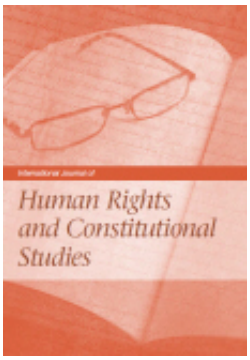

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The synthesis of law, judicial duty and enforcement of rights in Africa

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Abstract: The ideals of judicial duty and the law cannot be sufficiently realised in Africa where there is a theory of human rights which sought to suggest that socio-economic rights are less important for the subjects of law on the continent. Rights, whether socio-economic or civil and political in nature, must be seen as an essential component of the rule of law. In that light, any conception of rights by any court that discounts socio-economic rights in the African human rights constituency is a negation of the ideals of the rule of law within the larger context of law on the continent. Democracies in Africa and consistent with their true plural customary values cannot sustain a theory of law and rights that bifurcate the structure of rights. Rights are rights and must be conceived and enforced without any nominative classification that discounts their unity; it is the best way that rule of law can have a better meaning for the people on the continent as subjects of the law so enacted.

Keywords: law; judicial duty; human rights; synthetises; enforcement of rights in Africa; theory of rights; rule-based rights; value-based rights; legal rights; constitutional democracy; courts.

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1 Introduction

A constitution may be measured for its worth or strength base on its human rights provisions. In post-conflicts or authoritarian situations, a constitution is thought to be strong if it has adequate provisions reflecting on all rights and freedoms that the global human rights constituency argues for. Where there are less or insufficient provisions on rights, the constitution is adjudged as a weak one. So, a weak constitution, it is argued, blunts the hopes of human rights advocates, courts and the people of that state. The situation will deepen their misery and neglect and provides no distinction in terms of constitutional values and political experience between their previous lives and what is provided for in the post-conflict or authoritarian state. This is even complicated with a

near cancerous hopelessness where there is a weak or positivist judiciary which might exclusively focus on a mere logical disquisition of rights from the poor provisions of such rights that exist in the constitution.

However, this view of desolation may not be entirely true; a weak constitution on rights may not necessarily obfuscate all opportunities on human rights enforcement. In fact, a strong court can do well for the human rights constituency in that state with a weak constitution. Put differently, a strong court with the appropriate judicial conception of rights can do well with a weak constitution on human rights. Thus, the poverty of human rights or their values in a national constitution is not necessarily an unrevised judgment of despair for human rights claimants in that country. Such a fate only obtains where there is a weak constitution with a weak court. In any case, where both the constitution and the courts are weak, the view is that the peoples' constitution making objective is defeated and the struggle for good constitutional governance must continue.

This paper makes the claim that the essence of law and judicial duty in young African democracies must cohere with a theory of rights which respects and protects the wellbeing of the people by seeing socio-economic rights as an integral part of the rule of law. On that account, I claim that rights listed in the constitutions of these states are not exhaustive of the rights intended to be enforced in these legal systems. Judicial duty in interpreting and enforcing the constitution as law should aspire to both moral and legal theories of rights not only for a complete and comprehensive theory of law and rights, but also to aid judicial incorporation of rights norms that are necessary for the sustenance of values inherent in a constitutional democracy and human dignity. This requires the courts to be sensitive to questions of appropriate remedies that hold sacrosanct such constitutional values central to preserve human dignity and just democratic governance.

2 Contemporary human rights discourse

Since this work is about human rights, it is important to acknowledge where it stands in relation to the broad debates about human rights in Africa. Only a sketch is possible here. There is now evidence in the existing large body of literature documenting the failure of post-independence African states to uphold human rights.[1] There is equally evidence in relevant literature that seeks to justify or explain this apparent failure of governments to respect human rights as one of the legacies of colonialism and foreign exploitation.[2] Against this background of arguments about failure and reasons for failure, there is work that seeks to chart the unique African approach to human rights that preceded colonialism that might now inform solutions.

In fact, some authors have thus examined traditional forms of social and political organisation in Africa with a view to showing that, despite greater emphasis on social solidarity, family and community relationships, and customary bonds and duties, African societies still celebrated individual human dignity and prohibited conduct that violated human dignity.[3] These authors thus reject a competing view that human rights were uniquely European or Western historically, that this vision of human rights is the one that informs the universal conception of human rights applicable globally today, and that traditional African approaches to human dignity are nebulous and communal and have nothing to do with human rights properly understood.[4]

Yet another line of inquiry plies the middle road between the Western conception of human rights which recognises the individual as the nucleus of analysis and the cultural-

relativist Afrocentrics who predicate the concept of human rights on the community.[5] For this group, an African conception of human rights recognises, but does not over-emphasis, the community, and strikes a balance between the individual and communal rights.[6] Finally, there is a very pragmatic body of literature that examines specific topics of human rights, good governance, and development from domestic and international legal perspectives with a view to identifying specific problems and solutions for the protection and enforcement of human rights.[7]

The core argument of this paper is premised upon a view of human rights which is inclusive and which sees the need to reconcile communitarian and individualistic approaches that supposedly define African and Western approaches to human rights. It also fits into the forward-looking literature that explores specific problems and solutions about the protection and enforcement of human rights. But it takes a unique approach. The big gap that remains in the literature is how legal theory can be explored as a means to deal with the serious problems encountered relative to enforcing values protected by constitutions in Africa. What role does legal theory play in judicial understating of rights, especially in transitional or young democracies in Africa? This topic has not been wholly ignored. The importance of developing an 'African approach to legal theorising' for solving African problems has been acknowledged.[8] But it remains an area in need of more detailed study.

The approach that I will take looks beyond expositions steeped in doctrine and empirical accounts of the successes and failures of courts in Africa. Such studies, though powerful and perceptive, have failed to develop a theory of judicial method by which the difficult questions of conception of rights in constitutional adjudications are to be confronted by the courts. The performances of courts in Africa in their current political stage, warrant such an approach. A sound theory of constitutional interpretation in an era of rights must take account of sound theory of rights, which is at present critical for the courts to hold governments accountable to the promises of human rights and the rule of law in post-independence constitutions.

3 The trail of debates in the global human rights constituency

We should begin with the trajectory of global human rights debates. Within nations and on the international scene, the reputation of human rights is high.[9] In politics, law and morality, the discourse of human rights has been pervasive.[10] There is rarely any position, claim, criticism or aspiration relating to social and political life that is not expressed in the language of rights.[11] Their recognition and enforcement has engaged the attention of individuals, groups, corporate entities, states and inter-governmental organisations. Yet there remain burning normative questions, such as what are human rights and what explains their pervasive popularity in recent decades. The former in particular is a contentious question. A satisfactory answer to this question is imperative in order to lay the basis for a legitimate claim by potential rights-holders and for the source of the obligation on others to enforce the rights. Sheer speculation on this will not suffice. Likewise extreme abstraction would likely confuse the issues. At its best, it might engender ignorance among potential rights claimants and blur the nature and scope of obligations in respect of protecting these rights.

A number of theories of rights ranging from natural law, legal positivism, to cultural relativism have tried, in their limited perspectives, to tell us what human rights are.[12] But

there is no unanimity in their conclusions. Engaging these theories here is inevitable. But the limited focus for this exercise as it relates to the central question to address here is not, what is the nature of human rights? Rather, the key question is: what conception of human rights is needed for a sound approach to legal interpretation in a constitutional democracies in Africa? This narrower question permits us to avoid all sorts of philosophical issues about the nature of rights that are ultimately not necessary to solve as there are many hard and invariably un-resolvable problems about the nature of rights.

So, it is possible to offer a schematic overview of the range of rights theories on offer, before side-lining the ones that are unhelpful for our purposes. On that account, it is helpful to acknowledge, for example, two extreme views about rights:

a the idea that what is right and what rights people have is a matter of natural law, a universal set of norms that exists independently of what people say or think, derived either from God or from 'nature'

b the idea that what is right and what rights people have depends on human behaviour and agency, and will therefore vary with social and cultural differences, and also human emotions and personal attitudes.

These are two extreme views, and they are therefore controversial. Many people would reject (b). For example, many people would say slavery is wrong, not just for our society but for all societies. But many people would have trouble accepting (a). That position seems to depend upon either religious belief, which in liberal societies people tend to disagree about, or upon a view of 'nature' or 'the universe' that is difficult to understand. So, the tendency has been for theorists to develop accounts of rights that fall between these two extreme views.

For example, John Finnis seeks to explain natural rights without God in the background as the author of natural rights (though he personally believes God is in the background), and without 'nature' as an alternative, secular, author of rights.[13] He accepts that liberal societies must adopt a non-theological explanation for natural rights, but he also says that simply putting 'nature' in for 'God' as the author of rights is not the solution. Finnis accepts the view that we cannot derive an 'ought' from an 'is', and so we cannot say what humans ought to do or what rights they ought to recognise on the basis of facts about 'nature', even, 'human nature'. Finnis argues instead that the basic 'goods' of human life, which are the foundations of natural law and natural rights, should simply be seen as self-evident truths that any rational human person will acknowledge, even if they cannot prove their truth.

