

The justiciability of social, economic and cultural rights in Namibia and the role of the non-governmental organisations

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Introduction

Namibia has celebrated its 18th year of independence. On this auspicious occasion, it is proper to reflect on the status and enjoyment of all human rights in the country. Human rights are traditionally divided into two main groups, namely –

- civil and political rights, and
- economic, social and cultural (ESC) rights.

Without going into detail about the reasons for such a demarcation, suffice it to say that civil and political rights have for years received, both at the international and national levels, much more prominence than ESC rights. Namibia is no exception in this regard. It is safe to state that, in the realm of civil and political rights, much has been achieved in Namibia. Many people freely exercise and enjoy the fundamental rights and freedoms recognised and protected in the Bill of Rights entrenched in the Constitution of the Republic of Namibia (Chapter 3), most of which are civil and political rights. The same cannot be said for ESC rights, though. This is so because of a number of factors, i.e. the non-entrenchment of ESC rights in the Constitution, the way these rights have been formulated in the Constitution, and the dominant perception that these rights are not enforceable under the current constitutional dispensation. ESC rights are sine qua non for improving people's lives and standard of living. Human rights jurisprudence from other jurisdictions shows that ESC rights can and should play a greater role in improving people's opportunities in life. Thus, this paper is premised on the conviction that ESC rights can and should play a greater role in the work and mandates of Namibian human rights organisations, with the ultimate view of using the court system to enforce ESC entitlements. The main thrust of this article, therefore, is directed towards the justiciability and or enforcement of ESC rights in Namibia.

The work herein is divided into seven sections. The discussion commences by giving a concise profile of the prevailing socio-economic conditions in the country, and how these impact on ESC rights entitlements. The next section lists the legal instruments regarded as the sources of ESC rights at the universal, regional and national level, respectively. This is followed by a commentary on the focus of certain prominent human rights organisations in the country. This part shows that the work of many of these non-governmental organisations (NGOs) have had a bias towards civil and political rights. Section five emphasises that ESC rights are legal rights unto themselves, and not mere political goals. It further seeks to highlight the danger of subjecting these rights to such a view. Section six contains the main thrust of this work. In this section I contend that ESC rights may indeed be invoked in Namibian courts. Such an invocation can either be done directly by way of a reliance on Article 144 of the Constitution, or indirectly through an expansive reading and/or interpretation of civil and political rights, as has been done in other jurisdictions, such as India. The work concludes with recommendations directed to all relevant role players involved in the human rights arena so as to ensure that all human rights are fully enjoyed.

Namibia: A socio-economic snapshot

An assessment of the human rights situation in Namibia would be incomplete without reflecting on the prevailing socio-economic conditions in the country. Research has shown that poverty is still widespread in rural communities, where nearly half the households spend more than 60% of their income on food.¹⁸² Is it reasonable and justifiable that, in an open and democratic society based on human dignity and freedom, a large majority of the population still lives in abject poverty alongside extremes of wealth? Indeed, Namibia's Gini coefficient is still one of the highest in the world. Moreover, despite the fact that government spends a considerable part of its budget on basic services like education and health, the majority of the population still has insufficient access to such services. With reference to education, there is a general consensus that Namibia has made significant progress in terms of access to education. However, there are still high disparities in the rate of enrolment amongst the various language groups. Whereas only 18% of San children are enrolled in formal education, the corresponding figures for German- and Owambo-speaking children are 92% and 89%,

182 Harris, A. 2007. *Spotlight on Development – Towards the Millennium Development Goal*. Windhoek: The NANGOF Trust, p 4.

and 89%, respectively.¹⁸³ Also, the quality and standard of education at state schools still remains a big challenge. Similarly, Namibia spends a considerable part of its annual budget on health, but health expenditure is highly unequal across the country. For instance, the per capita expenditure on health is lowest in the north-west, although that part of the country has the highest mortality rate amongst children under 5 years of age.¹⁸⁴ The provision of low-cost housing poses another challenge to the government. For example, it is said that with the current rate at which low-cost houses are being delivered, an applicant for such a house will have to wait for around 70 years to have his/her application for a house considered.

As these examples show, government's current social safety measures are not succeeding in reversing the ever-widening gap between rich and poor in Namibia. Therefore, additional strategies need to be devised to complement their efforts. Human rights, specifically ESC rights, can be one of the strategies to employ in order to achieve social justice in Namibia.

The right to work; the right to fair conditions of employment; the right to form and join trade unions; the right to social security; the right to protection of the family; the right to an adequate standard of living, including the right to food, clothing, and housing; the right to health; the right to education; and the right to culture are internationally recognised rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR). In 1993, the Vienna World Conference on Human Rights reiterated that –¹⁸⁵

... all human rights are universal, indivisible, interdependent and interrelated.

