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## The Protection of Economic, Social and Cultural Rights in Africa

DANWOOD M. CHIRWA AND LILIAN CHENWI

### 1 Introduction

Nobody would deny that economic, social and cultural rights are closely related to development and the eradication of poverty. Yet the legal protection of these rights remains contested. In the African context, controversies around the legal status of these rights have resulted in a lopsided analysis of the continent's political history. For example, slavery both in its current and old forms is often portrayed as a two-way power relation between master and slave, which entails the denial of the freedom of the slave and his subjugation to the master.<sup>1</sup> But the trans-Atlantic slave trade was no simple transaction between slave and master. It involved a complex dynamic between peoples and continents and between foreign slave traders and owners and individual slaves, their families, clans and ethnic groups. The slave trade involved a wide range of human rights violations, both at macro- and micro levels, not limited to fundamental infringements of the human dignity, life, physical integrity and liberty of those that were subjugated, but also a denial of their rights to a family, culture, language, livelihood and health, and the destruction of ethnic populations and their ways of life.<sup>2</sup>

<sup>1</sup> See e.g. Y. A. Rassam, 'International law and contemporary forms of slavery: An economic and social rights-based approach', (2005) 23(4) *Penn State International Law Review* 809; P. Kolchin, *American Slavery, 1619–1877* (New York: Hill and Wang, 1993).

<sup>2</sup> See M. Walowitz, 'The struggle for international trade and its implications for Africa', in B. A. Ogot (ed.), *General History of Africa, Abridged Edition: Vol. V, Africa from the Sixteenth to the Eighteenth Century* (Paris: UNESCO, 1999) 1; P. Diagne, 'African political, economic and social structures during this period', in Ogot, in this note, 13. For the impact of contemporary forms of slavery on human rights, see e.g. C.E. Welch, 'Defining contemporary forms of slavery updating a venerable NGO' (2009) 31(1) *Human Rights Quarterly* 70; Rassam, 'International law and contemporary forms of slavery' 1; C. Harding, 'Under Western eyes – contemporary problems in the removal of conditions of slavery and servitude' (1983) 14 *Cambrian Law Review* 809; E. Ching, 'Still searching for

The denial of the right of self-determination is typically the lens through which the history of colonialism is viewed.<sup>3</sup> In truth, colonialism was a system of domination that sought to derive socio-economic benefits for the colonial powers at the expense of the livelihoods of the colonised peoples. It separated families and ethnic groups into different countries when European powers partitioned Africa in the late nineteenth century. Large swathes of land were grabbed from local Africans and given to colonial settlers, who in turn subjected the local people to forced labour. The imposition of foreign culture on colonised peoples was done at the expense of African cultures, religion, traditions and practices.<sup>4</sup> Both colonialism and slavery are examples of violations that cut across all categories of human rights.

The dawn of independence in the late 1950s promised ‘self-determination’ and ‘accelerated development’, the terms that nationalists used as rallying cries in their struggles for independence. Although these struggles were fought on a human rights platform, the onset of independence was met with resistance to human rights. At the regional level, the Charter of the Organisation of African Unity<sup>5</sup> (OAU Charter), which created a new regional body to coordinate the struggle for independence, made cursory references to human rights and codified the principle of non-interference, which later served as a shield from external criticism of human rights records of African countries. At the domestic level, African nationalists began to see the protection of human rights as an impediment to the newly independent governments who saw their primary task as being to bring about accelerated development.<sup>6</sup> Human rights were cynically cast aside by using anti-colonialism rhetoric to claim that they were an imposition of the departing colonial masters on the newly established independent states.<sup>7</sup> In framing

a redeemer: Enforcing the human right of freedom from slavery in Africa’ (2004) *Singapore Law Review* 138.

<sup>3</sup> See e.g. R.G. Gorelick, ‘Apartheid and colonialism’ (1986) 19(1) *Comparative and International Law Journal of Southern Africa* 70.

<sup>4</sup> See A.A. Boahen (ed.), *General History of Africa, Abridged Edition: Vol. VII, Africa in the Nineteenth Century until the 1880s* (Paris: UNESCO, 1990) 208–16.

<sup>5</sup> Adopted 23 May 1963, 479 UNTS 39, entered into force 13 September 1963.

<sup>6</sup> A.A. Mazrui, ‘Seek ye first the political kingdom’, in A.A. Mazrui (ed.), *General History of Africa, Unabridged Edition: Vol. VIII, Africa since 1935* (Paris: UNESCO, 1999) 105; R. Howard, ‘The full belly thesis: Should socio-economic rights take priority over civil and political rights? Evidence from sub-Saharan Africa’ (1983) 5 *Human Rights Quarterly* 467, 468; T. Mboya, *Freedom and After* (Boston: Little, Brown, 1963) 159.