Another intermediary position is the one put forward by Rawls. His answer was to imagine people in the 'original position' designing a Constitution behind a veil of ignorance. This approach recognises that human agency is relevant to our understanding of justice and rights, but it tries to eliminate personal and cultural factors from the attempt to define justice and rights.[14]

Another attempt to avoid the idea that rights are either a matter of abstract metaphysics or local cultural attitudes is that advanced by Dworkin.[15] Dworkin says that we all think certain specific propositions are true, like slavery is wrong, and he then says that identifying the truth about right and wrong is possible without leaving the 'first-order' level of discourse about right and wrong and ascending to a second-order level in which the status of first-order truths is questioned. There is no need to resort to metaphysical arguments about truth. Truth emerges within the first-order dimension

when people argue for and against propositions through a particular interpretive method. They take the specific propositions that they accept as true and develop a theory of justice or rights that demonstrates how all of those specific propositions can be seen to be coherent and justified; those that do not fit are rejected as untrue, or the theory adjusted to accommodate them, and this theory can then be the test for new questions about justice or rights. Dworkin calls this oscillation between specific and abstract ideas about truth a search for 'reflective equilibrium'.[16]

These intermediary positions are mentioned because, for our purposes, it makes sense to be explicit about the philosophical foundations for rights needed for the argument being developed. There may or may not be a theological or metaphysical or natural basis for human rights; but, answering that complex question is not necessary for understanding the constitutional interpretation of human rights in a liberal democracy. It is sufficient to take a more modest intermediary stance, like any of the ones just described, for they are all based upon the idea that human rights are universal goods about which we can engage in rational discourse. It follows that the argument here cannot, however, be agnostic about all theories of morality and rights. The arguments that follow only make sense if we reject sceptical theories that deny the existence of morality and rights altogether, or which say that morality and rights are entirely a matter of subjective personal belief or attitude.

If such a sceptical approach were permitted, it would be hard to defend the idea of an unwritten fundamental law enforceable by judges against democratically-elected legislators, since there would be no reason to prefer judicial beliefs about rights over anyone else's. Instead, the argument of this paper is premised upon the idea that morality and rights do have some degree of objective reality to them, and that judges are well positioned institutionally to figure out what they are. People will of course differ about what the best interpretation of morality and rights is, and what is best for one community may not always be, given differences in social and cultural factors, the best for another community; but the argument here assumes that we can engage in rational debate about the objective truth about what rights people have, and that the best answers to hard questions about moral rights (and thus legal rights) exist independently of what particular people (even judges) may happen to think. In this respect, at least, the thesis follows the general path marked by Dworkin.[17]

We begin, then, from a starting point that is common to a variety of different rights theories—by accepting the value for people of rights, and the central importance of the right of equal freedom. If we begin the analysis at this starting point, we may focus our energy on the more pressing issue about the relationship between this innate sense of equal freedom and institutions, laws, and constitutions. At this point, it may be useful to be schematic again and distinguish between two traditions in political theory that address this topic: liberal natural rights theory developed by authors like Hobbes and Locke, and classical republican theory associated with older Roman sources.

Pursuant to the liberal natural rights tradition, rights are pre-political and civil society is created to protect them. In contrast, the republican rights tradition conceives of rights as social and political phenomena. There are no pre-political rights, there is no state of nature; rather, the natural condition of humanity is political or social, and because rights define political and social relations, there can be no pre-political or pre-social rights. Even freedom, under this approach, is understood as a product of civil or social order. But even this contest between rights schools is not necessary to resolve. Whether we accept a liberal or a republican explanation, we still accept that rights depend upon some

form of civil or social order. And both traditions concede that some rights will be protected by law while others will not, and so some way must be developed to distinguish between moral rights that are also legal rights, and moral rights that are not legal rights.

However, a detailed examination of these theories of rights, as I said, is not necessary here. The schematic outline is just to acknowledge their existence, and all may not be relevant to the limited task of this paper, which is to attempt to distinguish between what I term rule-based rights schools, which say rights flow only from positive law, and value-based schools of rights, which say that rights have *a priori* existence, and so exist independently of legal enactment; I will then suggest that value-based rights theory may be seen to shade into something slightly different, namely, a reason-based rights theory that views rights as inherent within the concept of law. Such a focus is relevant in terms of thinking through the theoretical possibilities of how to conceive of the relationship between moral/natural law rights on the one hand and legal or positive law rights on the other hand as an answer to the key question: what conception of human rights is needed for a sound approach to legal interpretation in a constitutional democracy.

3.1 Ruled-based theory of rights

Jeremy Bentham, in his *Anarchical Fallacies*, insisted that "natural rights is simple nonsense: natural and imprescriptible rights (an American phrase), rhetorical nonsense, nonsense upon stilts".[18] Leading up to this oft-quoted sentence, Bentham had declared that "right is the child of law; from real laws come real rights". which parallels his explanation that human rights are no more than 'bawling upon paper'. Rights, on this account, are principally legal commands and their justification is not contingent upon our humanity, but on an expression of legal fact that entitles citizens of a particular state to entitlements that the courts shall enforce.

The claim that there are no *a priori* rights and that the authority and legitimacy of human rights stem from the prescription of state officials or state laws, may still find some support today.[19] But after the post-war human rights revolution, even positivists generally admit that, even in the absence of law, rights may exist as a matter of morality. But consistent with the positivist account of the nature of law, this view sees no necessary connection between moral rights and their potential legal basis. On this account, rights in Ghana and Nigeria will not be valid in law because of any adherence to morality. Legal rights and moral rights are separate, though there may be a contingent connection between them in some respects. Rights are to be particularised and reduced to law by the specific legal acts of the state.

AmartyaSen has argued that this positivist approach, or what we might call the 'rule-based' approach, to rights permits the arbitrary rejection of some rights from legal protection, for it permits states to "accept the general idea of human rights but exclude, from the acceptable list, specific classes of proposed rights".[20] This point is linked to the broader arguments to follow. It may be true that the rule-based account recognises the flexibility with which the nature and form of rights can be reformed, but it also allows rigidity, perhaps even wickedness, since rights cannot transcend the empirical reality created for them by the state. Under the competing theory of natural law, rights have long been seen to transcend state realities. In the Hellenistic period which followed the breakdown of the Greek city-states, the Stoic philosophers formulated the doctrine of natural rights as something which belonged to all men at all times. These rights were not the particular privileges of citizens of particular cities, but something which every human

being everywhere was entitled, in virtue of the simple fact of being human and rational.[21] The rule-based view of rights seems to be a rejection of this idea of moral or natural rights, or at least its relevance as a legal idea.

The rule-based rights theory is also inconsistent with international human rights protections, like the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.[22] Of course, to the extent that these human rights instruments accord authority and legitimacy to human rights by virtue of their ratification by party states it can be said that they affirm the rule-based approach. In theory, however, as we will see in the broader arguments to follow, positivism tends to undermine the international basis of human rights because of the emphasis positivists place on the supremacy of national sovereignty.[23] Actions of states may therefore violate universal norms enunciated in the human rights instruments, thereby negating their fundamental value to the human rights community.

Furthermore, even universal consensus on the legal protection of rights does not necessarily lead to a universal acceptance on the determination of the content of the rights legally protected. As Loren Lomasky has argued, the former may be attainable, but the latter may not be.[24] And, of course, seen from the positivist rule-based rights theory, the gains, benefits, interests and entitlements arising from these instruments will be limited to the particular stated rights. This has its limitations. As Jeremy Waldron asserts: "[T]o secure a constitutional protection [for a right not expressly acknowledged], the proponent of the right will either have to agitate for constitutional reform or, if there is already a Bill of Rights, persuade those entrusted with the task of interpreting it to recognise the new right under the heading of some existing provision".[25] This task may be easy or difficult to achieve and may depend largely on the temperament of the political forces at the time.[26]

So long as rights are regarded as an artefact of explicit law or legislation, arguments about rights will be arguments about whether there is or is not an established rule in the authoritative system of rules that entitles one person to act in a certain way or possess certain things and or requires others to permit or assist that person in such respects.[27] No assumptions will be made about pre-existing or anticipated positive rules.[28]

These concerns are closely connected to the relationship between legal rights and legal remedies as backed by state institutions such as courts, legislatures and the police.[29] This is typically constructed not only on a rejection of the notion of moral rights but also on the conceptual distinction between what Maurice Cranston would call a 'lawful entitlement' and a 'just entitlement'.[30] The former being a positivist or legal right is necessarily enforceable. This connects both justification and proof as to be able to obtain an authoritative ruling from a court of law.[31] This attribute does not necessarily apply to the latter as it lacks precision and institutionalisation, though may contingently apply. Not all just entitlements are lawful entitlements. The justness of an entitlement or interest of an African citizen will not necessarily cloth it with the required legality as to justify its enforcement by the state institutions upon its invocation. Carl Wellman eloquently wrote:

> "Typically a legal rights is a complex cluster of legal liberties, claims, powers, and immunities involving the first party who possesses the right, second parties against whom the right holds, third parties who might intervene to aid the possessor of the right or the violator, and various officials whose diverse activities make up the legal system under which the first, second and third

> parties have their respective legal liberties, claims, power and immunities and whose official activities are in turn regulated by the legal system itself."[32]

On this point, rights are legal rights in Africa on the account that they are characteristically recognised by positive law, the actual law of actual states and which give power to the right-holders to invoke the coercive power of the state for their fulfilment or recompense in their non-fulfilment. There must be an authoritative remedial mechanism that is called into action to deal with alleged rights violations, so that rights may be said to exist even if they are frequently violated, save that there is an appropriate and available legal response to such violations.[33]

A major difficulty that would beset such an analysis in the specific contexts of Africa is less about the connection between the available legal rights with remedies as it is the potential inadequacy or non-exhaustiveness of the legal rights. Africa national courts will not give any remedy to a just claim if such a claim is not authoritatively expressed as a matter of law. The potential certainty and precision of legal rights do not compensate for their potential narrowness, which may preclude certain 'just' but 'unlawful' entitlements from the citizens. Legality of rights is implored to circumscribe the nature and form of rights.

