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CHARTING A PATH FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE 'NEW GAMBIA'

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1 Introduction

In 2016, Gambians made a symbolic choice to elect a new leader that would pave the way for what would be the first democratic change of government since 1965. This change did not only allow the new government of The Gambia to close a dark chapter of human rights violations since 1994, but also presents an opportunity for renewed commitment for increased respect for human rights and the rule of law in the Gambia. As part of the institutional reform agenda of the new government, The Gambia has embarked on a comprehensive constitutional reform for a durable democracy and rule of law.¹ Despite the renewed optimism among Gambians for a transformative society after the end of President Yaya Jammeh's era in 2017, that was marked by massive economic deprivation and financial mismanagement, recent economic growth in the country is seemingly not translating into concrete socio-economic services for Gambians. Although, The Gambia's national poverty rate rose slightly between 2010 and 2015/6 (an increase of 0.5 percentage points), the number of people living in poverty went up from 0.79 million in 2010 to 0.94 million in 2015/16. The poor in rural areas account for about 64 per cent of the total poor in the country.² The recent outbreak of the novel Corona virus, christened Covid-19, has further exposed the vulnerabilities that societies without effective economic, social and cultural rights (ESCR) suffer and 'illuminated the critical role of socio-economic rights

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1 National Human Rights Commission Act 2017; CRC Act 2017 and TRRC Act 2017.

2 Gambia – 'Integrated Household Survey 2015'.

in securing a dignified life for all and in countering social and economic inequalities'.³

The Gambia has since independence lacked a normative constitutional basis for ensuring accountability for socio-economic deprivations particularly for vulnerable groups and communities, despite ratifying various regional and international human rights instruments that guarantee ESCR. This chapter advances a case for the inclusion of justiciable ESCR in the new Constitution, as the basis on which The Gambia can create an accountable system of government which thrives on the respect for ESCR. To that end, the chapter reflects on the current state of socio-economic rights in Gambia and makes a case for the inclusion of justiciable ESCR in the 2020 Draft Gambian Constitution – highlighting some of the arguments against and particularly, the arguments in favour of including ESCR. The chapter will also highlight the socio-economic rights that should be guaranteed in the Constitution and to what extent they should be guaranteed as well as the procedural and institutional framework for the enforcement/adjudication of these rights.

2 The current status of socio-economic rights in Gambia

There are different pathways to achieve the protection of ESCRs in domestic law. ESCR may be guaranteed either in the constitution or in ordinary legislation.⁴ The former comes with significant advantages. Firstly, a constitution can serve as a benchmark upon which the validity of legislation, policy or government action can be measured. Equally, it will inevitably dictate the direction of domestic law and policy in general.⁵ Constitutional entrenchment of ESCR may be in the form of an enforceable Bill of Rights⁶ which implies that they can be enforced in courts. On the other hand, they may be included in the Constitution as part of Directive Principles of State Policy (Directive Principles). Justiciability of Directive Principles is contestable because Directive Principles widely provide a guide to judicial interpretation and executive policy making and

3 S Liebenberg 'Covid-19 and the critical importance of achieving socio-economic rights' *Daily Maverick* 20 March 2020 <https://www.dailymaverick.co.za/article/2020-03-20-covid-19-and-the-critical-importance-of-achieving-socio-economic-rights/> (accessed 6 July 2022); see also PK Ozili 'Covid-19 in Africa: Socio-economic impact, policy response and opportunities' (2020) 42 *International Journal of Sociology and Social Policy* 117.

4 F Viljoen 'National legislation as a source of justiciable socio-economic rights' (2005) 6 *ESR Review* 6 at 7.

5 Viljoen (n 4) 8-9.

6 Viljoen (n) 8.

functions.⁷ However, their justiciability may be entrenched when they are incorporated as rights in national legislation. These approaches are the major pathways for incorporating international standards on ESCRs into domestic legal systems.

The Gambia's approach to ESCR cannot easily be explained using any single approach because the 1997 Constitution which is the supreme law of the land incorporates a Bill of Rights with few ESCR and elaborate Directive Principles relevant to ESCR.⁸ The ESCR in the 1997 Constitution include the right to basic education, property, and the right to join trade unions. Those rights that are expressly guaranteed in Chapter 4 of the Constitution can be enforced through a judicial process in terms of article 37.⁹ It must be highlighted that even those ESCR in Chapter 4 are not adequately defined for one to appreciate their precise content. Fundamental rights such as the right to food, shelter, clean water, adequate standard of living and employment only form part of the Directive Principles. Although the justiciability of Directive Principles has not been tested in the Gambia, they generally indicate a constitutional commitment that cannot be merely disregarded by the government on account of their place in the Constitution.¹⁰

Moreover, a reading of article 37(8) of the 1997 Constitution suggests that the rights guaranteed in Chapter 4 are not exhaustive, and do not exclude the enjoyment of other rights, particularly those in the Directive Principles.¹¹ Article 37(8) provides that the rights specifically mentioned in Chapter 4 of the Constitution should not be regarded as 'excluding other rights which may be prescribed by an Act of the National Assembly as inherent in a democracy and intended to secure the freedom and dignity of man'.¹² Therefore, article 37(8) can arguably become a basis to seek the enjoyment of those rights contained in the Directive Principles as they enhance human dignity and are inherent in a democracy. The Directive Principles are framed in terms suggesting that they only serve as guiding principles in the interpretation and application of the Constitution and policy making process of the government.¹³ Though they may not engender

7 F Viljoen *International human rights law in Africa* (2006) 551.

8 S Bah 'The perils of sovereign debts on the progressive realisation of economic, social and cultural rights in The Gambia' (2018) 1 *Gambia Law Review* 126.

9 Section 37 of the 1997 Constitution of the Gambia provides for the enforcement of fundamental rights.

10 See *Ghana Lotto Operators Association v National Lottery Authority* (2007-8) 2 *SCGLR*.

11 O Jammeh *Constitutional Law of the Gambia 1965-2010* (2010) 265-303.

12 Section 37(8) of the 1997 Constitution.

13 Section 211 of the Constitution clearly states that the Directive Principles 'shall not

enforceable legal obligations, they are useful as constitutional benchmarks through which national legislation may be enacted to guarantee ESCR.

The Directive Principles represents a constitutional commitment in the Gambia if one considers the imports of article 211(b), which provides that the:

Executive, the Legislature and all other organs of the State in taking policy decisions, making laws and in the administration of the Gambia, shall according to their respective functions be guided by and observe them with a view to achieving by legislation or otherwise the full realisation of these principles.¹⁴

Consequently, institutions mandated with the responsibility to interpret or enforce the Constitution are required to be guided by the provisions in the Directive Principles. This provision at a minimum imposes a constitutional commitment on the organs of the state to ensure the realisation of the Directive Principles, consistent with fundamental ESCR of citizens.

