The constitutional protection of socio-economic rights in East Africa

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Over the years, there has been increased international recognition of the universality, indivisibility and interdependence of civil, social, political and economic rights. This means that the neglect or violation of one right may impact negatively on another.

Most African countries, including those in East Africa, have assumed obligations under human rights treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples’ Rights (ACHPR) to respect, protect and fulfil socio-economic rights. The national constitutions of these countries also either explicitly recognise socio-economic rights in a bill of rights or include them in the preamble or in a section on directive principles of state policy (DPSPs).

In spite of this recognition, the violation of civil and political rights continues to attract more attention than that of socio-economic rights, which are the daily concerns of most people, especially the poor and disadvantaged groups of society. Like most of sub-Saharan Africa, East African countries have experienced the socio-economic challenges of poverty, such as environmental degradation and inadequate access to health care, education, housing, and social security. There are also the related challenges of gender inequality and homophobia, which are largely experienced by women and sexual minorities.

It should be noted at the outset that, within the domestic context, socio-economic rights can be given effect to ‘by all appropriate means’ in order to ensure governmental accountability (Committee on Economic, Social and Cultural Rights, General Comment 9: The domestic application of the Covenant, UN doc. E/C.12/1998/24). This may be achieved through constitutional protection, legislative promotion and/or judicial enforcement. Thus East African countries are obliged to use all means at their disposal to ensure the protection and realisation of socio-economic rights. This contribution will particularly focus on the constitutional protection of socio-economic rights in East Africa.

Tanzania

Aside from the right to work, which is expressly recognised in the Bill of Rights of the Constitution of Tanzania (article 22), socio-economic rights are outlined in Part II, which deals with DPSPs. The state is enjoined to uphold the principles of social justice and ensure, inter alia, that “the use of national wealth places emphasis on the development of the people and in particular is geared towards the eradication of poverty, ignorance and disease’ (article 9(j)). The state is also required to make appropriate social welfare provisions for the sick, elderly and disabled (article 11(1)).

The DPSPs also guarantee every person ‘the right to access education’ (article 11(2)) and the freedom ‘to pursue education in a field of his choice up to the highest level according to his merits and ability’ (article 11(2)).

Even though all organs of the state, including the legislature, executive and judiciary, are obliged to take cognisance of, observe and apply the DPSPs (article 7(2)), the Constitution renders these objectives and principles non-justiciable. In this respect, the Constitution expressly provides as follows:

The provisions of this Part of this Chapter are not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law or judgment complies with the provisions of this Part of this Chapter (article 7(2)).

It is important to note that the Bill of Rights contains certain provisions that could be applied – by a sufficiently creative court – to protect socio-economic rights. For example, the Constitution guarantees the right to life (article 14) and respect for human dignity (article 12(2)). The Constitution provides as follows: ‘Every person has the right to live and to the protection of his life by the society in accordance with the law’. The words ‘right to live’ may be interpreted to include basic entitlements such as access to food, water, education, shelter and a decent environment.

Kenya

In a referendum earlier this year, Kenyans approved a Constitution with a progressive Bill of Rights that is meant to form ‘an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies’ (article 19(1)). (The paper by Laibuta on page 20 outlines this process in detail and offers further reflections on the Kenyan case.) It can be argued that this provision obliges those making and implementing policy in Kenya to be guided by a rights-based approach in the development of socio-economic policy frameworks. The Bill of Rights explicitly recognises most of the socio-economic rights contained in the ICESCR and other relevant international instruments. According to the Constitution, every person has the right ‘to the highest standard of health, which includes the right to health services, including reproductive health care’ (article 43(1)(a)). The Constitution also guarantees every person the right ‘to accessible and adequate
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housing, and to reasonable standards of sanitation’ (article 43(1)(c)) and ‘to be free from hunger, and to have adequate food of acceptable quality’ (article 43(1)(c)). Other rights are those ‘to clean and safe water in adequate quantities’ (article 43(1)(d)), to social security (article 43(1)(e)) and to education (article 43(1)(f)). The Constitution provides that ‘no person shall be denied emergency medical treatment’ (article 43(2)).

The Constitution builds on the jurisprudence of the Committee on Economic, Social and Cultural Rights (CESCR) and provides that where the state claims that it does not have the resources to implement any of these socio-economic rights outlined in article 43, the onus is on it to prove that the resources are not available (article 20(5)(a)). The state has to show that in allocating resources, it has given priority to ensuring the widest possible enjoyment of a socio-economic right ‘having regard to prevailing circumstances, including the vulnerability of particular groups or individuals’ (article 20(5)(b)). However, the court ‘may not interfere with a decision by a state organ concerning the allocation of resources, solely on the basis that it would have reached a different decision’ (article 20(5)(c)).

The Constitution enjoins the state to put in place affirmative action programmes for the purpose of ensuring minorities and marginalised groups, inter alia, participation in government interventions; special opportunities in educational and economic fields; access to employment; and reasonable access to water, health services and infrastructure (article 56(a)–(e)). The Constitution also guarantees every person the right to a clean and healthy environment (article 42). A person who alleges that this right ‘has been, is being or is likely to be, denied, violated, infringed or threatened’ may apply to a court for redress (article 70(1)). The court may order or give directions
(a) to prevent, stop or discontinue any act or omission that is harmful to the environment;
(b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
(c) to provide compensation for any victim of a violation of the right to a clean and healthy environment (article 70(2)).

