

**CHALLENGES TO THE IMPLEMENTATION AND ENFORCEMENT OF SOCIO-
ECONOMIC RIGHTS IN MOZAMBIQUE**

**Submitted in partial fulfilment of the requirement of the fulfilment of the degree LLM
(Human Rights and Democratisation in Africa)**

BY

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DEDICATION

I dedicate this work to the poorest and vulnerable people who are victims of discrimination and injustice, who cry for need of a little peace and protection of their human dignity.

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I would like first to thank the God almighty. I especially thank my family (my mother, sisters and brothers). Lindlyn Tamufor you are forever the best helpful woman and friend (thank you for everything and your assistance Lin). Thanks to my supervisor for your very useful academic comments in this work and being friendly with me. I would also like to thank Kwesi and Cornelius for their editing assistance. My gratitude to Third World Network Africa (TWN Africa) for accepting me as an intern providing me with an excellent environment and resources to finish this work. TWN Africa goes beyond as NGO, it is an academic centre.

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LIST OF ABBREVIATIONS

ADM	Airports of Mozambique
APRM	African Peer Review Mechanism
AU	African Union
CESCR	Committee on International Covenant on Economic Social and Cultural Rights
CIP	Centre for Public Integrity
CSO's	Civil Society Organisations
EAC	Strategic Anti-Corruption
GCCC	Central Office for the Fight against Corruption
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Commission of Jurists
LDH	Mozambican Human Rights League
NEPAD	New Partnership for African Development
NGO's	Non-Governmental Organisations
OAU	Organisation of African Unity
OP-ICESCR	Optional Protocol to the International Covenant on Economic Social and Cultural Rights
OSISA	Open Society Initiative for Southern Africa
PARPA II	Plan of Action Plan for the Reduction of Absolute Poverty 2006-2009
PES	Economic and Social Plan
SERs	Socio-Economic Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nation Development Programme
UTRESP	Public Sector Reform Technical Unit

CHAPTER ONE

INTRODUCTION

1.1 Background to the study

One of the main concerns all over Africa is the development of socio-economic rights (SERs) to eliminate or reduce poverty in order to achieve a necessary quality of life, peace and social justice.¹ The institution of the African Union (AU) focuses on the realisation of SERs as one of its main objectives.²

The Republic of Mozambique (Mozambique) is one of the African countries which face the challenge of realising SERs. Ordinary people face daily hardships because they are denied socio-economic opportunities through which to realise their potential.³

Mozambique is located in Southern Africa and it bordered by Tanzania to the north, Madagascar in the Indian Ocean on the east, South Africa and Swaziland in the south, Zimbabwe on the west, and Zambia and Malawi on its north-western side. The total land area of Mozambique is 799 390 square kilometres with total population of about 21,669,278 million people according to the statistics of 2009.⁴

Mozambique is a developing country that was colonised by the Republic of Portugal (Portugal). It attained its official independence from Portugal on 25 June of 1975. A civil war started in 1976, lasted for 16 years and ended in 1992 with the signing of Peace Agreement in Roma (Italy) by Frelimo and Renamo.⁵ The civil war exacerbated poverty and slowed down the process of social and economic reconstruction.

Since the Peace Agreement, the administration of justice has undergone significant transformation. The 1990 Constitution introduced a multi-party political system, protection for human rights, a free-market economy and the separation of the executive, judicial and

¹ The Constitutive Act of the African Union including the New Partnership for African Development (NEPAD) and its African Peer Review Mechanism (APRM) recognize that the development of the economic and social conditions in Africa is one of the current problems, therefore must be promoted and protected at all levels through democratic principles.

² See the objectives and purpose of Constitutive Act of AU, African Charter on Human and Peoples' Rights (African Charter) adopted in 1981 and entered into force in on 21 October 1986.

³ Mozambican Human Rights League (LDH) 'Human rights in Mozambique in 2007' (2008) in its part II underlines several violations of the right work, education and health. See also A Jose 'Human Rights and Fundamental Freedoms' in Centre for Public Integrity (CIP) 'Governance and public integrity in Mozambique: practical problems and challenges, (2008) 31.

⁴ <http://www.infoplease.com/ipa/A0107804.html> (accessed 04/10/09).

⁵ J Hanlon and T Smart *Do bicycles equal development in Mozambique?* (2008) 33.

legislative powers. The subsequent adoption of the 2004 Constitution⁶ that revoked the 1990 Constitution entrenched individual rights and freedoms and strengthened the independence of the judiciary. In the writer's views, the 2004 Constitution did not introduce a lot of transformation but conserved the legal philosophy and principles introduced by the 1990 Constitution.

Mozambique is an independent and democratic State based on social justice and the doctrine of separation of powers.⁷ One of the main goals of its 2004 Constitution is to respect, protect, promote and fulfil human rights as well as foster the achievement of material and spiritual well being and quality of life for all citizens.⁸ In addition, Mozambique has ratified a number of international instruments on human rights including the African Charter on Human and Peoples' Rights (African Charter). However, the difficulties to realising SERs still persist.⁹ Particular areas of concern include administration of judicial systems, lack of access to social justice by ordinary and vulnerable people, and limited opportunities for the enjoyment of SERs such as health, education, work, housing, social security, food and clean water.¹⁰

In the past years, 2008 in particular, the country experienced several protests against the high cost of living, poverty, and unequal distribution of goods and resources.¹¹

The country is facing a situation of severe poverty, widespread hunger and unfulfilled elementary needs.¹² The 2009 Social Watch Report reaffirmed that socio-economic inequality and hunger has dramatically increased despite some evolution in fighting poverty. It also pointed out the persistent violation of right to education and health.¹³ These difficulties seem to have been exacerbated by the deficient implementation of SERs as well as by the damaging trend of corruption and lack of public accountability. Corruption has been the subject matter of a lot of studies and media debate. For example, in 2008 about 406 cases of corruption were

⁶ The 2004 Constitution was approved on 16, November 2004 by Assembly of the Republic and came into force in 21, January 2005 and it is published in BR No. 51, 1st Serie, 22, December 2004.

⁷ Art 1 and 3 of the 2004 Constitution.

⁸ Art 11 of the 2004 Constitution.

⁹ n 3 above.

¹⁰ LDH (n 3 above). See also Open Society Initiative for Southern Africa (OSISA) *Mozambique: Justice sector and the rule of law* (2006); Plan of Action Plan for the Reduction of Absolute Poverty 2006-2009 (PARPA II) and Hanlon and Smart (n. 5 above) in its chapter seven and eight and ten.

¹¹ This information was widely reported by Media and can be seen in the main national newspapers: Noticias, Savana, O Pais and Zambeze published during February 2008.

¹² Plan of Action Plan for the Reduction of Absolute Poverty 2006-2009 (PARPAII) 21; See also J Hanlon, 'Is poverty decreasing in Mozambique?' (2007) 1/7, and Hanlon and Smart (n 5 above) 131/138/159; in chapter seven and eight of this book the authors reveals the discrepancies between the reality and official declaration that poverty has considerable reduced and that the development is great. They give concrete examples of widespread hunger with main focus in children and the concerns of lack of access to education, health and access to water and work.

¹³ Social Watch 'Making finances work: People first' (2009) 122/123.

submitted to the Public Prosecution Service¹⁴ and only 31 have been adjudicated and decided.¹⁵ In addition to that, Mozambique has not ratified the International Covenant on Social Economic and Cultural Rights (ICESCR) which is the main international legal instrument for the promotion and protection of SERs. Curiously there is no public institution that has the original mandate to deal with human rights issue in Mozambique. This situation represents threats to the development of an environment which can sustain peoples' SERs.

Although the 2004 Constitution provides in chapter V for the protection of SERs, (this is common to the other African countries such as South Africa and Ghana), it is not clear if they can be judicially enforced and in which Court citizens may lodge complaints in order to fulfil the constitutional provisions on access to justice.¹⁶

The Constitution, in addition to SERs, provides for the right of popular action (public interest litigation).¹⁷ This is one of the most important means of ensuring the protection of constitutional rights. In this regard, some scholars argue that 'to have a meaningful effect, justiciability of socio-economic rights has to go together with the respect of rule of law; an independent, functioning and respected judiciary; and the availability of at least some resources.'¹⁸

Effective implementation and enforcement of SERs is viewed in this research as the principal means of enabling the successful enjoyment of basic socio-economic services by ordinary people. However, this requires the removal of the substantial barriers that leave people with little choice and little opportunity to enjoy the rights in question towards their development and autonomy.

In fact, the ability of people to realise their full potential is crucially influenced by economic opportunities, social powers and the enabling conditions of good health, basic education,

¹⁴ According to Art 236 of the 2004 Constitution, 'The Public Prosecution Service shall represent the State and defend such interests as the law may determine, and it shall control the legality and duration of detentions, shall conduct the institution of criminal proceedings...'

¹⁵ CIP 'Annual report on corruption in Mozambique in 2008' (2009); <http://www.cip.org.mz/index.asp?sub=publ&doc>.

¹⁶ 2004 Constitution states: Art 62(1) 'The State shall guarantee that citizens have access to the courts...', Art 69 states that Every citizen shall be entitled to contest those acts that violate their rights established in the Constitution and the laws, and Art 70 states 'Every citizen shall have the right of recourse to the courts against acts that violate their rights and interests recognised by the Constitution and the laws.'

¹⁷ Art 81 of the 2004 Constitution states that: 1. All citizens shall have the right to popular action in accordance with the law, either personally or through associations for defending the interests in question. 2. The right of popular action shall consist of: a) The right to claim for the injured party or parties such compensation as they are entitled to; b) The right to advocate the prevention, termination or judicial prosecution of offences against the public health, consumer rights, environmental conservation and cultural heritage.

¹⁸ F Viljoen *International human rights law in Africa* (2007) 569/570.

food, access to water and justice.¹⁹ The institutional arrangements for these opportunities are also influenced by the existence of a strong legal and institutional framework of SERs and by the exercise of people's freedom to easily access justice and to participate in public decision making which impacts these opportunities.²⁰

The focus of the research is therefore to suggest a possible approach and the efficient mechanisms for the effective implementation and enforcement of SERs in Mozambique.

1.2 The problem statement

Mozambique is faced with severe poverty and persistent obstacles to the enjoyment of SERs. Such problems are seen to be exacerbated by a failure to implement SERs, ensuring a clear legal and institutional framework for their justiciability and also by the perceived damaging trend of corruption and lack of public accountability. There is a need for strengthening the jurisdiction and hierarchy of the Courts to deal with constitutional matters. Ensuring institutional capacity and the power of Courts in this regard remains a challenge. Lawyers and other legal assistant have difficulties to effectively use the constitutional tools to ask for judicial remedy for violation of SERs, what more the vulnerable and marginalised people? Thus, this situation is contributing to an existing environment of violation of SERs with fewer opportunities to judicially blame the State.

The ongoing reforms regarding separation of powers and administration of justice to realise SERs is not very transparent and does not always involve relevant actors within the justice sector including members of civil society organisations (CSO's). Furthermore, lack of transparency in the allocation of resources to realise SERs contributes to rising socio-economic inequality and keep people powerless to participate in decision making process.

1.3 Research questions

- What are the main legal and institutional challenges to the implementation and enforcement of socio-economic rights in Mozambique?
- How can provisions that guarantee socio-economic rights in the Constitution and ordinary legislation of Mozambique be implemented in real terms?
- Can poverty be alleviated by ensuring that socio-economic rights are made effectively justiciable in Mozambique?

¹⁹ A Sen *Development as freedom* (1999) 5.

²⁰ Sen (n 19 above).

- How can civil society be empowered to assist in the process of implementing and enforcing the realisation of socio-economic rights?
- What are the obstacles to the implementation and enforcement of SERs in Mozambique?

1.4 Research objectives

1.4.1 The overall objective of this study is:

- To contribute to the improvement of promotion, protection, and fulfilment of SERs as well as the improvement of the rule of law and good governance in Mozambique.

