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March, 2016

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THE RECOGNITION OF HEALTH RIGHTS IN CONSTITUTIONS ON THE AFRICAN CONTINENT: A SYSTEMATIC REVIEW

ANDRA LE ROUX-KEMP *

I. INTRODUCTION

In 2004, Eleanor D. Kinney and Brian Alexander Clark stated that two-thirds of all Constitutions worldwide contain 'provisions protective of health or health care', and that more recent Constitutions are also 'more likely to reflect statements of duty and entitlement' with regard to health.[1] The Office of the UN High Commissioner for Human Rights confirmed this in 2008, when it reported that the right to health or health care has been recognised – in some form or another – in at least 115 Constitutions around the world.[2] This is certainly a landmark development for the recognition of human rights and specifically socio-economic rights and the right to health. More recently, in a 2013 article published in the *Harvard Human Rights Law Journal*, Katharine G. Young and Julieta Lemaitre held that 'the path is [now] open to create health systems that are more rights respecting and more just'.[3]

This article will provide an overview of the Constitutional provisions pertaining to the right to health and health-related rights in the Constitutions of countries on the African continent. The discussion will be based on a systematic

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1 Eleanor D. Kinney and Brian Alexander Clark, 'Provisions for health and health care in the constitutions of the countries of the world', 37 *Cornell International Law Journal* (2004): 285–335, at 291.

2 Office of the UN High Commissioner for Human Rights The Right to Health Fact Sheet No. 31, 10 (2008), available at http://www.ohchr.org/documents/publications/factsheet31.pdf

3 Katharine G. Young and Julieta Lemaitre, 'The comparative fortunes of the right to health: Two tales of jusiticiability in Colombia and South Africa', 26(1) *Harvard Human Rights Journal* (2013): 179–216, at 180; It must be noted that these two authors substantiate their optimistic claim by referring to two scholars, Norman Daniels and Jennifer Prah Ruger, who are actually moving away from a human rights framework in arguing for the realisation of health rights. See footnote 6 of Young and Lemaitre's article.

African Journal of International and Comparative Law 24.1 (2016): 142–157
Edinburgh University Press
DOI: 10.3366/ajicl.2016.0144
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www.euppublishing.com/journal/ajicl

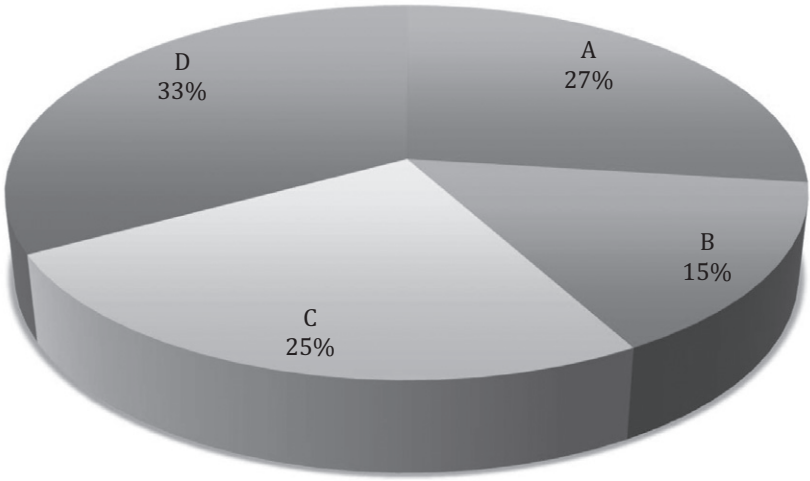

Figure 1. Systematic review of all African Constitutions.

evaluation of all the African Constitutions to date (see Figure 1).[4] The discussion will furthermore be divided into four categories:

- A: Constitutions of countries that make limited or no provision for the right to health and health-related rights (27 per cent);
- B: Constitutions that restrict the right to health and/or health-related rights to principles and objectives of State policy thereby reducing the enforceability or justiciability of the rights (15 per cent);
- C: Constitutions that do not provide for a right to health specifically but provide for health-related rights (25 per cent); and
- D: Constitutions that offer a comprehensive exposition of a right to health, health-related rights, as well as measures to ensure the enforceability thereof (33 per cent).

The primary aim and contribution of this article is to provide an overview and framework for the formal Constitutional recognition of the right to health and health-related rights in African Constitutions. It will be evident from this systematic review that the recognition of health rights in African Constitutions is actually rather limited, and where provision is made for a right to health and/or health-related rights, few Constitutions also include measures to ensure the enforceability thereof. Moreover, those countries whose Constitutions do include extensive provision with regard to the enforceability of social, economic and cultural rights, are either currently beleaguered by political and economic instability, which makes it difficult to realise the developmental and aspirational

4 There are currently 53 countries on the African continent the most recent being constituted is South Sudan. The only country on which no English information could be obtained for the purposes of this systematic review was Western Sahara.

ideals of their Constitutions, or their Constitutional jurisprudence oscillates from defeatist positions, where the lack of available resources are lamented and citizens are being denied their rights, to instances of isolated victories where governments are held to their Constitutional obligations.