Having said this, however, it is important to observe that this rule-based theory of rights, which is focused on positive law, is different from the republican theories I described above. There is a difference between saying (as republicans do) that rights only exist in civil or social orders and saying (as Bentham did) that rights only exist if explicitly enacted by positive law within a civil or social order. For example, the civic republican could argue that once there is a social or civil order all sorts of 'rights' must be taken to exist, even if they have not been explicitly enacted into positive law; whereas, of course, Bentham insisted that enactment was necessary for rights to exist.

3.2 Value-based and reason-based theories of rights

We should make the point here that the rule-based theory of rights, as recounted above, is not the only one accepted within the human rights community. An alternative approach exists, and we may call it the value-based theory of rights. It focuses the rights discourse on the values that justify the recognition of rights rather than the positive laws by which they may or may not be affirmed. Under this conception of rights, the suggestion is that legal rules in a state do not create rights, but only recognise them. The existence of rights is *a priori* to their legal source and the validity and legitimacy of such rights are not solely contingent on acts of parliament or written constitutions that have given concrete expression to such rights. But what really distinguishes this approach from the rule-based approach is the idea that the *a priori* moral existence of rights has a legal aspect too, so that rights may have a legal quality in absence of explicit or positive legal recognition. Here, we may say, the value-based theory of rights shades into what we may call a *reason*-based theory of rights.

One version of the reason-based theory of rights insists that certain moral rights (to equality, freedom of speech, etc.), while perhaps *a priori* or independent of legislative enactment, are nevertheless inherent within the concept of legal order or the rule of law. In other words, once people decide to have a legal system, whatever the nature of that legal system, they must recognise certain basic human rights, since it is impossible to

have a system that is 'legal' without respecting the 'rule of law', and you cannot respect the rule of law without respecting these basic human rights. This is basically an insight Lon Fuller developed, but one more recently developed by T.R.S. Allan and David Dyzenhaus.

Another variation on this theme is the Dworkinian one (though it may be best seen as a value-based rather than reason-based example). Dworkin does not go so far as saying that all legal orders must respect basic human rights because rights are inherent within the concept of the rule of law upon which legal order rests, though he comes close. Instead, he says that once a legal system expressly commits itself to certain rights, principles or values for certain people, then through legal reasoning based upon the idea of law as integrity we should conclude that these rights, principles or values are implicitly extended to embrace analogous rights, principles or values and are extended to cover other people or other situations, if such an extension is warranted by a general theory of political morality that shows the legal materials of that legal system to be coherent and justified.

The advantage of the Fullerian and Dworkinian theories, as the broader arguments of this work, will show, is that they tell us:

a law and legal rights embrace more than what positive law happens to say at any point; it includes things that are implicit or 'unwritten'

b there is a technique of legal reasoning available to show us which parts of 'morality' must be considered implicitly part of the law, and which parts of morality are just non-legal in character.

Of course neither approach relies upon any positivistic test or rule of recognition to accomplish this task; both seem to rely upon the fact that, ultimately, law and morality are integrally connected and the relationship between them will be an ongoing or dynamic process of interpretation (or reasoning or discourse).

However, the broader argument under the value-based and reason-based accounts of rights is that rights that people possess are not the product of positive law. As Robert Nozick has written, "individuals have rights, and there are things no person or group may do to them (without violating their rights)".[34] Similarly, Rawls asserts that each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.[35] Such claims perhaps are based on norms and morality of universal humanity, which parallels the Stoics' idea of a law common to all imperial subjects, of a *jus gentium*.[36] This is also consistent with the language of inalienable and imprescriptible rights in historic official declarations such as the French Declaration of the Rights of Man and the Citizen or newly minted constitutions of nascent democracies, as in Ghana.

This account of rights might loosely be referred to as the theory of natural rights. Though there are, of course, competing accounts of natural rights, most accounts are connected to the notion that moral rights may have a legal status independent of legislation. H.L.A. Hart suggested that this idea is built upon a belief that such rights are natural in three separate senses: rights are not artefacts of human will; they do not depend for their existence on social convention or recognition; and in important ways rights are reflected in or have adapted to features of human nature.[37] These predicates must feature prominently in the determination of individual claims which are to constitute natural rights.

It is worth observing that natural rights and moral rights may imply different things for some people. The 'natural' label generally suggests an existence independent of both

positive law *and* other social constructs or conventions, whereas the 'moral' label, while often used in that sense too, is sometimes used to describe social or political attitudes within particular communities or traditions.[38]

As mentioned above, I will not take a stand on the philosophical debate about whether the objective reality of rights is independent of or linked to social practices, though I will insist upon their having an objective reality, either way, sufficient to allow us to make rational claims about them. In other words, theories of both natural rights and moral rights could have the same implication, that is, that their existence and enforcement by state institutions in Africa does not solely lie in their being expressed within positive legal rules. It is this commonality that gives the two phrases a conceptual unity. My concern here is not to determine which of these phrases is theoretically appropriate, but only to underscore an account of rights different from the rule-based version. Thus regardless of the usage or conception of moral or natural rights, the *a priori* value-based account of rights may apply to any rights that are held to exist prior to, or independently of, any legal or institutional rules.[39] What I have called the reason-based idea of rights takes this one step further, and asserts that certain of these rights (but not all of them) are inherent within the very idea of law.

So, in Africa, as the argument will show, the existence of such category of rights is anterior to and independent of their enactment by legislators, or their declarations, explicit or implicit, by Constitution makers.[40] This contention is consistent with Amartya Sen's suggestion that the notion of human rights is built on our shared humanity. Accordingly, rights are not derived from our citizenship of any country, or membership of any nation, but are presumed to be claims or entitlements of every human being.[41] Considerations of safeguarding rights thus need not be contingent on citizenship and nationality, may not be institutionally dependent on a nationally derived social contract.[42]

If this could be taken as a solution to the critical problem of how to reasonably articulate the nature and source of such rights, it does not seem helpful to worry about Joel Fienberg's query that: "how can we recognise them and resolve disagreements about their existence, and what practical consequence, if any, follows from their possession, especially when they are not given legal protection".[43] Fienberg's concern is that just because rights can be natural or moral, and just because they exist independently of law and citizenship, it does not follow that we know what they are or what they mean. This is partly rooted in the implication that such rights are not deemed real rights by some dubious constitutional and rights language or that they may be wrongfully withheld by law makers of a particular state.

In Africa, it should be possible to understand such rights as a manifestation of general or universal values rather than of mere conventional morality. While we may accept that the specific application of universal values may depend upon local conditions, including cultural differences, what cannot be allowed is a theory of rights where rights are simply determined by the *absolute subjective* moral feelings and beliefs of a particular group of individuals; a local community in an obscured part of Africa, for example, cannot have its own entirely unique conception of rights and values, and so it would not be acceptable for such a group to claim of right, as a reasonable value, the discretion to kill all foreigners in that part or to rob them of their property. Though it is possible for peculiar subjective feelings like this to emerge to support values that are thought to be crucial for the development or survival of that group, such values must also cohere with objective and universal principles of morality, which exist independently of legislative enactment[44] or

local custom, and can be evaluated and sustained through an interactive process of critical scrutiny with open impartiality, ideally by the courts.

A claim that a certain moral value enough to be seen as a right is also a claim that reasoned scrutiny will sustain that judgment. No one, of course, expects that there will be unanimity in what everyone actually wants; but the fact of disagreement simply shows how important it is to invoke arguments that can sustain judgments[45], arguments which demand a general appreciation of the reach of reasoning in favour of those rights, if and when others try to scrutinise the claims on an impartial basis[46] and with recourse to objective and universal moral principles. Of course, the proper identification of rights is never an easy task. It can be complicated by at least three possibilities.

First, there is the possibility for such subjective group values to emerge as a language of *a priori* value-based rights. Secondly, such *a priori* value-based rights as recorded may either be independent of objective and universal principles of morality or overlap with it. Lastly, such rights may overlap with legal rights – that is, they are both recognised as *a priori* valued-based rights and given legal protection by a positive law. This has a further precise complication made possible by the potential distinction within valued-based rights between some of such rights that are exercisable as legal rights before positive legal recognition, what I have called reason-based rights, and those which cannot be so exercised unless they are enacted into law.[47]

The reason for this conceptual plurality lies in the character of the value-based rights. Unlike positive legal rights where the question of justiciability is typically expected to be settled upfront, rights in the reason-based category do not easily yield to that conclusion. While there may not be an easy way out there, it is reasonable to suggest that rights on this account are not only rights by virtue of their subjective moral source. In fact, they are rights regardless of their positive legal recognition, and claims about them should be deeply rooted in objective, critical and universal moral concerns for humanity or the wellbeing of the people. Besides, if claims of such rights are strongly supported by these objective moral principles, and sustained through an interactive process of critical scrutiny with open impartiality, legal or judicial protection should be accorded them as to foster their justiciability. Finally, those moral rights that are found to have an implicit legal character will invariably 'fit' (to borrow Dworkin's phrase) into a coherent interpretation of law; indeed, their legal enforcement will be seen to be not only helpful to but necessary for the completion of the aspirations toward legality and constitutionalism within the relevant jurisdiction.