This means that civil and political rights as well as ESC rights have to be treated in an equal manner, on the same footing, and with the same emphasis.¹⁸⁶ After Namibia had ratified the ICESCR, it entered into force for the country on 28 February 1995. In addition, Chapter 3 of the Namibian Constitution also seeks to protect certain ESC rights, albeit in a somewhat limited and modest fashion.

183 (ibid.:3).

184 Government of the Republic of Namibia. 2003. *Namibia National Health Accounts*. Windhoek: Ministry of Health and Social Services, p 56.

185 *World Conference on Human Rights: Vienna Declaration and Programme of Action*, Part I, para. 5. UN Doc. A/CONF. 157/23.

186 Cooman, F (Ed). 2006. *Justiciability of economic and social rights*. Antwerp: Intersentia, p 2.

In order to contribute to the debate of the de jure and de facto status and justiciability of ESC rights in Namibia, it has become imperative to critically engage the questions posed by Cooman¹⁸⁷ as to whether ESC rights only exist on paper as part of treaties and constitutions to which governments often pay lip service at international fora, or whether they really mean something in practice for those who want to invoke these rights before the courts?¹⁸⁸

The next section will, therefore, evaluate how these rights can be enforced in the Namibian legal system.

Sources of ESC rights

ESC rights, as noted by Scheinin,¹⁸⁹ are an essential part of the normative international code of human rights. As he points out,¹⁹⁰ they have their place in the Universal Declaration of Human Rights (UDHR), in universal and regional conventions on human rights, and in a plethora of human rights treaties aimed at the eradication of discrimination and the protection of certain vulnerable groups. At the universal level, the UDHR and the ICESCR are singled out as the most important sources of ESC rights. In this regard, the UDHR provides for the right to social security, the right to work, the right to rest and leisure, the right to an adequate standard of living, the right to education, and the right to the benefits of science and culture.¹⁹¹ The ICESCR is regarded as the principal legal source of ESC rights. The rights recognised in and protected by this instrument include the right to work and to favourable working conditions (Articles 6 and 7); the right to organise and take collective action (Article 8); the right to social security (Article 9); the right to protection of the family, including protection of mothers and children (Article 10); the right to an adequate standard of living, including the right to food, clothing and housing (Article 11); the right to health (Article 12); the right to education (Article 13); and the right to culture (Article 15). Furthermore, the Convention on the Rights of the Child upholds and affirms the applicability of many of the rights contained in the ICESCR to children.¹⁹² Various other international human rights instruments contain provisions which

187 (ibid.:2).

188 Footnote 5, supra.

189 Scheinin, M. 2001. *Economic and social rights as human rights*. Dordrecht: Martinus Nijhoff, p 29.

190 (ibid.).

191 See Articles 22–27 of the UDHR in this regard.

192 See in particular Articles 25, 27, 28 and 32.

are directly related to ESC rights. The Convention on the Elimination of all Forms of Racial Discrimination, for example, prohibits discrimination on the basis of racial or ethnic origin with respect to ESC rights. The Convention on the Elimination of Discrimination Against Women affirms the applicability of the full range of ESC rights for women. Similarly, a broad range of worker-related rights has been developed under the auspices of the International Labour Organisation (ILO) and enshrined in the ILO Conventions and other legal instruments.¹⁹³

At the regional level – and of relevance to Africa and Namibia – is the African Charter on Human and Peoples’ Rights, which protects the right to work, the right to health, and the right to education.¹⁹⁴

The Namibian Constitution, for its part, contains an extensive catalogue of fundamental rights and freedoms. However, as noted in the preceding section, the ESC rights provisions therein are protected in a rather limited and modest fashion. Most of the provisions relating to ESC rights are couched as guiding principles of state policies that are fundamental to the governance of the country, and the state is obliged to have regard to these principles in making laws.¹⁹⁵

Thus, the following sections will endeavour to elaborate on the status of ESC rights in the Namibian legal system, investigate to what extent they are enjoyed in Namibia, and suggest ways in which these rights may be invoked in Namibia.