In addition to the 1997 Constitution, the government of The Gambia adopted policies and legislation relevant to the realisation of ESCR. These include the Domestic Violence Act and the Sexual Offences Act of 2013, the Women's Act of 2010, the Trafficking in Persons Act of 2007 and its amendment in 2010, the Labour Act of 2007 and Children's Act of 2005. All these legislations contain some elements of ESCR relevant to specific category of individuals. The Women's Act¹⁵ and the Children's Act¹⁶ for instance make provision for a number of economic and social

confer legal rights or be enforceable in any court' but should guide government's legislative, policy and administrative decisions as well as interpretative tools for courts.

14 Section 211(b) of the 1997 Constitution.

15 Rights guaranteed in the Children's Act include: prohibition of discrimination against women in employment (sec 16); free choice of employment and profession (sec 17); equal remuneration (sec 18); social security benefit (sec 19); maternity leave (sec 20); protection of health and safety at work (sec 21); right to necessary supporting social services (sec 23); right to education and training (sec 25); right to health and health care (sec 29); prohibition of discrimination in reproduction health services and rights (sec 30); right to marry (sec 34); right to retain maiden name (sec 37); right to inheritance (sec 44); right to peace (sec 45); right to food security (sec 47); right to adequate housing (sec 48); right to positive cultural context (sec 49); right to a healthy and sustainable environment (sec 50); and right to sustainable development (sec 51).

16 Including the right to survival and development; right to health and health services; right to parental care, protection and maintenance; right to social activities; right to education; prohibition of social and cultural practices that affect the welfare, dignity, normal growth and development of the child; right of the child to be maintained; prohibition of child marriage; prohibition of child betrothal; prohibition of exploitative child labour; and prohibition of hazardous employment.

rights, complementing constitutional and other legislative provisions. The rights guaranteed in the Women's Act are enforceable by the High Court.¹⁷

Beyond legislation, the Gambia has also adopted development policies that should form important components of the overall policy framework for the implementation of ESCR. Even though these policies consist of a variety of soft laws rather than hard laws, they are useful in providing the harmonisation of government policies in line with its ESCR obligations. The much talked about National Development Plan (NDP)¹⁸ adopted in 2018, for instance, outlines an ambitious blueprint on how the current government intends to transform the Gambia into a modern accountable state based on the foundations of democracy, good governance, and respect for human rights, security and prosperity.¹⁹ The NDP focuses on eight national priorities including health, education, security and employment. Although the adoption of the NDP is commendable, many of the priorities are not aligned to any sectoral priority.

Although the Directive Principles and other provisions contained in Chapter 4 of the 1997 Constitution reflect a commitment to govern the Gambia in accordance with the values of social justice, the enjoyment of ESCR in the Gambia remains elusive to many Gambians. These constitutional commitments have not informed the content of government's development programmes. In fact, government's spending on ESCR of citizens over the years has not been impressive.²⁰ The inclusion of justiciable ESCRs in the new Constitution will therefore lay the foundation for a democratic dispensation anchored on the values of social justice that will represent a major redirection of the country's bleak profile on ESCR.

17 Section 13.

18 National Development Plan – NDP (2018-2021).

19 The Poverty Reduction Strategy Paper (PRSP) 2008-2020 represented similar ambitions. Under the PRSP the government made an undertaking to invest 25 per cent of her annual budget to social services. However, this threshold could not be met due to the pressures of debt repayments.

20 For instance, in 2018 GMD 955 171 920 allocated to the health sector is twice less than the 15 per cent of GDP threshold recognised in the Abuja Declaration of 2001. Similarly, in 2013, the National Health Account in the Gambia showed that the health expenditure of the government only stood at 5.6 per cent of the GDP, and 46.7 per cent of that was donor funded whilst only 28 per cent came from the government. This left households with the burden to finance 21.21 per cent of the national healthcare services.

3 A case for justiciable socio-economic rights in the new Gambian Constitution

Since independence in 1965, the Gambia has made modest progress, relative to her GDP, in improving human development of citizens despite the relative tranquillity it has enjoyed for over five decades.²¹ This consistently places the country in the lowest ranks on the UN Human Development Index.²² Part of the consequence of this neglect has translated into massive unemployment among young people, extreme poverty in rural and urban areas, increased inequality, low life expectancy, inefficient public service, lack of adequate infrastructure and decline in the health and education sectors. The endemic nature of poverty in The Gambia is well known, with an estimated 48.6 per cent of Gambians living in absolute poverty in 2016, an increase from 48.1 per cent in 2010 and extreme poverty estimated to be as high as 20.8 per cent.²³ As a result of endemic poverty, average Gambians have little disposable income – at least 58.7 per cent of household expenditure is spent on food.²⁴ Food insecurity and malnutrition among Gambians has remained unchanged or worsened in the last ten years.²⁵ Food insecurity has increased from 5 per cent to 8 per cent over the past five years and at least 10.3 per cent of children suffer from malnutrition.²⁶ Recent estimates suggest that at least one-third of the population is vulnerable to food insecurity and about 55 per cent cannot meet the daily required calories.²⁷

21 A Saine *The paradox of third-wave democratization in Africa: The Gambia under AFPRC APRC Rule, 1994 2008* (2009) 2.

22 UNDP 'Human development indices and indicators: 2018 statistical update' Briefing note for countries on the 2018 statistical update: Gambia (2019).

23 Gambia Bureau of Statistics 'Integrated Household Survey 2015/26 Volume III: Prevalent and depth of poverty' (2017) www.gbosdata.org/downloads-file%2Fthe-2015-16-gambia-integrated-household-survey-vol-iii&usg=AOvVaw1NfEd_Zub9xSjFHTLYADoq (accessed 29 March 2020); See also Gambia's Combined Report on the African Charter on Human and Peoples' Rights for the period 1994 and 2018 and Initial report under the Protocol to the African Charter on the Rights of Women in Africa (2018) 19 https://www.achpr.org/public/Document/file/English/gambia_state_report_1st_eng.pdf (accessed 7 April 2020).

24 As above.

25 World Food Programme 'Gambia' <https://www.wfp.org/countries/gambia#:~:text=The%20Gambia%27s%20poverty%20rate%20remains,leading%20a%20food%20security%20emergency> (accessed 7 April 2021).