We can thus ground such reason-based rights in a conception of rule of law that holds humanity sacrosanct and supports claims that seek to validate human dignity, welfare and livelihood. There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient.[48] To understand rights in this manner is to postulate that rights may not only be independent of legislation but are also independent grounds for judging legislation or law that purports to recognise such rights.[49]

3.3 Judicial duty and justiciability debates on socio-economic rights

Be that as it may, this theory may have to overcome some resistance in conceiving socio-economic rights as part of law and the appropriateness of their judicial enforcement. In fact, there has been a long-standing controversy over the appropriateness of making

Socio-Economic Rights justiciable.[50] Some critics argue that the moral and political foundations to address the needs of people do not necessarily lie in justiciable[51] Socio-Economic Rights. Vierdag asserts that "the implementation of these claims is a political matter, not a matter of the law and hence not a matter of rights".[52] Though doubtful a position, it has been supported by Christian Starch, who argues that making Socio-Economic Rights justiciable amounts to a necessary breach of the principle of separation of powers.[53] Their enforcement by the courts leads to an intrusion into the legislative domain. However, we can regard these criticisms with some suspicion. Vierdag's position obviously fails to take account of how dangerous it is to cede the entire currency of rights to the arena of politics with the potential of an indefinite postponement of their realisation.[54] Christian Starch as well, is oblivious of the structural relevance of the doctrine of checks and balances and how the Judiciary can systemically prevent the abuse of rights.

Nevertheless, the most compelling objection is that the courts lack the institutional competence to enforce these rights.[55] The argument goes that useful decisions on these rights demand expertise in complex policy issues which the courts do not have. Nor can social science evidence provide a clear basis for the courts to decide on these rights. Further, Socio-Economic Rights have wider policy implications which cannot be sufficiently evaluated by courts. By implication judicial pronouncement on them is likely to be reactionary, which can undermine the ability of legislatures to systematically deal with issues of social justice.[56] The range of charges has been pushed further to suggest that Socio-Economic Rights are not only indeterminate, but are 'positive' rights whose enforcement depends on availability of resources.[57] Lack of a conceptual clarity on these rights presents an insurmountable task for the courts. It would thus be better for such matters to be left to legislatures to deal with through careful policy studies and structural economic and social programmes.

However, some governments have defied the logic of these objections and provided for such rights in their constitutions.[58] Perhaps the rationale in part, is to demonstrate a commitment to social integration, solidarity and equality, including tackling the question of income distribution[59] in the larger society. It also illustrates a major concern for the protection of vulnerable groups, such as the poor and the handicapped.[60] These are human needs which should not be at the mercy of changing governmental policies and programmes, but should be defined as entitlements.[61] For Amartya, the correct conception of these rights should properly relate to a purpose as to how a person can function or exist as a human being.[62] Such rights should thus be conceived as components of a commitment to individual wellbeing and freedom.[63]

It is highly inconceivable that a person can turn his mind to the right to vote or fair trial if denied access to food, water, housing and medical care. In situations where poverty has eaten people up and the gulf between the rich and the poor is extremely wide, it makes no sense to talk about the right to vote or fair trial. Therefore, any attempt to remove these rights from the hierarchy of enforceable rights is to potentially negate the benefits accorded to individuals by the Civil and Political Rights. For a best and just form of democracy, the Civil and Political Rights must irrevocably be interconnected with Socio-Economic Rights.[64] To separate these sets of rights, and attach differential remedial content labels is to court a dubious structural imbalance in our conception of rights.[65] We must aim at a comprehensive Human Rights regime that values life and the dignity of persons. Socio-Economic Rights are a prior commitment to such a regime and a

foundation to the wellbeing of individuals. Civil and Political Rights are presumably lame without enforceable Socio-Economic Rights.[66]

It is a sweeping and highly doubtful claim to state that Civil and Political Rights do not require resources in their enforcement. For instance, democratic rights require governments to spend significant amount of resources to enable citizens participate in the democratic process. *In Re: Certification of the Constitution of the Republic of South Africa*,[67] the Constitutional Court of South Africa stated: "Many of the civil and political rights entrenched...will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion...."[68] Such was also the opinion of the same Court in *August v Electoral Commission*[69] when it held that the state has an obligation to take reasonable steps to enable prisoners to vote in an election. Such steps involve providing for a voter register and extending to the prisoners the opportunity to register and to cast their votes. This cannot be done without resources.

The realisation of the right to a fair trial also demands resource commitments on the part of governments. In *Airey v. Ireland*[70] it was suggested that a right to fair trial extends to legal aid funding and maintaining the court system. It is simplistic to suggest that only Socio-Economic Rights demand governments to spend resources. Perhaps in a case-by-case basis such assertion may have some credence: otherwise, it is in danger of being over generalised. Even in such circumstances we might be careful to reasonably examine what we regard as 'resources'. Otherwise we risk the fallacy of bigotry in our conceptions and conclusions or we may decorate our conclusions without persuasive arguments.

The entire concept of humanity requires us to live beyond mere linguistic categorisations and save people from socio-economic wrench, disease, malnutrition and neglect. In the face of these preventable misfortunes governments must accept and take the responsibility. Setting governments free through simplistic generalisations as suggested above is to make an unfortunate apocalyptic conclusion on the fate of the poor, vulnerable and the suffering. There is nothing to be gained by hiding behind concepts to consign a cross section of the population to a perpetual damnation. This view is best illustrated by Scott and Macklem: "A failure to entrench social rights is an act of institutional normatisation that amounts to a powerful viewing of members of society by society itself. A constitutional vision that includes only traditional civil liberties within its interpretative horizon fails to recognise the realities of life for certain members of the society who cannot see themselves in the construction and legitimation of a legal self for whom social rights are either unimportant or taken for granted".[71]

The institutional competency argument is also problematic, as is the assertion that Socio-Economic Rights are indeterminate. First, there is a patent failure in the institutional argument to understand that judges deal with real specific cases. They thus have the capacity to test more effectively the particular implications of abstract principles and discover problems that the legislation could not forecast.[72] Besides, there is the presumption that the judicial process is an unorganised exercise. On the contrary, it is an organised, rational and deliberative process tailored towards producing fair and well-reasoned results.[73] It only requires sufficient evidence to be made available to the courts in the course of adjudication.

The indeterminate argument fails on its face for underestimating the role of judicial interpretation. Interpretation partly targets the discovery and preservation of community values which goes to the survival of the people. Socio-Economic Rights are nothing but the constitutionalisation of such values. In that case, judges can enquire into the reasonableness of governments' policies or programmes to ascertain the extent to which they reasonably intend to realise these values. Such a duty does not present any problem of indeterminacy. Be that as it may, there is no insurmountable problem with the force to absolutely preclude the Judiciary from enforcing Socio-Economic Rights.

3.4 Evidence of work: African courts and socio-economic rights

3.4.1 The right to livelihood and life

The right to livelihood has been limitedly part of constitutional jurisprudence worldwide.[74] The influence perhaps is from the International Bill of Rights on states constitutions and the desire to hold the right to livelihood as a necessary adjunct of the right to life.[75] Possession of the means of livelihood is thus considered an essential feature of life and makes the idea of constitutional entitlement to the basic necessities of life a useful one. States are either required to directly provide these basic necessities of life or provide the conditions necessary for individuals to be able to obtain them. Typically, the right to work or engage in any lawful economic activity is a probable candidate for the state to do this. In fact, the Socio-Economic Rights represent the states commitment to livelihood. To enforce the ethical content of this constitutional jurisprudence, courts are expected to convert policy-based social justice interest to principled-based right to livelihood. Possible ways to do this is through the application of the concepts of fair procedures, reasonableness and the rule of law.

At the same time, courts would be required to revise their narrow construction of the right to life as only unlawful deprivation of one's physical existence to include the right to livelihood. That is, the right to livelihood premised on basic necessities of life should be incorporated into the judicial construction of the right to life. Where a state wilfully without reasonable lawful justification deprives a person or group of persons the means of livelihood, the right of life of such a person or group of persons can be deemed to have been infringed upon. The state does not need to openly strangle people in the streets or indiscriminately shoot them or gas them. It is sufficient if there is an unjustifiable denial of fair procedure, reasonableness or the rule of law in a decision which adversely affects a person's right to livelihood. Perhaps this makes sense within the context of the constitutional jurisprudence which says that the Directive Principles may be justiciable in circumstances where they can be supported and soldered by those justiciable fundamental rights.

The Supreme Court of India gave us the insight of making the right of livelihood part of the right to life. In *Olga Tellis v Bombay Municipal Corporation*[76], Chief Justice Chandrachud stated that "If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of living to the point of abrogation. Such a deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live…That, which alone makes it possible to live, leave it aside what makes life liveable, must be deemed to be an integral component of the right to life".[77] The court in this case confronted the right to livelihood on the network of

directive principles of the Indian Constitution and held the protection available as component to the right to life. The courts held that slums which serve as residence to the slum dwellers and are near to their work place provide a means to livelihood to the workers. It thus requires not only the principles of natural justice be followed in the course of government eviction of them but resettlement in order to avoid a deprivation of dwellers means of livelihood.

