup> BLACK'S LAW DICTIONARY 865 (6th ed. 1990).

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of our Constitution which guarantees a right to free basic education for all.<sup>10</sup> In this circumstance, there arises a constitutional duty which is enforceable like any other legal duty. Thus, it will be no justification in constitutional terms to say that there are no funds for that commitment. It would most likely mean that there is a duty to find the money through the budgetary process in order to start such a program, and to improve upon it on a progressive and consistent basis. This is the notion of the progressive realization of justiciable socioeconomic rights and collective rights, which allow aggrieved persons to make their claim and at the same time provide an opportunity for state officials to demonstrate in a judicial setting the constraints preventing them from implementing the plaintiffs' claim.

In this regard, I consider the South African Constitution of 1996 as having been drafted skillfully. For example, Articles 26 and 27 state that:

26(1) Everyone has the right to have access to adequate housing; (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right . . .<sup>11</sup>

27(2) The state must take reasonable legislative and other measures, within available resources, to achieve the progressive realization of each of these rights.<sup>12</sup>

Indeed, we often forget that there are aspects of socioeconomic rights enforcement that do not require any extra financial outlay by the state. Sometimes, all that is required is a duty of forbearance on the state's part, or, in other words, a negative duty to refrain from taking certain adverse actions. One example would be the negative dimension of the right to education through the freedom from arbitrary expulsion or exclusion from school. Similarly, the negative aspect of the right to health would simply be freedom from non-interference with one's own health. Quite clearly, the Covenant on Civil and Political Rights imposes negative duties of forbearance and positive duties of performance on States. Thus, the guarantee of humane treatment in detention embodied in Article 10(1) arguably necessitates the construction of a sufficient number of detention centers by the state to prevent overcrowding.<sup>13</sup>

In the context of environmental rights understood as a group right or collective right, I see the same problem with justiciability as I do with the more individualized socioeconomic rights such as the right to education, to social security, to basic medical services, to cultural life, and the right to work and earn a living. But I also see a way out for the benefit of aggrieved persons.

It is clear that some aspects of environmental rights can be enforced simply by ensuring that would-be violators cease and desist from their acts of nuisance and other acts that endanger the community, coupled with an action for damages or compensation, if called for, under the general law of torts or specific statutes on

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<sup>10</sup> GHANA CONST. art. 25, §1, cl. a.

<sup>11</sup> S. AFR. CONST. 1996 s. 26, §1.

<sup>12</sup> *See id.* s. 27, §2.

<sup>13</sup> International Covenant on Economic, Social, and Cultural Rights, *supra* note 4, at art. 10(1).

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conservation, mining, and environmental standards. Those are certainly justiciable acts.

Further, in appropriate cases action can be taken to prevent the creation of hazardous or unacceptable environmental conditions through investment projects or undertakings by insisting upon environmental impact statements and periodic monitoring by independent environmental agencies. Most modern environmental legislation now provides for this, and there should be no problem with justiciability in this instance. Indeed, I will couple this concept with the use of the well-known action of mandamus to compel the diligent performance of an environmental agency's statutory duties.

Finally, where the enjoyment of an aspect of environmental rights requires fresh governmental budgetary outlays during times of financial scarcity, the court could adopt the same approach advocated above for the realization of individualized socioeconomic rights. If the entire financial outlay is not available for the resettlement of communities affected by mining activities or the construction of dams, or for the provision of boreholes to replace drinking water sources contaminated by careless investment activities, there could be an enforceable duty to find such monies through the budgetary process. These monies could be used to start the ameliorative program and to improve upon the level of financial outlay in an incremental, but progressive and objectively verifiable, fashion. That would be the extent of the justiciability of the matter.

It would seem wrong for a judge to declare suits such as these to be totally unjusticiable on the grounds that the entire financial outlay was unavailable for implementation at the time of the suit. Moreover, a suit might be quite justiciable even though in the end a court might decide that the state or other community actor had not violated any constitutional or statutory provision and had complied with its constitutional obligation in the particular case.