A further important question that served as an impetus for this study is what real impact the formal, Constitutional recognition of the right to health and health-related rights has on the health of ordinary citizens and the public health systems of African countries? Kenya, for example, has the eleventh highest adult HIV prevalence in the world and maternal and child mortality rates continue to increase, while South Africa is still struggling with the big divide between public and private health care services, a legacy from its apartheid past.[5] In addition, Danso reported in 2007 that Africa is the only continent 'whose per capita output [for health] consistently declined over the last century, falling from 21% of GDP to 15.6%'.[6] And Chan submits that '…human rights law has so far had only limited success in actually improving the lives of persons living with HIV/AIDS in sub-Saharan Africa'.[7]

This stark disparity between the optimistic projections with regard to the formal, Constitutional recognition of the right to health and health-related rights versus the perceived absence of a real impact and change on the African continent, falls outside the ambit of this article. However, in considering this disparity, a closer look at the Constitutional provisions for health and health care on the African continent is certainly warranted, and the systematic constitutional review presented in this article is a useful starting point for a more critical debate on Constitutionalism and health care.

II. CONSTITUTIONS THAT DO NOT MAKE PROVISION (OR MAKE VERY LIMITED PROVISION) FOR THE RIGHT TO HEALTH OR HEALTH-RELATED RIGHTS

The Constitutions of the United Republic of Tanzania (1997), the Kingdom of Swaziland (2005), the Republic of Djibouti (1992),[8] and the Constitution of the Republic of Sudan (1998) make no provision for the right to health or any related health rights. With regard to the Constitution of Tanzania, this is especially noteworthy as the Constitution contains both a section for fundamental objectives and directive principles of State policy (Part II) and a section on basic rights and duties (Part III), but do not include any socio-economic or cultural rights.

5 A. Green, Kenya's new president promises health system reform, 381(9875) *The Lancet* (2013): 1348–9, at 1348.

6 Kwaku Danso, 'International Perspectives on health disparities and social justice: the African condition', 17 *Ethnicity and Disease* (2007): S2-50–S2-54, at S2–50.

7 Kathryn Bromley Chan, 'From legal universalism to legal pluralism: expanding and enhancing the human rights approach to HIV/AIDS', 21(2) *South African Journal of Human Rights* (2005): 191–214, at 192.

8 The most recent amendments to the Djibouti Constitution were in 2010, which provided (inter alia) for the abolishment of the death penalty.

The Constitutions of the Republic of Botswana (1966), St Helena, Ascension and Tristan da Cunha and the Republic of Mauritius (1968) are also noteworthy because these Constitutions make no express provision for the right to health or any health-related rights, but do make provision for the limitation of some rights in order to protect public health. For example, Articles 8(1)(a)(i) and 8(5)(a)(v) of the Constitution of Botswana allows for the deprivation of property if it is in the interest of public health or if it is reasonably necessary to do so (if, for example, the property is injurious to the health of human beings). This is similar to articles 8(1)(a) and 8(4)(v) of the Constitution of Mauritius.[9]

Limited provision for health-related rights is included in the Constitutions of the Republic of Chad (2005), Guinea-Bissau (1984) and the Republic of Gabon (1991). In Article 1 of the Constitution of Gabon, for example, the protection of health, social security, a preserved natural environment, rest, and leisure are mandated and guaranteed for all – notably children, the handicapped, aged workers and the elderly – and subject to the State's available resources. The Constitution of the Republic of Liberia (1984) also offers limited recognition to health-related rights by referring to the well-being and welfare of its people in Articles 7 and 8.

The Constitution of the Republic of Congo (2002) states that the State is the 'guarantor' of public health (Article 30) and that every citizen has the right to a healthy, satisfying and durable environment (Article 35), while the Constitution of Guinea-Bissau (1984) merely recognises the importance of bodily (and moral) integrity of the person in Article 37(1) and (2) and that citizens should enjoy the inviolability of their persons in Article 38. Similarly, the Constitution of the Republic of Chad (2005) only provide for the right of its citizens to a healthy environment in Article 47 and the Constitution of Mauritania (2012) only make reference to its citizens' rights to sustainable development and an environment that is balanced and respectful of health (Article 19).

III. CONSTITUTIONS THAT RESTRICT THE RIGHT TO HEALTH AND/OR HEALTH-RELATED RIGHTS TO PRINCIPLES AND OBJECTIVES OF STATE POLICY

The inclusion of social and economic (as well as other third generation rights) in a separate section that is generally referred to as "principles and objectives of State policy" is fairly common in the Constitutions of many African countries (see Figure 1). These principles and objectives of State policy are usually not binding on the government and cannot be enforced by courts, and merely refer to the aspiration of ideals and objectives that governments should strive to achieve. Okere therefore submits – and as will be evident from the discussion below – that this Constitutional tactic renders rights as nothing more than '. . . moral precepts,

9 For similar provisions allowing for the limitation of rights in order to protect Public Health see Chapter II of the Constitution of Mauritius and Articles 9(2)(a), 11(5)(a), 12(2)(a) and 14(3)(a) of the Constitution of Botswana.