In *Issa Iddi Abass & others v. Accra Metropolitan Assembly and Anor*[78] the plaintiffs who were in a similar position as their Indian counterparts, were faced with an imminent eviction notice by the defendant from a piece of land they had occupied. It was established as a matter of fact that the occupied land was earmarked for a government project with a public interest value. Plaintiffs' arguments for procedural fairness in the eviction process, right to life and the right of livelihood as provided for by Articles 23, 13 and 36 respectively of the Ghanaian Constitution was rejected by the Accra High Court. The articulated rationale simply was that they were squatters. Justice Appau observes that "[T]he mere eviction of plaintiffs who are trespassers, from the land they have trespassed onto, does not in anyway amount to an infringement on their rights as human beings".[79]

The court in this case treated lightly the elements of reasonableness and fairness in the administrative actions of the defendant. The short eviction notice served on the plaintiffs in this case does little to provoke the sympathy scruples of the court as it reduced itself largely to considering a private law question whether or not the plaintiffs were entitled to the occupied lands. The court also rejected the persuasive principle of the Indian case on grounds of different social and historical factual context. Had the court purposefully engaged, I suggest, the constitutional jurisprudence of the Indian Supreme Court in *Olga Tellis* the outcome in this case may have been different. This is premised on the understanding that the occupied land serves as both a place of residence to the plaintiffs and commercial activities from which they make their living. A deprivation of the land thus apparently is a deprivation of means of livelihood of the plaintiffs and by extension their right to life.

It should be argued that the conclusion reached by the court in the *Abass Case* is a denial of a legal forum to vindicate rights contemplated by the Constitution. It is an act of judicial "exclusion of one set of interest from the list of protected rights" which in effect is "a vast legal judgement lending universality and authority" to only those interests that enjoy explicit constitutional protection.[80] Denying an individual or group, as in the case of the plaintiffs in this instance, the ability to make constitutional claims against the state with respect to housing and livelihood, is to exclude those interests from a process of reasoned interchange and discussion, and forecloses a useful forum for the recognition and redressing injustices.[81]

It is important that the court recognises as a principle of adjudication that the meaning of constitutional guarantees such as the rights in question will always be underdetermined by their wording and that reference must always be had, explicitly or implicitly, to more general normative understandings of the society in which a legal decision-maker operates.[82] This allows the court to discover and determine through the principles of the fundamental law of reason and justice the inherent meaning of a right not by a mere inclusion of words in a constitutional document, but responding to arguments over the kinds of normative values a decent and just legal system like Ghana would uphold.[83]

3.4.2 The right to housing

In both international and regional human rights instruments, the right to adequate housing[84] has been explicitly recognised.[85] African national constitutions such as South Africa also contained provisions to that effect. It therefore makes sense to focus on the constitutional jurisprudence of South Africa in order to understand the legal norms that the right entails. Perhaps we may do that after setting out the general scope of the right as may be understood in international human rights law. In his final report in 1995, Justice Rajindar Sachar, a former United Nations Special Reporteur on housing rights, stated that the right to housing:

> "must be seen and interpreted, in the most general sense, to imply the following: a) That once such obligations have been formally accepted, the State will endeavour by all appropriate means possible to ensure everyone has access to housing resources adequate for health, well-being and security, consistent with other human rights; b)That a claim or demand can be made upon society for the provision of or access to housing resources should a person be homeless, inadequately housed or generally incapable of acquiring the bundle of entitlements implicitly linked with housing rights; and c) That the State, directly upon assuming legal obligations, will undertake a series of measures which indicate policy and legislative recognition of each of the constituent aspects of the right in question".[86]

But Justice Sachar was also quick to point out what housing rights do not factually and normatively imply. As he stated, it does not mean:

> "a) That the State is required to build housing build housing for the entire population; b) That housing is to be provided free of charge by the State to all who requested it; c) That the State must necessarily fulfil all aspects of this right immediately upon assuming duties to do so; d) That the State should exclusively entrust either itself or the unregulated market to ensuring this right to all; or e) That this right will manifest itself in precisely the same manner in all circumstances and locations."[87]

Predicating our discussion on Justice Sachar's comments, the essence of the right to housing may not be difficult to discern. Human survival with dignity largely depends on the realisation of the right to adequate housing.[88] We may also compromise other basic human rights like the right to family life and privacy and the rights to health and development if the right to housing is trenched upon.[89] The right to housing has particular significance for children. Because of their vulnerability they have special needs for care and protection.[90] Without decent secure accommodation children are unlikely to realise their right to grow and develop in an atmosphere of moral and material security, free from abuse and neglect.[91] Reasonable legislative and any other meaningful measures are thus expected of a government to provide access to adequate housing to people. Arbitrary evictions and demolition of people's houses by governments must not take place. In a relevant situation where eviction is required in a compelling public interest, government must take reasonable steps to prevent human suffering by providing suitable alternatives such relocation or resettlement.

In South Africa, Section 26 of the Constitution entitles everyone to have access to adequate housing. It also requires reasonable legislative and other measures for, subject to availability of resources, the progressive realisation of this right. Finally, it frowns upon arbitrary evictions and laws that permit such actions. The leading jurisprudence on this right is *Government of the Republic of South Africa and Others* v. *Grootboom and*

Others[92]. In this case, the respondents were rendered homeless following an eviction from their informal homes built on a piece of private land earmarked for formal low-cost housing.

At the time of the eviction many people including the respondents were on a waiting list for low-cost housing from the municipal authorities. It was not clear when the respondents will be able to access the low-cost houses. The question for the court was in twofold: whether at the point of the eviction, the government was constitutionally obliged to have taken reasonable steps to provide them with basic shelter until they obtained permanent accommodation; and how reasonable were government measures in realising the squatter's right to housing. In a unanimous court, it was held that the eviction was in violation of the respondents' constitutional right to housing and that the government has a positive constitutional obligation to provide adequate basic shelter to the respondents after the eviction.

The most engaging aspect of the Court's jurisprudence is its conception of 'reasonableness'. What must be a deemed reasonable action by the government in respect of enforcing the guaranteed rights? The Court thinks as Viljoen correctly reads it that reasonableness is constitutive of three distinct elements.[93] First, reasonableness does not require the court to 'enquire whether other desirable or favourable measures could have been adopted or whether public money could have been better spent. The question is whether the measures that have been adopted are reasonable.'[94] The court will be precluded by this principle from reasoning by comparison – abstract comparisons of whether government could have better spent money adopting different measures or projects. Rather, the reasoning that this principle invites the court to do is internal –focus on the reasonablessness of the particular program in question. Secondly, government would be required to address through the adopted program the needs of those desperately in need to access the right.[95] A program which is aimed at addressing a long term housing needs of the population is not sufficient if it excludes the short term needs of those in intolerable and desperate conditions.

Thirdly, such programs adopted in respect of facilitating access to the benefits of the right must be effectively implemented. A beautiful and reasonable program without an effective implementation is nothing but pretence.[96] Within this context, the court held the government housing program with long waiting list unreasonable as it fails to provide for the needs of the respondents who were evicted from their homes. The court also emphasises that statistical progress in the housing project does not adequately justify the reasonablessness of such a project if temporary relief for the respondents' disparate conditions are not provided for. Beneath this understanding was the court's conception of 'access to'. To the court, to be able to access a house, it must not only be affordable, but also there must be land, services and a dwelling.[97] Congruence of these elements is necessary if the government intends not be seen as preventing and impairing the right to access adequate housing.[98]

3.4.3 The Right to Health

Health in the words of the Constitution of the World Health Organisation (WHO) is "a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity".[99] While the right to health is not to be construed as a guarantee of the right to be healthy, it is to be conceived as 'good health that enable individuals to develop to the maximum of their physical and mental potential, and to live economically

and socially productive lives in harmony with the environment'.[100] The African Charter position on the right to health may thus achieve some level of semblance with this when it provides that it is "the best attainable state of mental and physical health".[101]

However, the right to healthcare service as provided for in some constitutional jurisprudence is not to be seen as synonymous with the right to health. The former does not conclusively express the content of the latter. This may be suggestive of a fact that the right to healthcare is a component of the right to health. Nutrition, water, housing and food can all contribute to the social, physical and mental well wellbeing of the person which underpins the definition of the right o health. This distinction is necessary to keep in mind a broader scope of the right to health which aspires to address more critical questions such as its relationship with the right to life, dignity, physical integrity, education[102], environmental health[103] and adequate housing. For instance, harmful cultural practices that violate the physical integrity of the person can raise legitimate right to health concerns.[104] Thus there seems to be a normative overlap with these areas as well as some civil and political rights.[105]

However, it may be a difficult but not an impossible task to achieve a conceptual clarity given these intersections. In fact, the content of the right to health as may be understood from the corpus of international human rights jurisprudence leans towards a set of core elements which must be guaranteed by states.[106] Though the full right to health may be subject to a progressive realisation as Article 2(1) of ICESCR stipulates, the core content may not be subject to this qualification.[107] It is reasonable to infer this from the Health For All and Primary Health Care strategies of WHO,[108] which states that "there is a health baseline below which no individuals in any country should find themselves".[109]

Embedded in this statement are two distinct but interrelated principles which usually underpin the construction of the right to health, namely the preconditions for health, and the healthcare services. While the content of the preconditions for health is defined by education, adequate food supply and nutrition, safe drinking water and basic sanitation, healthcare services encapsulate immunisation, treatments, maternal and child healthcare, and provision of drugs.[110] In respect of the broader scope of the right to health therefore, there are good reasons to assume that the two constitutive principles outline above, are enough to form the core content of the right. It thus makes sense to talk of the right of access to healthcare services and the underlying preconditions for health relative to the protection of the right to health.