1.4.2 The specific objectives:

- To stimulate research in the field of SERs in Mozambique in order to add depth to the existing research;
- To critically analyse the legislation and other frameworks that deal with the protection of SERs and propose possible solutions to bridge the existing gaps in such legislation.
- To raise awareness among the Mozambican public that SERs are constitutionally protected and that their violation can be judicially remedied in order to ensure their better implementation without discrimination.
- To demonstrate that reinforcement of the institutional and legal environment of SERs and their effective implementation can better fight poverty and progressively improve realisation of SERs, inclusion and the achievement of material and spiritual well being and quality of life for all citizens of Mozambique.
- To answer the questions of whether the policies and laws on SERs are being implemented as intended and whether the resources are being used for the purposes specified by the law-makers.

1.5 Significance of study

SERs are seen to be currently one of the biggest challenges for African countries in their fight against poverty, political arbitrariness and appalling human rights. Mozambique, therefore, has made the first step by introducing SERs as protected constitutional rights. However, there are concerns on implementation and realisation of SERs within the Mozambican legal and institutional system and empowering vulnerable people.

Therefore, by exploring examples of best practices on implementation and enforcement of SERs in other countries such as South Africa and Ghana, the study intends to analyse obstacles posed to the implementation and enforcement of SERs rights in Mozambique. The study focuses on challenges to the realisation of SERs in Mozambique because the author of this present study is Mozambican and has interest in the development of SERs in his home country. The study uses the example of South Africa not just because it is a neighbour to Mozambique but because it is the African country that has developed the most in providing both the theory and practice for justiciable SERs.²¹ It also uses Ghanaian legal examples because the study is written in Ghana and the country has also provided constitutional mechanisms to realise SERs as justiciable rights.²²

1.6 Research methodology

The study is based on desk research. It involve analyses of information in books, laws, case laws and other documents and internet information on SERs in the light of public policies and other significant means to realise SERs in Mozambique.

1.7 Limitations of the study

There were several obstacles met with in conducting this study. They include impossibility to carry a field research and lack of existing literature and case laws focused on justiciability of SERs in Mozambique. Further the writer faces difficulties with the English language. He is from a lusophone (Portuguese speaking) country and there is less of literature on SERs and human rights in general in the country. Some of the existing literatures are written in Portuguese. Therefore, their translation into English was a big challenge. The study does not purport to be exhaustive in the issues of implementation and enforcement of SERs. It only covers some of the main legal and institutional objections to the judicial and quasi-judicial mechanisms to realise SERs. The study does not cover 'cultural rights' as the study would be

²¹ Viljoen (n 18 above) 575; See also the 1996 Constitution of South Africa regarding SERs and the judgements of the South African Constitutional Court on SERs matters <http://www.constitutionalcourt.org.za/uhtbin/cgiisirsi/0/0/x/503/9>.

²² See chapter V and XI of the Constitutional of the 1992 Republic of Ghana regarding SERs and the jurisdiction of the Courts.

very broad and vague. Significant policies and plans aiding implementation of SERs are not discussed in depth; neither is their scope and purpose greatly explored.

1.8 Assumptions underlying the study

Given the fact that SERs are provided as justiciable constitutional rights in Mozambique and that the current functioning of their institutions (legislative, judicial, executive and civil society organisations), this study aims to show that there is an administrative machine to adjudicate and progressively realise SERs within the prevailing conditions of the country. It also aims to demonstrate that the justiciability of SERs can become a reality if their constitutional provisions are put in place as required. Further, that the legal and institutional obstacles that leave ordinary people, particularly the vulnerable groups, with little choice and little opportunities to access and benefit from SERs towards development of reasonable socio-economic standard of living can be challenged and removed.

1.9 Definitions

This study comes across with concepts and terms that basically have to be understood as defined here. For instance, implementation means the structures and procedures that are placed by the government to give effect to the SERs at the national level. Enforcement is understood as the legal action and mechanism which a person is able to use to launch a judicial complaint regarding a violation of his rights and make them effective through the necessary remedy. Further, the above concept and next ones are used as to understand functioning of SERs, which are those basic fundamental social needs, recognised as human rights in several international human rights instruments that enable a minimum quality of standard of living for the human being.

According to the study conducted by International Commission of Jurists on comparative experiences on justiciability of SERs ‘Justiciability means that people who claim to be victims of violation of SERs are able to file a complaint before an independent and impartial body, to request adequate remedies if a violation has been found to have occurred or to likely to occur, and to have any remedy enforced.’²³ In addition to this legal term is the concept of accountability which means holding government responsible for its actions in order to realise SERs as well as the obligation to explain to the people all aspects of those actions within an acceptable time.

²³ International Commission of Jurists (ICJ) *Courts and the legal enforcement of economic, social and cultural rights, comparative experiences of justiciability* (2008) 1.

Accountability of the function of Government leads to analysis of separation of powers. Separation of power is a principle of Constitutional Law that says the three branches of Government namely the legislature, executive and judiciary have separate powers and functions, and must be interdependent but not trespass on the role of another branch.²⁴ This is reinforced by the notion of the independence of the judiciary; judiciary is an impartial body whose decisions are not influenced by any personal bias or interest and is not controlled or influenced by the authorities whose functions the judiciary body has to review. It is independence from the executive and the legislature.²⁵

Furthermore, the study underlines the importance of good governance to the realisation of SERs. Good governance understood as governance that results in stable and accountable government that respects the values of human rights and democracy.²⁶ Good governance goes hand in hand with the notion of democratisation which is a process by which a society becomes increasingly participatory through elections to representative bodies and accountable to the people within a transparent public administration and independent judiciary.

However, in a society that endorses democracy all these definitions are meaningless if the rule of law is neglected while the State exercises its public administrative activity. According to BC Smith the rule of law is a complex constitutional principle that comprise different conceptions of justice, namely regularity (requires regular and impartial administration of public rules), equality (in the sense that like cases are treated alike as to limit the discretion of the authority) and ubiquity (in the sense that there can no be offence without law).²⁷ The rule of law goes beyond the use of legal instruments. It involves the rule of justice and protection for all members of society against excessive governmental power.²⁸ Therefore, the execution of State power must be based on laws that were made according to the Constitution and with the aim to safeguard freedom, justice and legal certainty.²⁹

The realisation of SERs depends fundamentally on the respect to the rule of law. In 1993 the UN World Conference on Human Rights in Vienna underlined that principle of the rule of law and the protection and promotion of human rights are inseparable.³⁰

²⁴ S Khosa *Social economic rights in South Africa* (2007) 17.

²⁵ BC Smith *Good governance and development* (2007); See also ICJ (n 23 above) 8.

²⁶ Smith (n 25 above) 4/5.

²⁷ Smith (n 25 above) 78/79.

²⁸ W Benedek (ed) *Understanding human rights, manual on human rights education* (2006) 169, citing international commission of Jurists.

²⁹ Benedek (n 28 above) 172.

³⁰ The World Conference on Human Rights: Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23.

Realisation of SERs means to give effect to the provisions of SERs in order to make them real and effective. This leads to the socio-economic empowerment of the vulnerable and marginalised people understood. Vulnerable people include the illiterate and poor people with critical economic difficulties to access justice and claim their rights on their own, thus needing a special protection of their SERs.

1.10 Literature survey

There are limited articles and books written on the field of justiciability of SERs in Mozambique. However, across national boundaries, there is a wide body of literature that helps to interrogate the realisation of SERs in Mozambique.

Sibonile Khosa³¹ edited a book on the history, development and articulation of different legislation and institution for the realisation of SERs in South Africa including the interpretation of the main cases on SERs in South Africa and the trends of protection of each SERs within the fight against corruption.

Boaventura Sousa Santos and Joao Trindade³² edited a book in two volume that provide a detailed background of the transition to multiparty democratic system embedded in the 1990 Constitution including a comprehensive and global overview of the administration and environment of justice in Mozambique from 1975 to 2003.

Frans Viljoen³³ a well known professor and researcher on law and human rights issues discuss in depth the realisation of human rights in Africa. He also underscores the importance of the International Human Rights Law in Africa. Furthermore he offers an explanation of justifiability of socio economic rights at the domestic level including Mozambique. Viljoen presents briefly analyse of the justiciability of SERs in Mozambique.

B.C. Smith³⁴ addresses the issues of good governance including the definition and functioning of rule of law, human rights, poverty, corruption, participation and accountability. He basically explains the theoretical and practical concerns about quality of governance in general.

³¹ Khosa (n 24 above).

³² BS Santos and JC Trindade (eds) *Conflito e Transformacao Social: Uma paisagem das justicas em Mocambique* (2003) Vol. I and II, in English means (in Conflict and Social Transformation: a view of justices in Mozambique).

³³ Viljoen (n 18 above).

³⁴ Smith (n 25 above).

Amartya Sen³⁵ is one of the most notable scholars on development and socio-economic issues. He defined development as freedom, freedom from basic needs, poverty and hunger. However, the author does not provide a direct legal perspective of development and freedom.

A book edited by Wolfgang Benedek³⁶ deals with the concept, nature and challenges of human rights and also explains human rights as a way of life that we should all take to build justice in the society.

Daniel Brand D and Christopher Heyns³⁷ edited a book on the theory and practice of SERs in South Africa. They explain the role of SERs in South Africa. They provide details of specific SERs, including their implementation and enforcement through the South African Constitution.

Tony Hodges and Roberto Tibana³⁸ examine the mechanisms and the treatment of the process of the State budget of Mozambique within the role of three powers of the Government on implementing good governance and democracy in fulfilling citizen's right.

1.11 Overview of the chapters

The study is structured in five chapters. The introduction which gives the overview of the research topic and its aims represents the first Chapter. Chapter Two focuses on contextualization and the philosophical content of SERs, including the role of their implementation and enforcement in international and African human rights systems. Chapter Three analyses the legal framework of SERs in Mozambique and its function in the realisation of SERs. It discusses and critically analyses the legal obstacles and the possibility for effective justiciability, enforcement and implementation of SERs under the Mozambican Constitution. Other national and international instruments that impose a duty on the Mozambican Government to respect, promote, protect and fulfil SERs are also considered. In this Chapter, a brief outline and discussion of the approach to SERs in South Africa and Ghana is also done. Chapter Four discusses the peculiar institutional system, particularly the role of separation of powers in the realisation of SERs. It also brings to light some of the main practical obstacles to the realisation of SERs in Mozambique and the importance of civil society in promoting the protection of SERs. Chapter Five provides recommendations and a Conclusion.

³⁵ A Sen (n 19 above).

³⁶ Benedek (n 28 above).

³⁷ D Brand and C Heyns *Socio economic rights in South Africa* (2005).

³⁸ T Hodges and R Tibana *A economia politica do orcamento em Mozambique* (2005). In English (The political economy of Mozambican State budget).

CHAPTER TWO

THE THEORETICAL PERSPECTIVE OF PROTECTION OF SERs AT THE INTERNATIONAL AND REGIONAL LEVEL

2.1 Introduction

At the beginning of the 21st century the international community functioning under the auspices of the UN affirmed the elimination of poverty and the implementation and enforcement of human rights as the greatest challenge.³⁹ Consequently, the practice of democracy, rule of law and good governance are now part of the prevailing rhetoric. This pre-eminent legal and political system is viewed as a panacea to expand the opportunities for people to improve their standards of living and facilitate access to the minimum resources required to lift people out of the worst forms of poverty.⁴⁰

The enjoyment of SERs is based on respect for human dignity, equality and the protection of individual freedoms to realise one's potential. It is argued by human rights researchers that the advancement of human rights is particularly important for the world's poorest people, for without rights especially the realisation of SERs, they probably face the risk of remaining in severe poverty and marginalisation.⁴¹

The purpose of this chapter is to provide the content, characteristics and importance of SERs as well as their role at the international level and their relevance at the domestic level.

2.2 Historical basis of protection of SERs

*'Every human being inherently knows human rights – we each know when injustice is present and that justice is the ultimate expression of human rights'*⁴²

Most of the academics/researchers and institutions in the field of human rights have advocated that the development of a human rights culture as a way of life can result in real changes in people's lives and contribute to enable people to enforce their rights through domestic Courts and international human rights bodies.⁴³ Currently, there are several

³⁹ United Nation Development Programme (UNDP) Human and Development Report, 2000 'Human rights and development'; See also United Nations Millennium Declaration adopted by the General Assembly Resolution A/RES/SS/2 of 18 September 2000, and K Annan 'In Larger Freedom: Towards development, security and human rights for all', Report of the Secretary-General, UN Doc A/49/2005, 21 March 2005.