fond hopes and pious wishes'.[10] Eight of the Constitutions considered in this review include such a demarcation between enforceable Constitutional provisions and non-enforceable aspirational ideals: the Constitution of the Republic of Namibia (1990);[11] Article 8 of the Constitution of the Republic of Sierra Leone (1991);[12] Article 216 of the Constitution of the Republic of Gambia (1997);[13] Chapter 3 of the Constitution of Malawi Act 20 of 1994; and article 27 of Chapter III of the Constitution of the Kingdom of Lesotho (1993).[14] The relevant aspirational ideas included in the Constitutions of Uganda,[15] Ghana and Nigeria[16] will be elaborated on below.

The Constitution of Uganda (1995) contains a codicil entitled 'The National Objectives and Directive Principles of State Policy (NOPNP)', which comprises all the objectives and principles that organs and agencies of the State, citizens, organisations, and other bodies/persons should apply or consider when interpreting the Constitution or other laws of the country (Article I(i) of the NOPNP).[17] With regard to social and economic objectives, the State is required to fulfil the fundamental rights of all Ugandans to social justice and economic development and to ensure, in particular, that all developmental efforts are directed at realising the maximum social and cultural well-being of the people (NOPNP XIV(a)). The State is also required to ensure that all Ugandans enjoy rights, opportunities and access to health services, as well as various other underlying determinants of health, such as education, safe water, work, decent shelter, adequate clothing, food, security and pension and retirement benefits (NOPNP XIV(b)). Objective XX specifically applies to medical services and requires of the State to take all practical measures to ensure the provision of basic medical services to the population.[18]

10 O. Okere, 'Fundamental objectives and directive principles of state policy under the Nigerian Constitution', 32(1) *International and Comparative Law Quarterly* (1983): 214–28, at 223.

11 See, specifically, Article 95(j).

12 This Constitution is currently being reviewed under the guidance of Justice Edmond Cowan, former speaker of Parliament and the current Ombudsman.

13 Article 216(4) requires that the State endeavour to facilitate equal access to clean and safe water, adequate health and medical services, habitable shelter, sufficient food and security of the person. Also see Articles 29(2) and 31(2) for health-related rights pertaining to children and disabled persons.

14 Article 27 provides that: 'Lesotho shall adopt policies aimed at ensuring the highest attainable standard of physical and mental health for its citizens, including policies designed to (a) provide for the reduction of stillbirth rate and of infant mortality and for the healthy development of the child; (b) improve environmental and industrial hygiene; (c) provide for the prevention, treatment and control of epidemic, endemic, occupational or other diseases; (d) create conditions which would assure to all, medical service and medical attention in the event of sickness; and (e) improve public health.' Other health-related provisions include Articles 30(b), 32(c) and 36.

15 The discussion on the Constitution of Uganda is based on A. Le Roux-Kemp, 'Conventions, customs and beliefs – social determinants and realising the right to health in Malawi and Uganda', 45(1) *Comparative and International Law Journal of Southern Africa* (2012): 1–17.

16 The discussion on the Constitution of Nigeria is based on A. Le Roux-Kemp, 'Realising the right to health in Nigeria', 2(1) *Africa Nazarene Law Journal* (2014): 119–38.

17 Compare with Article 14 of the Constitution of Malawi Act 20 of 1994.

18 R.E. Kapindu, 'Poverty reduction strategies and the rights to health and housing: the Malawian and Ugandan experiences', 6(2) *African Human Rights Law Journal* (2006): 493–523, at 505.

While the right to health is therefore not explicitly incorporated among the operational provisions of the Constitution, many of the provisions of the NOPNP read together with the operational provisions of the Constitution of Uganda can therefore be invoked to protect the health rights of Ugandan nationals. For example, the State must ensure that all Ugandans enjoy rights, opportunities and access to education (Chapter 4, Article 30), health services (NOPDP XIV(b), clean and healthy environment (Article 39), work, decent shelter, adequate clothing, food, security, pension and retirement benefits (Article 30 and NOPNP XIV(b)). In addition, fundamental human rights are described as inherent to human dignity and not dependent on any action or inaction by the government (article 20), while Article 45 of the Constitution provides that: '…the rights, duties, declaration and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned'.[19]

Similarly, while the social and economic rights of the Constitution of Malawi is not enforceable, the human rights enshrined in Chapter IV of the Constitution are enforceable (Article 15(1)), and although the right to health is not explicitly included in this chapter, Article 30(2), which requires that the State shall take all the necessary measures for the realisation of the right to development and that such measures shall include (inter alia) health services, as well as the underlying determinants of health, can be utilised to lobby for health rights. The Constitution of Malawi furthermore requires of the State to actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the goal of adequate health care, which must be commensurate with the health needs of Malawian society and international standards of health care (Article 13 and especially 13(c)).