<sup>7</sup> See H.K. Prempeh, ‘Africa’s constitutionalism revival: New dawn or false start’ (2007) 5(3) *International Journal of Constitutional Law* 469, 473; J. Eckel, ‘Human rights and decolonization: New perspectives and open questions’ (2014) *Humanity Journal* 111, 115–17.

the debate as a binary between human rights and development, the newly independent states understood human rights narrowly as civil and political rights. Even so, that civil and political rights were crucial to development was ignored, and more importantly, that human rights include economic, social and cultural rights, which have an important role to play in development, was also neglected.

The consequence of the political rhetoric about development and human rights was that in a number of countries, a new constitution was hurriedly adopted to replace the one adopted at independence, removing the bill of rights – that in any case codified predominantly civil and political rights – or reducing their role.<sup>8</sup> Further constitutional changes were made banning multiparty politics and removing presidential elections. In the end, far from taming and humanising the colonial state, as the nationalists had promised before independence, the new independent African states consolidated and expanded state authority.<sup>9</sup> The stage was set for the emergence of Africa's strong men, dictatorial regimes, military coups and regimes, civil wars and politics of ethnicity.<sup>10</sup> People could be detained without trial, courts became a sham, disposessions of people's property became common, freedom of expression was curtailed, and political opponents could be disappeared without any regard to their families. In short, it became difficult for citizens to exercise their freedom or enjoy their livelihoods freely.

The movement for democratic change that emerged in the 1990s was a struggle for a return to competitive politics, an end to top-down politics and the recognition of and respect for the rule of law and human rights. In many countries, one-party governments were toppled, giving way to elected governments.<sup>11</sup> The transition to democracy invariably involved the negotiation and adoption of new constitutions that placed human rights at their centre. The renewed attention given to human rights in the

<sup>8</sup> Prempeh, 'Africa's constitutionalism revival', 474, reporting that between 1960 and 1962, 13 newly independent African countries amended their independence constitutions. By 1970, many more had followed suit. See also C.M. Fombad, 'Constitution-building in Africa: The never-ending story of making, unmaking and remaking of constitutions' (2014) 13(4) *African and Asian Studies* 429.

<sup>9</sup> J.I. Elaigwu and A.A. Mazrui, 'Nation-building and changing political structures', in Mazrui, *Africa since 1935* 435, 447.

<sup>10</sup> See generally G. Hyden, *African Politics in Comparative Perspective* (Cambridge: Cambridge University Press, 2006); M. Meredith, *The Fate of Africa: A History of Fifty Years of Independence* (New York: Public Affairs, 2005).

<sup>11</sup> It has been reported that by the end of 1994, 29 out of 54 African countries had held elections. By the end of 1998, only four countries had not held competitive elections. See C.C. Gibson, 'Of waves and ripples: Democracy and political change in Africa in the 1990s' (2000) 5 *Annual Review of Political Science* 201, 202.

new constitutions was preceded by an earlier regional effort made in 1981 to adopt the African Charter on Human and Peoples' Rights<sup>12</sup> (African Charter). This treaty broke with regional trends in Europe and America by recognising civil and political rights, economic, social and cultural rights, and group rights all at once and subjecting them to the same enforcement mechanisms.

Since then, this regional feat has been followed by more regional treaties expanding the scope of the rights recognised and strengthening the enforcement mechanisms. In particular, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa<sup>13</sup> (African Women's Protocol) and the African Charter on the Rights and Welfare of the Child in Africa<sup>14</sup> (African Children's Charter) expanded the scope of the protection of women's and children's rights respectively, while the African Children's Charter further introduced a specialised monitoring body for children's rights, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). Expanding the scope of the rights of older persons and persons with disabilities through a new treaty is also currently under consideration. At the turn of the century, the continent shed its OAU skin by creating the African Union, whose Constitutive Act makes the protection and promotion of human rights an explicit and central part of its mandate.<sup>15</sup> One of the first policy initiatives of the AU, the New Partnership for Africa's Development (NEPAD), sought to advance economic, social and cultural rights by focusing on poverty reduction; improving access to health, water, sanitation and education; ensuring food security; facilitating socio-economic development; and protecting and promoting culture.<sup>16</sup> The establishment of the African Court on Human and Peoples' Rights (African Court) has meant that it is now possible to obtain concrete legal remedies for violations of human rights, including economic, social and cultural rights, which the African Commission on Human and Peoples' Rights (African Commission) could

<sup>12</sup> Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986.