⁴⁰ Sen (n 19 above).

⁴¹ Smith (n 25 above) 48.

⁴² Benedek (n 28 above) 22.

⁴³ C Lillian 'Claiming economic social and cultural rights at international level' (2009) 1; see also ICJ (n 23 above) 1. The African Commission has also been claimed the same position and challenging the State parties to address human rights issues as required in the human rights treaties.

international human rights treaties, national Constitutions and legislation that recognise the right to a remedy for violations of SERs in the same vein as civil and political rights.⁴⁴

For decades, recognition of SERs as human rights and their justiciability has been neglected in favour of civil and political rights.⁴⁵ They have often been treated as ‘simple aspirations or second class rights’ and it was thought impractical to give SERs the status of human rights.⁴⁶ It was argued that the judicial enforcement of such rights was inappropriate because of their nature as positive rights that require the allocation of resources from the Government.⁴⁷

SERs were granted the formal legal status of fundamental human rights through the adoption of the ICESCR in 1996.⁴⁸ The ICESCR came into force in 1976 and protects a wide variety of SERs. It is considered being a code of universal and binding international legal rules of SERs for those States ratifying it.⁴⁹ However, SERs lack adequate enforcement mechanisms and States have reservations in incorporating them in their legal system as justiciable rights when compared to civil and political rights.⁵⁰ In fact, SERs have received little legal protection in international and domestic law.⁵¹

Nevertheless, with persisting efforts to make SERs legally enforceable, they have been recognised as justiciable rights which can be enforced in the Courts and other ‘quasi-judicial’ international, regional and national bodies through binding legal instruments. General comments of the Committee on Economic, Social and Cultural Rights (CESCR) demonstrate clearly that they have legal power and that States parties have the legal duty to fulfil them.⁵² Furthermore, the international community has established that all human rights are ‘universal’, ‘indivisible’, ‘interdependent’ and interrelated, thus SERs must be given the same importance as civil and political rights. This position was reinforced in the Vienna Declaration and

⁴⁴ Examples include the International Covenant on Economic Social and Cultural Rights (ICESCR); the Optional Protocol on ICESCR (OP-ICESCR); the African Charter, and the national Constitutions of South Africa, Ghana and Mozambique.

⁴⁵ ICJ (n 23 above) 1.

⁴⁶ Khoza (n 24 above) 19.

⁴⁷ Khosa (n 24 above) 95.

⁴⁸ See preamble, objectives and purpose of ICESCR. In fact, a treaty is an international legal binding instrument, therefore the adoption of ICESCR aimed to give legal status to SERs. See also JM Moreno ‘The International Covenant on Economic, Social, and Cultural Rights’ in FG Isa and K Feyter (eds) *International protection of human rights: Achievements and challenges* (2006) 159.

⁴⁹ Moreno (n 48 above) 159. See also M Scheinin ‘Economic and social rights as legal rights’ in A Eide, C Krause and A Rosas (eds) *Economic social and cultural rights* (1995) 41.

⁵⁰ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (accessed 27/10/09); a number of the States member of the UN has not ratified the ICESCR, only in this year the OP-ICESCR was adopted, and most of African countries have not incorporate SERs in their Constitutions as justiciable rights.

⁵¹ khoza (n 24 above) 95/6.

⁵² General Comment No. 3 (1990) Committee on Economic, Social and Cultural Rights (CESCR) ‘The nature of the States obligation.’ <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (accessed 12 August 2009).

Programme of Action adopted by the World Conference on Human Rights in 1993.⁵³ Moreover, some SERs can be indirectly justiciable and enforced through civil and political rights. For example the right to life which can be used as a basis to enforce the right to health or water. This is particular well developed where violations of SERs are linked to violation of civil and political rights and it helps even in some jurisdictions where effective adjudication of SERs is limited or inexistent.⁵⁴

In order to challenge the allegation of vagueness of justiciability of SERs, the international community has increasingly acknowledged that the enforcement mechanisms for SERs need to be strengthened.⁵⁵ For this reason specific international instruments and institutions have been introduced to promote, protect and fulfil SERs at the international and national level.⁵⁶

2.3 The content and importance of SERs

SERs are those fundamental human needs that ensure that human beings have the capacity to obtain and maintain a minimum standard of living to ensure their human dignity.⁵⁷ Some scholars identify ‘SERs as those specific rights that give people access to certain basic needs (resources, opportunities and services) necessary for human beings to lead a dignified existence.’⁵⁸

According to the ICESCR, SERs include the right to work⁵⁹, the right to social security⁶⁰, the right to family protection⁶¹, the right to an adequate standard of living and to the continuous improvement of living conditions⁶², the right to enjoy the highest possible standard of physical and mental health⁶³, and the right to education, including compulsory primary education.⁶⁴ These rights were established to ensure a suitable environment to enable human beings to live with dignity, to have access to basic needs and to prevent systematic violations of their SERs. In fact, SERs are worded such that they require the ‘progressive realisation within available resources and over a reasonable period of time’ to be enjoyed.⁶⁵ Thus ‘they

⁵³ The World Conference on Human Rights: Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, part I, para. 5.

⁵⁴ ICJ (n 23 above) 65.

⁵⁵ Khoza (n 24 above) 101.

⁵⁶ Some examples include the OP-ICESCR and CDESCR.

⁵⁷ SERs are mainly recognised in instruments such as; the 1948 Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), Africa Charter and African Charter on the Child.

⁵⁸ Khoza (n 24 above) 20.

⁵⁹ Art 6, 7 and 8 of the ICESCR.

⁶⁰ Art 9 of the ICESCR.

⁶¹ Art 10 of the ICESCR.

⁶² Arts 11 of the ICESCR.

⁶³ Art 12 of the ICESCR.

⁶⁴ Art 13 of the ICESCR.

⁶⁵ Art 2 (1) of the ICESCR.

are important tools for these groups, who are often most affected by poverty and who experience a number of barriers that block their access to resources, opportunities and services in society.’⁶⁶ However, they may not always be realised ‘immediately’ as is the case for civil and political rights.

States must take legislative measure which must be supported by appropriate policies, programmes and implementation plans to give effect to SERs in the short, medium and long term.⁶⁷ States also have to ensure access to socio-economic opportunities over time and make services progressively accessible to the people without discrimination. Therefore, they are recognised as rights that impose a duty on the Government to create conditions and allocate resources for people to enjoy them. For that reason, SERs bring up the question of how efficiently and effectively resources are allocated for their realisation.

2.3.1 Justiciability of SERs

Justiciability is understood as an ability to benefit from the right to ask the judicial, quasi-judicial or related institutions a remedy for a violation for the right in question. Consist in its capacity to be invoked in these bodies so as to obtain their protection when violated.⁶⁸ It implies the existence and access of mechanisms that guarantee and protect the rights provided in the legal instrument such as treaties and constitutions. The legal instruments must therefore ensure the clear course of action and the appropriate Court to enforce the claimed right whenever violated.⁶⁹

2.3.2 International Standards for the protection of socio-economic rights

The protection of SERs is based on the concept of human dignity and the values which underline it. Non-discrimination, equality, solidarity, fundamental freedoms and minimum core are all values which determine the integral dignity of the human being, communities, and humankind in general.⁷⁰ These standards are to be complied with whenever authorities interpret, implement and enforce human rights.

2.3.2.1 Non – Discrimination and Equality

Article 2(2) of the ICESCR obliges each State Party “to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind...” In that

⁶⁶ Khoza (n 24 above) 20. See also A Eide ‘The right to an adequate standard of living including the right to food’ in Eide, Krause and Rosas (n 49 above) 93.

⁶⁷ Art 2 of the ICESCR see also CESCR General Comment No 3.

⁶⁸ Moreno (n 49 above) 159/160.

⁶⁹ ICJ (n 23 above) 6/40/41.

⁷⁰ Moreno (n 49 above) 155.

regard, non-discrimination and equality are qualified as the elementary underpinnings of international human rights law and as vital to the exercise and enjoyment of SERs.⁷¹

‘Discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world’s population. Economic growth has not, in itself, led to sustainable development and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination.’⁷²

2.3.2.2 Fundamental freedoms

The effective implementation of SERs requires individuals to be capable to participate in decision-making process and to be free from injustice and violations of the rule of law.

In order for States to ‘guarantee’ that SERs are enjoyed in the light of referred standards, States should ensure that legislation, strategies, policies, and plans of action address both ‘formal and substantive’ discrimination by public and private actors in the area of the SERs. Such instruments should clearly address the equality and fundamental freedoms for all groups, particularly the vulnerable groups, in order to accelerate the progressive realisation of SERs and ensure human dignity.⁷³

2.3.2.3 Minimum core obligation

According to paragraph ten of the General Comment No. 3 of CESCR SERs have to be interpreted and realised taking into consideration the principle of minimum core obligation in order to provide for all people the basic essential level of each SERs. This principle is generally justified to be a corollary of the concept of human dignity, therefore understood as a vital minimum for the particular survival of vulnerable people without which SERs such as health, food, and water would be meaningless.⁷⁴

2.4 Protection of SERs in International human rights instruments

Given that domestic systems often fail to protect human rights, international human rights mechanisms have developed to act as ‘safety nets’ for the protection of human rights.⁷⁵ The UN has established and adopted a number of human rights instruments and institutions at the

⁷¹ CESCR, General Comment No. 20 (2009) ‘Non-discrimination in economic, social and cultural rights’ (para 2) <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (accessed 28 August 2009).

⁷² CESCR, General Comment No. 20 (para 1).

⁷³ CESCR, General Comment n. 20 (para 37/8).

⁷⁴ ICJ (n 23 above) 23.

⁷⁵ R Smith, ‘The United Nations system of human rights protection’ in C Heyns and K Stefiszyn (eds), *Human rights, peace and justice in Africa: A reader* (Pretoria: PULP, 2006) 191.

international level which impact on the national level. Some of these instruments reinforce the implementation and enforcement of SERs.

2.4.1 The Universal Declaration of Human Rights (UDHR), 1948

The UDHR is the first international human right instrument to define and protect SERs.⁷⁶ The UDHR protects both civil and political rights and SERs and is recognised universally.⁷⁷ However, it is not a legally binding document. Despite this fact it serves as one of the main guidelines of human rights principles and is used as a source of aspiration for treaties and national constitutions including the Mozambican Constitution.⁷⁸

2.4.2 The ICESCR, 1966 and the Committee on Economic, Social and Cultural Rights (CESCR)⁷⁹

The ICESCR is the most important international instruments on SERs. This document represents the first international effort to transform the SERs in the UDHR into legally binding provisions. In this regard, it defines characteristics and the content of SERs as well as the process by which states must realise them.⁸⁰

Article 2(1) of the ICESCR set out that ‘States parties must take steps to progressively achieve the full realisation of the rights in the ICESCR.’ They must do this individually and through international assistance and co-operation, especially economic and technical cooperation. They must do so to the maximum of their available resources.

The main international body under the auspices of the UN for the promotion and protection of SERs is the CESCR. It is the supervisory body for the implementation of the ICESCR. It is mandated to receive State’s reports. It does not have, under the ICESCR, the power to decide individual and inter-State petitions. For such cases the Optional Protocol to the ICESCR (OP-ICESCR) was adopted to enable it to receive and determine individual and inter-State petitions and to extend the power of the CESCR.⁸¹ The CESCR also sets out ‘general comments’ that provide its interpretation of the rights and the nature of the obligations they impose on states.⁸²

⁷⁶ The Universal Declaration was adopted by UN in 1948.

⁷⁷ Arts 25 and 26 of the Universal Declaration provide for the right to health and right to education respectively.

⁷⁸ Art 43 of the 2004 Constitution.

⁷⁹ The CESCR was established under the ECOSOC Resolution 1985/17 of 28 May 1985.

⁸⁰ Art 2 and 3 of ICESCR.

⁸¹ <http://www2.ohchr.org/english/bodies/cescr>. See also both the Preamble and Art 1 of the OP-ICESCR.

⁸² CESCR General Comments available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm> (accessed 12 August 2009).

When determining whether a State has violated the ICESCR the CESCR will consider the 'reasonableness' of the steps taken by the state party in accordance with its obligations.⁸³ If it finds that there is a violation, the CESCR will state its views on remedies and make recommendations to the state concerned.