However, despite this official commitment to health rights, it has been suggested that the Constitution of Malawi does not hold the same public profile or the substantive force as the Constitution of the Republic of South Africa. High levels of poverty and illiteracy have also slowed the development of a mobilised civil society and human rights are generally viewed as an offshoot of so-called 'western values' and a threat to Malawian tradition and culture.[20]

Chapter Six of the Constitution of the Republic of Ghana (1992) also provides for social, economic and cultural rights as directive principles to guide State policy, and Article 34(2) specifically requires that the President report to Parliament at least once a year on the steps taken to ensure the realisation of the policy objectives included in this Chapter.[21] A similar duty is also placed on the President of Uganda to report to Parliament on an annual basis on the

19 Also see Ben Kiromba Twinomugisha, 'Implications of the TRIPS Agreement for the protection of the rights of access of medicines in Uganda', 2(1) *Malawi Law Journal* (2008): 253–78, at 261.

20 A. le Roux-Kemp, *supra* note 15, at 9.

21 For specific health-related rights included in Chapter Six, see Article 36(10), which requires of the State to safeguard the health, safety and welfare of all persons in employment and Article 39(2), which requires that traditional practices that are injurious to the health and well-being of the person be abolished.

progress that has been made in achieving these national objectives and directive principles. This duty is included in the NOPNP to ensure that all possible steps are taken to realise the policy objectives and directives included in the NOPNP (Article I(ii)).[22] However, the language used in both the Ugandan NOPNP and Ghanaian Chapter Six – specifically with regard to the realisation of the ideals contained therein – only requires of the government to be 'guided' by these principles. This, at best, imposes a moral obligation on government and provides no mechanism to ensure effective enforcement.[23]

A final example is the Constitution of Nigeria (1999), which provides for social, economic and cultural rights (including the right to health) in Chapter 2, entitled 'Fundamental Objectives and Directive Principles of State Policy'. In this context the fundamental objectives refer to the ideals to which the nation should strive and the directive principles lay down the policies that should be pursued in an effort to realise these national ideals.[24] The executive, legislative and judicial tiers of the Nigerian government are only required to observe these fundamental objectives and directive principles, and to apply them in order to promote the welfare and advancement of society.[25] Article 17(3)(c) and (d) specifically requires of the State to direct its policy towards ensuring that the health, safety and welfare of citizens in employment are safeguarded and not endangered or abused and that there are adequate medical and health facilities for all.

These socio-economic rights contained in Chapter 2 of the Constitution of Nigeria do not entitle citizens to actionable claims and are non-justiciable. This is reflected in Article 6(6)(c) where the judicial powers of Nigerian courts are explicitly ousted and declared not to '…extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State policy set out in Chapter Two of [the] Constitution'.[26] Article 12(1) of the Constitution of Nigeria furthermore provides that no international treaty that Nigeria may be a state party to will be enforceable unless it has been enacted as domestic law by the National Assembly.[27] While Nigeria has therefore ratified both the International Covenant on Economic Social and Cultural Rights (ICESCR) and the African Charter on Humans and Peoples Rights (ACHPR), only the ACHPR has been enacted as domestic law and in terms of the hierarchy of laws in Nigeria, this enacted law, although viewed as above other legislation in the country, remains subject to the Constitution. Thus, the enacted law cannot introduce justiciable socio-economic rights as it is set out

22 Compare with Article 71 of the Draft Constitution of the Republic of Zambia (2013).
23 A. le Roux-Kemp, *supra* note 15, at 4.
24 O. Okere, *supra* note 10, at 214.
25 A. le Roux-Kemp, *supra* note 16.
26 Also see Article 13 of the Constitution of Nigeria.
27 Compare with Article 39 of the Constitution of South Africa.

in the ACHPR, since these rights have already been declared unjusticiable in Chapter 2 and Article 6(6)(c) of the Constitution of Nigeria.[28]

IV. CONSTITUTIONS THAT DO NOT PROVIDE FOR A RIGHT TO HEALTH SPECIFICALLY, BUT PROVIDE FOR HEALTH-RELATED RIGHTS

Constitutions that do not explicitly provide for a right to health, but include enforceable health-related rights include Articles 52 and 51 of the Draft Constitution of the Republic of Zambia (2013), the preamble of the Constitution of the Federal Islamic Republic of the Comoros, Article 49 of the Constitution of São Tomé e Príncipe, Articles 1, 3, 15 and 17 of the Constitution of the Republic of Mali (1992), and the Transitional Constitution of South Sudan (2011), the latter of which requires of government to promote public health and establish, rehabilitate and develop basic medical and diagnostic institutions and to provide free primary health care and emergency services for all citizens (article 31).[29]

In the Constitution of the Central African Republic (2004) no provision is explicitly made for a right to health, however, Article 6 of the Constitution places a duty on the State and other public collectives to see to the physical and moral health of the family. Article 9 also guarantees a healthy environment for every citizen and protects and mandates assistance for workers with health problems due to work conditions. Another Constitution that provides for health-related rights in the context of the right to family life is Article 22 of the Constitution of Equatorial Guinea (1991), which places a duty on the State to ensure the protection of every person from birth and to foster normal development and security of every person's moral, psychological and physical integration as well as family life. Article 22 furthermore states that the State 'shall encourage and promote primary health care as the cornerstone of the development in this sector'.