Namibian NGOs and ESC rights

Namibian NGOs have employed very creative strategies to claim and realise people’s basic rights. Civil society organisations have worked in diverse fields such as promoting access to affordable housing (Shack Dwellers’ Association), rural development (Namibia Development Trust), minority rights (Working Group of Indigenous Minorities in Southern Africa, the Omaheke San Trust), HIV/AIDS (Namibia Network of AIDS Service Organisations), and gender issues (Sister, Women’s Action for Development). NGOs that have explicitly taken up human rights issues are the Legal Assistance Centre (LAC), the National Society for Human Rights (NSHR), and the Basic Income Grant Coalition (BIG). The approaches the latter three NGOs have taken are discussed in more detail

193 Leckie, S & A Gallagher (Eds.). 2006. Economic, social and cultural rights: A legal resource guide. Philadelphia: University of Pennsylvania Press, p xv.

194 See in particular Articles 15–17 of the African Charter on Human and Peoples’ Rights.

195 See Article 95 of the Constitution of the Republic of Namibia.

below, along with those of the Office of the Ombudsman. Although not an NGO, the Office of the Ombudsman is included here because it has a constitutional mandate to monitor the protection and enjoyment of all human rights. This certainly includes ESC rights.

The Legal Assistance Centre

The LAC is the only public-interest law centre in Namibia. Its mission is to make the law accessible through education, law reform, research, litigation and legal advice. Since its inception the LAC has worked mainly on civil and political rights, and has had great success in the promotion and protection of these rights. However, they have not shown the same vigour in claims pertaining to ESC rights. In 2004, the LAC was approached by residents of the Goreangab Dam settlement to institute action against the City of Windhoek for cutting off the water supply to their community. Instead of taking the matter to court, the LAC reached an agreement with the Municipality without the prior consent of the residents.¹⁹⁶ With this, the LAC missed an opportunity to institute the first class action for socio-economic rights in Namibian courts.

The National Society for Human Rights

The NSHR is one of the main human rights monitoring and advocacy organisations in the country. Like the LAC, it has mainly focused on the monitoring and advocacy of civil and political rights. However, recent reports indicate that the NSHR has expanded its monitoring mandate to include the observance of ESC rights. For example, the latest NSHR report focuses on, amongst other things, the status of the right to an adequate standard of living, the right to a safe environment, the right to education, the right to health, and the right to culture.

The BIG Coalition

The BIG Coalition is a practical response to poverty in Namibia. It is a coalition of NGOs that advocate for the state to pay a monthly cash grant of N\$100 to every Namibian citizen, regardless of age or income. The money paid to people not in need is recuperated through the tax system. Despite the fact that the BIG initiative has been applauded nationally and internationally as a unique way

196 Sashman, C. 2004. "LAC gets cold feet". *New Era*; available at <http://allafrica.com/stories/200410210255.html>.

to address the income disparities in the country, the government rejected the Coalition's proposal, saying that Namibia was not a welfare state. This led the Coalition to launch its own pilot project in the Omitara village, which is said to be one of the most impoverished settlements in the country.

The Ombudsman

The office of the Ombudsman is an institution established under Article 89 of the Constitution. The duty of the Ombudsman is to investigate, amongst other things, apparent or alleged violations of fundamental rights and freedoms.¹⁹⁷ The human rights and fundamental freedoms that can be investigated by the Ombudsman are not only those contained in Chapter 3, but include a variety of civil, political, economic, social and cultural rights.¹⁹⁸ In 1998, for example, the Ombudsman received 1,111 complaints. The largest percentage of these related to unfair dismissal (21%), followed by complaints about remuneration/salaries (13%) and pension funds (12%). These are all issues of a socio-economic nature, indicating the important role the Ombudsman plays in protecting and enforcing socio-economic rights in Namibia.¹⁹⁹

Economic, social and cultural rights as legal rights in Namibia

Apparently, the drafters of the Constitution bought into the idea that ESC rights were not true rights and that they related instead to goals, policies and programmes. This might indeed be the case if one compares such rights to civil and political rights. However, as pointed out by Eide and Rosas,²⁰⁰ fundamental needs should not be at the mercy of governmental policies and programmes, but should be defined as entitlements.²⁰¹ Treating ESC entitlements as mere political programmes undermines the fundamental principle that human rights

197 See Article 91(a) of the Constitution of the Republic of Namibia.

198 See Reif, LC. 2000. "Building democratic institutions: The role of national human rights institutions in good governance and human rights protection". *Harvard Human Rights Journal*, 13; <http://www.law.harvard.edu/students/orgs/hrj/iss13/reif.shtml>; last accessed 12 January 2006; quoted in Mubangizi, JC. 2006. "The constitutional protection of socio-economic rights in selected African countries: A comparative evaluation". *Afr. J. Legal Stud.*, 1:1–19.

199 (ibid.).

200 Asbjørn, E & R Allan. 2001. *Economic, social and cultural rights: A universal challenge*. Dordrecht: Martinus Nijhoff, p 3.