2.4.3 The Optional Protocol to the ICESCR (OP-ICESCR), 2008⁸⁴

The OP-ICESCR was adopted to empower the CESCR to receive complaints about violations of the rights protected under the ICESCR. It offers an opportunity to those whose SERs have been violated to seek justice at the international level as a means of last resort. Thus, victims of violations of their SERs must exhaust local remedies and ensure that the national justice system has failed to give an appropriate remedy.⁸⁵

The Optional Protocol provides, therefore, three main complaints procedures. The first is individual complaints. The person making the complaint ('the author') must be a victim of the violation of a right or rights protected under the ICESCR.⁸⁶ The second procedure is inter-state complaints. These are complaints made by one state against another.⁸⁷ The last procedure is inquiries. These allow a mandated body to investigate grave and systematic violations of human rights.⁸⁸ The OP-ICESCR is not yet in force. It will come into force three months after the deposit of the 10th instrument of ratification.

2.5 The African regional human rights system and SERs

The African regional system was established in 1981 when the African Charter was adopted by the Organisation of African Unity (OAU) now superseded by the African Union (AU). This system considers the specific circumstances affecting the region in defining rights to be protected. 'SERs play a central role in the current human rights discourse in Africa,'⁸⁹ and are seen as the 'only means of defence against poverty for millions of the poorest people and marginalised groups in Africa.'⁹⁰

In addition, the Constitutive Act of the AU has reinforced the commitment to human rights protection in the region. Its preamble refers to the African struggle for the human dignity of 'our people' and 'to promote and protect human and peoples' rights. Further, its article 3 sets

⁸³ Art 8 (4) of the OP-ICESCR.

⁸⁴ The OP-ICESCR was adopted by the UN General Assembly on 10 December 2008.

⁸⁵ Art 3 of the OP-ICESCR.

⁸⁶ Art 2 of the OP-ICESCR.

⁸⁷ Art 10 of the OP-ICESCR.

⁸⁸ Art 11 of the OP-ICESCR.

⁸⁹ SC Agbakwa, 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) in C Heyns and K Stefiszyn (n 75 above) 70.

⁹⁰ Agbakwa (n 89 above) 70.

out as one of the objectives of the AU ‘to promote and protect human and peoples’ rights in accordance with the African Charter and other relevant human rights instruments...’

2.5.1 The African Charter

African Charter is not only seen as a testament to the collective recognition of the indivisibility of human rights and dignity, but also the most central regional treaty protecting SERs for all States parties, including Mozambique. It contains justiciable SERs. It sets the protection of the right to work⁹¹, health⁹², and education.⁹³ It also provides for the right to development⁹⁴, environment, and special assistance to the family⁹⁵, children, the aged, and people living with disabilities. However, the right to food, water, social security and housing are not explicitly mentioned.

The interpretation, implementation and enforcement of the African Charter are monitored by the African Commission on Human and Peoples’ Rights (African Commission).⁹⁶ This supervisory body has the power to receive State reports, inter-State and individual complaints, and undertake investigations on human rights matters.⁹⁷

On 25 January 2004, the protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights came into force. This Court reinforces the protective mandate of the commission. Therefore they complement each other.⁹⁸ The African Court has the power to consider cases and disputes about the interpretation and application of the African Charter, the African Court Protocol and any other relevant human rights instrument ratified by the states concerned.⁹⁹ Efforts have been made to merge the African Court with the African Court of Justice. The African Court of justice is intended to be the principal judicial organ of the African Union (see article 2(2) of the Protocol of the Court of Justice of the African Union, 2003).¹⁰⁰

2.5.2 Other African treaties relevant to SERs

The African Charter on the Rights and Welfare of the Child, 1990 has several articles that protect the children’s SERs while taking into consideration an ‘African fingerprint’ and

⁹¹ Art 15 of African Charter.

⁹² Art 16 of African Charter.

⁹³ Art 17 of African Charter.

⁹⁴ Art 22 of African Charter.

⁹⁵ Art 18 of African Charter.

⁹⁶ The African Commission was constituted and met for the first time in 1987

⁹⁷ Art 45 of the African Charter and <http://www.achpr.org> (accessed on 2 September 2009)

⁹⁸ Art 2 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (1998/2004) (Protocol on the African Human Rights Court).

⁹⁹ Art 3(1) of the African Court Protocol

¹⁰⁰ <http://www.africancourtcoalition.org> (accessed on 2 September 2009).

perspective. The supervisory body for the implementation of the African Children's Charter is the African Committee of Experts on the Rights and Welfare of the Child.¹⁰¹

Another treaty is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 which protects significant women's SERs. The implementation of this treaty is monitored by the African Commission and the African Court as they have the same mandate under the African Charter.

The AU Convention on Preventing and Combating Corruption 2003 also plays an important role in the full realisation of SERs.

2.6 The importance of international and regional human rights law for the realisation of SERs in Mozambique

'Implementation and enforcement of human rights law has to take place domestically, where rights are protected most effectively.'¹⁰² Before one rushes to claim rights on the international level they are required to first exhaust local remedies. International law is therefore 'subsidiary' to the national regime.

The international and regional human rights systems can serve as model of how to establish mechanisms of implementation of SERs. States are required to use all necessary means available to 'give effect' to the legal provisions and pronouncements of treaty bodies in its domestic policies and legislation.¹⁰³ They can assist to overcome prejudices against justiciability of SERs in Mozambique. International treaties can also illustrate the necessity of providing effective remedies in order for the State to be in compliance with its obligations to enforce SERs. These systems impose the language and paradigm of human rights in the governance process and they legitimise claims and encourage the domestic judicial enforcement of SERs.

2.7 Conclusion

The route to achieving goals of SERs depends on the commitment of the government to the protection of human rights.

¹⁰¹ <http://www.africa-union.org/child/home.htm> (accessed 2 September 2009).

¹⁰² Viljoen (n 18 above) 10.

¹⁰³ Viljoen (n 18 above) 32.

CHAPTER THREE

LEGAL FRAMEWORK TO THE PROTECTION OF SERs IN MOZAMBIQUE

3.1 Introduction

This study advocates that an existence of a transparent and well structured legal and institutional human rights law system which addresses the essential values of human dignity and the basic needs of people (particularly the vulnerable and marginalise groups), largely constitute the first step to realising SERs for all citizens.

How the legal framework deals with the implementation and enforcement of SERs are the main discussions that this chapter will address. In consideration to this, a brief analysis of South Africa and Ghana legal system in implementing and realising SERs will be considered.

3.2 Protection of SERs in the Mozambican Constitution

The Constitution is the supreme legal document in Mozambique that draws the basis for all social, economic, legal and political systems in the nation.¹⁰⁴ It is the legal Statute of the State.¹⁰⁵ It offers the legal tools that enable the legal empowerment of poor and marginalised groups to enjoy and claim their constitutional rights. The manner in which SERs is protected in the Constitution is an expression and acknowledgement of the justiciability of SERs.

The Constitution sets out SERs as protected and justiciable rights. In fact, its articles 62 (1) and 70 guarantee access and recourse to the Courts whenever a person experiences the breach of his constitutional rights.¹⁰⁶ In these provisions, the legislator does not make a distinction between SERs and civil and political rights in the ability of their judicial complain procedure whenever violated. They are both protected fundamental human rights and their violation can be justiciable and enforceable. Thus, the content and nature of SERs can not be an allegation to refuse their justiciabilty. This reinforces the prevailing principle ‘if legislator does not make a distinction, the interpreter is not allowed to make it in an attempt to substitute the power of the legislator.’ In addition, the Constitution sets out the right of popular action for all citizens as a tool to judicially claim some SERs such as the right to health.¹⁰⁷ But the operation of this right depends on the implementation ordinary law to give effect to it. To give

¹⁰⁴ Art 2(4) and 3 of the 2004 Constitution.

¹⁰⁵ G Cistac ‘The three powers of the State’ in CIP (n. 3 above) 16.

¹⁰⁶ See n 16 above.

¹⁰⁷ Art 81 (1) (2) (a) (b) of the 2004 Constitution state that: 1. ‘All citizens shall have the right to popular action in accordance with the law, either personally or through associations for defending the interests in question. 2. The right of popular action shall consist of: a) the right to claim for the injured party or parties such compensation as they are entitled to; b) The right to advocate the prevention, termination or judicial prosecution of offences against the public health, consumer rights, environmental conservation and cultural heritage.’

effect to such enforcement provisions, it is necessary to identify the Courts that have the power to adjudicate cases against the State for violation of SERs or fundamental human rights.

The Constitution sets out three categories of Courts in the country: Supreme Court, Administrative Court and the Courts of Justice.¹⁰⁸ It defines the Supreme Court as the highest body within the hierarchy of Courts of Justice.¹⁰⁹ Yet it states that Courts of Justice have the ordinary jurisdiction in civil and criminal matters and also exercise their jurisdiction over all remaining matters not attributed to other jurisdictional orders.¹¹⁰

It is not clear if the Courts of Justice have the mandate to adjudicate cases where the State is a party in the matter through its public authority or its sovereignty. Civil matters in the Mozambican legal system are interpreted as matters that involve juridical relation of private persons in juridical issues of non-public nature. On the contrary, judicial actions regarding SERs and human rights in general, are basically litigations against the State. The State is the only one who has the duty to protect human rights. For that reason, it seems that the State cannot be held accountable by the Courts of Justice. Thus, one can argue that the State cannot stand in Courts of Justice when empowered by its public autonomy.

According to the Constitution, the Administrative Court has the power to adjudicate cases concerning disputes arising from administrative legal relations.¹¹¹ Consequently, it will adjudicate violation of SERs if they are within its jurisdiction. SERs violations represent a breach of law by the State within the function of public administration of the nation. Nevertheless, the problems come in when the violations take place out of administrative juridical relations. In those cases which court has the power to deal with the matters?

This concern can particularly arise if the Administrative Court declares that it does not have the mandate to deal with SERs matters arising out of its jurisdiction. In these cases, the Courts of Justice might extend their mandate to cover it. This comes from the extension of their jurisdiction i.e. 'all remaining matters not attributed to others jurisdictions.'¹¹² However, since the Courts of Justice have ordinary jurisdiction on civil and criminal matters, the question whether they have the power to adjudicate cases where the State is a part is not expressly stated remains open and debatable.

¹⁰⁸ Art 223 (1) of the 2004 Constitution.

¹⁰⁹ Art 225 of the 2004 Constitution.

¹¹⁰ Art 223 (4) of the 2004 Constitution.

¹¹¹ Art 230 (1) of the 2004 Constitution

¹¹² Art 223 (4) of the 2004 Constitution.

The Constitution sets out in article 212 (1) (2) that ‘the function of the Courts is to guarantee and strengthen the rule of law as an instrument of legal stability, and they must guarantee respect for the laws and safeguard the rights and freedoms of citizens.’ Moreover, ‘the Courts shall punish breach of the legal order and shall adjudicate cases in accordance with the law.’ That is meaningful for enforcement of human rights as legal entitlements that can be claimed in the Courts. It is also related to the general principle set out in article 56(1) of the Constitution that ‘individual rights and freedom shall be guaranteed by the State and shall be exercised within the framework of the Constitution and the Law.’

Curiously, article 241 (1) of the Constitution states that ‘the Constitutional Council is a sovereign public office with special jurisdiction to administer justice in matters of a legal-constitutional nature.’ In fact, the Constitutional Council acts and functions as an ‘authentic Court.’¹¹³ However, it is not defined as a Court in the Constitution. Constitutional Council and realisation of SERs is discussed in the next Chapter.

The Constitution also sets out that the Government has the obligation to guarantee the enjoyment by citizens of their rights and freedoms. When the Government fails to give effect to its constitutional obligations regarding SERs, whether by inaction or action, it breaches the law. The victims of such violations can recourse to the Courts and ask for remedy of violation of their SERs. However, there is no clarity on the category of Courts that can enforce or remedy violation SERs. The question remains: should it be the Administrative Courts or Courts of justice?