The Constitution of Eritrea (1997) and the Constitution of the Federal Democratic Republic of Ethiopia (1994) link the provision of health rights to the availability and allocation of resources. The Constitution of Eritrea provides in Article 21(1) that the State shall endeavour, within the limit of its available resources, to make available to all citizens health, education, cultural and other social services. And, the Constitution of Ethiopia places an obligation on the State in Article 41(4) to allocate 'an every increasing resources [sic]' to provide to the public health, education, etc. Other health-related rights included in the Constitution of Ethiopia are Article 35(5)(a), which guarantees the right of women to receive full pay while on maternity leave and, furthermore, allows for the duration of the maternity leave to be determined by law, taking into account the nature of the work as well as the health of the mother and the well-being of the child and family. Article 90, with the subtitle Social Objectives, also requires that, to the extent that the State's resources allows, that policies shall aim to provide all

28 A. le Roux-Kemp, *supra* note 23; Also see C. Onyemelukwe, 'Access to anti-retroviral drugs as a component of the right to health in international law: examining the application of the right in Nigerian jurisprudence', 7(2) *African Human Rights Law Journal* (2007): 446–74, at 468.

29 Also see Articles 41, 17(1)(d), 17(1)(g), 29 and 30 for other health-related rights.

Ethiopians access to public health and education, clean water, housing, food and social security.

The Constitution of the Republic of Madagascar (2010) is also of particular interest as this Constitution recognises the State's obligation to protect the health of citizens from their conception through the organisation of free public health care 'which gratuitousness results from the capacity of the national solidarity' (Article 19). And Article 8 of the Constitution of the Republic of Senegal (2001) guarantees all citizens their fundamental freedoms, economic and social rights as well as group rights, which include the right to health and a health environment. This provision can be compared to Article 8 of the 2011 Constitution of Libya, which requires of the State to ensure equal opportunity and strive to guarantee a proper standard of living, as well as the rights to work, education, medical care and social security.

Interestingly, the Constitution of the People's Republic of Benin (1990) links its provision for health, education culture, information, vocational training and employment (Article 8) to the 'blossoming out' of its people, a concept that reminds of Aristotle's concept of 'human flourishing'[30] and specifically binds itself to guarantee equal access. This is similar to Article 7 of the Constitution of the Republic of the Côte d'Ivoire (2000).

V. CONSTITUTIONS THAT PROVIDE FOR A COMPREHENSIVE EXPOSITION OF A RIGHT TO HEALTH, HEALTH-RELATED RIGHTS AND THE ENFORCEABILITY THEREOF

Only a third of all African Constitutions provide specifically for a right to health as well as health-related rights and while some of these Constitutional provisions are comprehensive and far-reaching, others are very succinct and do not elaborate on subsidiary health-related rights or the enforceability thereof. For example, the following Constitutions merely provide for a right to health and health-related rights without offering any measures to ensure the enforceability thereof: the Constitution of the Democratic Republic of Congo (2005) in sections 47, 18, 42, 43, 48, 53; the Constitution of the Republic of Togo (1992 – revised in 2002) in Article 34; section 54 of the Constitution of the People's Democratic Republic of Algeria (1989); sections 55 and 68 of the Constitution of the Republic of Burundi (2005); section 31 of the Constitution of the Kingdom of Morocco (2011); Article 15 of the Constitution of the Republic of Guinea (2002); Article 38 of the Constitution of the Tunisian Republic (2014); and sections 47, 22, 23, 24 and 46 of the Constitution of the Republic of Angola (1992).

The Constitution of the Republic of Rwanda (2003) merely provides that all citizens have the right and duties relating to health, and that the State has the duty of mobilising the population for activities aimed at promoting good health and to

30 The Aristotelian concept of 'human flourishing' features prominently in Jennifer Prah Ruger's health capability paradigm, an alternative normative framework for the realisation of basic human capabilities (rights), as set out in her monograph *Health and Social Justice*, Oxford University Press (2012).

assist them in the implementation of these activities. No specific provisions on the rights to housing, clean water or sanitation are included in the Constitution and the Constitution is also silent on the justiciability of social, economic and cultural rights in general. The Constitutions of the Republic of Niger (2010) and the Republic of the Seychelles (1993), respectively include a right to health in Articles 13 and 29 that reflects the wording of the International Covenant on Social, Economic and Cultural Rights but here, too, no provision is made for the enforcement of these rights.[31]

In contrast, the right to health as articulated in Article 89 of the Constitution of the Republic of Mozambique (2004) is very comprehensive and is further supplemented by specific health rights in Article 116. Article 89 provides that: 'All citizens have the right to medical and health care under the law, and the duty to promote and protect public health.' And Article 116(1)–(3) provides that medical and health care be organised through a national health system and that the State promotes the participation of citizens and institutions in raising the level of community health. Subsections 116(4)–(5) furthermore require of the State to promote the expansion of medical and health care and the access of all citizens to the enjoyment of this right, and that the State promotes, disciplines and controls the production, marketing and use of chemical, biological, pharmaceutical, and other means of treatment or diagnosis. Section 45(e) of the Constitution goes as far as to place a duty on every citizen to protect and promote public health and Article 81 recognises the right to promote the prevention, cessation and the prosecution of offenses against (inter alia) public health.

