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978-1-107-17365-1 — The Protection of Economic, Social and Cultural Rights in Africa

Edited by Danwood Mzikenge Chirwa, Lilian Chenwi

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THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN AFRICA

The Protection of Economic, Social and Cultural Rights in Africa critiques the three main models of constitutionally protecting economic, social and cultural rights in Africa – direct, indirect and hybrid models. It examines the choices that states have made, how the models have worked, whether they have been tested in litigation and the jurisprudence that has arisen. The book analyses the protection of economic, social and cultural rights in a range of African countries: Angola, Cameroon, Ethiopia, Ghana, Kenya, Mozambique, Nigeria, Senegal, South Africa and Uganda. Leading legal academics explore how these rights feature at the regional and sub-regional levels, as well as the link between domestic and international mechanisms of enforcement.

DANWOOD MZIKENGE CHIRWA is Professor of Law and former head of the Department of Public Law at the University of Cape Town, South Africa. He has authored a number of books on law and is the founder and Editor-in-Chief of the *Malawi Law Journal*. He has published, taught and supervised postgraduate students on economic, social and cultural rights.

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THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN AFRICA

International, Regional and National Perspectives

Edited by

DANWOOD MZIKENGE CHIRWA

University of Cape Town

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Frontmatter

[More Information](#)

In memory of Silvester Chirwa 15 April 1994–27 April 2015

CONTENTS

<i>Notes on Contributors</i>	page x
<i>Foreword by Kate O'Regan</i>	xvii
<i>Preface</i>	xix
<i>Acknowledgements</i>	xxiii
PART I Introduction	1
1 The Protection of Economic, Social and Cultural Rights in Africa	
DANWOOD M. CHIRWA AND LILIAN CHENWI	3
PART II International Protection	31
2 Direct Protection of Economic, Social and Cultural Rights in International Law	
LILIAN CHENWI AND DANWOOD M. CHIRWA	33
3 Indirect Protection of Economic, Social and Cultural Rights in International Law	
MARTIN SCHEININ	72
PART III African Regional and Sub-Regional Protection	89
4 The Protection of Economic, Social and Cultural Rights under the African Charter	
MANISULI SSENYONJO	91
5 The Protection of Women's Economic, Social and Cultural Rights in Africa	
REBECCA BROWN AND JUDY ODER	121

6	The Protection of Children’s Economic, Social and Cultural Rights under the African Children’s Charter	
	JULIA SLOTH-NIELSEN	155
7	Protection of the Economic, Social and Cultural Rights of Older Persons and Persons with Disabilities in the African Regional System	
	LILIAN CHENWI	180
8	Group Rights and the Protection of Economic, Social and Cultural Rights in Africa	
	DANWOOD M. CHIRWA	212
9	Regional Institutional and Remedial Arrangements for the Judicial Enforcement of Economic, Social and Cultural Rights in Africa	
	FRANS VILJOEN	243
10	Sub-Regional Judicial Enforcement of Economic, Social and Cultural Rights	
	SOLOMON T. EBOBRAH	274
PART IV	Domestic Constitutional Protection Models and Jurisprudence	303
11	Direct Constitutional Protection of Economic, Social and Cultural Rights in South Africa	
	SANDRA LIEBENBERG	305
12	Direct Constitutional Protection of Economic, Social and Cultural Rights under Kenya’s 2010 Constitution	
	GODFREY O. ODONGO AND GODFREY M. MUSILA	338
13	Direct Constitutional Protection of Economic, Social and Cultural Rights in Lusophone Legal Systems: Angola and Mozambique	
	AQUINALDO C. MANDLATE, JOÃO NHAMPOSSA AND DANWOOD M. CHIRWA	372
14	Direct Constitutional Protection of Economic, Social and Cultural Rights in Francophone Legal Systems: Senegal	
	FATIMATA DIALLO	396

CONTENTS ix

15	Ethiopia’s Hybrid Constitutional Protection of Economic, Social and Cultural Rights	
	SISAY A. YESHANEW	423
16	Uganda’s Hybrid Constitutional Protection of Economic, Social and Cultural Rights	
	CHRISTOPHER MBAZIRA	447
17	Ghana’s Hybrid Constitutional Protection of Economic, Social and Cultural Rights	
	PETER A. ATUPARE	476
18	Indirect Constitutional Protection of Economic, Social and Cultural Rights in Nigeria	
	ENYINNA S. NWAUCHE	501
19	Indirect Constitutional Protection of Economic, Social and Cultural Rights in Cameroon	
	ATANGCHO N. AKONUMBO	527
	<i>Index</i>	550