According to the law, the Courts can not refuse to adjudicate the matters alleging that the law is not clear or that there is no defining law about which Court has the mandate on a case.¹¹⁴ Further, the general principle set out in the Constitution is that individual rights and freedoms shall be guaranteed by the State, and shall be exercised within the Constitutional framework and the law.¹¹⁵

State must ensure that all citizens can enforce their rights set out in the Constitution, otherwise it is considered as denial of access to justice and a breach of the right to access and to recourse to the Courts.¹¹⁶ Further, if the Court in question alleges that it has no jurisdiction

¹¹³ Constitutional Council has adjudicate and decided in several cases regarding electoral disputes and unconstitutionality of laws and other regulations as presented in its report of activities 2003-2008 <http://www.cconstitucional.org.mz/UserFiles/File/Tsave/relatorio/Act2003%202008%20aprovado%20em%20sessao%20de%2013X08.pdf> (accessed 02/10/09).

¹¹⁴ Art 8 of the Civil Code of Mozambique.

¹¹⁵ Art 56(1) of the 2004 Constitution.

¹¹⁶ Art 62 and 70 of the 2004 Constitution.

of a particular matter, it must show and inform the victim and the public which Court has that power, through the principle of collaboration of public administration and the obligation to inform the citizens about the protection of their right.¹¹⁷

3.2.1 Interpretation of SERs within the function of the Mozambican public administration

Constitutionally SERs are argued by some notable academics to be blueprints for State's manifold activities that proactively guide and shape legislative action, policy formulation and executive administrative decision-making.¹¹⁸ This position is reinforced by Cristina Queiroz when she argued that fundamental SERs imply objective duty of States to create conditions in order to realise SERs.¹¹⁹

In order to give effect to the SERs, the Constitution set out in article 203 that the Government has the responsibility to administer the country and ensure the development of quality of life of citizens by implementing fundamental human rights and freedoms through its constitutional function and mandate.¹²⁰ It is through these constitutional duties that the Government has to ensure and implement constitutional policies, strategies and programs to realise SERs within reasonable time and available resources.

SERs are interpreted basically as 'programmatically norms.' This was influenced by the Constitutional system of the Republic of Portugal that colonised Mozambique.

In fact, the interpretation of SERs as 'programmatically norms' reveals that the State has the constitutional obligation of legislating, planning and managing available resources and may take other measures in order to realise SERs. Some academics argue that the role of SERs in domestic Constitutions as protected and justiciable rights whether understood as 'programmatically norms' or not, implicate the Government to make decisions within transparent programmes and institutions that are accountable, capable and democratic.¹²¹

Constitutionally SERs are understood as 'programmatically norms' in the sense that if they need ordinary law to be implemented, it can raise the question of direct or indirect application of

¹¹⁷ Decree 30 of 2001, 15 October (Operational Norms of the Public Administration Services of the Republic of Mozambique).

¹¹⁸ Brand and Heyns (n 37 above) 2.

¹¹⁹ C Queiroz *Diretos fundamentais sociais, questões de interpretativas e problemas de justiciabilidade* (2006) 16.

¹²⁰ Art 203 (1) of the 2004 Constitution states that: The Council of Ministers shall secure the administration of the country, shall guarantee its territorial integrity, shall safeguard public order and the security and stability of citizens, shall promote economic development, shall implement the State's social agenda, shall develop and consolidate legality and shall carry out the country's foreign policy.

¹²¹ Queiroz (n 119 above) 124-129/149; ICJ (n. 23 above), and Viljoen (n 18 above) 569/570.

Constitution. For example, the Constitution sets out the right to health (article 89) that must be implemented 'within the terms of the law' and understood as 'claw backs' norms. On the other hand, the right to housing (article 91) does not require the implementing law or 'claw backs' laws to be implemented. Rather, it can be direct implementation through the Constitution. Even though is still 'programmatic norm' because the State has to create appropriate measures that include institutional, normative and infrastructural conditions to realise the right to housing.

3.2.2 The Mozambican Constitution and International law

The international law instruments become automatically part of the ordinary legislation of Mozambique following their ratification by the Assembly of the Republic and subsequent publication.¹²² The process of domestication of international law is basically through the monist system. Monist system means that 'international law is incorporated directly into the domestic legal system, allowing for the immediate domestic application of international treaties.'¹²³

The Mozambican Constitution must be interpreted taking into account the principles of the Charter of United Nations and the Charter of the Organisation of African Unity.¹²⁴ In addition, the constitutional principles regarding fundamental rights shall be interpreted and incorporated in harmony with both the Universal Declaration of Human Rights and the African Charter of Human and Peoples Rights.¹²⁵

However, Mozambique has ratified more instruments regarding civil and political rights rather than on SERs and it has tended not to ratify provisions that allow for individual petitions to be made to the international treaty bodies.¹²⁶ This fact can be understood as lack of interest or political will to take legal responsibility for violation and of fundamental human rights at international level.

¹²² Art 18 (1) (1) of the 2004 Constitution states that: 1. 'Validly approved and ratified International treaties and agreements shall enter into force in the Mozambican legal order once they have been officially published and while they are internationally binding on the Mozambican State.' 2. 'Norms of international law shall have the same force in the Mozambican legal order as have infra-constitutional legislative acts of the Assembly of the Republic and the Government, according to the respective manner in which they are received.'

¹²³ ICJ (n 23) 19.

¹²⁴ Art 17 (2) of Constitution of Mozambique state that: The Republic of Mozambique shall accept, observe and apply the principles of the Charter of the United Nations and of the Charter of the Organisation of African Unity.

¹²⁵ Art 43 of the 2004 Constitution.

¹²⁶ Some examples include Optional Protocol to the International Covenant on Civil and Political Rights, Optional Protocol to CEDAW and the ICESCR.

The African Charter is the international binding document that reinforces the general justiciable SERs of everyone in Mozambique. Therefore, the African Commission and the establishment of the African Court of Justice can be useful to challenge effective realisation of SERs in Mozambique.

3.3 Ordinary legislation in Mozambique and SERs

3.3.1 Organic Law of the Judicial Courts¹²⁷

The present law provides the legal basis of the powers, organisation and function of the Judicial Courts and gives effect to their definition and mandate as set out in the Constitution. Nevertheless, it does not clarify the power of these Courts to deal with SERs matters and human rights in general. Further, it does not clearly explain the meaning, scope and extension of their jurisdiction to ‘all remaining matters not attributed to other Courts.’ Instead of clarifying the jurisdiction of the Courts of Justices, it repeats the same provision of the Constitution regarding their jurisdiction.

3.3.2 Organic Law of the Administrative Court¹²⁸

The Organic Law of Administrative Court provides the legal basis of the powers, organisation and function of the Administrative Court. It basically says that this court has the power to adjudicate cases arising from juridical administrative relations.¹²⁹ But it does not clarify its power regarding SERs and human rights in general. In fact, if violations of SERs result from administrative legal relations it has the power to deal with such violations of SERs. But not all violations of SERs results from these relations. Therefore, the power of the Administrative Court to deal with human rights cases is restricted or limited.

The law in question set out limitations of the jurisdiction of the Administrative Court whenever the matters arise from acts of political function of the government, from acts of legislative function, and acts from criminal procedures and actions.¹³⁰ If violations of SERs arise from one of these acts, the administrative court does not have the power to deal with them. However, that does not mean that there is no jurisdictional protection of violation of SERs arising from these acts. It simply means that it should be the power of others jurisdiction and not the jurisdiction of the Administrative Court.¹³¹ In that situation, the question posed is which other jurisdictions have the power to deal with these matters? Do

¹²⁷ Lei n. 24 /2007, de 20 de Agosto (Lei de Organizacao Judiciaria); means Law 24/2007, 20 August (Organic Law of the Judicial Courts).

¹²⁸ Lei n. 5/92, de 6 de Maio (Lei Organica do Tribunal Administrativo); means Law 5/92, 6 May (Organic Law of Administrative Court).

¹²⁹ Art 1 and 4 of the Organic Law of the Administrative Court.

¹³⁰ Art 5 of the Organic Law of the Administrative Court.

¹³¹ A Chambule ‘Notes and comments on the Organic Law of Administrative Court’ (2001) 45.

these matters fit within the ‘all remaining matters not attributed to other Courts’ of the jurisdictions of the Judicial Courts?

The formalities required to fulfil the file as to lodge a complain for the violation of SERs or other rights within the jurisdiction of Administrative Court are very complex in such way that even lawyers sometimes fail to adequate them as required. Therefore, file complains are often dismissed just because of these formalities and not because the Court have no mandate to deal with the matter. Further, these formalities include very short time period (deadlines) required to file complain at first instance or appeal.

3.3.3 The State Budget¹³²

The State Budget Law is important for SERs because it defines the allocation of resources not only for the sectors relevant to the realisation of SERs, but for almost all social, economic, political and cultural administration of the country.¹³³

Provide detailed and regular information about the implementation of the State budget can represent an important factor of participation to allow citizens follow up the government’s commitment in realising SERs. It can also contribute in building a legal environment to promote and provide transparency and accountability in the use of public resources. It is therefore important to challenge the State budget in order to align it with the realisation of SERs.

Whether the resources available are or not enough to realise SERs is not the problem that this research addresses. But how efficiently available resources are utilised to gradually realise SERs is more important in complying with the fundamental SERs provided in the Constitution. If the State demonstrates that it has used the available resources according to its constitutional obligations and the rule of law, it can not be blamed for not having enough resources to realise SERs.

Mozambique is a developing country and its budget is heavily dependent on external funds. It has been argued by some national academics and non-governmental organisations (NGO’s) such as Roberto Tibana and Tony Hodges that the process of the budget involves basically the participation of two actors: The executive and the external donors. Consequently, the accountability of the Mozambican Government to the external donors is stronger than the one

¹³² The State budget is approved by law. For example the Law 1/2009, 8 January approves the State Budget of 2009.

¹³³ See for instance the Law No. 1/2009, 8 January which approve the State Budget of 2009.

given to the national society.¹³⁴ Further, the same authors argue that the formulation of the State budget is not oriented by clear and objective criteria that give priority to the basic socio-economic concerns. Its criteria are basically the ones recommended by the donors.¹³⁵

This position has been reinforced in the studies of some national NGOs regarding the formulation and execution of the Budget of the State. For example, Centre for Public Integrity (CIP) has analysed the proposed budget for the year 2009 taking into consideration the evaluation of the process of formulation and operation of the State Budget between the years 2005 and 2008.¹³⁶ In this study, CIP raises concerns about lack of clear criteria and correlations of the budgetary with the Plan of Action for the Reduction of Absolute Poverty 2006-2009 (PARPAII) and the Government Economic and Social Plan (PES) that are somehow 'transverse and inconsistent components.' CIP's study also reveals that the budget for 2009 lack some detailed information such as the comprehensive description of incomes per sector or institutions that are expected to be generated. Finally, it criticises the fact that allocation of resources are concentrated in the central level of Government and public administration rather than equitably distributed within local level (provincial and district).¹³⁷

Tony Hodges and Roberto Tibana go beyond in their study to argue that there is not only one global and consistent State budget but several sub-budgets and systems of budget including the *Off-budget* (extra-budget). Yet they argue that the control of the budget resources is wide and scrappy because of the nature of the external funds that usually funds some Government projects in different and similar areas but not through the approved State budget law.¹³⁸ They demonstrate that the process of the State budget is made within deficient and fragmented institutional systems and inadequate human resource capacities. Furthermore, they reveal that the issue of budget is not yet of interest to CSO's which have yet to engage deeply in the discourse of formulation and implication of State Budget in the people's lives. Even the media does not cover State budgetary matters in profound detail. The media only reports the budget when it goes to Parliament for its approval.¹³⁹

The present study also defends a position that the process within of State budget should be one of the main aspects in the discourse of the realisation of SERs. This is due to the fact the realisation of SERs might improve if the entire State budget is well known and that the use and operation of available resources is clear, discussed, understood and better allocated.

¹³⁴ Hodges and Tibana (n 38 above) 13.

¹³⁵ Hodges and Tibana (n 38 above) 15.

¹³⁶ CIP 'Good governance and the 2009 Mozambican State budget' (2008) 10/18/30/31.

¹³⁷ CIP (n.136 above) 10/18/30/31.

¹³⁸ Hodges and Tibana (n 38 above) 14/15.

¹³⁹ Hodges and Tibana (n 38 above) 13/14.