Allow me at this point to refer to a decision of the South African Constitutional Court in a case brought under the South African Constitution of 1996, and to repeat the wise remarks of the judge in this difficult and slippery area of constitutional law. The case was based on Article 26 of the 1996 Constitution addressing the right to adequate housing.<sup>14</sup>

In the case of *Gov't of the Republic of S. Afr. & Others vs. Grootboom & Others*, the South African Constitutional court dealt with the right to adequate housing.<sup>15</sup> In the course of his opinion, Judge Yacoob made the following remarks, "I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognized by the Constitution, which expressly provides that the state is not obliged to go beyond available resources or to realize these rights immediately. I stress, however, that despite all those qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce."<sup>16</sup>

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<sup>14</sup> S. AFR. CONST. 1996 s. 26.

<sup>15</sup> *Gov't of Republic of S. Afr. & Others v Grootboom & Others* 2000 (1) SA 46 (CC) (S. Afr.).

<sup>16</sup> *Id.* at 93-94.

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While bemoaning the difficulties in the enforcement of socioeconomic and group rights, I need to mention that quite often we ourselves make enforcement formalistically difficult either by the way we draft our legal instruments or by our general treatment of important sources of law in our legal systems. Take the treatment of the so-called group right to a healthy environment under the 1992 Constitution of Ghana.

This constitution does not really mention a right to a healthy environment as among the fundamental human rights and freedoms dealt with in Chapter 5.<sup>17</sup> This means that the right to a clean environment is not a human right, or that while it is a human right, it is not a fundamental human right of the same order as, let us say, the right to life (Article 13)<sup>18</sup> or the right to personal liberty (Article 14)<sup>19</sup> or even the socioeconomic rights mentioned in Articles 24 through 30.<sup>20</sup>

The reference to the environment is actually located in the Directive Principles of State Policy, Article 36(9), and deals with the Economic Objectives of those Principles.<sup>21</sup> Regrettably, that constitutional provision is not couched directly in terms of the right to a clean environment. Rather, it is formulated in terms of the protection of the environment for inter-generational justice, as well as the need for interstate cooperation in the protection of the global environment as the common heritage of mankind - the so-called global commons. Moreover, the location of that provision in the Directive Principles, rather than in Chapter 5 of the Constitution dealing with fundamental human rights may well raise an issue as to its constitutional stature.

Allow me to make some general comments on the tenor and formulation of the Directive Principles embodied in Chapter 6 of the Ghana Constitution, which does have the effect of undermining a possible claim that there is a constitutional right to a clean environment in Ghana.

Note that Article 34(1) of the 1992 Constitution, the operative article on implementation of the Directive Principles, emphasizes what is generally perceived as the main significance of directive principles in the constitutional settings – postulating “duties of aspiration” for the state and the community at large rather than imposing direct duties on them.<sup>22</sup> Article 34(1) states that the Directive Principles “shall guide” our application and interpretation of the Constitution or any other law, and in “taking and implementing any policy decisions, for the establishment of a just and free society.”<sup>23</sup> If they are merely guiding principles of interpretation and action, one wonders why all the subsequent substantive Articles in Chapter 6, such as Articles 35 through 41, are couched in the normally mandatory language of “shall” rather than “shall endeavor to” or “is expected to” as might seem appropriate.

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<sup>17</sup> GHANA CONST. ch. 5.

<sup>18</sup> *See id.* art. 13.

<sup>19</sup> *See id.* art. 14.

<sup>20</sup> *See id.* art. 24-30.

<sup>21</sup> *See id.* art. 36, §9.

<sup>22</sup> *See id.* art. 34, §1.

<sup>23</sup> *Id.*

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But perhaps this also betrays ambivalence in the legal status of “rights” such as the so-called right to clean environment. These principles may portray our wish on the one hand that these rights be viewed as real rights, but at the same time our awareness that we might not have the resources available for their realization over the short term.

Our domestic law is not the only place we should look to when searching for the right to a clean environment and other socioeconomic rights. Ghana is a party or signatory to some important and relevant international instruments and there should be an interface between domestic law and international legal instruments.