Two further beacons of hope with regard to the formal, Constitutional recognition of health rights on the African continent can be found in two recently drafted Constitutions, the Draft Constitution of the Arab Republic of Egypt (2013)[32] and the Constitution of the Republic of Zimbabwe (2013). Article 18 of the Draft Constitution of the Arab Republic of Egypt provides as follows:

> (18) Every citizen is entitled to health and comprehensive health care with quality criteria. The State guarantees to maintain and support public health facilities that provide health services to the people, and work on enhancing their efficiency and their fair geographical distribution.
>
> The State commits to allocate a percentage of government expenditure that is no less than 3% of the Gross Domestic Product (GDP) to health. The percentage will gradually increase to reach global rates.

31 Also see Article 12, which provides that each person has the right to life, to health, to physical and moral integrity, to a healthy and sufficient food supply, to potable water, education and instruction in the conditions specified by law. Also, Article 21, which places a duty on the State to see to the physical, mental and moral health of the family, particularly the mother and the child. Article 35 enshrines the right to a healthy environment.

32 The Constitutional history of modern Egypt can be traced back to the Egyptian revolution of 1919. This exert is based on the new draft Constitution under President Mansour's rule, as the 2012 Constitution was suspended on 3 July 2013.

> The State commits to the establishment of a comprehensive health care system for all Egyptians covering all diseases. The contribution of citizens in its subscriptions or their exemptions therefrom is based on their income rates.
> Denying any form of medical treatment to any human in emergency or life-threatening situations is a crime.
> The State commits to improving the conditions of physicians, nursing staff, and health sector workers, and achieving equity for them.
> All health facilities and health related products, materials, and health-related means of advertisement are subject to state oversight. The state encourages the participation of the private and public sectors in providing health care services as per the law.

Further health-related rights include: Article 16, which provides all citizens who do not have access to health insurance with a right to social security; Articles 25 and 58, which includes related socio-economic rights and the right to a healthy balanced environment; Article 40 dealing with the right of those detained to appropriate health standards; and Article 59 guaranteeing 'healthy' housing.

Similarly, Article 76 of the Constitution of the Republic of Zimbabwe provides that:

> (1) Every citizen and permanent resident of Zimbabwe has the right to have access to basic healthcare services, including reproductive healthcare services.
> (2) Every person living with a chronic illness has the right to have access to basic health care services for the illness.
> (3) No person may be refused emergency medical treatment in any health care institution.
> (4) The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of the rights set out in this section.

This right is further elaborated upon in Article 29, which places a duty on the State to take all practical measures to ensure the provision of basic, accessible and adequate health services and to take appropriate, fair and reasonable measures to ensure that no person is refused emergency care treatment. Article 29(2) furthermore requires of the State to take all preventative measures within the limits of the resources available to it against the spread of disease, including education and public awareness programmes. Article 73(1)(a) provides that every person has the right to an environment that is not harmful to their health and well-being, and the right to confidentiality of a medical or health condition is also recognised in Article 57(e)).

A clear difference between the Constitution of Zimbabwe and the Draft Constitution of the Arab Republic of Egypt is that the comprehensive exposition of the right to health in the latter also includes provisions dealing specifically

with the enforceability of social, economic and cultural rights.[33] Article 85(1), for example, deals with the enforcement of fundamental human rights and freedoms and provides for any person with an interest or acting on behalf of somebody else with an interest in the case, to approach a court. The formalities relating to the proceedings, including the commencement thereof should be kept to the minimum (Article 85(3)(b)) and the court should also not be unreasonably restricted by procedural technicalities (Article 85(3)(c)).

These provisions on the enforceability of social, economic and cultural rights mirror Article 38 of the Constitution of South Africa (1996), which also provides for a wide range of persons to approach a competent court where it is alleged that a right in the Bill of Rights (Chapter 2) has been infringed upon or is threatened. Specific provision is furthermore made for a right to access to health care services in Article 27(1)(a) of the Bill of Rights, and Article 27(3) provides that no person may be denied emergency medical treatment. Reference is also made to the rights to food, water and social security in Articles27(2)(b) and 27(2)(c).[34] The rights to adequate housing and education are set out separately in Articles 26 and 29, respectively and while no explicit right to sanitation exists, it can be argued that Article 24(a), which makes provision for the right to an environment that is not harmful to a person's health and well-being, and the right to housing of Article 26, also cover sanitation. (This particular exposition of the right to health and its underlying determinants are also reflected in Articles 25 to 27 of the 2012 Constitution of the Federal Republic of Somalia.)