The leading jurisprudence perhaps from among African superior courts on the right to health, is from two South African cases: *Soobramoney*[111], and *Treatment Action Campaign (TAC)*[112], the former being severely but rightly criticised for a self-imposed limitation on the construction of the right.[113] In *Soobramoney*, an indigent 41-year old man in the final stages of chronic renal failure challenged in court hospital guidelines that disqualified him from receiving regular renal dialysis treatment. He argued that such treatment was imperative in order to prolong his life. The hospital guidelines prioritise treatments and justified this on insufficient resources to provide dialysis treatment for all patients with chronic renal failure, and that Soobramoney condition was acutely incurable and irreversible.

Relying on Sections 11 and 27(3) of the final Constitution of South Africa, Soobramoney contended that the guidelines were in breach of his right to life and the duty of the state not to refuse emergency treatment. This focus was finally shifted by the court to Section 27(1) and (2) which guarantee the right to healthcare services within available state resources. Before then, the court had without denying that the state has a

duty not to refuse emergency treatment held that the peculiar condition of Soobramoney did not constitute an emergency and similarly did not think it appropriate to consider the case under the right to life provision as it rejected the constitutional jurisprudence of the Indian Supreme Court in *Paschim Banga Khet Mazdoor Samity v State of West Bengal*[114] where it was held that refusal of emergency treatment violates the right to life. The Indian case recognises the intersection of these two rights and it was argued for Soobramoney that Section 27(3) should be construed consistently with Section 11.

The majority of the Court thought that Soobramoney condition was an ongoing incurable one which requires an ongoing treatment. Such a condition does not meet the Court constitutive elements of emergency treatment, which must be sudden and unexpected. Articulating the precondition for emergency treatment, the Court stated that "[I]t is one in which emergency treatment was clearly necessary. The occurrence was sudden, the patient had not opportunity of making arrangements in advance for the treatment that was required, and there was urgency in securing the treatment in order to stabilise his condition. The treatment was available but denied".[115]

Based on this ordinary construction of emergency treatment, the Court reasoned that were the right to emergency treatment been generously construed so as to allow Soobramoney access dialysis treatment, it would inevitably lead to "… prioritising the treatment of terminal illness over other forms of medical care and would reduce the resources available to the state for purposes such as preventive healthcare and medical treatment of persons suffering from illnesses or bodily infirmities which are not life threatening"[116]. An ongoing, fast deteriorating, incurable medical condition as in Soobramoney's case, which requires an ongoing life-prolonging treatment, will seem to contradict this position.[117] Were his situation sudden but curable and requires an immediate, not ongoing medical attention, he may have qualified under Section 27(3) for an emergency treatment.

Finding that the appellant condition did not constitute an emergency medical case, the Court turned to consider Soobramoney's Section 27(1) right to access healthcare services, but stated that this right is subject to a limitation in Section 27(2). It is not a free-standing right. The state is only required to realise such a right within its available resources.[118] Accordingly, the Court held that the state was not in breach of its constitutional duty since there was a proven case of insufficient resources to provide Soobramoney with free medical treatment. The Court highlighted its rationale in a clear expression that "a court will be very slow to interfere with rationale [budgetary] decisions taken in good faith by political organs and medical authorities whose responsibilities it is to deal with such matters".[119]

While the decision is positive on a limited note of discouraging the state from merely pleading "lack of resources without providing cogent justificatory evidence"[120] it does little to establish a positive duty on the state to ensure sufficient resources are made available for healthcare services and emergency treatment. It appears the Court rationale not to interfere with political decisions taken in good faith in respect of resource utilisation sufficiently discounts the institutional function of the Court in protecting rights. Rationale decisions of other political organs may not be rationale in the context of protecting fundamental rights especially when such organs are heavily under the influence of the vicissitudes of politics. Such stance does nothing to evolve a better constitutional requirement on the government to proactively engage pertinent issues of human rights protection.

Nonetheless, the South African Constitutional Court acquitted itself well in *TAC* where it jettisoned the Soobramoney's jurisprudence. It embraced and clarified much better the principle of reasonableness in interrogating the decisions of government in respect of socio-economic rights. The right in question in *TAC* was the right to access healthcare where the Court has to decide on a policy decision of government not to make Nevirapine available generally at public health facilities to prevent mother-to-child transmission of HIV at birth. The government limited the drug, though provided for free of charge by the pharmaceutical company, to only a few training and research sites. This makes it difficult for mothers out of reach of these few prescribed sites to access the drug even if medically indicated. The applicants therefore contended among others that such a decision was unreasonable and in breach of their rights to access healthcare services.[121] The Court held the policy unreasonable as it was in violation of the state duty to fulfil the rights to healthcare. Such a duty, the Court stressed, cannot be fulfilled by unreasonably withholding access to resources which the state has the capacity to provide.[122] Withholding the Nevirapine from the pregnant HIV-positive mothers was thus unreasonable.

Though the facts of *Soobramoney* and *TAC* are not in any way similar, it is remarkable that the Court was prepared in the interest of protecting the right of health of the applicants to interfere with policy decision of the government. It is not conclusive that the policy decision was taken in good faith. If upon examination, it is proven to be unreasonable and adversely impinges on the health rights of a person, the court has served sufficient notice in *TAC* that it would interfere with such a decision in order to protect the constitutionally guaranteed right.

From the above cases, we should note that difficulties in the realisation of rights do not make the claimed rights non-rights. Thus the "exclusion of all economic and social rights from the inner sanctum of human rights, keeping the space reserved only for liberty and other first-generation rights, attempts to draw a line in the sand that is hard to sustain".[123] It must be argued that subscription to democracy and human rights necessitates a clear value commitment by the state, a fulfilment of which entails both the removal of constraints on the exercise of freedom and positive duties to facilitate the equal enjoyment of such freedom.[124] If human rights are to be secured to all, it does not make sense to ignore other constraints on the ability of individuals to exercise their rights. Such constraints can arise as much from poverty, poor health, and lack of education as from tyranny and intolerance.[125]

On this, Amartya Sen would point to a "removal of major sources of un-freedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or over-activity of repressive states".[126] It is thus not reasonable to hold a contest between human rights categorisations founded on justiciability between civil and political rights and socio-economic rights in an attempt to deny their inherent indivisibility and interrelatedness. For instance, it is difficult to argue that poverty is not the creation of law or state intervention through property law. Sen for instance thinks that entitlements to livelihood could be denied by a law that "stands between food availability and food entitlement". In that case, "starvation deaths can reflect legality with vengeance".[127]

Sandra Fredman therefore reasons that both set of rights must interact and interrelate. She observes that free speech or assembly is of little value to a homeless or starving person.[128] Likewise, the rights not to be detained without fair trial or subjected to torture can mean nothing to the beggar in *Agege Market* in Western Nigeria who cannot access the legal system to redress breaches of these rights by the security apparatuses or fellow citizens. In fact, freedom of the individual within a society directly entails a positive duty on the state to ensure the provision of a range of options, of public goods and the framework within which human relationships can flourish.[129] This does not necessarily conform to Hegel's argument that the state embodies objective reason that requires the allegiance of all,[130] as rights are not the supreme gifts of state nor solely founded on state laws. The value that positive duties "add to traditional doctrines of restraint is the perception that failure by the State to act can limit freedom as much as action by the State".[131]

In developing countries it is not unreasonable to put governments under a constitutional duty to provide socio-economic rights to the people. There are reasons to think it is more rather than less appropriate to think of socio-economic rights as legal rights in developing than in developed countries. First, we also should recognise that the judicial enforcement of socio-economic rights is not merely rendered impossible in cases where there *is* a relatively narrow or discrete point of principle at stake, rather than socio-economic policy development generally, and where courts adopt appropriate standards of deference to legislatures and executives.

It should further be observed that in developed countries with long histories of stable politics, in which governments have generally developed socio-economic policy in a responsible fashion, the concern about relative institutional competence and democracy, which suggests that politicians not judges should address socio-economic rights, is very strong. It is right to think in these countries that socio-economic rights should primarily be worked out in the 'forum of politics' (the legislature).

But, in contrast, in developing countries in transition from a time of military dictatorship and political corruption, where there is not a long history of politicians addressing socio-economic issues in a responsible way, the concerns about justiciability, democracy and relative institutional competence, which we can accept as very real, nevertheless become weaker, and competing concerns about the relationship between socio-economic rights and civil and political rights become stronger. It thus makes more sense to think that at least some socio-economic rights could be appropriately located within the 'forum of principle', i.e., the courts, where they will be safe from the vicissitudes of politics that may be, in these young democracies, still rather unpredictable.