201 (ibid.).

are inalienable. Several authors have shown the unsoundness of viewing ESC rights as ‘spurious rights’. For example, in 1986, a group of distinguished experts in international law meeting in Maastricht observed that, as human rights and fundamental freedoms were indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political rights and ESC rights.²⁰² Similarly, at a meeting held in Abuja, Nigeria, in 1999 between local and international human rights actors, the Secretariat of the African Commission, academics, journalists, legal experts, the Nigerian Human Rights Commission, and traditional community leaders, participants decried the failure of the African Commission on Human and People’s Rights to concretely engage the continent’s human rights problems and address Africa’s pervasive ESC rights denials.²⁰³

Current practices in Namibia show that ESC entitlements are still not regarded as legal rights unto themselves. It comes as no surprise, therefore, that documents such as the NSHR’s 2007 Annual Report²⁰⁴ would reveal that a disproportionate number of people in the country still live in abject poverty, do not enjoy an adequate standard of living, are unemployed, are extremely poor, and live in squalid living conditions in informal settlements. Needless to say, the situation as sketched above is incompatible with the government’s obligations to protect, respect and fulfil the ESC rights/entitlements of the people. The perception of ESC rights as unenforceable principles of state policy cannot be left unchallenged, therefore. Such an attitude is defeatist and contrary to the principle that all human rights and fundamental freedoms are indivisible and interdependent. An expansive and purposive reading of the Namibian Constitution may indeed lend itself to the successful invocation of ESC rights under the current constitutional dispensation. The following section will seek to clarify my statement.

202 *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*. UN Doc. E/CN.4/1987/17.

203 International Human Rights Internship Program & Asian Forum for Human Rights and Development. 2000. Circle of rights – Economic, social and cultural rights activism: A training resource. Washington, DC: IHRIP, p. 541.

204 National Society for Human Rights. 2007. *Namibia: Human Rights Report 2007*. Windhoek: NSHR, pp 12–19.

The enforcement of ESC rights in Namibia: A constitutional dilemma?

According to Liebenberg,²⁰⁵ there is either a direct or an indirect way to protect ESC rights as justiciable rights within the domestic legal system. The South African Constitution provides a clear example of the direct protection of ESC rights, by containing a detailed catalogue of these entitlements in its Bill of Rights. Such an entrenchment of ESC rights allows individuals and groups whose rights have been violated to seek redress from the courts. ESC rights are protected indirectly through an expansive interpretation of certain civil and political rights.

I argue that ESC rights can be enforced both directly and indirectly under the Namibian Constitution. The direct way would be grounded on the creative device of Article 144 of the Constitution, which reads as follows:

Unless otherwise provided for by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Applying Article 144 to the ICESCR, therefore, means that the Covenant – as ratified by Parliament – became part of the corpus of law of Namibia on the date it entered into force for Namibia on 28 February 1995. The construction of Article 144 presupposes that the provisos and entitlements of the ICESCR have direct and immediate application within the Namibian legal system, thereby enabling individuals to seek enforcement of their internationally recognised ESC rights in Namibian courts. Article 144 thus potentially opens the door for Namibian citizens to appreciate the importance of the world beyond their own country in the definition and enforcement of human rights.²⁰⁶ Indeed, the Article in question has in the past been relied upon to invoke certain provisions of international instruments binding on Namibia. For example, in *Kuaesa v Minister of Home Affairs & Others*, the court held that the African Charter on Human and Peoples' Rights had become binding on Namibia and formed part of the law of Namibia and, therefore, had to be given effect in Namibia.²⁰⁷ The case of *Michael Andreas*

205 Liebenberg, S. 2001. *The protection of economic, social and cultural rights in domestic legal systems*. The Hague: Global Law International, pp 57–78.

206 Mutasah, T. 2004. "The justifiability of socio-economic rights in southern Africa". The OSISA Journal, 4, 3, November: 1.

207 Case No. A 125/94, unreported, pp 78–9.

Müller & Imke Engelhard v Namibia was another instance in which the utility of Article 144 was at issue. *In casu*, the United Nations Human Rights Committee, relying on Article 144, held that Article 26 of the International Covenant on Civil and Political Rights had direct application in Namibia, and that certain provisions of the Aliens Act, 1937 (No. 1 of 1937) (as amended in South Africa to February 1978) were inconsistent with the equality and non-discrimination guarantees contained under Article 26 of the Covenant. As such, the Committee directed the Namibian government to allow the husband in question to adopt his wife's surname, despite the government's objections.²⁰⁸ This decision confirms the international-law-friendly nature of the Namibian Constitution. However, sceptics claim that such friendliness only extends to the enforcement of civil and political rights, and not to ESC rights. Needless to say, such a construction bespeaks a thin and impoverished version of Article 144.