The annual State budget is a numerical expression of PES, PARPA II, and the five years Government Programme. However, PARPA II which is an important document to fight poverty and realise SERs as well as to fight corruption and implement good governance is approved only by Government without a public discussion through Assembly. PARPA II recognise the principle of minimum core obligation when set out its main objective and purpose as to reduce the levels of poverty defined to be ‘the impossibility, owing to inability and/or lack of opportunity for individuals, families, and communities to have access to the minimum basic conditions, according to the society basic standards.’¹⁴⁰ Nevertheless, the mechanism of accountability of PARPA II is not strong and transparent as well. Curiously, problems of lack of transparency and participation in important document involving peoples’ life seem to be symptomatic of Mozambican Government. An analysis of the review process of the 1990 Constitution of more revealed a similar lacks of transparency and participation. For example, the publication of the information given by the Ad-Hoc Committee on the constitutional review was limited to some political and social elites.¹⁴¹

3.3.4 Legislation on corruption and realisation of SERs

The issue of corruption within public administration in Mozambique is very complex with wide impact the people’s lives. It is another thesis on its own. The practice of corruption is directly linked to the illegal use of public resources that is fundamental to realise SERs. Corruption leads to increase poverty. It depletes the public resources necessary for effective realisation of SERs and compromises the practice of good governance. It is one of the current obstacles to the realisation of SERs.

Controlling and minimizing opportunities for the practice of corruption goes a long way to contribute to the effective allocation of resources defined to gradually realise SERs. The Government has adopted anti-corruption legislation; they include the Anti-corruption Law No. 6/2004¹⁴², the AU Convention on Preventing and Combating Corruption 2003, and plans and strategies such as Strategic Anti-Corruption (EAC)¹⁴³ and PARPA II. It also created the monitoring body on the implementation of legislation on corruption.¹⁴⁴

Corruption and related practice of illegal use of public resources allocated to the realisation of SERs can be fought through effective justifiability of SERs as to show that SERs are being

¹⁴⁰ PARPA II, 8.

¹⁴¹ G Cistac ‘ Critical view on the process of constitutional review of the 1999 Constitution: Issues of methodology’ in Faculty of Law of Eduardo Mondlane University *Contribute for the debate of constitutional review* (2004) 11-14.

¹⁴² Law no. 6/2004, of 17 June (introduces complementary mechanisms for the fight against corruption.

¹⁴³ Approved on April 2006.

¹⁴⁴ The monitoring body is the Central Anti-Corruption Office (GCCC).

effective realised as required by the Constitution. In one of the public debates on corruption during a workshop about the role of anti-corruption institutions organised and held in Maputo by CIP on 27 September 2007, two well-known lawyers in Mozambique, namely Lucinda Cruz and Antonio Frangoulis argued that corruption in Mozambique is very complex and with diverse dimension. In that regard they take the position that corruption should also be fought through other related judicial actions or judicial litigation.

This study defends that effective litigations of SERs and their realisation can help to fight corruption and vice-versa. These litigations can help fighting absolute poverty and 'bad governance' because the illegal use of public funds and resources limit realisation of SERs and the improvement of quality of peoples lives. In fact, fighting absolute poverty requires the removal of its obstacles such as corruption, limitation of access to SERs, social exclusion, inequalities and disrespect of rule of law. PARPA II also adopt this way of fighting poverty at least in theory. Nevertheless, its implementation is problematic. Amarty Sen in addition argue that 'the more inclusive the reach of, the more likely it is that even the potentially poor would have a better change to overcoming penury.'¹⁴⁵

Here are some examples of corruption involving senior and prominent figures of Government: The former Minister of Interior of Mozambique (Almerinho Manheje) is facing judicial prosecution in an alleged case of corruption of illegal use of public funds involving approximately US\$8.8-million. Other members include Diodino Cambaza the former executive director of Airports of Mozambique (ADM)¹⁴⁶, and the former Minister of Transports and Communications (Antonio Munguambe) who were also accused of illegal use of public funds.¹⁴⁷ These cases where brought to light in 2008 and they join the previous cases of alleged massive corruption, fraud and poor management of public funds particularly in the banks. These bank frauds were brought to light by the journalist Carlos Cardoso and the Economist Siba Siba Macuacua who were subsequently murdered in obscure circumstances in 2000 and 2001 respectively. Their murders sparked public outcry in Mozambique against corruption because it was publicly perceived that they were murdered because of their investigative reports on the Bank corruption scandals which were rumoured to have involved the son of the former president and other government figures at the time.¹⁴⁸ The murder of

¹⁴⁵ Sen (n 19 above) 90.

¹⁴⁶ Airports of Mozambique (ADM).

¹⁴⁷ This cases of alleges practices of Corruption was widely reported by several national Media (print, radio and television) and it can be consulted in the newspaper such the national daily news (journal noticias), SAVANA, o Pais, Zambeze, specifically from 22 September to December 2008.

¹⁴⁸ OSISA (n 10 above) 88/89.

Carlos Cardoso was judicially decided in 2003¹⁴⁹, but there is no significant development in the ongoing case of Siba-Siba since 2001.

Further detailed information on the trends of corruption and anti-corruption legislation and its impact on the quality of life of the people and protection of human rights in general can be seen in the book by Joseph Hanlon and Teresa Smart¹⁵⁰, in the CIP's report¹⁵¹ and the on the Mozambican Government's report on Corruption.¹⁵²

3.4 The approach of the Constitution of South and Ghana

3.4.1 The Constitution of South Africa.

South Africa has one of the most progressive Constitutions based on the fundamental values of human rights including human dignity, equality and non-discrimination and it is very advanced regarding effective justiciability of SERs.

The South African Constitution has clearly set out that SERs are justiciable and enforceable.¹⁵³ For that, it has defined the Constitutional Court as the highest and specific Court in constitutional matters.¹⁵⁴ Constitutional matters include issues involving the interpretation, protection or enforcement of the Constitution.¹⁵⁵

The South African Constitution says explicitly how the State must realise SERs. It states that 'State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of SERs in the bill of rights.'¹⁵⁶ The Mozambican Constitution adopted the similar approach regarding the right to housing in article 89 as explained above.

For further detailed information on the structures and each stage of the South African Bill of Rights litigation namely application, justiciability, and jurisdiction (as procedural issues),

¹⁴⁹ The trial was broadcast live on Mozambican radio and TV and was followed almost by everybody wide country.

¹⁵⁰ Hanlon and Smart (n 5 above) 223-260.

¹⁵¹ CIP, (n 15 above) and the Anti-Corruption Legislation in Mozambique, Contribute to an improvement in the anti-corruption legal framework in Mozambique (2008) respectively; <http://www.cip.org.mz/index.asp?sub=publ&doc>.

¹⁵² Ministerio da Funcao Publica , UTRESP, Relatorio sobre a implementacao da Estrategia Anti-Corrupcao (2008).

¹⁵³ Art 34 and 38 of South African Constitution.

¹⁵⁴ Art 164 (3) and 172 (2) (a) of the South African Constitution.

¹⁵⁵ Art 164 (7) of the South African Constitution.

¹⁵⁶ Art 26(2); 27(2) of South Africa Constitution.

interpretation, limitation and remedies (as substantial issues) consult the South African Bill of Rights Handbook.¹⁵⁷

3.4.1.1 The 1997 case of Soobramoney v Minister of Health, KwaZulu-Natal regarding access to health care (the Soobramoney case)¹⁵⁸

Mr Soobramoney was an unemployed man suffering from chronic kidney failure and was in need of dialysis treatment but the medical authorities declared him ineligible for such treatment. He approached the court alleging that his right to access health care had been violated under section 11 and 27 (3) of the South African Constitution which spells out the right to life and the right not to be refused emergency medical treatment respectively. He further asked for a remedy that constituted an order to the provincial hospital to provide him with the requisite dialysis treatment for his survival.

The Constitutional Court decided against his claim arguing first that his claim does not fall under ‘the right to medical emergency treatment’ because his disease was not a case of sudden catastrophe, but progressing care to prolong his life. Secondly, many other patients are in the same situation and the hospital in question could not provide for all of them. Thirdly, the hospital did not breach their guidelines that determine the requirements to benefit from the dialysis treatment when declared him disqualified for the treatment. Its decision was reasonable regarding the ‘reasonableness’ test order by the constitution.¹⁵⁹ Lastly, it argued that according to the Constitution, the right of health services is limited by the availability of resources.

The case in question demonstrates the practicality of justiciability of SERs and help to evaluate the availability of resources and its management including the performance on the delivery of social service by the government. However, it also demonstrates the limits and concerns of the justiciability of SERs.¹⁶⁰ Mr Soobramoney consequently died for not getting the treatment as claimed. The Court did not refuse the justiciability of SERs in question (right to health). Indeed, it demonstrates how this right can be justiciable.

¹⁵⁷ I Currie and J de Waal *The Bill of Rights handbook* (2005) chapter 1 to chapter 10.

¹⁵⁸ *Soobramoney v. Minister of Health, KwaZulu-Natal*, 1998 1 SA 765 (CC), November 27, 1997.

¹⁵⁹ According to the paragraph 41 of the case of *the Government of the Republic of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC), when the Constitutional Court of South Africa considering reasonableness it does not enquire whether other whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.

¹⁶⁰ ICJ (n 23 above) 52.

3.4.1.2 The 2000 case of *Grootboom and Others v Government of South Africa and Others (the Grootboom case)*¹⁶¹

The Grootboom case was related to the right to access to adequate housing. In this case, a group of homeless people, including adults and children, had been moved by local authority onto private land from their informal settlement in Oostenberg, Western Cape because of the bad conditions in which they lived. They were evicted from the private land and their building materials were destroyed. For that, they alleged that the State violated their right to access to adequate housing as stated in section 26 (1) and the right of children to shelter in section 28 (1) (c) of the South African Constitution. In order to get remedy for such violations, they sought an order from the High Court to direct the State to provide them with temporary shelter or housing until the time they find permanent accommodation. The High Court acknowledged the violation of the right of the children to shelter but not the right to adequate housing.

However, on appeal, Constitutional Court resolved the case in different terms of the High Court. It decided that the Government's housing programme did not follow and meet its housing rights obligation to take reasonable steps as required in section 26 (2) of the Constitution. It declared that this Government's programme was unreasonable, therefore, unconstitutional as it failed to comply with this provision. The Court further said that there is a need for the Government to take reasonable legislative and other measures. It also said that the policy or programme should be capable to achieve the progressive realisation of the right in question. Further, it argued that it must ensure the requirement of use of available resources.

It is important to note that this case also demonstrates that SERs can be justiciable as a means to challenge the government so as to effectively and efficiently implement SERs and involve the people in the decision-making process. It also demonstrates a way to challenge the government to be accountable about the function of public administration regarding realisation of SERs. In addition, it brings to light, as Professor Frans Viljoen argues, that effective implementation is part of the issue of justiciability as to ensure that the formulation of the government policy and strategies to realise SERs are not enough. They must be reasonably formulated and implemented according to the Constitutional obligation.¹⁶²

¹⁶¹ *Grootboom* (n 159 above).

¹⁶² Viljoen (n 18 above) 576.

3.4.2 The Constitution of the Republic of Ghana

The 1992 Constitution of the Republic of Ghana (Ghana Constitution) has clearly set out the jurisdiction of Courts to deal with violation of ‘any of the provisions on fundamental human rights and freedoms.’¹⁶³ It has defined the Supreme Court as the superior Court and with exclusive original power in all constitutional matters related to its enforcement or interpretation.¹⁶⁴ The person who experiences the breach of their fundamental rights can address the matters to the High Court, but it is the Supreme Court that has the original and exclusive power to deal with the case.¹⁶⁵ SERs understood as fundamental human rights can be justiciable and enforced in the Courts if violated. Chapter five of the Ghana Constitution does not make any hierarchy between SERs and civil and political rights. This means that they are susceptible or appropriate to be enforced by the Courts. Consequently, the Ghana Courts have considered matters involving the realisation of SERs as seen below.