NOTES ON CONTRIBUTORS

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NOTES ON CONTRIBUTORS

xi

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Frontmatter

[More Information](#)

NOTES ON CONTRIBUTORS

xiii

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FOREWORD

This book, the first to grapple with the judicial implementation of economic, social and cultural rights across Africa, is to be welcomed warmly. The adoption of the Universal Declaration of Human Rights in 1948 by the United Nations marked a new era in the global recognition and protection of human rights. The Declaration drew no distinction between civil and political rights on the one hand and economic, social and cultural rights on the other. Yet in the decades that followed human rights law and practice, under international law, regional human rights law and in domestic jurisdictions, tended to distinguish sharply between the two categories of rights. That distinction was reflected in the mid-1960s by the adoption of two international covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. And it was also reflected in the widespread understanding that although civil and political rights were appropriate for implementation by judges, economic and social rights, in particular, were not. The decades since 1990 have seen a slow but steady shift in that understanding. Most notably, perhaps, the shift can be seen in the explosion of constitution-making that followed the destruction of the Berlin Wall in 1990.

In the last two decades, many constitutions have either explicitly provided for the implementation of economic and social rights by courts or asserted that economic and social rights constitute principles of state policy that should guide policy-making by governments. The result has been the emergence of jurisprudence on economic and social rights in many jurisdictions around the world. That jurisprudence raises acute challenges. Courts need to ensure that economic and social rights are protected and fulfilled, but they also need to develop an appropriate model of the separation of powers to ensure that the democratic arms of government remain accountable for the fulfilment of economic and social rights. This is not an easy task. It is especially challenging in the developing world where most of the world's poor people live, and where economic and social rights are therefore of desperate importance.

Africa has the opportunity to be at the vanguard of this new jurisprudence. This opportunity arises partly from the fact that Africa has seen the adoption of a raft of new constitutions since 1990, many of which contain economic and social rights and partly from the fact that persistent and widespread poverty in Africa means that economic and social rights hold out special hope for millions of Africans. This book describes how African courts have grappled with this opportunity. In drawing together the experience of the adjudication of economic and social rights across our continent, Professors Chirwa and Chenwi have facilitated a robust and frank continental dialogue on the challenges and possibilities of economic and social rights adjudication in Africa. We should be grateful to them and to the many authors in this edited collection for their engaged scholarship with this crucially important topic.

Courts are reliant not only on an independent and competent legal profession to do their work well, but – especially in relation to doctrinal developments in the legal system – are also reliant on the academy for ideas, for critique and for engagement. Increasingly across Africa, the academy is addressing the challenges of developing the legal systems on our continent to be responsive to the needs of the people of Africa. The quality of the scholarship in this book, and its reach, provide a fine example of the contribution that scholars can make to envisaging a principled and imaginative jurisprudence for Africa in this century.

Kate O'Regan
Retired Judge, Constitutional Court of South Africa

PREFACE

Africa has been at the forefront of making concrete efforts to give legal protection to economic, social and cultural rights and to enforce them by judicial and quasi-judicial means. This claim might sound suspicious to those unfamiliar with African legal systems and somewhat surprising, given the continent's history of gross human rights violations and oppressive political systems, from slavery and colonialism to one-party rule and military dictatorships. But the truth is that, at the regional, sub-regional and domestic levels, African states have outpaced other regions in recognising economic, social and cultural rights as enforceable rights.

Trailing Europe and the Americas by more than two decades in establishing a regional system of human rights, Africa adopted the African Charter on Human and Peoples' Rights (African Charter) in 1981. This treaty gave equal legal recognition to civil and political rights, economic, social and cultural rights, and solidarity rights, and subjected all these rights to the same enforcement mechanisms. This development happened at a time when the opposition to the full international and constitutional recognition of these rights was still at its peak. Since the 1980s, African states have adopted more regional treaties expanding the scope of economic, social and cultural rights, and establishing stronger enforcement mechanisms such as the African Court on Human and Peoples' Rights. They have also created sub-regional mechanisms for the protection of human rights and adopted domestic constitutions that have embraced democracy and enshrined extensive bills of rights. Enforcement mechanisms at all these levels – regional, sub-regional and domestic – have produced a growing body of jurisprudence enforcing economic, social and cultural rights.

Yet little has been written about all these legal developments. Although some attention has been given to the jurisprudence of the African Commission on Human and Peoples' Rights, which monitors the implementation of the African Charter, and of the South African Constitutional Court, insufficient attention has been given to the protection of these rights

at the regional and sub-regional levels, to the various approaches that domestic constitutions have taken, and to the jurisprudence that has arisen.