26 As above.

27 Republic of the Gambia 'Zero hunger strategic review: A national guide to achieving Sustainable Development Goal 2 by 2030' (2018) 16.

Beyond poverty and food insecurity, Gambia is reported to have one of the highest rates of maternal mortality in Africa,²⁸ accounting for 36 per cent of all deaths among women aged between 15 and 49,²⁹ despite a steady decline over the years. Similarly, while enrolment in education has increased over the last decade, the averaged level of educational attainment is very low, with the average Gambian attaining only three and half years of primary education, resulting in a labour force that is composed mainly of low skilled workers with limited productivity.³⁰ The quality of education also remains low, despite recent improvements and enrolment needs to rapidly expand beyond the primary level.³¹ Many of the challenges in the education sector are attributable to underfunding, requiring the need to substantially increase resource allocation to the sector.³²

Additionally, unemployment rates are very high, estimated at 29.8 per cent nationally and as high as 35.3 per cent among young people aged between 15-34 years and 38.3 per cent among women.³³ The high unemployment rate has resulted in the exodus of skilled labour and a rise in irregular migration of many young low-skilled people who engage in the perilous journey across the Sahara desert towards Europe.³⁴ Gambia is reported to have the highest emigration rate per capita in Africa with an estimated 11 929 Gambians arriving in Italy by boat in 2016, 24 per cent of whom were unaccompanied minors.³⁵ Between 2009 and 2018, and estimated 45 000 Gambians, representing more than 2 per cent of

28 P Idoko, MO Anyawu & S Bass 'A retrospective analysis of trends in maternal mortality in a Gambian tertiary health centre' (2017) 10 *BMC Research Notes* <https://bmcresnotes.biomedcentral.com/track/pdf/10.1186/s13104-017-2817-0.pdf> (accessed 7 April 2020).

29 UNICEF 'Maternal and child health' <https://www.unicef.org/gambia/maternal-and-child-health> (accessed 7 April 2020).

30 Ministries of Basic and Secondary Education and Higher Education Research Science and Technology *Education Sector Strategic Plan 2016-2030* 11 <https://www.globalpartnership.org/sites/default/files/2018-09-the-gambia-essp-2016-30.pdf> (accessed 7 April 2020).

31 As above.

32 As above.

33 Government of the Gambia 'Decent work country programme: The Gambia (2015-2017)' 8 https://www.ilo.org/wcmsp5/groups/public/ed_mas/program/documents/enericdocument/wcms_560922.pdf (accessed 10 June 2019).

34 CTC Suso 'Backway or bust: Causes and consequences of Gambian irregular migration' (2019) 57 *Journal of Modern African Studies* 111.

35 Maastricht Graduate School of Governance 'Gambia migration profile: Study in migration routes in West and Central Africa' (2017); see also International Organisation for Migration 'Mapping and socio-economic profile of communities of return in The Gambia: Synthesis report' (2018) 3 https://ec.europa.eu/trustfundforafrica/sites/euetfa/files/eu-iom-ji_cartographie_gm.pdf (accessed 7 April 2020).

the country's entire population arrived in the European Union through irregular means.³⁶

These circumstances present a catalyst for instability and are rooted in the socio-economic history of the country. The government of President Jawara had to deal with popular discontent due to the prevalence of poverty and extreme socio-economic conditions.³⁷ A dismal approach to ESCR did not therefore commence in 1994. The poverty alleviation strategy of both President Jammeh and Jawara were strikingly similar in that their development agenda was not people oriented.³⁸

President Jammeh's neoliberal economic development agenda 'Vision 2020' for instance articulated an ambitious agenda for economic reform based on export-led growth. Twenty-two years down the line after the coming into power of President Jammeh, the socio-economic conditions regressed. The economic decline was reinforced by undisciplined domestic and external borrowing.³⁹ Even the current government's blueprint for development is not radically different from the previous ones in terms of its shortcoming in translating economic aspirations into improved standard of living for the population.

Consequently, the need to take ESCR commitments seriously recently emerged in discussions on the new constitutional making process in the Gambia. The Constitutional Review Commission (CRC) nationwide consultation at the beginning of 2019 triggered intense debates around the inclusion of ESCR in the new Constitution for the pursuit of an adequate standard of living. Even though The Gambia is a tiny country that just emerged from the grips of economic mismanagement with significant debt, both domestic and external, it is important for the demands to include ESCR in the new Constitution to be aspirational, to achieve transformative change in governance and the lived realities of Gambia's inhabitants. This will require multi-stakeholder and sectoral conversations to agree on minimum standards with room for progressive monitoring and evaluation.

36 J Altrogge & F Zanker 'The political economy of migration governance in The Gambia' (2019) https://www.medam-migration.eu/fileadmin/Dateiverwaltung/MEDAM-Webseite/Publications/Research_Papers/WAMiG_country_reports/WAMiG_Gambia_country_report/WAMiG_Gambia_country_report.pdf (accessed 7 April 2020).

37 Saine (n 21).

38 Saine (n 21) 101.

39 Saine (n 21) 135.

In the Gambia, the potency of justiciable ESCR in the new Constitution should not be underestimated. Justiciable ESCR in the new Constitution will enhance the creation of institutional mechanisms for the adjudication and enforcement of ESCR. Thus, the institutional relationships that will be relevant for the purpose of meaningful enjoyment of ESCR is of equal importance as it will ensure meaningful and effective accountability.⁴⁰

Much of the argument against the justiciability of ESCRs have recently shifted to the appropriateness of complaints and adjudication procedures. The UN Committee on Economic, Social and Cultural Rights (CESCR) in General Comment 9 made it clear that ESCR must have effective remedies regardless of whether domestic courts are able to enforce them or not.⁴¹ The role of courts in enforcing ESCR has been quite contentious since the adoption of the Universal Declaration of Human Rights which subsequently resulted in the adoption of two separate covenants. One of the objections that has emerged in human-rights discourse against the justiciability of ESCR is the argument that courts do not have the capacity to adjudicate rights that would require judicial interference in the determination of resource allocation and social policy which is the traditional function of the executive and legislature.⁴² To this challenge, the Constitutional Court of South Africa in the *Certification of the Constitution of the Republic of South Africa* held that:

In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.⁴³

40 M Langford & A Nolan 'The justiciability of social and economic rights: An updated appraisal' (2007) 4.

41 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 9: The domestic application of the Covenant, 3 December 1998, UN Doc E/C.12/1998/24 (1998) para 2

42 R Larsson 'The justiciability of socio economic rights – Courts as protectors of economic and social rights: The case of South Africa' Masters thesis, Lund University, 2009, at 26; for more extensive discussion on this see C Mbazira *Litigation socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009); K McLean *Constitutional deference, courts and socio-economic rights in South Africa* (2009).