<sup>13</sup> Adopted 13 September 2000, AU Doc. CAB/LEG/66.6, entered into force 25 November 2005.

<sup>14</sup> Adopted 11 July 1990, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

<sup>15</sup> See generally the Constitutive Act of the African Union (AU Constitutive Act), adopted on 11 July 2000, OAU Doc. CAB/LEG/23.15, entered into force 26 May 2001.

<sup>16</sup> See New Partnership for Africa's Development framework document, October 2001, paras. 113–20, 123–8, 130, 136 and 140–1, available at <http://www.nepad.org/resource/new-partnership-africas-development> (accessed 4 July 2016).

not grant. The emergence of sub-regional economic communities, such as the Economic Community of West African States (ECOWAS), Southern Africa Development Community (SADC) and East African Community (EAC), has also opened up new ways of protecting and enforcing human rights at the sub-regional level, more so now that the sub-regional courts have been given the power to pass binding judgments.

Much has been written about these new constitutions: the power structures they create, the accountability frameworks they establish, the civil and political rights they recognise, constitutionalism, and the manner in which they entrench the dependence of the judiciary.<sup>17</sup> However, very little has been written on the manner and extent to which these constitutions recognise and protect economic, social and cultural rights. As an exception, much of the focus on the protection of these rights has been on South Africa, which no doubt has one of the leading constitutions in the world and has produced pioneering case law on these rights. The literature on the African human rights system has also tended to deal with the overall normative and enforcement framework,<sup>18</sup> rather than on the jurisprudence on specific sets of rights, not least on economic, social and cultural rights.<sup>19</sup> How African domestic constitutional frameworks relate and link to the sub-regional, regional and international protection mechanisms for these rights has rarely been explored. This book attempts

<sup>17</sup> See e.g. A. An-Na'im (ed.), *Human Rights Under African Constitutions: Realising the Promise for Ourselves* (Philadelphia: University of Pennsylvania Press, 2003); D.M. Chirwa and L. Nijzink (eds.), *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (Tokyo: United Nations University Press, 2012); M.K. Mbondenji and T. Ojienda (eds.), *Constitutionalism and Democratic Governance in Africa: Perspectives from Sub-Saharan Africa* (Pretoria: PULP, 2013); K. Prempeh, 'Presidential power in comparative perspective: The puzzling persistence of the imperial presidency in post-authoritarian Africa' (2008) 34(1) *Hastings Constitutional Law Quarterly* 1.

<sup>18</sup> See e.g. F. Viljoen, *International Human Rights Law in Africa* (Oxford: Oxford University Press, 2012); E.A. Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedures* (The Hague: Martinus Nijhoff Publishers, 1996); U.O. Umuzurike, *The African Charter on Human and Peoples' Rights* (The Hague: Martinus Nijhoff Publishers, 1997); M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2006* (2nd edn.) (Cambridge: Cambridge University Press, 2008).

<sup>19</sup> The little that exists consists largely of journal articles and book chapters, see e.g. C.A. Odinkalu, 'Analysis of paralysis or paralysis of analysis: Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23(2) *Human Rights Quarterly* 327; D.M. Chirwa, 'African regional human rights system: The promise of recent jurisprudence on social rights', in M. Langford (ed.), *Socio-Economic Rights Jurisprudence: Emerging Trends in Comparative and International Law* (Cambridge: Cambridge University Press, 2008) 323.

to address the protection of economic, social and cultural rights and the jurisprudence that has evolved at these four levels: domestic, sub-regional, regional and international.

## 2 Aims and Methodology

The aims of this book are aligned to the four tiers of focus to which we have alluded, the central concern being investigating the possibilities for the judicial enforcement of these rights at each level. On the domestic front, we are interested first in investigating and critiquing the manner and form in which economic, social and cultural rights feature in African constitutions. What informed the choice of the constitutional models in the selected countries? How do these models relate to the constitutional histories of the countries under study? Second, we are interested in investigating how these models have worked in practice. In particular, we ask whether these constitutional models have been tested in litigation. If so, what sort of jurisprudence has arisen? Has such jurisprudence reinforced or undermined the protection of economic, social and cultural rights? Where the courts have found no problem with adjudicating these rights, how have they dealt with the common concerns about the role of the courts in socio-economic decision-making? Where the courts have refused to enforce these rights, what reasons have they given? Lastly, the country studies are expected to identify the merits and demerits of each model in practice, and discuss the strategies litigants have used, or can use, to overcome those demerits.