The South African Bill of Rights, in terms of Article 8 of the Constitution, applies to all law and binds the legislature, the judiciary and all organs of State and courts are mandated to develop the common law to the extent that current legislation does not give effect to a Constitutional right (Article 8(3)).[35] And, with regard to the rights included in Article 27 and referred to above, it is explicitly stated that the State must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of these rights (Article 27(2)). However, compared to the Draft Constitution of the Arab Republic of Egypt discussed above, the Constitution of the Republic of South Africa does not make provision for greater access to courts and ease of formalities and procedures for the adjudication of Constitutional rights.[36]

Arguably the most comprehensive inclusion of socio-economic rights in an African Constitution, including provisions on the enforceability thereof, can be found in the 2010 Constitution of the Republic of Kenya. This Constitution is hailed as being one of the most transformative and progressive constitutions in a modern democracy. Chapter Four of the Constitution of the Republic of Kenya

33 Compare with Article 170 of the Draft Constitution of the Arab Republic of Egypt.

34 Sections 52 and 51 of the Draft Constitution of the Republic of Zambia (2013) are very similar to section 27 of the South African Constitution.

35 Compare with sections 20(2)–(4) of the Constitution of the Republic of Kenya.

36 See section 34 of the Constitution of South Africa on the right to access to courts and *Prior v Battle* 1999 (2) SA 850 (Tk); *Van Huysteen NO v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C); *Rail Commuters Action Group v Transnet* 2003 (5) SA 593 (C).

provides a normative framework for the recognition, protection and promotion of fundamental, constitutional and human rights and freedoms. Article 19(1) articulates the importance of this Chapter for the new Constitutional dispensation in Kenya and consigns the Bill of Rights as an integral part of Kenya's democratic state and a framework for all its social, economic and cultural policies. The Chapter itself is, according to Article 19(2), based on the fundamental requirement to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. It is furthermore recognised in Article 19(3)(b) that the rights and freedoms contained in the Bill of Rights are not a *numerus clausus* (although they are fairly comprehensive), but that other rights may also be recognised in so far as they are not inconsistent with the Bill of Rights.[37]

The human rights and freedoms are set out in Part 2 (Articles 26 to 51) of the Chapter, while the first part (Articles 19 to 25) deals with the enforcement and limitation of the rights and freedoms. Part 3 of the Chapter (Articles 52 to 57) is unique and provides for the specific application of these rights and freedoms to vulnerable groups, such as children, the youth, persons with disabilities, elderly persons, and members of certain traditionally marginalised ethnic, religious or cultural communities. The second-generation rights or socio-economic rights are set out in Articles 41 to 46 of the Constitution and Article 43 provides for the right to health:

> 43(1) Every person has the right –
>
> (a) To the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
> (b) To accessible and adequate housing, and to reasonable standards of sanitation;
> (c) To be free from hunger, and to have adequate food of acceptable quality;
> (d) To clean and safe water in adequate quantities;
> (e) To social security; and
> (f) To education.
>
> (2) A person shall not be denied emergency medical treatment.
> (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependents.

Comparing Article 27(1)(a) of the South African Bill of Rights to its Kenyan counterpart, it is clear that the Constitution of the Republic of South Africa has a much narrower articulation of the right to health and reduces the right to a very specific right *to access to health care services*, which includes reproductive health

37 Compare with section 39(3) of the South African Bill of Rights.

care. Article 43(1)(a) of the 2010 Constitution of the Republic of Kenya, however, explicitly provides for the right to health care services and reproductive care, as well as the *highest attainable standard of health* – using the wording of Article 12 of the International Covenant on Economic, Social and Cultural Rights (1966) and principle I of the Declaration of Alma Ata (WHO, 1978).

With regard to the implementation and enforcement of the rights and fundamental freedoms contained in the Bill of Rights of the Constitution of the Republic of Kenya, Article 21(2) provides that the State must, in the first instance, achieve the progressive realisation of the rights guaranteed under Article 43 by means of legislative action, policies and other measures, including the setting of standards. This duty of the State also includes its international obligations in respect of human rights and fundamental freedoms (Article 21(4)), and particularly with regard to the needs of vulnerable groups within society, such as women, the elderly, disabled persons, children, the youth, members of minority or marginalised communities and members of particular ethnic, religious or cultural groups (Article 21(3)). And while Article 24 recognises the limitations of the rights and fundamental freedoms, including that no right is absolute, it is also stated that no right may be so limited as to derogate from its core or essential content and a limitation to a fundamental right ought to be justified (Article 24(3) and 24(2)(c)).

If the State should claim that it does not have the resources to implement the right, a court, tribunal or other authority must be guided in its decision or judgment by the following principles:

(a) it is the responsibility of the State to show that the resources are not available;
(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
(c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion (Article 20(5)).

Article 20(5)(a) of the Constitution of the Republic of Kenya therefore requires the prioritisation of the allocation of resources for the realisation of the fundamental rights and freedoms, and Article 21 requires proactive action from the State in realising these rights and freedoms through legislative action, policies and other measures, including the setting of standards. This is certainly in stark contrast to those African constitutions that only recognise the right to health and/or other health-related rights in an addendum or codicil to the Constitution that merely comprises State's objectives, principles, values and aspirations, e.g. the Constitutions of Lesotho, Malawi and Uganda referred to in part III above.