43 *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) 76.

Thus, it has increasingly become clear that the role of courts in the enforcement of ESCR is not fundamentally different from the enforcement of civil and political rights.

The Universal Declaration of Human Rights (UDHR) adopted by the UN in 1948 as a common standard of human rights for all nations and peoples recognises both civil and political rights and ESCR.⁴⁴ In the transformation of the principles of the UDHR into a binding legal instrument, the UN would subsequently adopt two separate human rights treaties instead of a single treaty guaranteeing these rights, as a result of disagreements among the negotiating states.⁴⁵ These contestations resulted in the adoption of the International Covenant on Civil and Political Rights (ICCPR)⁴⁶ and the International Covenant on Economic, Social and Economic Rights (ICESCR)⁴⁷ in 1966 and their entry into force a decade later in 1976. This was against the call for the adoption of one instrument that will capture the two categories of rights.⁴⁸ The latter constitutes the foundation of ECSR at the international level. The adoption of two separate covenants and their disparate treatment in terms of substantive provisions and institutional framework for monitoring implementation appears to have further contributed to the alienation of ESCR into an inferior status, lagging behind civil and political rights.⁴⁹

However, in 1993 the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights reiterated the interdependence and indivisibility of human rights.⁵⁰ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights⁵¹ and the Limburg Principles⁵² also reinforced the obligation on states to

44 P Alston & R Goodman *International human rights in context* (2007) 277.

45 McLean (n 42); Mbazira (n 42).

46 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p 171.

47 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol 993, p 3.

48 B Stark 'Reclaiming social rights: International and comparative perspectives' (1999) 21 *Human Rights Quarterly* 547.

49 McLean (n 42) 7.

50 UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, UN Doc A/CONF.157/23 (1993).

51 International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997.

52 UN Commission on Human Rights, Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights (Limburg Principles), 8 January 1987, UN Doc E/CN.4/1987/17 (1987).

adopt concrete steps for the realisation of ESCR. At the regional level, the African Commission on Human and Peoples' Rights' (African Commission) emerging jurisprudence and the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (African Charter) indicate a profound indictment on states to take progressive and concrete steps in ensuring the fulfilment of ESCR in their domestic legal order by guaranteeing at least the minimum core of ESCR in the African Charter.⁵³ Notably, the African Charter does not separate generations of rights and thus recognises indivisibility and interrelatedness of human rights.

There is a growing universal acceptance of the justiciability of ESCR as fundamental rights. This is reflected in the increasing number of countries including ESCR in their constitutions, and with domestic courts and regional mechanisms adjudicating ESCR claims,⁵⁴ and the coming into force in 2013, of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights which empowers the Committee on Economic Social and Cultural Rights to adjudicate on complaints relating to the violation of ESCR submitted by individuals and groups against state parties. This is partly in recognition of the interdependence and indivisibility of human rights and the continuous realisation that the enjoyment of ESCR is tied to human dignity as socio-economic deprivation does not only limit the life opportunities of individuals but it also erodes their dignity.⁵⁵ The preservation of human dignity requires the state to respect the equal worth of the poor by allocating resources to address the conditions that perpetuate marginalisation and vulnerability.⁵⁶ Consequently, countries have not only made progress in including ESCR in their constitutions across the world over the last two decades, but their courts have also contributed immensely in the determination of the precise content of ESCR.⁵⁷

53 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, adopted in 2011.

54 M Langford 'The justiciability of social rights: From practice to theory' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2009) 3-45.

55 JC Mubangizi 'The constitutional protection of socio-economic rights in selected African countries: A comparative evaluation' (2006) 1 *African Journal of Legal Studies* 1 at 19.

56 S Liebenberg 'The value of human dignity in interpreting socioeconomic rights' (2005) 21 *South African Journal of Human Rights* 1.

57 Langford (n 54) 6.

In light of the absence of adequate enforceable ESCR in the 1997 Constitution, the inclusion of a Bill of Rights in the new Constitution rendering ESCR justiciable will be one of the main mechanisms through which such rights can get effective enforcement in The Gambia. This will represent a major constitutional shift in terms of ESCR in the 'new Gambia'. The ongoing constitutional review process is thus an opportunity to lay down a firm ESCR constitutional framework that accords with the building of a transformative society and accountable government that thrives on constitutional values for the recognition and protection of fundamental ESCR. This will arguably take ESCR beyond the syndrome of mere paper promises and create minimum constitutional standards upon which to measure progress in ESCR implementation and realisation. This will enhance the responsiveness of the state to inequality and larger socio-economic deprivation.⁵⁸ Equally, including justiciable ESCR in the new Constitution of the Gambia will translate the social justice and welfare aspirations of majority of Gambians into constitutional commitments.

Moreover, inclusion of justiciable ESCR in the new Constitution will serve as an authoritative source of claims, persuasion, and benchmarks to measure the state's conduct.⁵⁹ Including ESCR in the new Constitution would mean that claims of ESCR deprivation can be heard and determined by courts, which will pave the way for individuals and groups to allege infringements of substantive rights in the courts or in quasi-judicial mechanisms. If violation is found, the relevant court or quasi-judicial body will frame remedies that may include rectification of the wrong, compensation or an order for the state to undertake certain positive measures.⁶⁰ The findings on such substantive rights will constitute authoritative interpretation of the relevant ESCR. Equally, the inclusion of ESCR in the new Constitution of The Gambia will be symbolic in eroding the untenable divides that exist between ESCR and civil and political rights under the current Constitution.

It is, however, important to point out that the mere inclusion of ESCR in the new Constitution does not in itself guarantee their implementation but will significantly create a constitutional layer for accountability. Constitutional protection of ESCR combined with adequate judicial reforms and committed civil society will hold the promise for the effective realisation of ESCR in the 'new Gambia'. Equally, effective enforcement

58 S Liebenberg & B Goldblatt 'The interrelationship between equality and socio economic rights under South Africa's Transformative Constitution' (2007) 23 *South African Journal on Human Rights* 335.

59 Viljoen (n 7) 6-7.

60 Viljoen (n 7) 7.

of ESCR demands a broad approach to standing for adjudication.⁶¹ Consequently, the kind of Bill of Rights envisaged by this chapter is one that recognises and confers broad standing to individuals and civil society to advance ESCR in (quasi) judicial forums and other constitutional mechanisms.