But this introduces our second formalistic problem, namely, the treatment of the sources of law in our Constitution. With our penchant for participation in treaty negotiations and signatures, our Constitution makes no explicit reference to international law as a source of law in our legal system. There is an oblique reference under the Directive Principle of State Policy Article 40(c) to the government’s duty in international relations to promote respect for international law and treaty obligations.<sup>24</sup> But Article 11, which deals with the sources of law in Ghana proper, does not even mention international law either in its customary law or treaty law mode.<sup>25</sup>

This is in sharp contrast with other constitutional systems, such as that of the United States, where treaties are named specifically as a separate and distinct sources of law, co-equal in the U.S. with federal statutory law under Article VI (2) of its constitution.<sup>26</sup> Constitutions such as the 1949 German Constitution, as amended, go even further by explicitly providing for the applicability of customary international law and for the supremacy of its rules over statutes.<sup>27</sup>

The consequential problem that we face in Ghana is that we subscribe to the dualist view of treaty law application according to which norms of international law acquire applicability in the domestic legal system only when a domestic legislature has transformed or reduced these treaties into domestic legal instruments, such as a statute or an annex to a statute. This is in contrast with legal systems where international treaties are named as one of the sources of law, as is the case in the United States, or where treaties after ratification are said to be directly applicable without the additional measure of passing a legislature measure - the so-called self-executing treaties.

The treatment of international law in the 1992 Constitution does not of course suggest that the international law of socioeconomic rights is inapplicable in our domestic legal system, or that an aggrieved person cannot make a claim in our courts based on international legal norms. But it does mean that the plaintiff or applicant would have to unravel, or point to, an international legal right embedded in one of the sources of law specifically named in Article 11. For example, in the case of a treaty-based right, one might point to a constitutional provision or

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<sup>24</sup> *See id.* art. 40, §c.

<sup>25</sup> *See id.* art. 11.

<sup>26</sup> U.S. CONST. art. VI, §2.

<sup>27</sup> GRUNDGESTEZ [GG] [Constitution] art. 25 (F.R.G.).



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to a parliamentary enactment giving it direct force in the legal system. For a right based on customary international law, one might with some luck find the norm in the common law or other existing law in the form of case law or convince a court in an ongoing case that a certain legal proposition is a rule of customary international law.

We really ought to remind our legislature, the legal officers from the treaty sections of our Attorney General's Department, and the Ministry of Foreign Affairs, that there is the constant need to ensure not just the parliamentary ratification of signed treaties, but also their enactment into statutes as Annexes, Schedules, or Appendices, so that the treaty rights and obligations of our citizens will become meaningful.

### **II. The Justiciability of Economic and Social Rights in Courts and Other Institutions**

I will now make brief references to attempts to enforce socioeconomic rights under the African Charter on Human and People's Rights, as well as the domestic law of selected African countries.

#### 1. Regional and Subregional Institutions

In 1981, the Assembly of the Heads of Government of the Organization of African Unity ("OAU"), now replaced by the African Union ("AU"), adopted the African Charter on Human and Peoples' Rights ("ACHPR").<sup>28</sup> The ACHPR forms the cornerstone of the African regional human rights system. Article 30 of the Charter establishes an African Commission on Human and Peoples' Rights, which in turn constitutes the fulcrum for the attempts at human rights enforceability under the Charter.<sup>29</sup> Article 45(2) mandates the protection of the Charter rights.<sup>30</sup> Complaints of human rights violations are embodied in what is referred to in the Charter as communications.

Under Articles 47 through 53, if a state party reasonably believes that another state party has violated the provisions of the Charter, it may write to the State to draw attention to the matter.<sup>31</sup> If the matter is not settled within three months, the matter may be referred to the Commission which will then conduct its own investigation and make findings.<sup>32</sup> The report is then submitted to the Assembly of Heads of State and Government, with recommendations for appropriate action.<sup>33</sup> It is also possible under Article 55 for public interest groups and others to submit communications at the discretion of the Commission.<sup>34</sup>

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<sup>28</sup> ACHPR, *supra* note 5.

<sup>29</sup> *See id.* art. 30.

<sup>30</sup> *See id.* art. 45(2).

<sup>31</sup> *See id.* art. 47-53.

<sup>32</sup> *See id.* art. 48.

<sup>33</sup> *See id.* art. 52-53.

<sup>34</sup> ACHPR, *supra* note 5, art. 55.

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It is apparent that the Charter paradigm was essentially an intergovernmental arrangement for the invocation of the remedial process, as well as its enforcement. This has probably introduced an unacceptable level of politicization into the process. However, on a continent with a history of massive violations of human rights, until recently this was a good start. The representatives of the African Union, meeting in Banjul, Gambia on June 9, 1998, moved a step further and adopted the Protocol to the African Charter on Human and People's Rights On the Establishment of an African Court on Human and People's Rights.<sup>35</sup> The Protocol came into force on January 1, 2004.<sup>36</sup> With the establishment of this Court, we should do a better job at acknowledging the justiciability of socioeconomic rights and of their enforcement for the benefit of aggrieved individuals.