This book represents an attempt to provide a comprehensive account of the legal protection of economic, social and cultural rights in Africa. It investigates and critiques the various models that have been used to protect these rights at the regional, sub-regional and domestic levels and how these models have worked in practice. In particular, it explores and critiques the jurisprudence of the courts and treaty bodies on these rights. In pursuing the above, this book seeks to reveal what African states have contributed to the development, understanding and judicial enforcement of economic, social and cultural rights. While it draws on some international scholars, the book draws largely on African scholars and activists, some of whom have served as members of international and regional human rights monitoring bodies, been involved in research, teaching or litigation on economic, social and cultural rights for a considerable period of time, and are familiar with African legal systems.

After providing a contextual background to the legal protection of these rights, the book moves on in Part II to a discussion of their protection at the international level. There are two chapters in this part, one focusing on the direct protection of these rights in international treaties and the mechanisms of enforcing these rights, and another addressing the notion of indirect protection of economic, social and cultural rights. These chapters set the stage for the discussion of these rights in the African legal contexts.

Part III shows that at the regional level, economic, social and cultural rights most often are protected directly, while at the sub-regional level they are protected indirectly. The extent to which these rights are protected through these ways is discussed, as is the jurisprudence that has evolved from the regional and sub-regional levels. Separate chapters cover general normative protection, special normative protection and judicial mechanisms of protection. The discussion of general protection focuses on the African Charter, while that for special protection is covered in three separate chapters focusing on women, children, and older persons and persons with disabilities. This is followed by a chapter establishing a link between group rights and economic, social and cultural rights. Collectively, these chapters demonstrate the breadth and uniqueness of the protection of economic, social and cultural rights in the African regional human rights system. The chapter on regional judicial enforcement mechanisms traces the evolution of the enforcement

PREFACE

xxi

mechanisms of the African regional system and how the present system functions in relation to the enforcement of economic, social and cultural rights. The chapter on sub-regional judicial enforcement mechanisms considers the protection frameworks, the nature of the judicial mechanisms available within sub-regional mechanisms and the case law that these mechanisms have produced thus far. The discussion covers the west, east and southern African sub-regional economic arrangements.

Part IV is devoted to the discussion of three prevalent constitutional models of protecting economic, social and cultural rights in Africa: direct, hybrid and indirect models. For direct models, Kenya and South Africa are used as examples; for hybrid Ghana and Uganda; and for indirect Nigeria. We also include an examination of constitutional models from Francophone and Lusophone countries. Hence, the book features a chapter on Angola and Mozambique, which represent the dominant direct protection mechanism for Lusophone countries, and Senegal, which also represents a direct model commonly found in Francophone countries. However, Cameroon's indirect protection model included in this book is also found in some Francophone countries.

The choice of these domestic models was based on a wide range of factors, including the availability of primary and secondary materials, the availability of authors, geographical representation, and variety of legal systems and legal traditions. An effort was made, with limited success, to include chapters from Lusophone, Francophone and North African countries. We hope that the sample of chapters included here provides a fair representation of the constitutional models of protecting economic, social and cultural rights in Africa and the jurisprudence that has emerged thus far.

Overall, the book shows that African states have over the last 20 years increasingly recognised economic, social and cultural rights as justiciable rights. The creation of regional and sub-regional courts with mandate over the interpretation and enforcement of these rights has replaced the initial discomfort explicit in the African Charter with judicial solutions to human rights problems. At the domestic level, the trend in Anglophone, Francophone and Lusophone countries is towards recognising economic, social and cultural rights directly in the bill of rights or partly in the bill of rights and directive principles of state policy. African constitutions that do not have economic, social and cultural rights in their constitutions are the older ones, adopted at independence or during the first wave of political change. The constitutions adopted from the 1990s have

generally given greater recognition to these rights, and those adopted after 2000 have done even better. At regional, sub-regional and domestic levels, these rights are being interpreted by the courts, some of which have produced pioneering jurisprudence.

Without a doubt, there are many challenges to giving full effect to these rights. The level of commitment to these rights varies from country to country and so has the degree to which domestic courts have embraced their role in the enforcement of these rights.

We hope that this book will improve our understanding of the manner in which and the extent to which economic, social and cultural rights are protected in Africa at the regional, sub-regional and domestic levels; how these rights have been interpreted and enforced; and the contribution that Africa as a whole has made to the development of these rights. 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. 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.

Clearly, there is a broad range of possibilities of enforcing these rights in Africa currently. 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.

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