4 The transition: Norm setting

Viljoen notes that, '[t]he ultimate test of international human rights law is the extent to which it takes root in national soil'.⁶² The Gambia as a state party to the ICESCR,⁶³ and the African Charter has an obligation to give effect to the provisions of the Covenant and the African Charter within its legal system.⁶⁴ The drafting of a new Constitution therefore presents the ideal opportunity to constitutionalise the provisions of the Covenant and the African Charter to serve as a representation of the state's full commitment to fulfilling its obligations. Consequently, the new constitutional dispensation should guarantee the full range of rights contained in the Covenant and the African Charter. These rights will only be realised within the domestic legal system if incorporated into domestic law.⁶⁵

Commendably, the Final Draft Constitution recently out-dooed by the Constitution Review Commission substantially mirrors the provisions of the Covenant. Section 57 guarantees the right to education in terms similar to article 13 of the Covenant. Notably, it even goes further than the Covenant by guaranteeing free compulsory education up to the secondary level. Similarly, section 60 guarantees the right to fair labour practices and trade union rights in terms similar to articles 7 and 8 of the Covenant. Further, section 62 guarantees the rights to social security, an adequate standard of living (including housing, food, water) and health –

61 I Currie & J D Waal *The Bill of Rights Handbook* (2016) 72-88.

62 Viljoen (n 7) 518.

63 UN Treaty Collection 'Status of the ICESCR' https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4 (accessed 7 July 2022).

64 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 3: The Nature of States Parties' Obligations (art 2, para 1 of the Covenant), 14 December 1990, UN Doc E/1991/23 (1990); UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 9: The domestic application of the Covenant, 3 December 1998, UN Doc E/C.12/1998/24 (1998).

65 KV Aldrich 'Constitutionalising economic, social and cultural rights in the new millennium' (2010) *Graduate Student Theses, Dissertations, & Professional Papers* 241 <https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1260&context=etd> (accessed 5 June 2019).

corresponding to rights guaranteed in articles 9, 11 and 12 of the Covenant respectively.

It is also important to highlight the formulation of the ESCR guaranteed in the Final Draft Constitution. Unlike the South African Constitution, which in some instances only guaranteed 'access' rights,⁶⁶ the ESCR rights in the Final Draft Constitution are guaranteed as direct rights in line with the provision of the ICESCR, the African Charter and other human rights instruments, which arguably provides stronger entitlements to right holders.

One notable feature worth highlighting is the fact that most of the ESCR in the Final Draft Constitution are not necessarily contained in section 62 which is titled 'economic and social rights' but are interspersed with other rights. Whether this was deliberate or mere coincidence, it is of symbolic importance as it reinforces the interdependence and indivisibility of human rights.⁶⁷ It is also commendable that section 33 of the Final Draft Constitution recognises the obligation of the state and its organs to respect, protect, promote and fulfil the rights guaranteed in the Constitution. This is in further recognition that all human rights engender a spectrum of obligations, an important move away from the hitherto false negative/positive obligations conundrum associated with the generational classification of rights. In this regard, perhaps it is a misnomer that section 62 of the Final Draft Constitution is titled 'Economic and social rights' which bundles together a number of ESCR rights rather than providing for these rights independent in different provisions. It is for instance, interesting that the right not to be refused emergency medical treatment is contained in a different clause rather than being made part of the right to health.

However, beyond the notable recognitions, there are certain deficiencies/omissions that deserve attention. Perhaps the most notable omission is the right to work guaranteed in article 6 of the Covenant which is conspicuously missing from the Final Draft Constitution. The ICESCR specifically provides for the right to work in article 6 as a separate right from the right to fair labour practices and trade union rights guaranteed in article 7 and 8 respectively. Article 6 of the ICESCR guarantees 'the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'.⁶⁸ The right to work

66 C Heyns & D Brand 'Introduction to socio-economic rights in the South African Constitution' (1998) 2 *Law, Democracy & Development* 153 at 159.

67 Heyns & Brand (n 66) 157.

68 Article 6 of the ICESCR.

therefore entails an obligation on the state party to ensure that individuals can freely accept or choose their professions, careers or work.⁶⁹ Even though the African Charter's provision related to work⁷⁰ is quite vague – creating an uncertainty on whether what is protected is an independent right to work or merely a consequential right to safe working conditions, we agree with Udombana who argues that '[t]he right to work, thus, is both an inherent and instrumental freedom; as an instrumental freedom, it promotes development and contributes to the expansion of human freedom in general'.⁷¹ Udombana further argues that article 15 of the African Charter guarantees an independent right to work which obliges states to take appropriate policy, technical and institutional measures to ensure that opportunities for work are made available.⁷² This position is confirmed by the African Commission through various soft law instruments, including the Principles and Guidelines on the Implementation of Economic Social and Cultural Rights.⁷³ The Maputo Protocol also places an obligation on states to 'adopt and enforce legislative and other measures to guarantee women equal opportunities in work, career advancement, and other economic opportunities'.⁷⁴

While the Committee on Economic Social and Cultural Rights (CESCR) considers articles 6 (right to work), 7 (right to fair labour practices) and 8 (right to form and or join trade unions) as interdependent,⁷⁵ it nonetheless considers the right to work as an independent right that state parties must guarantee and fulfil. The right to work places an obligation on states to ensure that their populace have 'the right of access to a system of protection guaranteeing each worker access to employment' and 'the right not to be unfairly deprived of employment'.⁷⁶ The right to work entails that state parties ensure optimal employment which is to be achieved through

69 Para 6 of the UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 18: The Right to Work (art 6 of the Covenant), 6 February 2006, UN Doc E/C.12/GC/18 (2006).

70 Article 15 of the African Charter.

71 NJ Udombana 'Social rights are human rights: Actualizing the right to work and social security in Africa' (2006) 39 *Cornell International Law Journal* 181 at 187.

72 As above.

73 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' (2009) paras 56-59; see also *Sébastien Germain Marie Aikoué Ajavon v Republic of Benin* (Application 62/2019) ACtHPR (4 December 2020).