Nonetheless, I should like to indicate some sense of how these communications regarding socioeconomic rights that have been handled under the old Charter system.

### a. *The Right to Work*

*Annette Pagnouille ex rel. Abdoulaye Mazou v Cameroon* (1996/97) was a case involving the right to work, based on Article 15, which provides that "every individual has a right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work."<sup>37</sup>

The right to work is understood as the right of everyone for an opportunity to gain a living by work that he or she freely chooses or accepts. The Commission held that the dismissal from employment or non-reinstatement of Mazou, a magistrate, who had been unlawfully detained and removed from his former position, constituted a violation of the right to work under Article 15, thusly entitling the employee to compensation.<sup>38</sup>

### b. *The Right to Health (ACHPR)*

Article 16(1) of the Charter states, "[e]very individual shall have the right to enjoy the best attainable state of physical and mental health."<sup>39</sup> There are other health-related rights guaranteed under the Charter, including prohibitions against inhuman or degrading punishment and treatment (Article 5) and non-consensual medical treatment and experimentation.<sup>40</sup>

In regards to prisoners, the Commission has stated that the Charter obliges states to provide detainees access to medical care. In *Media Rights Agenda v Nigeria*, the Commission held that denying a detainee access to a doctor, thereby

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<sup>35</sup> Organization of African Unity, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc.

<sup>36</sup> *Id.*

<sup>37</sup> *Pagnouille ex rel. Mazou v Cameroon*, 10th Annual Activity Report of the African Court for Human and Peoples' Rights (1996-1997).

<sup>38</sup> *Id.*

<sup>39</sup> ACHPR, *supra* note 5, art. 16(1).

<sup>40</sup> *See id.* art. 5.

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leading to a deterioration in health, violates the prisoner's right to health.<sup>41</sup> Similarly, the starvation of prisoners and the denial of blankets, clothing, and health care have been found to be in violation of Article 16 in addition to violating the prohibition against torture and other cruel, inhuman, and degrading treatment under Article 5.<sup>42</sup>

The Commission has also found, *inter alia*, a violation of Articles 16 and 24 by Nigeria through its oil production operations that caused environmental degradation and resultant health problems among the Ogoni people.

### c. *The Right to Education*

The right to education, guaranteed in Article 17(1), simply states "Every individual shall have the right to education."<sup>43</sup> The Article is not sufficiently detailed to give a clear understanding of the nature and scope of the right guaranteed, or to ascertain the obligations of state parties in relation to education. For example, it is uncertain as to which education one has a right to. Some guidance may be derived from the Commission guidelines for national periodic reports on the right to education under Article 17(1) of the African Charter.

## 2. Domestic Courts

For the domestic litigation of social and economic rights, I will first make reference to three South African cases brought to court under that country's current Constitution. The first is a right to health case, *Soobramoney v Minister of Health, KwaZulu Natal*. In this case, the applicant sought an order to compel the KwaZulu-Natal health department to provide him with access to extremely expensive dialysis treatment at a time when many poor people in that province had little or no access to even primary health care services.<sup>44</sup> The Court found the case justiciable but did not find any violation of Article 27(3) dealing with the right to health, due perhaps to the opportunity cost of acceding to the applicant's request.<sup>45</sup>

The second case, *Gov't of the Republic of S. Afr. & Others v Grootboom & Others*, deals with the right to housing. In *Grootboom*, to which I made reference earlier, the South African Constitutional Court upheld the plaintiff's claim that the state's housing policy in the area covered by the Cape Metropolitan Council had failed to make reasonable provisions within available resources for

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<sup>41</sup> *Media Rights Agenda & Others v Nigeria*, 14th Annual Activity Report of the African Court for Human and Peoples' Rights (2000-2001).

<sup>42</sup> See generally *Malawi African Ass'n v Mauritania*; *Amnesty Int'l v Mauritania*; *Diop, Union Inter-africaine de Droits de l'Homme and RADDHO v Mauritania*; *Collectif de Veuves et Ayants-droit v Mauritania*; *Ass'n Mauritanienne de Droits de l'Homme v Mauritania*, 13th Annual Activity Report of the African Court on Human and Peoples' Rights (1999-2000).