Where an applicant alleges violation of this right, he/she ‘does not have to demonstrate that any person has incurred loss or suffered injury’ (article 70(3)). It is important to note that the Constitution here tackles the question of locus standi and introduces the concept of public interest litigation. A person is thus not required to have a personal interest or injury before lodging an application or petition alleging a violation of other people’s rights (article 22(2)(a)–(d)).

Previously, courts in Kenya adopted a rather restrictive approach to standing in matters of environmental law. For example, in Wangari Maathai v The Kenya Times Media Trust ([1989] KLR 267), the Court held that the applicant had no standing because she had not alleged that ‘the defendant company [was] in breach of any rights, public or private in relation to the plaintiff nor [had] the company caused damage to her’. However, in Rodgers Muema Nzioka and Others v Tiomin Kenya Ltd (Mombasa High Court, Civil Suit No. 97 of 2001), the Court held that where a person sought to vindicate his or her right to a clean and healthy environment, he/she did not need to demonstrate a right or interest in the land alleged to have been invaded.

It should be noted that the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights require states parties to the ICESCR to provide effective remedies against the violation of economic, social and cultural rights. To this end, the Kenyan Constitution provides for a number of remedies, including declaratory orders, injunctions and compensation. In addition to these remedies, a person who alleges that his/her right to a clean and healthy environment has been or is likely to be denied, violated or threatened may apply to the court for orders or directions ‘to prevent, stop or discontinue any act or omission that is harmful to the environment’ (article 70(2)). The applicant may also ask the court ‘to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment’ (article 70(2)(b) and ‘to provide compensation for any victim of a violation of the right to a clean and healthy environment’ (article 70(2)(c)).

Rwanda

The Constitution of the Republic of Rwanda guarantees human dignity and personal freedom and provides that the human being shall be sacred (article 12) and all citizens shall be equal before the law without any discrimination (article 16). The family shall be protected (article 24) and marriage must be monogamous (article 25). The Constitution guarantees ‘the liberty of teaching’ (article 26), and primary education is mandatory and free (article 27). The Constitution also guarantees every person the right to work, to freely choose his/her work, to have equitable and satisfying working conditions (article 30) and to form and join trade unions (article 31).

Uganda

The Ugandan Constitution provides for the majority of socio-economic rights, which ‘shall guide all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions for the establishment and promo-
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The state has a number of obligations in respect to the right to adequate food. It shall ‘take appropriate measures to encourage people to grow and store adequate food’. The state is also enjoined to establish national food reserves and ‘encourage and promote proper nutrition through mass education and other appropriate means in order to build a healthy State’.

Socio-economic rights explicitly recognised in the Bill of Rights are the right to education (article 30), women’s rights (article 33), children’s rights (article 34), rights of persons with disabilities (article 35), minority rights (article 36), the right to a clean and healthy environment (article 39), protection from deprivation of property (article 26) and economic rights (article 40).

According to the Constitution, any person who claims that any constitutional right or freedom ‘has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation’ (article 50(1)). The Constitution has relaxed the rules of standing and permits any person or organisation to ‘bring an action against the violation of another person’s or group’s human rights’ (article 50(3)). For example, in The Environmental Action Network Ltd v Attorney General and NEMA (Misc. Application No. 39 of 2001), the applicant, a public interest litigation group, filed the application in its own behalf and on behalf of non-smoking members of the public under article 50(2) of the Constitution, to protect their right to a clean and healthy environment, their right to life and the general good of public health in Uganda. The state attorney raised a preliminary objection that the petitioners’ advocates did not address the nature and content of the right to education, partly because the petitioners’ advocates did not address the court on what the right entailed.

The Uganda Human Rights Commission, which is a constitutional quasi-judicial organ, has also considered a number of cases with a bearing on socio-economic rights. For example, in Kalyango Mutesasira and Others v Kunda Kiwanuka and 3 Others (Complaint UHRC 501/2003), the complainants alleged a failure to pay their pensions and sought the enforcement of the payment. It was held that there had been a violation of the complainants’ rights to property and social security.

Conclusion

There are many constitutional opportunities through which the East African states can be held accountable for violations of socio-economic rights. Because of the interdependence and indivisibility of rights, the courts in countries where socio-economic rights are not entrenched in a bill of rights can import notions of these rights into the meaning of civil and political rights protected under the various constitutions. Courts can also invoke the provisions of international human rights law. The Ugandan Constitution recognises those rights and freedoms, which are not explicitly recognised under Uganda’s Bill of Rights (article 45). It can thus be argued that socio-economic rights that are contained in international instruments to which Uganda is a party are implicitly recognised by that country’s Constitution. The Kenyan Constitution also expressly provides that the general rules of international law are applicable in Kenya.

Courts can also draw guidance from national case law in other jurisdictions that have adjudicated on socio-economic rights. Courts should also devise ways of rendering DPSPs justiciable. However, there is a need for concerted efforts by civil society organisations and public-spirited individuals to bring actions to court and quasi-judicial bodies such as human rights commissions challenging violations of socio-economic rights by the state and non-state actors.

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