74 Article 13 of the African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003.

75 Paragraph 8 of CESCR General Comment 18.

76 Paragraph 6 of CESCR General Comment 18.

providing assistance (including technical and vocational guidance)⁷⁷ to identify and find employment without discrimination.⁷⁸ The CESCR considers that state parties have an obligation to ensure that their national legal systems recognise the right to work and provide detailed plans on how to achieve optimal employment.⁷⁹ The specific guarantee of the right to work is important for the protection of access to those who are most vulnerable to unemployment including women, young persons, older persons, persons with disabilities and migrant workers.⁸⁰ The right to work is important to ensure that individuals are able to provide for themselves and their dependents basic necessities such as food, water, shelter and may be even linked to the right to life because being able to provide these necessities is essential to the sustenance of life and human dignity. It is therefore incomplete that the Final Draft Constitution guarantees fair labour practices and the right to form and or join trade unions,⁸¹ but fails to include the right to work, which would be a prerequisite to fair labour practices or trade union rights.

With unemployment estimated at 29.8 per cent nationally – with rates as high as 35.3 per cent among young people aged between 15-34 years and 38.3 per cent among women,⁸² it is imperative that the right to work is specifically guaranteed and all relevant government policies and measures put in place to ensure that development programming aims to create decent sustainable jobs for the populace, especially for the youth, who have resorted to irregular migration through dangerous routes, for jobs in Europe.

5 Implementation and enforcement of socio-economic rights under the new dispensation

For The Gambia to effectively enforce ESCR, various fora and institutions that work particularly with ESCR need to be established. The Kenyan Constitution for instance, created human rights institutions such as the Gender and Equality Commission, the Commission on Administrative

77 Article 6(2) of the ICESCR.

78 Para 12 of CESCR General Comment 18. See also RT De George 'The right to work: Law and ideology' (1984) 19 *Valparaiso University Law Review* 15.

79 Paragraph 26 of CESCR General Comment 18. See also NJ Udombana 'Social rights are human rights: Actualizing the right to work and socialsecurity in Africa' (2006) 39 *Cornell International Law Journal* 181 at 199.

80 Paragraphs 13-18 of the CESCR General Comment 18.

81 Article 60 of the Final Draft Constitution (2020).

82 Government of the Gambia 'Decent work country programme: The Gambia (2015-2017) 8 https://www.ilo.org/wcmsp5/groups/public/ed_mas/program/documents/enericdocument/wcms_560922.pdf (accessed 7 July 2022).

Justice, and the Kenya National Commission on Human Rights to among others monitor the implementation of human rights, including ESCR.

Similarly, South Africa has institutions such as the South African Human Rights Commission, Commission for Gender Equality as well as Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, which are created by section 181(1) of its Constitution and deal with human rights issues. These institutions are impartial, independent, subject to the law and the Constitution only and they perform their functions without fear, favour, or prejudice.⁸³ In The Gambia, the National Human Rights Commission has been recently established to perform this important function. In addition to the National Human Rights Commission, courts will also play an important role in the enforcement of ESCR, being the final arbiters of constitutional rights.

5.1 Enforcement by the National Human Rights Commission

Gambia passed the National Human Rights Commission Act on the 13 December 2017 which was assented to by the president on 13 January 2018. The National Human Rights Commission has a mandate to promote and protect human rights.⁸⁴ The promotional mandate is performed through public awareness, studies and publishing reports on human rights, contributing to government policy formulation and encouraging government to ratify and implement international human rights instruments.⁸⁵ Beyond its promotional mandate, the National Human Rights Commission has an important role to play in the enforcement of ESCR. Notably, it is mandated to among others 'monitor, receive, investigate and consider complaints of human rights violations in The Gambia, including violations by private persons and entities' and make appropriate recommendations for remedial action to the government or relevant entity.⁸⁶ In performing this mandate '[t]he Commission has the powers, rights and privileges vested in the High Court at a trial' to hear human rights complaints and enforce decisions arising from such complaints.⁸⁷ These powers and functions are replicated in article 221 of the Final Draft Constitution. This places the National Human Rights Commission in an advantageous position to play a complementary role in the enforcement of the proposed ESCR included in the Final Draft Constitution. While the enforcement role of the National Human Rights

83 Section 181(2) of the The Constitution.

84 Section 12(a).

85 Section 12(e)-(k).

86 Section 12 of the National Human Rights Commission Act, 2017.

87 Section 13 of the National Human Rights Commission Act.

Commission could be viewed as being similar to that of a court, it is trite that procedures and processes before national human rights institutions are more informal than regular courts and therefore more accessible to victims who are unable to access the court system, which is usually more formal and may be prohibitive in terms of the cost of filing applications and lawyers' fees. Another important mechanism through which the National Human Rights Commission can contribute to the implementation/enforcement of ESCR is through the development of indicators and national benchmarks for monitoring ESCR.⁸⁸ The development of indicators and benchmarks will provide an important tool through which the measures put in place by government to ensure the realisation of ESCR can be assessed.

The Final Draft Constitution also envisages that the National Human Rights Commission will 'act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights that apply to The Gambia'.⁸⁹ In this capacity, the National Human Rights Commission can play the important role of ensuring that the state and its organs adopt the relevant measures to respect, protect and fulfil The Gambia's ESCR obligations under various human rights treaties including following up on the implementation of concluding observations and other communications from treaty bodies and decisions of regional courts and tribunals.

The National Human Rights Commission can therefore offer 'soft protection'⁹⁰ to ESCR through quasi-judicial adjudication, development of benchmarks and indicators for monitoring and providing an avenue for monitoring of implementation through the publication of studies, annual reports and policy papers aimed at ensuring policy coherence among the various implementing government departments and agencies. The effective implementation of this mandate will partly depend on how jealously the National Human Rights Commission will guard its

88 S Bah 'The role of the Uganda Human Rights Commission in the implementation of ESCR: Opportunities and lessons' Master's dissertation, University of Pretoria, 2017; see also C Apodaca 'Measuring the progressive realization of economic and social rights' in S Hertel & L Minkler (eds) *Economic rights conceptual, measurement, and policy issues* (2007) 165; S Kalantry, JE Getgen & SA Koh 'Enhancing enforcement of economic, social, and cultural right using indicators: A focus on the right to education in the ICESCR' (2010) 32 *Human Rights Quarterly* 253.

89 Article 221(3)(f).

90 Heyns & Brand (n 66) 153.

independence, coupled with having the full complement of personnel and other resources required to execute its mandates.

5.2 Enforcement by courts

The desirability of judicial enforcement of ESCR has been discussed earlier in this chapter and more thoroughly elsewhere.⁹¹ In this regard, it is commendable that the Final Draft Constitution empowers the courts to enforce all the rights guaranteed in the Constitution including ESCR, on a non-discriminatory basis.⁹² It is also notable that while the Final Draft Constitution recognises that resources may have an implication on the fulfilment of ESCR, it places the onus on the state to justify the non-availability of resources and provide a plan on when those resources will be made available. This is in line with jurisprudence of the Committee on Economic Social and Cultural Rights⁹³ and the African Commission,⁹⁴ which requires states to adopt 'deliberate, concrete and targeted' measures making full use of the maximum resources available to fulfil ESCR.