<sup>43</sup> ACHPR, *supra* note 5, art. 17(1).

<sup>44</sup> *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) (S. Afr.).

<sup>45</sup> *Id.*

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the people in that area.<sup>46</sup> These people had no access to land, nor roofs over their heads, and were living in intolerable conditions.<sup>47</sup>

The final South African case, *Minister of Health & Others v Treatment Action Campaign & Others*, concerns the right to health in the context of the AIDS epidemic. Here, the applicants sought to challenge a government policy on accessibility to a drug called nevirapine, which is designed to prevent the risk of mother-to-child transmission of HIV.<sup>48</sup> The policy restricted the provision of a single dose of nevirapine to mothers and their newborn children at only limited designated research and training sites, thereby eliminating its availability at any other public health institutions outside the designated sites.<sup>49</sup> The result was that doctors in the public sector, who did not work at these sites, were unable to prescribe the drug to their patients, even though the manufacturers of nevirapine offered to make it available to the South African government free of charge for a period of five years.<sup>50</sup>

The question in the case became whether the measures adopted by the government fell short of its obligations under the Constitution.<sup>51</sup> The Constitutional Court found that this was indeed the case, and ordered the Government to remove the aforementioned restrictions.<sup>52</sup>

It should be noted that in all these cases there was no problem with justiciability as the Court had determined earlier that they were justiciable. Thus the Court's remaining task was to determine whether the South African state had complied with its constitutional obligations relating to particular social and economic rights.

Finally, I will refer to a short but interesting case from Ghana, which, even though not presented to the Court directly as a constitutional right to health, was brought in that vein. In *Republic v Chief Admin. Officer, La Polyclinic, La-Accra, Minister of Health, Att'y General and Minister of Justice*<sup>53</sup>, an application was brought by a public interest law firm on behalf of a 25 year-old woman who had delivered a baby in a polyclinic in the capital city of Accra. She was clearly an indigent young woman, unemployed, and living on the generosity of her mother. She was presented with a bill of Cedis 1,500,000, roughly \$150 U.S. dollars at the time, which was a rather stiff amount considering her economic status. She was clearly in no position to pay, but the polyclinic authorities detained her and her child until settlement of the bill. At the time of bringing the suit, she and her child had been in hospital detention for at least eighteen days.

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<sup>46</sup> *Grootboom*, *supra* note 12.

<sup>47</sup> *Id.*

<sup>48</sup> *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC) (S. Afr.).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Treatment Action Campaign*, 2002 (5) SA 721 (CC) (S. Afr.).

<sup>52</sup> *Id.*

<sup>53</sup> *Republic v Chief Admin. Officer, La Polyclinic, La-Accra, Minister of Health, Att'y General and Minister of Justice*, (High Ct. 2003) (Ghana), unreported (copy on file with author).

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The applicant, through a public interest law firm, sued for the release of herself and her child on the writ of habeas corpus and on alleged violation of Article 14 of the 1992 Constitution of Ghana, which guaranteed the right to personal liberty subject to certain well-known exceptions. The High Court Judge, in his ruling on March 3, 2003, ordered that the applicant be released and brought before him.

### **III. Conclusion**

I will conclude this presentation by restating the following postulates. First, socioeconomic rights are to be presumed to be rights in the legal sense if they are described as rights in the relevant Constitution, or in treaty provisions made enforceable within the municipal legal system, or in statutory law, whether or not they constitute rights in the narrow Hohfeldian sense. Second, claims based on such rights could be justiciable in the courts even if the total resources for their implementation are not immediately at the disposal of the state or other community actors. Third, the notion of progressive realization of justiciable socioeconomic rights, as exemplified by the South African Constitution of 1996, affords the state and other authorities a constitutional breathing space when they cannot reasonably go beyond available resources at the time of the suit.

While these may serve as useful postulates, the ultimate determinants in the enforceability and actual enforcement of socioeconomic rights include what the state is willing to implement in good faith at the domestic level, the willingness of the judiciary and other national quasi-judicial institutions to break new ground in the expansion of justice delivery, and the courage and commitment of the legal profession and nongovernmental legal aid organizations to engage in public interest litigation, among other measures such as public education and political lobbying.

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