4 Conclusions

Judicial duty on socio-economic rights should be taken seriously as a mechanism to engender a system of decision-making and social control that serves the general interest. The content of this general interest should encompass the legitimate interests of all members of society as identified by criteria such as wellbeing, autonomy, justice and equality. Indeed, rights have a vital role here in giving clear and forceful expression to

those fundamental interests that are recognised as basic to a decent and truly human existence. They provide check lists against which people can measure the reality of their democracy, the justice of their laws, the fairness of their economic and social system and the appropriateness of their conduct towards other people.[132] Moreover, they serve to identify the priority goals of all legitimate governments. They are, at the very least, an affirmation of universal value of human dignity.[133]

So in confronting the difficult question of defining the theory of rights appropriate for socio-economic rights in Africa that is at the core of this paper, one need not be too simplistic and conclude that either the rule-based or value-based rights accounts, each in its unique right, be exclusively adopted. It is reasonable to accept an overlap of the two accounts. Therefore, it must be stated that rule-based rights in their narrow construction should not be considered as exhaustive of the rights to be enforced in these states. A complete and sound theory of rights for these states should integrate both rule-based and value-based rights. Inherent in the idea of law are rights which must be protected by courts, and the reason-based rights theory helps us to see just this point.

Notes

1 E.g., Abdullahi Ahmed An-Na'im, 'Introduction: expanding legal protection of human rights in African contexts' in Abdullahi Ahmed An-Na'im (ed.), *Human Rights Under African Constitutions: Realising the Promise for Ourselves* (Philadelphia: University of Pennsylvania Press, 2002) at 4.

2 Abdullahi Ahmed An-Na'im 'The legal protection of human rights in Africa: how to do more with less' in A. Sara and T.R. Kearns (eds.), *Human Rights: Concepts, Contests, Contingencies* (2001) at 89.

3 E.g., Okey Martin Ejidike, 'Human Rights in the Cultural Traditions and Social Practice of the Igbo of the South-Eastern Nigeria' (1999), 43 *Journal of African Law* 71; Francis M. Deng 'A Cultural Approach to Human Rights among the Dinka' in An-Naim & Francis Deng (eds.), *Human Rights in Africa: Cross Cultural Perspectives* (Washington, D.C.: The Brookings Institution, Washington DC, 1990) at 272-3; KwasiWiredu 'An Akan Perspective on Human Rights' in An-Naim& Deng, *ibid*. at 253-54; Hurst Hannum, 'The Butare Colloquium on Human Rights and Economic Development in Francophone Africa: A Summary and Analysis' (1979), 1 *Universal Human Rights* at 64; MakauMutua, *Human Rights: A Political and Cultural Critique* (2002) at58, 65; Kwame Gyekye, *An Essay on African Philosophical Thought: The Akan Conceptual Scheme* (Cambridge: Cambridge University Press, 1987) at 154.

4 E.g., Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982), 76 *American Political Science Review* 303; BassamTibi, 'The European Conception of Human Rights and the Culture of Islam' In An-Naim & Francis Deng (eds.) *Human Rights in Africa* at 104-132; Rhoda Howard, 'Group versus Individual Dignity in the African Debate on Human Rights' in An-Naim& Francis Deng (eds.) *Human Rights in Africa* at 159-183; Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990) at 17-19;

5 El-Obaid Ahmed El-Obaid and KwadwoAppiagyei-Atua, 'Human Rights in Africa: A New Perspective in linking the past to the present' (1996), 41 *McGill Law Journal* 819.

6 *Ibid* at p.853. See also MakauMutua, *Human Rights* at 8.

7 Chidi Anselm Odinkalu, 'Back to the future: the imperative of prioritising for the protection of human rights in Africa' (2003), 47 Journal of African Law 1; Obiora C. Okafor, *The African Human Rights System: Activist Forces and International Institutions* (Cambridge: Cambridge University Press, 2007); Ben Nwabueze, *The Presidential Constitution of Nigeria;* Leslie Rubin & Pauli Murray, *The Constitution and Government of Ghana* (London: Sweet & Maxwell, African Universities Press, 1964); OluwoleIdowuOdumosu, *The Nigeria Constitution: History and Development* (London: Sweet & Maxwell, African Universities Press, 1963); Abdullahi Ahmed An-Na'im (ed.), *Human Rights Under African Constitutions*; Paul TiyambeZeleza& and Philip J. McConnaughay (ed.), *Human Rights, the Rule of Law, and Development in Africa* (Philadelphia: University of Pennsylvania Press, 2004); Claude E. Welch Jr. & Ronald I. Meltzer, *Human Rights and Development in Africa* (Albany: State University of New York Press, 1984); Ben Nwabueze, *Constitutional Democracy in Africa*. Vol. 1-5 (Spectrum Books, 2001); AbdallaBujra& Said Adejumobi, *Breaking Barriers, Creating New Hopes: Democracy, Civil Society, and Good Governance in Africa*(Africa World Press, 2004); Ann WillcoxSeidman et al., *Africa's Challenge: Using Law for Good Governance And Development*(Africa World Press, 2007); C. Adams, *Affirmative Action in a Democratic Africa* (Juta Academic, 1993); Staffan Lindberg, 'The Democratic Qualities of Competitive Elections: Participation, Competition and Legitimacy in Africa' (2003), 41 Commonwealth & Comparative Politics 61; Appiagyei-Atua, Kwadwo, 'Minority Rights, Democracy and Development: The African Experience' (2008), 15 International Journal on Minority and Group Rights 489; Clement E. Asante, *The Press in Ghana: Problems and Prospects* (University Press of America, 1996); Bourgault, Louise M., *Mass Media in Sub-Saharan Africa* (Bloomington: Indiana University Press, 1995); OkechukwuOko, 'Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria' (2005), 31 Brook Journal of International Law 9; Nana K.A. Busia, Jr. 'Ghana: Competing Visions of Liberal Democracy' in Abdullahi Ahmed An-Na'im (ed.), *Human Rights Under African Constitutions* at 59.

8 Ahunwan Boniface, 'Contextualising Legal Theory: Economic Analysis of Law and Jurisprudence from the African Perspective' (2000), 12 *Afr. J. Int'l & Comp. L.* 240, at 243.

9 See N. Bobbio, *The Age of Rights*; Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

10 Douzinas convincingly writes, 'A new idea has triumphed on the world stage: human rights. It unites left and right, the pulpit and the state, the minister and the rebel, the developed world and the liberals of Hampstead and Manhattan'. *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart, 2000) at 1.

11 Tom Campbell, *Rights: A Critical Introduction* (New York: Routledge 2006) at 3.

12 See Lon L. Fuller, *The Morality of Law*; H.L.A. Hart, *The Concept of Law*; Ronald Dworkin., *Taking Rights Seriously* (London: Duckworth, 1977), Joseph, Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1988) chap. 3; and John Finnis, *Natural Law and Natural Rights*,(Oxford: Oxford University Press, 1980).

13 Finnis, *Natural Law and Natural Rights.*

14 John Rawls, *A Theory of Justice* (1971).

15 Ronald Dworkin, 'Objectivity and Truth'.

16 See also chapter 6 of Dworkin's*Taking Rights Seriously*.

17 See Dworkin, *Justice for Hedgehogs* and 'Truth and Objectivity'.

18 Jeremy Bentham, *Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued during the French Revolution* (1792); republished in *The Works of Jeremy Bentham*, vol. II, ed. J. Bowring (Edinburgh: William Tait, 1843), p. 501.

19 Jerome J. Shestack, 'The Philosophic Foundations of Human Rights' (1998), 20 *Human Rights Quarterly* 201 at 209.

20 AmartyaSen, 'Elements of a Theory of Human Rights' (2004), 32 *Philosophy and Public Affairs* 315 at 316.

21 Maurice Cranston, *What Are Human Rights?*(London: The Bodley Head Ltd, 1973) at 2.

22 UN Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (1966) and International Covenant of Economic, Social and Cultural Rights (1966).

23 Shestack, 'The Philosophic Foundations of Human Rights' at 209-10.

24 Loren Lomasky, *Persons, Rights and the Moral Community* (1987) at 13.

25 Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993), 13 *Oxford Journal of Legal Studies* 3 at 11.

26 See Jane Mansbridge, *Why We Lost the ERA* (Chicago: University of Chicago Press, 1986).

27 Campbell, *Rights* at 15.

28 *Ibid.*

29 *Ibid.,* at 87.

30 Cranston, *What Are Human Rights?* at 19.

31 *Ibid.*

32 Carl Wellman, 'Upholding Legal Rights' (1975), 86 *Ethics* 49 at 50-1.

33 Campbell, *Rights* at 89; H.L.A. Hart, *The Concept of Law.*

34 Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974) at ix.

35 John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971) at 3.

36 Ernest Bloch, *Natural Law and Human Dignity* (D.J. Schmidt trans.) (Cambridge, Mass.: MIT Press, 1988).

37 H.L.A. Hart 'Natural Rights: Bentham and John Stuart Mill' in H.L.A. Hart, *Essays on Bentham* (Oxford: Clarendon Press, 79 at 84.

38 Rex Martin and James W. Nickel, 'Recent Work on the Concept of Rights' (1980), 17 *American Philosophical Quarterly* 165 at 175.

39 *Ibid*., at 84.

40 Joel Feinberg, 'In Defence of Moral Rights' (1992), 12 *Oxford Journal of Legal Studies* 149 at 149.

41 Sen, *The Idea of Justice* at 143.

42 *Ibid.,* at 144.