One issue that courts must address when enforcing ESCR under the new constitutional dispensation is the role that international human rights law will play in the adjudication of ESCR, given that the inclusion of ESCR in national constitutions is largely influenced by international law⁹⁵ following the ratification of international human rights treaties by states. In consequence, even though national courts and institutions have never shied away from learning from the experience of other states, it may be imperative 'to obtain guidance from the jurisprudence which has been developed on the level of international law'.⁹⁶ To this end, it is important to examine what role international law will play in the enforcement of human rights generally and socio-economic rights in particular, under a new constitutional dispensation.

The Gambia recently made the article 34(6) declaration to the African Court Protocol to allow individuals and NGOs to bring claims of human rights before the African Court. This has created another avenue beyond the domestic human rights mechanism for the enforcement of ESCR. The

91 See generally M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008).

92 Article 32(1) & (2) of Final Draft Constitution (2020).

93 Paragraph 2 of General Comment 3.

94 African Commission 'Principles and guidelines on the implementation of economic, social and cultural rights' (2012).

95 Heyns & Brand (n 66) 156.

96 As above.

ECOWAS Community Court of Justice has also been very instrumental in responding to human rights claims in West Africa and has in a number of cases made findings against The Gambia for human rights violations.⁹⁷ These should inspire resort to international law in the interpretation of the ESCR and other rights guaranteed in the Final Draft Constitution.

Like most commonwealth countries, The Gambia ascribes to the 'dualist' approach to international law which requires domestication of treaties subsequent to ratification before they have binding legal effect in the domestic legal order. Shyllon suggests that, the fact that The Gambia's 1997 Constitution expressly states its superiority and sovereignty in section 4, connotes a dualist approach to the application of international laws at the domestic level.⁹⁸ This is confirmed in article 11(2) of the Final Draft Constitution which expressly requires treaties to be domesticated before they become part of the laws of The Gambia. The Final Draft Constitution, however, appears to make some concessions in this regard by giving courts the option to resort to international law in the interpretation of the Bill of Rights. It provides that courts 'may' consider international treaties ratified by the state when interpreting human rights provisions of the Constitution.⁹⁹ While this provision at first instance appears to make some inroads, we submit that it is redundant and quite inconsequential, given that courts have never been shy to resort to international law and indeed foreign law to aid interpretation, even without express constitutional provisions. The provision therefore really adds no value if courts are not mandated to apply it. In this regard, inspiration may be drawn from the South African Constitution which makes it mandatory for courts to consider international law in the interpretation of the human rights provisions but optional in the case of foreign law.¹⁰⁰

The South African constitutional approach of making it mandatory for courts to consider international law ensures that the state does not merely ratify international instruments with no intention of domesticating and implementing them. Provisions requiring courts to mandatorily consider international law will ensure that at least, courts are put on notice and consider the state's international obligations while enforcing human rights

97 See *Chief Ebrimah Manneh v The Republic of The Gambia*, ECW/CCJ/APP/04/07, judgment ECW/CCJ/JUD/03/08 (5 June 2008); *Federation of Africa Journalists (FAJ) v The Gambia*, ECW/CCIJ/APP/36/15, ECW/CCJ/JUD/04/18 (2018).

98 OO Shyllon 'Monism/dualism or self executory: The Application of human rights treaties by domestic courts in Africa' (2009) http://web.abo.fi/instut/imr/secret/kurser/Advanced09/Essays/Workinggroup4/Shyllon_Monism%20Dualism%20or%20Self%20Executory.pdf (accessed 7 July 2022).

99 Section 10(3) of the Final Draft Constitution (2020).

100 The Constitution of the Republic of South Africa, 1996.

guaranteed in the constitution. This ensures that a fair balance can be struck between dualism and ensuring adherence to the treaty obligations of the state.

5.3 Socio-economic rights litigation and the issue of standing

Deciding who can institute a complaint on a human rights violation is an important aspect to consider especially with the sensitivity and needs that come with ESCR. Various African states have different standing requirements. Some jurisdictions have victim specific standing requirements which only allows persons who are directly affected or likely to be affected by offending law or conduct to be able to institute legal action to challenge same. In other jurisdictions, individuals and other legal entities are allowed to sue on behalf of victims but with the consent of the victims, while the most liberal jurisdictions allow general public interest litigation which does not require the applicant to be a direct victim or even have the consent of victims in some cases. A more generous standing requirement is perhaps suitable for human rights litigation in context where most victims are likely to be too socially and economically disadvantaged to challenge offending actions or legislation in court. Opening the courts to everybody and giving them standing to institute legal proceedings to enforce ESCR is perhaps the best way to go about addressing human rights violations and this extends to people who are not necessarily victims but are acting either in the interests of the victim who cannot bring the matter themselves, or anyone acting in the interests of a group or public interest, as well as an association that acts in the interests of its members.¹⁰¹ This is position in the South African Constitution, as well as section 22(1) and (2) (a)-(d) of the Kenyan Constitution.

These Constitutions are very liberal on standing because of the real possibility that sometimes, the actual victims may not be able to go to court themselves for various reasons such as age (minors), capacity (having mental illness), and/or poverty, among others. It is therefore encouraging that article 34 of the Final Draft Constitution proposes generous standing requirements for the enforcement of human rights guaranteed in the Constitution. The article allows individuals to sue in their own right to enforce a contravention of the Constitution or in a representative capacity on behalf of a group or class of persons. Persons may also sue in the public interest without the need to be directly affected by the contravention and an association may sue for enforcement of the constitution if a contravention would affect one or more of its members.