The choice of the country studies was based primarily on a preliminary survey of African constitutions which revealed three broad constitutional models of protecting economic, social and cultural rights. The first is the direct constitutional protection model, whereby economic, social and cultural rights are enshrined expressly in a bill of rights. The countries with such constitutions include Angola, Burundi, Cape Verde, Chad, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, The Gambia, Guinea, Kenya, Madagascar, Mali, Mozambique, Niger, Rwanda, Saô Tomé and Príncipe, Senegal, Seychelles, South Africa and Togo.<sup>20</sup> It must be noted, however, that there are variations within the group as to the diversity of

<sup>20</sup> Angola and Mozambique could also qualify as hybrid models because they have chapters in their Constitutions that make provision for what are in Anglophone countries called directive principles of state policy. But the level of protection given to economic, social and cultural rights in their Bills of Rights is so extensive as to warrant them being classified under the direct constitutional protection model.



the economic, social and cultural rights each country's constitution protects, with some protecting a full range of economic, social and cultural rights and others not. In addition, despite the entrenchment of economic, social and cultural rights in the bill of rights, some of these constitutions do not state expressly whether these rights are enforceable by the courts. Nevertheless, for the sake of representivity, from the Anglophone countries, we chose to focus on South Africa, whose Constitution contains an elaborate catalogue of economic, social and cultural rights, and Kenya, which represents the constitutions that have been adopted recently.<sup>21</sup> From the Francophone countries, Senegal was selected. With these choices, we end up with a country study from South, East and West Africa respectively for the study of direct protection of economic, social and cultural rights.

The second model represents constitutions that do not recognise economic, social and cultural rights in the bill of rights, enshrining civil and political rights only, with a few recognising some aspects of economic, social and cultural rights as directive principles of state policies and others making a general commitment to these rights in the preamble. The countries with such constitutions include Botswana, Cameroon, Comoros, Djibouti, Lesotho, Liberia, Mauritania, Mauritius, Nigeria, Sierra Leone, Sudan and Zambia. Nigeria was chosen to represent the indirect protection of economic, social and cultural rights because of its capacious interpretation of civil and political rights and through directive principles of state policy. Cameroon represents a number of Francophone countries,<sup>22</sup> including Comoros and Mauritania, which make a broad commitment to human rights in the preamble without entrenching them in a bill of rights. The two country studies selected for this model represent Anglophone and Francophone experiences respectively, and with the inclusion of Cameroon, we also end up with a country study from Central Africa.

The third model is hybrid. It makes room for the recognition of some economic, social and cultural rights in the bill of rights and others as directive principles of state policy. Countries that have chosen this model include Eritrea, Ethiopia, Ghana, Malawi, Namibia, Swaziland,

<sup>21</sup> Other recently adopted constitutions are the Constitution of Zimbabwe 2013, the Constitution of Angola 2010, the Transitional Constitution of the Republic of South Sudan 2011, and the Constitution of Mozambique 2004, all of which establish a trend towards stronger constitutional protection of economic, social and cultural rights.

<sup>22</sup> However, it must be noted that Cameroon has a dual legal system coexisting side by side, with civil law applicable in the Francophone part and common law in the Anglophone part, thus making its experience interesting.

Tanzania, Uganda and Zimbabwe. From these countries, we selected one West African country, Ghana, and one East African Country, Uganda, both of which are Anglophone. In addition to these, Ethiopia was selected because, having not experienced colonisation, it has an indigenous legal system, which makes its experience of the hybrid model interesting.

Although these country studies were conducted in isolation of each other, we hope that they provide a diverse platform from which to assess the feasibility of each model of protecting economic, social and cultural rights. We also hope that they bring to light new information about the constitutional protection and adjudication of these rights, critique the practices and jurisprudence that has emerged thus far, and highlight the difficulties of and further possibilities for judicial enforcement of economic, social and cultural rights.

Despite domestic protection being critical to the protection of human rights, it is now widely accepted that international mechanisms are required to complement domestic efforts, in keeping with the idea that human rights are now a matter of domestic and international concern. Increasingly, especially in the African context, international law is no longer a one-way relation in which African countries are always playing catch-up with the standards established in international human rights law. African constitutional and regional human rights practices have in some respects outpaced international standards.<sup>23</sup> This book was conceived with this two-way interaction between international law and regional and domestic law in mind. On the one hand, the country studies are in part meant to establish whether there is a trend towards stronger constitutional protection of economic, social and cultural rights and whether there is a record of case law that sheds light on the nature of these rights and the obligations they engender on various actors. On the other hand, the book investigates the possibilities of protecting these rights at the international level and of obtaining remedies for violations of these rights in international forums. In exploring these possibilities, we are mindful of the enormous influence that international law has had on African constitutional practices. The greater the protection given to these rights in international law, the more compelling it will be for the states that are lagging behind to improve their domestic practices and procedures. International

<sup>23</sup> For example, in the areas of group rights and the enforcement of positive obligations implicit in economic, social and cultural rights; see Chapter 8, 212–242 and Chapter 11, 313–319 of this book.



remedies may also help individuals to vindicate their rights when domestic options do not yield satisfactory results.