In the recent 2008 case of Emmanuel Victor Asare and 3 Others v. Ga West District Assembly and the Attorney General.¹⁶⁶ The High Court of Justice of Ghana was tasked to enforce the fundamental human rights to life and property. The High Court of the case is subsequently referred to as the Mallam case – Mallam being the name of the area in which in applicant’s house was located. The Applicants homes in Mallam had been destroyed by the Ga District Assembly on the basis that they were illegally constructed and blocked the water way path, thus causing floods in the area. Mr. Asare and his co applicants sought the high court to enforce their human rights by ordering a prohibition on the destruction of their property by the defendants (Ga District Assembly) and further making reparations for all property destroyed.¹⁶⁷

The applicant’s case was brought to the High Court under Article 33 (1) of the 1992 Constitution of Ghana which provides that:

“Where a person alleges that a provision of this constitutions on the fundamental human rights and freedoms has been or is being or is likely to be contravened in relation to him, then without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress”.

The case was dismissed by Justice K Ofori Atta on the grounds that the lands on which the Applicants houses were built were illegally acquired, thus they were not due any

¹⁶³ Art 33 (1) (2) of the Constitution of Ghana.

¹⁶⁴ Art 126 and 13(1) (a) of the Constitution of Ghana.

¹⁶⁵ Art 33 (1) (2) (3) of the Constitution of Ghana.

¹⁶⁶ High Court of Justice, Automated Court 2, Accra, Ghana, Suit No. AP 36 / 2007. 2 May 2008

¹⁶⁷ See the Right to own property in Section 18 (2) of the 1992 Constitution Ghana.

compensation. His judgment acknowledge the importance of the right to life and property expressly stated in the African Charter on Human and People's Rights and the 1992 Ghana Constitution respectively. However he stated that encroachers cannot have the right to compensation or alternative accommodation.

Justice K Ofori Atta judgment is quite similar to the judgment of Justice Yaw Appua in the 2002 case of Issa Iddi Abass V Accra Metropolitan Authority (Ama) & another¹⁶⁸ (Subsequently referred to as the Sodom and Gommora case). Over 30,000 dwellers at Agboghloshie Market- a suburb of Accra, Ghana, referred to as "Sodom and Gomorrah" were faced with a planned forced eviction by AMA without alternative accommodation or relocation. The eviction was to pave way for the construction of a lagoon ecological zone by the Government of Ghana. The Center for Public Interest Law representing the applicants filed an injunction to restrain AMA and the Government of Ghana from effecting the eviction and a declaration that their Constitutional rights¹⁶⁹ to own property would be violated if the eviction is allowed to proceed without relocation or compensation.

Justice Yaw Appua in refusing the application for interim injunction sited the Grootboom case and said that there are real homeless people in South Africa unlike Ghana. He referred to the applicants as unlawful squatters and while admitting that all citizens of Ghana are entitled to property rights, such rights could not be achieved through lawlessness.¹⁷⁰

3.4.3 Conclusion: How can the legal system of Mozambique benefit from these approaches?

Mozambique can adopt the similar approach. Through the ordinary legislation the mandate of the Courts and the mechanism to enforce SERs can be clearly strengthened without the necessity of constitutional review which can be expensive, difficult and impractical. The Mozambican Constitution allows further clarification and implementation of its provisions through the ordinary legislation as long as it is consistent with the Constitution. Therefore, the jurisdiction and mandate of the Courts to deal with fundamental human rights or constitutional matters can be strengthened by amendment of the ordinary laws that define the organisation, powers and function of the Courts.

The South African and Ghana case laws on SERs can also help to inform the legal system of Mozambique in order to advance realise SERs.

¹⁶⁸ High Court of Justice, Accra, Ghana. Misc: 1203 / 2002.

¹⁶⁹ Right to own property spelt out in Section 18 (2) of the 1992 Constitution of Ghana.

¹⁷⁰ See the judgment at http://www.cepil.org.gh/ruling_31.pdf. p. 12 & 13.

CHAPTER FOUR

INSTITUTIONAL SYSTEM AND THE REALISATION OF SERs IN MOZAMBIQUE

4.1 Introduction

This chapter does not only deal with judicial institutions but also with other relevant institutions for the administration of justice and realisation of SERs in Mozambique including CSO's. The importance and the articulation of these institutions and obstacles to their functioning to realise SERs are the main points of discussion.

4.2 The role of Courts and enforcement of SERs

Generally the role of the Courts is to carry out their duty of law enforcement. The three official categories of Courts include Supreme Court, Administrative Court and The Courts of Justices. However, One can argue that there are only two official categories of Courts (Courts of Justices and the Administrative Court), because the Supreme Court is the highest body within the hierarchy of courts of justice. Thus it is a Court of Justice itself.¹⁷¹

According to the jurisdictional function of the Courts set out in article 231 of the Constitution; 'the Courts shall educate citizens and the public administration in the voluntary and conscientious observance of laws, thereby establishing a just and harmonious social community.' It is through this function that they can teach and apply principles of human rights in order to address the problems of protection and enforcement of SERs and also challenge the effective implementation of SERs by the Government. However, judges are still not very conscious of principles and content of human rights.¹⁷²

Mozambican Courts are vulnerable to interferences from other branches particularly the executive.¹⁷³ This compromises the independence of the Court's integrity and courage to adjudicate matters against the government or member of the governments regarding realisation of SERs. It is important to note that the Courts can influence how resources are used for realising SERs since the Government can be prosecuted if it fails to fulfil if it breaches the law, regarding SERs. Moreover, their decisions on SERs matters can influence and contribute to the legislative function to straighten the alleged vagueness of SERs.

The institutional capacity of the judiciary to cope with SERs adjudication depends also on the respect to the doctrine of separation of powers, allocation of material resources and the clarity

¹⁷¹ Art 225 of the 2004 Constitution. See also J Trindade and J Pedrosa 'Characterisation of the Mozambican judicial system and legal training' in Santos and Trindade (n 32 above) 289 Vol I.

¹⁷² OSISA (n 10 above).

¹⁷³ Cistac (n 115 above) 19. see also OSISA (n 10 above) 74/75.

of the legislation which is critical in Mozambique.¹⁷⁴ The judicial system lacks human and material resources.¹⁷⁵ The credibility of the judicial system of Mozambique is characterised by inadequacy access to justice and law, excessive delay on adjudication of judicial action, allegation of corruption within the judiciary, and limitation of independence of the judiciary.¹⁷⁶

In the view of this study the main problem within the Courts and the realisation of SERs lies first on their jurisdiction or mandate to deal with violations of SERs against the State and secondly on access to Courts by vulnerable people. Thirdly the unclear hierarchy of the Courts to deal with constitutional matters and last but not the least, the apparent neglected efforts in training the judges and empowering the Courts in human rights instruments, are also discussed in this study.

4.3 Constitutional Council

Constitutional Council was established under the 1990 Mozambican Constitution and came to effective function in 2003.¹⁷⁷ It was not created as a Court, but it has similar powers as the official Courts. It has a special jurisdiction to administer justice in matters of a legal-constitutional nature.¹⁷⁸ It is composed by judges and their decisions on constitutional matters are final.¹⁷⁹ Its decisions have status of Judgements as it is for the official Courts. Further, it has the power to adjudicate or settle conflicts of jurisdiction between the sovereign public offices that include the Courts. This latter power seems to provide a hierarchy of the Courts, placing the Constitutional Council as the highest one. The Constitution sometimes addresses the Constitutional Council in similar way of the mandate the Courts. For example, in its article 159 (g) regarding the general powers of the President to appoint the presidents of the existent categories of Courts, it includes the president of the Constitutional Council.¹⁸⁰ Thus,

¹⁷⁴ OSISA (n 10 above).

¹⁷⁵ For detailed information on difficulties on human and material resources on the judiciary system see J Pedroso, J Trindade and MML Marques 'Judicial System: Resources and procedural functioning' in Santos and Trindade (n 32 above) 319-337 Vol I; and OSISA, (n 10 above).

¹⁷⁶ Trindade and Pedroso (n 181 above) 277 Vol I.

¹⁷⁷ The Constitutional Council was created by the Constitution of 1990, came into force through the adoption of Law 9/2003, 22, October, Organic law of Constitutional Council which was surpassed/revoked by law 6/2006, de 2, August, as new Organic of Constitutional Council.

¹⁷⁸ Art 241(1) of Constitution of Mozambique.

¹⁷⁹ Art 248 (1) of the 2004 Constitution states that 'Judgements of the Constitutional Council shall be binding on all citizens, institutions and other legal persons, they shall not be subject to appeal and they shall prevail over other decisions.'

¹⁸⁰ Art 159 (g) of the 2004 Constitution sets that: 'In the performance of his functions, the Head of State shall have the power to: appoint the President of the Supreme Court, the President of the Constitutional Council, the President of the Administrative Court and the Vice President of the Supreme Court.'

one can ask if there is still doubt that the Constitutional Council is a jurisdictional office. All this has led some studies to characterise the Constitutional Council as a real Court.¹⁸¹

The Constitutional Council can play a significant role for the protection of human rights through its special jurisdictions on constitutional matters and also by its powers to evaluate and declare the unconstitutionality of laws and the illegality of normative acts of State offices.¹⁸² To date it has not made any clear pronouncements regarding the interpretation, justiciability and the procedures for the enforceability of SERs, including the power of the Courts to deal with the responsibility of the State for violation of SERs. In its reports of activities of the period between 2003 and 2008 there is no significant subjects about SERs matters as discussed in this research.¹⁸³ This report reveals that this body is in fact a 'Court' of electoral matters. Constitutional Council has basically decided on several electoral and unconstitutional matters.¹⁸⁴ One can ask if these matters are the totality of Mozambican constitutional issues. What about issues of mechanism of protection, interpretations, justiciability, enforcement and implementation of other fundamental human rights? Which body has the mandate to interpret them? Should this mandate rest with the Constitutional Council? An increase use of the Constitutional Council in adjudicating SERs and others fundamental human rights would contribute to clarify the mechanisms of human rights protection and also create a much needed jurisprudence to develop and reform the legal content and process.

Furthermore, the formality to access the Constitutional Council by individuals is very complex and limited since it seems that individuals can only access the Constitutional Council if they come together in a number of at least two thousand citizens. Individuals can access the Constitutional Council through the President of the Republic, the President of the Assembly of the Republic, at least one third of the deputies of the Assembly of the Republic, the Prime Minister, the Attorney General of the Republic, and the Ombudsman.¹⁸⁵ Because the provision in question deals with the request for evaluation of unconstitutionality one can ask

¹⁸¹ OSISA, (n 10 above) 33; see also T Timbana 'The judicial power in the constitutional review bill' in Faculty of Law of Eduardo Mondlane University (n 151 above) 146/14 8 and 151-153.

¹⁸² Art 244 (1) (a) (b) of the CRM, and Art 6 of Lei n.6/2006, de 2 de Agosto, Lei Organica do Conselho Constitucional.

¹⁸³ Report of the Constitutional Council activities during 2003-2008, approved on 13.10.08 available on <http://www.cconstitucional.org.mz/UserFiles/File/Tsave/relatorio/Act2003%202008%20aprovado%20em%20sessao%20de%2013X08.pdf> (accessed on 02/10/09). See also the evaluation of Constitutional Council activities 2003-2008 <http://www.cconstitucional.org.mz/UserFiles/File/Tsave/relatorio/BALANcO%20DE%20ACTVDADES%20008.pdf> (accessed 02/10/09).

¹⁸⁴ http://www.cconstitucional.org.mz/index.php?option=com_content&task=view&id=37&Itemid=54 (accessed on 02/10/09).

¹⁸⁵ Art 245 of the 2004 Constitution.

if access to Constitutional Council by singular person for other constitutional matters require the same criteria.