101 Section 38(a)-(e) of the Constitution of the Republic of South Africa.

This is in conformity with the African Commission's Guidelines on Fair Trial, which enjoins states to ensure

that in regard to human rights violations, which are matters of public concern, any individual, group of individuals or non-governmental organization is entitled to bring an issue before judicial bodies for determination.¹⁰²

Generous standing requirements for human rights litigation would therefore be in line with Gambia's obligations relating to the right to fair trial under the African Charter and the African Commission's own practice of allowing communications to be submitted *actio popularis*.¹⁰³

6 Legal aid and the enforcement of constitutional rights

It is trite that international human rights law only guarantees the right to state sponsored legal aid in criminal cases. For instance, the ICCPR guarantees state funded legal assistance to indigent accused persons 'where the interests of justice so require'¹⁰⁴ and the African Court on Human and Peoples' Rights has similarly interpreted the right to fair trial under article 7 of the African Charter to include an obligation on African states to provide state funded legal aid to indigent accused persons facing serious criminal charges.¹⁰⁵ Arguably, the reason for obligating states to provide state funded legal aid for some defendants in criminal cases is the potential deprivation of liberty and fundamental freedoms due to the imposition of criminal sanctions, especially, long custodial sentences, as a consequence of an unequal contestation between a generally better resourced state and an economically disadvantaged accused persons, which could lead to an unfair justice system.¹⁰⁶ It is no gainsaying, however, that ESCR deprivations can also have debilitating effects on liberty and fundamental

102 African Commission on Human and Peoples' Rights 'Principles and guidelines on the right to a fair trial and legal assistance in Africa' (2003), para E.

103 See MP Pedersen 'Standing and the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 407.

104 Art 14(3)(d) of the ICCPR.

105 *Alex Thomas v United Republic of Tanzania* Merits, Application 005/2013, judgment, 20 November 2015; *Wilfred Onyango Nganyi & 9 others v The United Republic of Tanzania*, Merits, Application 006/2013, judgment, 18 March 2016; *Abubakari Mohamed v The United Republic of Tanzania*, Merits, Application 007/2013, 3 June 2016.

106 S Muralidhar *Law, poverty and legal aid: Access to criminal justice* (2005); see also PM Bekker 'The right to legal representation, including effective assistance, for an accused in the criminal justice system of South Africa' (2004) 37 *Comparative and International Law Journal of Southern Africa* 173.

freedoms.¹⁰⁷ It is therefore our submission that the same concept of equality of arms should apply to contestations between individuals and the state concerning fundamental human rights deprivations and therefore state funded legal aid should be made available in human rights litigation where the interest of justice so requires.

As many African states have shown, it is desirable to extend state funded legal aid to certain civil claims. For example, in Ghana, state funded legal aid is provided for civil claims involving landlord and tenant disputes, inheritance disputes, disputes related to family relations such as child maintenance and divorce proceedings.¹⁰⁸ The Legal Aid Board, which is responsible for administering the legal aid scheme is further given the discretion to grant legal aid to persons who are not specifically mentioned in the law but whom in the opinion of the Board require legal aid,¹⁰⁹ leaving room for the Board to provide legal aid for human rights litigation in appropriate instances. In South Africa state funded legal aid is provided for qualifying civil cases including for the protection of constitutional rights,¹¹⁰ labour cases,¹¹¹ divorce and family related disputes¹¹² and land rights,¹¹³ among others. Kenya's Legal Aid Act similarly provides state funded legal aid for constitutional matters and matters of public interest,¹¹⁴ which would cover litigation for the enforcement of constitutional rights.

The constitutional regime of The Gambia should therefore ensure that at a minimum state funded legal aid be provided for human rights litigation, including for the enforcement of ESCR, where the interest of justice requires. Even though is not within the scope of this chapter to define what exactly would amount to 'interest of justice' regarding human rights litigation, we propose that in line with the African Commission's Guidelines and Principles on Fair Trial, some of the factors that may be taken into account should include the complexity of the case and the ability of the applicants to adequately represent themselves, the nature of the rights affected, and 'the likely impact of the outcome of the case on the wider community'.¹¹⁵ In addition to these, we also recommend that the applicant's membership of a marginalised group such as gender, disability

107 A Sen *Development as freedom* (1999).

108 Section 2(2)(a) of Legal Aid Scheme Act, 1997.

109 Section 2(2)(b) of the Legal Aid Scheme Act.

110 Regulation 10 of Legal Aid South Africa Act 39 of 2014: Regulations (2017).

111 Regulation 14 of the Legal Aid South Africa Act: Regulations.

112 Regulation 15 of the Legal Aid South Africa Act: Regulations.

113 Regulation 17 of the Legal Aid South Africa Act: Regulations.

114 Sec 35 of Legal Act 6 of 2016.

115 African Commission (n 102) para G (b)(2).

and age should have a favourable inclination towards the grant of state funded legal aid.

Perhaps one of the ways in which defraying legal costs can be ameliorated is by removing filing fees for human rights cases in the same way the Final Draft Constitution removes filing fees for applications brought to enforce provisions of the Constitution. Another viable way is to remove cost orders against applicants in cases instituted to enforce human rights unless there is a clear indication that the case was frivolously instituted without any merit and knowledge on the part of the applicant/plaintiff that there wasn't the slightest chance of success. Cost orders can be very prohibitive and deter even applicants who have genuine cases from approaching the courts. For instance, a recent cost order of the Supreme Court of Malawi amounting to approximately USD 29 000 was deemed so prohibitive that the applicant had to seek relief from the African Court of Human and Peoples' Rights.¹¹⁶ Cost orders for human rights litigation especially in relation to ESCR seems a bit counter-productive to the extent that the state would be the defendant in most cases. It seems unfair that the courts should award the state costs against individuals who seek the intervention of the courts to vindicate their rights.

7 Conclusion

After many years of repression, The Gambia has been presented with an opportunity to forge ahead a new constitutional framework that has the potential to transform the Gambian society into one that is right respecting and consciously working towards not only the fundamental freedoms but also importantly towards the improvement of the socio-economic wellbeing of Gambians. This transformative constitutional framework will only be achievable if both civil and political rights and ESCR are entrenched as justiciable rights in the Constitution to ensure government's accountability. The new constitutional framework should therefore, at a minimum guarantee the full complement of ESCR provided for in the ICESCR and African Charter which Gambia has ratified and therefore has an obligation to implement, through among others the adoption of national legislation. The inclusion of these rights in the new Constitution should be complemented by generous standing requirements and legal aid in appropriate instances to enable indigent persons who are usually the victims of ESCR violations to be able to seek judicial redress.

116 *Charles Kajoloweka v Republic of Malawi* Application 055/2019, Ruling on Provisional Measures (27 March 2020).

While the entrenchment of ESCR as justiciable rights is not a magic bullet for solving all of Gambia's socio-economic problems, it will be an important step towards the democratic and socio-economic transformation of The Gambia. The success of this project will depend on how robustly courts and other state institutions take up their role and are empowered with the necessary independence, personnel and funding in the implementation and enforcement of ESCR. Civil society organisations also have an important role to play in monitoring implementation and ensuring that relevant state institutions dutifully performing their tasks of improving the socio-economic conditions of Gambians.

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