Thus, this book also seeks to explore the ways in which economic, social and cultural rights are protected in international law and the possibilities for litigating these rights at that level. Two models of protection are considered – the indirect model and the direct model. Given that certain groups are more vulnerable to violations of economic, social and cultural rights than others, this book also investigates the degree to which the economic, social and cultural rights of vulnerable groups, such as women, children, older persons and persons with disabilities, are protected. How these direct and indirect international models of protection and special protection feature at regional and sub-regional levels in Africa is also explored.

In the end, we hope that the book will improve our understanding of the manner in which and the extent to which economic, social and cultural rights are protected in African constitutions, the meaning and implications of these rights, the standards by which states may be judged in deciding whether they have met their obligations, and the extent to which judicial enforcement can play a role in holding the state accountable for the provision of access to basic goods and services. Such knowledge may in turn provide a basis upon which African countries can learn from their own experience and other African countries' experiences, and share these experiences with the rest of the world. It can also shape the development of international and comparative constitutional jurisprudence on these rights, especially as various international monitoring bodies begin to perform their newly assigned complaints adjudicatory functions.<sup>24</sup> Conversely, knowledge about the protection of economic, social and cultural rights at international, regional and sub-regional levels will hopefully reveal the possibilities of bolstering the domestic protection of these rights and expanding the available remedial options. If used effectively, the combination of domestic protection mechanisms, comparative constitutional jurisprudence, sub-regional mechanisms, regional mechanisms and international mechanisms should ensure that victims of economic, social and cultural rights violations receive recourse and states and other relevant actors are held accountable for the implementation of economic, social and cultural rights.

<sup>24</sup> See Chapter 2.

### 3 Significance of Economic, Social and Cultural Rights in Africa

The increased recognition of economic, social and cultural rights in Africa is an acknowledgment of their relevance to the continent and the need to ensure their effective realisation. There can be no doubt that these rights are critical to the eradication of poverty, which is an enduring problem on the continent. Very recently, the African Commission expressed concern over 'the deep conditions of poverty, inequality and insecurity that continue to prevail on the African Continent'.<sup>25</sup> Despite being a resource-abundant continent,<sup>26</sup> poverty in Africa remains widespread and stands at about 48.4 percent of the whole population.<sup>27</sup> While this statistic represents an improvement on previous poverty estimates, the recent Ebola virus outbreak and other disasters have 'pushed many households back into poverty and destitution in the most affected countries'.<sup>28</sup> More worrying perhaps is that sub-Saharan Africa is still 'lagging behind the rest of the world in responding to the poverty challenge' and other regions 'in its attempt to reduce the intensity of poverty'.<sup>29</sup>

Poverty and the lack of access to economic, social and cultural rights do not mean the same thing. However, the two concepts overlap and correlate in important ways.<sup>30</sup> Broadly speaking, poverty denotes a state in which a person is unable to live a long, healthy and creative life, nor to enjoy a decent life worthy of self-respect and the respect of others.<sup>31</sup> As was succinctly stated in the Programme of Action of the World Summit for Social Development:

<sup>25</sup> African Commission on Human and Peoples' Rights, 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (2011) (African Commission Principles and Guidelines), available at [www.achpr.org/files/instruments/economic-social-cultural/achpr\\_instr\\_guide\\_draft\\_esc\\_rights\\_eng.pdf](http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf) (accessed 6 July 2016), preamble.

<sup>26</sup> Viljoen, *International Human Rights Law in Africa* 544.

<sup>27</sup> United Nations Development Programme (UNDP), *MDG Report 2015: Assessing Progress in Africa towards the Millennium Development Goals* (Addis Ababa: United Nations Economic Commission for Africa, African Union, African Development Bank and United Nations Development Programme, 2015) xiii.

<sup>28</sup> Ibid, xiii, 1–3.

<sup>29</sup> Ibid, 2.

<sup>30</sup> C. Heyns and M. Killander, 'Africa', in D. Moeckli, S. Shah and S. Sivakumaran (eds.), *International Human Rights Law* (Oxford: Oxford University Press, 2010) 442; S.P. Marks 'Poverty', in Moeckli, Shah and Sivakumaran (eds.), *International Human Rights Law* 587 and 588.

<sup>31</sup> UNDP, *Human Development Report* (New York: Oxford University Press, 2000) 73.