4.4 Ombudsman

Ombudsman or ombudspersons is an institution or office that was inaugurated by Sweden in 1809. This office was first taken up by other Scandinavian States and then spread out to other countries around the world. It was originally conceived as being mandated by parliament to monitor the application of laws by legal institutions and the public administration. This office has gradually led to play the role of defender of peoples' rights in respect of administrative authorities.¹⁸⁶

According to the Constitution of Mozambique, 'The Ombudsman is an office established to guarantee the rights of citizens and to uphold legality and justice in the actions of the Public Administration.'¹⁸⁷ This office was introduced by the Constitution in 2004 and reinforced by law n. 7/2006 of 16, August, which define its statute, procedures, and organisational structure. It was created to investigate the cases submitted to him on matters of fundamental rights, legality and justice. However, this office does not have the power to make decisions about such cases. His main role is to submit recommendations to the appropriate offices to correct or prevent illegalities or injustices.¹⁸⁸ According to article 259 (2) of the Constitution 'if the investigations of the Ombudsman lead to the conclusion that the Public Administration has committed serious mistakes, irregularities or violations, he shall inform the Assembly of the Republic, the Attorney General of the Republic and the central or local authority...' For that, he has to addresses pointed recommendations and measures to be considered by the referred offices.¹⁸⁹

However, to date, ombudsman is not yet in operation to carry on with his powers and ensure the protection and guarantee of rights of citizens and the rule of law. The reasons for the delay and ineffectiveness of this office never came up clearly. This situation is frustrating the expectations of citizens to use the office as a significant tool to protect Constitutional rights and ensure correct use of the rule of law by the public administration as well as to help other branches to realise human rights.

¹⁸⁶ J B Marie 'National Systems for the Protection of Human Rights' in J Symonides (Ed) *Human Rights: International protection, monitoring, enforcement* (2003) 265.

¹⁸⁷ Art 256 of the 2004 Constitution.

¹⁸⁸ Art 259 of the 2004 Constitution.

¹⁸⁹ Art 256 (2) of the 2004 Constitution.

4.5 President of the Republic and the separations of powers in realising SERs

The President of the Republic of Mozambique is the Head of State and through that the guarantor of the Constitution.¹⁹⁰ It is the most powerful sovereignty public office in the republic.¹⁹¹ His role includes addressing the nation through messages and communications plus informing the Assembly every year on the general state of the Nation. As guarantor of the Constitution and the Head of Government, the President of Republic plays an important role in the protection of Constitutional rights and the realisation of SERs.

The president can interfere and influence others branches of the State and the most important heads of the sovereign public offices are nominated by the President. The Courts, including the Constitutional Council where SERs and other fundamental human rights can be enforced or claimed are presiding by judges appointed by the President of the Republic as the Head of State. The extent to which Courts can freely deal with violation of fundamental human rights against the State is very limited.

Some other practical threats to the separation of power include the power of the President to dissolve the parliament if it rejects the government programme after debating it.¹⁹² This can force the parliament to accept the Government programme even is not clearly and efficiently elaborated in order to avoid to being dissolved.

The mandate of the President to annually inform the Assembly of Republic about the state of the nation as well as his communications and messages to the nations can not be directly challenged by Parliament. These communications also contain information about the State of realisation of fundamental human rights and good governance. But his statements are not always consistent with reality. For instance, last year the President simply said that 'the State of the nation is good'. This was criticised by the citizens and most civil CSO's including the opposition parties, as being vague. The annual formal address of the Head of State has been contested and criticised informally several times on its content and process.

4.6 Assembly of the Republic and SERs

According to the principle of rule of law and separation of powers stated in the Mozambican Constitution¹⁹³, the Assembly of the Republic plays an important role for the effective realisation of SERs. This is done not only by its primarily task of legislating, defining and explaining the content, purpose and scope of SERs and other rights but also because it has

¹⁹⁰ Art 146 (2) of the 2004 Constitution.

¹⁹¹ Art 146 and Arts 159 to 163 of the 2004 Constitution.

¹⁹² Art 159 (e) of the 2004 Constitution.

¹⁹³ Art 134 of the 2004 Constitution.

others constitutional tools to improve realisation of SERs. The Assembly can influence the ways and means by which resources can be allocated for the realisation of SERs through its constitutional powers to analyse and make decisions on Government programmes¹⁹⁴, reports on the activities of the Council of Ministers¹⁹⁵, Economic Social Plans, State Budget implementation¹⁹⁶, and approval of the State Budget¹⁹⁷. It can make decisions on the general bases for the organisation and functioning of Public Administration¹⁹⁸, and ratify and terminate international treaties.¹⁹⁹

However, the Assembly has so far been unable to carry out its responsibilities to fulfil SERs. The effective oversight function of the parliament seems to be weak. For examples it does not challenge in detail the government programs. It also does not have clear and effective mechanism to follow up the implementation of SERs through government programs, PARPA, PES and State budget. Furthermore, Parliament has been known to not make substantives changes in the State budget presented by the executive.²⁰⁰

Most of the members of parliaments (MPs) do not have necessary technical skills to fulfil their responsibility regarding initiating legislation, more less discussing and analysing important documents that result in the realisation of SERs.²⁰¹ The parliament is not yet able to effectively oversee the executive branch.²⁰² The oversight role of the parliament to the executive is merely formal since, in practice, the parliament is very limited in effectively exercising its oversight role to the executive.²⁰³

Currently, the legislative initiative is taken over by the government through its power of adopt decree-laws.²⁰⁴ During 2007-2009 the executive legislated far more than the parliament. This is a clear failure of separation of powers.²⁰⁵ In addition the Assembly has adopted laws which provisions are inconsistent with the Constitution. Therefore, declared unconstitutional by Constitutional Council.²⁰⁶

¹⁹⁴ Art 179 (2) (j) of the 2004 Constitution.

¹⁹⁵ Art 179 (2) (k) of the 2004 Constitution.

¹⁹⁶ Art 179 (2) (l) of the 2004 Constitution.

¹⁹⁷ Art 179 (2) (m) of the 2004 Constitution.

¹⁹⁸ Art 179 (2) (r) of the 2004 Constitution.

¹⁹⁹ Art 179 (2) (t) of the 2004 Constitution.

²⁰⁰ Hodges and Tibana) (38 above) 78.

²⁰¹ Hodges and Tibana (n 38 above) 137-139.

²⁰² Hodges and Tibana (n 38 above) 13/14.

²⁰³ T Hodges and Tibana (n 38 above) 17.

²⁰⁴ QSISA, (n 10 above) 5/21/41/42; see also Cistac (n 115 above) 18.

²⁰⁵ G Cistac (n 105 above) 18.

²⁰⁶ Some example includes the adoption by the assembly of the law creating the National Human Rights Commission on 26 December 2008, in which its Art 7(2) were declared unconstitutional, <http://www.cconstitucional.org.mz/UserFiles/File/Tsave/Acordaos/acordaos2009/acordao%204%20CC%202009.pdf> (accessed 02/10/09)

4.7 Mozambican Bar Association²⁰⁷

The Mozambican Bar Association is a public juridical person that was created to promote the protection of rule of law, fundamental human rights and freedoms, collaborate for good administration of justice sector and contribute to the development of juridical culture and amelioration of Law.²⁰⁸

Cases regarding human rights matters and corruption are seen as very difficulty to advocate freely as they often involve good governance and the State. Lawyers have complained that their professional and personal integrity are often threatened when they embrace these matters. These facts violate their immunity and independence necessary for the performance of functions as stated in article 63 (1) of the Constitution. As referred in the study conducted by Open Society Initiative for Southern Africa (OSISA) in the sector of justice in Mozambique, lawyers often have several and significant difficulties to deal with these matters.²⁰⁹ According to Tomas Timbana, it is not enough to guarantee that citizens have access to lawyers or legal assistant, but beyond that is to ensure immunity and integrity in the performance of their function to the legal assistance of the citizens.²¹⁰

This interference with the independence and integrity of lawyers has limited their role to promote and protect the rule of law, human rights and realisation of SERs. Lawyers are indirectly refrained from investigating and conducting studies in the field of human rights. For instance, the Mozambican Bar association actually has a Committee of Human Rights and Gender in its structure, but this body has conducted very little research in the protection of fundamental human rights including their justiciability.²¹¹

Some of the challenges facing the Mozambican Bar Association include its dwindling membership and accessibility of justice. Despite the increase in the number of lawyers every year in Mozambique, the Mozambican Bar Association faces a dwindling membership because most lawyers are not interested in public interest litigation.²¹²

http://www.cconstitucional.org.mz/index.php?option=com_content&task=view&id=37&Itemid=54 (accessed 02/10/09).

²⁰⁷ Established on 14 September 1994 by Law no. 7/94, 14 September.

²⁰⁸ Art 4 of the Status of Mozambican Bar Association.

²⁰⁹ OSISA (n 10 above) 91 citing debate on the round-table held at the Mozambican Bar Association, Maputo, 20 February 2005.

²¹⁰ T Timbana o Mandato Judicial na Nova Ordem Constitucional (2005) 9.

²¹¹ <http://www.ordemadvogadosmoz.org>.

²¹² Strategic plan of Mozambique Bar Association 2009-2014 (2009) 6/7/19/30/31; see also MML and J Pedroso 'Advocacy and legal representation' in Santos and Trindade (n 32 above) 39-47 Vol II.

4.8 National Human Rights Commission

The creation of Human Rights Commission is ongoing but with a lot of unexplained difficulties and delays. For instance the approved law that establishes the creation of a National Commission for Human Rights was declared to be unconstitutional by the Constitutional Council.²¹³ This slowed down the process of its establishment. In fact, looking to this difficulties and way the institution is drawn up is questionable whether Mozambique is giving a particular importance the existence of such institution as an monitoring Human Rights body as it is in other countries such as South Africa and Ghana.²¹⁴

4.9 Conclusion

A national human rights institution should help to monitor and promote human rights including SERs. The content of principle of separation of powers should be explored as commanded by the constitution and the idea of interdependence within this principle should be the fundamental key to develop protection of fundamental human rights.

²¹³<http://www.cconstitucional.org.mz/UserFiles/File/Tsave/Acordaos/acordaos2009/acordao%204%20CC%202009.pdf> (accessed 02/10/09).

²¹⁴ Ghana and South Africa has created National Human Rights Commission that has been promote and challenge the state to respect and protected human rights and it also ensure confidence of the people on the human rights system in these countries and the development of human right culture. For further details on the activities of the South Africa Human Right Commission (SAHRC) see http://www.sahrc.org.za/sahrc_cms/publish/cat_index_26.shtml; on the other hand see <http://www.chrajghana.org/> about the human rights activities of Commission on Human Rights & Administrative Justice, Ghana.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The opportunities to make SERs effectively justiciable and enforced in the legal system of Mozambique are limited to matters of violation of SERs within the jurisdiction of the Administrative Court. Other situations of violation of SERs out of the jurisdiction of Administrative Court remain difficult and impractical to be effectively enforced in the Courts. This is a result of the fact that there are no specific Courts to deal with constitutional matters as compared to the legal system of South Africa and Ghana.

The jurisdiction of the Courts and a clear hierarchy to deal with constitutional matters and consequently SERs should be the first step for the discussion of the justiciability and enforcement of each SERs provide by the Mozambican Constitution.

The state of Mozambique has legislated about fundamental human rights in such a way that it is difficult for citizens to judicially ask for remedies against the State for violation of SERs and human rights in general. Furthermore, the protection and realisation of SERs provided in the constitution will remain weak and worthless if the power of the Courts to effectively enforce their implementation is not set out clearly. Regarding the availability of resources to realise SERs is that the burden of proof is on the State to justify that the resources are not enough and that it has maximized the use of them to realise each SERs in the Constitution.

The Legal and Institutional mechanisms for the protection of fundamental human rights particularly SERs in Mozambique are very complex and unique in a way that does not benefit ordinary and vulnerable people to claim violations of their rights.

Most of the institutions regarding SERs are not in place or very structural and do not benefit the citizens. Constitutional instruments to protect human rights must be used and challenged so as to give effect to them. The State must take a positive approach.

5.2 Recommendations

It is further necessary to build capacity of the relevant institutions for human rights and train its human resource. It is also important for all these key institutions to have research offices specifically for human rights issues.

Mechanisms of control of powers and accountability must be more transparent and participative. Mozambique should ratify the relevant international instruments for SERs such as the ICESCR.

Most of the complex formalities to access courts and quasi-judicial institutions should be reduced. This can be achieved legislatively by first of all strengthening the judicial mandate of Courts to deal with SERs and other fundamental human rights concerns in general. Secondly, the hierarchy of the Courts and their relations with Constitutional Council has to be properly defined. Thirdly the ability a citizen to access the Constitutional Council has to be simplified and made accessible.

An increase on socio-economic empowerment of the people, particularly the poor and marginalised groups is necessary to build effective and participatory governance systems which will go a long way to realise SERs.

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