The Constitution of the Republic of Kenya therefore goes much further than the Constitution of the Republic of South Africa in ensuring the enforceability

of social, economic and cultural rights and, similar to Article 85(3) of the Draft Constitution of the Arab Republic of Egypt, the Constitution of the Republic of Kenya also ensure effective access to justice by requiring that the formalities relating to proceedings involving the rights contained in the Bill of Rights be kept to a minimum and that the charging of fees to commence such proceedings be prohibited and any unreasonable restrictions of procedural technicalities be barred. Article 22(3) also welcomes any organisation or individual with particular expertise to apply as amicus curiae to a particular case.

VI. SYNTHESIS AND CONCLUSION

Socio-economic rights, such as the right to health, create entitlements to material conditions for human welfare. Yet, although these rights have 'featured prominently in... international instruments that laid the foundation for the post-1945 human rights framework, and in many of the continental European and post-colonial constitutions enacted in the post-war period', they have largely remained 'expressions of a normative moral imperative'.[38] This is especially evident in the Constitutions of African countries where only one third of the Constitutions explicitly provide for a right to health and health-related rights, and the enforceability and status of these rights remain contested.

O'Cinneide explains that in developed states, redistributive measures implemented in terms of legislation and executive action appear to be fully capable in redistributing wealth and substantially eroding social inequalities without using human rights concepts and socio-economic rights specifically. While in post-colonial countries, socio-economic rights is said to have merely acquired a "normative pull", serving as a rhetorical expression of future aspirations in the face of economic under-development, authoritarian regimes and defective political mechanisms.[39] This is frustrating since human rights have become the dominant discourse and ideology of our time, and expectations therefore exist for it to address the full spectrum of human rights issues, especially in the "operation of modern complex systems of state governance".[40]

A case in point is the socio-economic jurisprudence of South Africa that have oscillated from a defeatist position where the lack of available resources are lamented and citizens accordingly denied their rights,[41] to the *TAC* case[42] where the government was ordered "... to take reasonable measures to extend the testing and counseling facilities to hospitals and clinics throughout the public health sector beyond the test sites to facilitate and expedite the use of nevirapine for the

38 C. O'Cinneide, 'Emerging models of socio-economic rights adjudication: lessons from home and abroad', unpublished workshop paper presented at the *Advancing Economic and Social Rights: Current Issues in Research* workshop held at Palace Green Durham University on 18 March 2011.

39 *Ibid*.

40 *Ibid*.

41 *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).

42 *Minister of Health and Others v Treatment Action Campaign & others* 2002 (10) BCLR 1033 (CC).

purpose of reducing the risk of mother-to-child transmission of HIV".[43] Isolated victories in the realisation of health rights are also evident from Kenyan socio-economic rights jurisprudence where the courts have described socio-economic rights as "by its very nature ideological" and necessitating therefore that "public bodies should be given appropriate leeway in determining the best way of meeting its constitutional obligations",[44] to a recent more robust pronouncement requiring the State to at least show that it has taken some measures or is taking conscious steps to actualise and protect the right to health specifically.[45] Another example is the Constitution of Cameroon (1996), which strongly asserts fundamental human rights, as well as underscores adherence to the rights enshrined in the Universal Declaration of Human Rights, the United Nations Charter, and the African Charter on Human and Peoples' Rights. Yet, the enforceability and justiciability of these rights remain untested as the Constitutional Council – the body with full jurisdiction in all matters pertaining to the interpretation and application of the Constitution – is yet to be appointed by the President.[46]

This systematic overview of the constitutional provisions relating to the right to health and other health-related rights on the African continent has shown that despite the widespread official promulgation of the right to the highest attainable standard of health in international instruments, the articulation thereof in African Constitutions remain wanting. And, where provision is made for a right to health and/or health related rights in Constitutions, it is often merely a case of Constitutions without constitutionalism; in other words, formal recognition that merely translates into expressions of normative moral imperative.[47]

43 *Ibid*., at paragraph 95.

44 *John Kabui Mwai & 3 others vs Kenya National Examination council and 2 others at Nairobi High Court*, Petition No. 15 of 2011 (2011) EKLR.

45 *Mathew Okwanda v Minister of Health and Medical Services & 3 other*, High Court at Nairobi, Petition 94 of 2012 [2013] eKLR and see *Mitu-Bell Welfare Society v Attorney General & 2 others*, Nairobi Petition No. 164 of 2011.

46 Article 65 of the Constitution.

47 Jacob Mchangama, 'Health as a human rights: the wrong prescription', *International Policy Network* (2009): 3–16, at 3; H. W. O. Okoth-Ogendo, 'Constitutions without Constitutionalism: reflections on an African Parado', in C.M. Zoethout *et al*., *Constitutionalism in Africa, a quest for autochthonous principles*, Gouda: Quint Deventer (1996), pp. 3–25 and O'Cinneide, *supra* note 29.

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