It further downplays the now undisputed fact that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Such sceptics are further reminded that, as per the principles of public international covenants, states are precluded from invoking provisions in their domestic laws to escape their international obligations. Therefore, the Namibian government, like any other state party to the Covenant, is obliged to take steps – including the adoption of legislation – to the maximum of its resources so as to progressively achieve the full realisation of all the ESC rights recognised and protected in the Covenant.²⁰⁹ It is submitted that, through the creative device of Article 144, the ICESCR may be directly invoked in the Namibian legal system.

ESC rights may also receive constitutional protection through an expansive interpretation of certain civil and political rights, such as the right to life, human dignity, equality or security of person.²¹⁰ This entails the indirect protection of ESC rights as justiciable rights within the domestic legal system. The best example of this type of protection is found in Indian constitutional jurisprudence, where the Directive Principles of State have been interpreted to give content to the civil and political rights as contained in the Bill of Rights of the Indian

208 United Nations Human Rights Committee. *Communication No. 919/2000: Namibia. Mr Michael Andreas Müller and Imke Engelhard v Namibia*. CCPR/C/74/D/919/2000, 28 June 2000.

209 See Article 2 of the ICESCR.

210 Footnote 25, *supra*.

Constitution. For instance, in the *Francis Coralie Mullin* case, the Indian Supreme Court declared that –²¹¹

[t]he right to life includes the right to live with human dignity and with all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing, shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.

The Indian experience with regard to overcoming the so-called constitutional dilemma, namely ESC entitlements, is of particular relevance to Namibia. Both constitutions contain elaborate catalogues of civil and political rights compared to scant ESC provisions/entitlements. In both constitutions, ESC entitlements are formulated as directive principles of state policies as opposed to enforceable rights. Also, both constitutions contain draw-back clauses precluding their respective courts to enforce the ESC entitlements.

Both constitutions also create a *prima facie* constitutional dilemma/impasse, namely the enforcement of ESC rights in their respective jurisdictions. This ‘dilemma’ has been treated differently in the two countries. The Indian judiciary has, through creative interpretation, pioneered a process of interpreting civil and political rights in a manner that would help give a dynamic legal character to ESC rights.²¹² In Namibia, lawyers, academics, the courts and ESC rights advocates have come to accept the situation as unbridgeable and beyond their powers. However, in India, ESC rights advocates – supported by the judiciary – refused to adopt such a defeatist attitude.

The difference in the two countries’ approaches and/or attitudes is telling. In India, the debate regarding the legal standing of ESC rights there has been settled, whereas, in Namibia, we are still grappling with the artificial divide between civil and political rights and ESC rights.

211 *Francis Coralie Mullin v The Administrator, Union Territory of Delhi*, (1981) 2 SCR 516 at 529.

212 Mutasah (2004:8).

The Indian judiciary succeeded in dispelling the perceived constitutional dilemma brought about by the Directive Principles of State policy. Through their expansive interpretation of these principles, the courts in that country have shown that the law can be used to fight poverty.

Conclusion

In this paper I argued that ESC rights need to be given greater prominence in order to address the high levels of inequality, poverty and social exclusion in Namibia. I further argued that it is indeed possible to invoke ESC rights within the Namibian legal system. I have shown that this can be done by either directly invoking these rights based on Article 144 of the Constitution, or indirectly through the expansive interpretation of certain civil and political rights as was done in Indian jurisprudence. With regard to human rights NGOs and state institutions, I have shown that there is a bias towards civil and political rights in their monitoring mandates.

In view of the above, I submit the following recommendations:

- The government should submit its periodic reports on the status of ESC rights in the country to the Committee on Economic, Social and Cultural Rights (CESCR), as per the provisions of the ICESCR. The government should further take concrete steps to ensure the protection, respect and fulfilment of all ESC rights.
- Human rights NGOs should expand the scope of their work to include ESC rights. They should also educate the general public about the scope and content of the various ESC rights. Furthermore, NGOs should remind government of its obligation to file its periodic reports to the CESCR, and should complement such reports with their own shadow reports. The LAC, as the only public-interest law centre, should consider the institution of public interest litigation as a way to seek enforcement of ESC entitlements.
- The Office of the Ombudsman should use its constitutional mandate more proactively to investigate all human rights violations, with a particular focus on ESC rights.
- The judiciary should learn from the best practices of the Indian jurisprudence when confronted with a claim involving ESC rights.