43 Feinberg, 'In Defence of Moral Rights' at 150.

44 *Ibid.,* at 152.

45 Sen, *The Idea of Justice* at 385.

46 *Ibid.,* at 386.

47 Feinberg, 'In Defence of Moral Rights' at 152.

48 Dworkin, *Taking Rights Seriously* at 193.

49 Michael Freeman, 'The Philosophical Foundations of Human Rights' (1994), 16 *Human Rights Quarterly* 491 at 500.

50 In the discourse of human rights, there is a marked schism between civil/political rights and socio-economic rights. The fundamental cause of this is justiciability. Even advanced democracies like Canada and the United States did not give them any constitutional protection. In some African countries like Botswana, Tunisia, Zimbabwe and Zambia, such rights are not provided for. Yet in other African countries they are explicitly provided for as justiciable rights. Ghana and South Africa are apt examples. Comparatively however, the socio-economic rights in Ghana are not as exhaustive as those in the South African Constitution. For instance they do not include an explicit provision on the right to health.

51 The concept *justiciability* has been defined by Lorne Sossin as "a set of judge made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable. The criteria used to make this determination pertain to three factors: (1) the capacities and legitimacy of the judicial process, (2) the constitutional separation of powers and (3) the nature of the dispute before the court". Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada (Thomson Canada Limited, 1999) at pp.2.*

52 Vierdag, E W, 'The Legal Nature of the Rights Granted by International Covenant of Economic, Social and Cultural Rights' in *The Netherlands Year Book of International Law* (1978) at pp.103.

53 Christian Starch, 'Europe's Fundamental Rights in their Newest Garb' (1982) Human Rights Law Journal 116. See also David M. Beatty, 'The Last Generation: When Rights Lose the Meaning' in *Human Rights and Judicial Review: A Comparative Perspective* (David M. Beatty ed., 1994).

54 Michelman, F.I., 'The Constitution, Social Rights and Liberal Political Justification' (2003) 1 *International Journal of Constitutional Law*, 13 at pp.16.

55 Craig Scott & and Patrick Macklem, 'Constitutional Ropes of the Sand or Judicial Guarantees? Social Rights in a New South Africa Constitution' (1992) 141 University of Pennsylvanian Law Review 1 at pp.15.

56 See Paul Breast, "The Fundamental Controversy: The Essential Contradictions of the Normative Constitutional Scholarship" (1981) 90 Yale Law Journal 1063.

57 See Michael Dennis & David Steward, "Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?" (2004) 98 America Journal of International Law 462(This rationale is grounded in the conception that these rights are positive in nature requiring governments to spend significant amount of resources for their realisation).

58 For instance, South Africa and Ghana.

59 Asbjorn Eide et al. (Ed.) *Economic, Social and Cultural Rights,* (Martinus Nijhoff Publishers, 2001).

60 ibid at pp.5.

61 Ibid at 6.

62 Amartya, "Well-Being, Agency and Freedoms: The Dewey Lectures 1984" (1985) The Journal of Philosophy 169.

63 David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed., 2002) at pp. 113.

64 See Kooijman, "Human Rights – Universal Panacea? – Some Reflections on the So-called Human Rights of the Third Generation" (1990) Netherlands International Law Review 320(he saw the relevance of these set of rights[socio-economic rights and civil and political rights] in equal proportions and advocated mutuality in their conception and enforcement).

65 See Ellen Willes, "Aspirational Principles or Enforceable Rights: The Future for Socio-Economic Rights in National Law (2006-2007) 22 America University International Law Review 35.

66 See Michael K. Addo, "Justiciability Re-examined" in *Economic, Social and Cultural Rights: Progress and Achievement* (Ralph Beddard & Dilys M. Hill ed., 1992).

67 [1996] 10 BCLR 1253.

68 Ibid at para 78.

69 (1999) 3 SA 1 (CC).

70 *European Human Rights Reports 305 (1979).*

71 Craig Scott & and Patrick Macklem, "Constitutional Ropes of the Sand or Judicial Guarantees? Social Rights in a New South Africa Constitution" at pp.35-36.

72 H. Spector "Judicial Review, Rights and Democracy" (2002) 22 Law and Philosophy 285; Barber, N W, "Prelude to the Separation of Powers" (2002) 6o Cambridge Law Journal 59; J. McMillan, "Judicial Restraint and Activism in Administrative Law" (2002) 30 Federal Law Review 335; J. Ferejohn "Judicialising Politics, Politicising Law" (2002) 65 Law & Contemporary Problems 41; and G. Hogan "Judicial Review and Socio-economic Rights" in *Human Rights, the Citizen and the State: South African and Irish Perspective* (J Sarkin & W Binchy ed., 2001).

73 John Stuart Mill said "[A] Court of Justice as such . . . does not declare the law *eo normine* and in the abstract, but waits until a case between man and man is brought before it judicially involving the point in dispute: from which arises the happy effect that its declarations are not made in a very early stage of the controversy; . . . that the Court decides after hearing the point fully argued on both sides by lawyers of reputation; decides only on as much of the question at a time as is required by the case before it, and its decision . . . is drawn from it by the duty which it cannot refuse to fulfil, of dispensing justice impartially between adverse litigants." J.S. Mill, *Considerations on Representative Government* (1861), reprinted in J.S. Mill, *Utilitarianism, On Liberty and Considerations on Representative Government*, (H.B. Acton, ed., 1972) at pp.403.

74 Fernandes, Walter & Paranjpye, Vijay, Rehabilitation policy and law in India : a right to livelihood (New Delhi: Indian Social Institute, 1997); Conway., *Human rights, assets and livelihood security, and sustainable development: Synthesis report from an inter-agency workshop* (London: ODI, 2001); Dorward A., *Pro-Poor Livelihoods: Addressing the Market/ Private Sector Gap* Paper presented at the Sustainable Livelihoods Seminar on 'Private Sector and Enterprise Development', Crown Plaza Hotel, Manchester, 19th November 2001(http://www.wye.ic.ac.uk/AgEcon/ADU/staff/dorward/ModMktsPrivateSector.pdf) and Moser, C. and Norton, A. with Conway, T., Ferguson, C. and Vizard, P., *To Claim Our Rights: Livelihood security, human rights and sustainable development* (London: ODI, 2001).

75 *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180.

76 AIR 1986 SC 180.

77 Ibid at 193.

78 The Case was listed as SUIT No. MISC 1203/2002 and was heard by Justice Yaw Appau in the High Court, Accra.

79 Ibid at p.15 of the unreported decision.

80 Scott and Macklem, "Constitutional Ropes of the Sand or Justiciable Guarantees?",*supra* note 700 at 28.

81 *Ibid.*

82 *Ibid*., at 29.

83 *Ibid*.

84 See Maria Foscarinis, Advocating for the Human Right to Housing: Notes from the United States (Realizing Domestic Social Justice Through International Human Rights) (2006) 30 New York University Review of Law & Social Change 447 and Abul Hasnat Monjurul Kabir, Development and Human Rights: Litigating the Right to Adequate Housing. (2002) 3 Asia-Pacific Journal on Human Rights and the Law 97.

85 Article 25(1) Universal Declaration of Human Rights, Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, Article 14(2) of the Convention on the Elimination of All Forms of Discrimination against Women, Article 5(e) of the Convention on the Elimination of All Forms of Racial Discrimination, Article 27 of the Convention on the Right of the Child, and Article 21 of the Convention Relating to the Status of Refugees. At the regional level: Article 31 of the Revised European Charter (1996), Article 31(k) of the Organisation of American States Charter (1948).

86 UN doc. E/CN.4/Sub.2.1995/12, para 12.

87 Ibid at para 11

88 See Jacobs Sidney *The Right to a Decent House* (London ; Boston : Routledge & K. Paul, 1976); Wheeler Michael, *The Right to Housing* (Montreal: Harvest House, 1970); Cambronne Karl, Towards a recognition of a constitutional right to housing (1974) 42 UMKC Law Review 362; and John J. Williams, 'The Grootboom Case and the Constitutional Right to Housing: The Politics of Planning in Post-apartheid South Africa' in *Inclusive Citizenship : Meanings and Expressions (*Naila Kabeer ed., London ; New York : Zed Books, 2005)

89 See RG Bratt, ME Stone, and CW Hartman, *A Right to Housing: Foundation for a New Social Agenda* (Temple University Press, 2006) and J Krieger, and DL Higgins, Housing and Health: Time Again for Public Health Action (2002), 92 *American Journal of Public Health*, 758.

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91 Ibid.

92 *Government of the Republic of South Africa and Others* v. *Grootboom and Others* 2000 (11) BCLR 1169.

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94 *Government of the Republic of South Africa and Others* v. *Grootboom and Others* at para 41.

95 Ibid at para 95.

96 Ibid at para 42. See also Frans Viljoen, *International Human Rights Law in Africa* at 576.

97 Ibid at para 35.

98 Ibid at para 34.

99 Basic Documents, World Health Organisation, 1988, 1.

100 Cheadle M.H., Davis, D.M. and Hayson N.R.L., *South African Constitutional Law: The Bill of Rights* (Durban: Butterworths Publishers Ltd, 2002) at 494. See also.

101 Article 16(1) of the African Charter on Human and Peoples' Rights. The right to health is also codified in a number of international human rights instruments: Article 25 of the Universal Declaration of human Rights (1948); Article 11of the European Social Charter (ESC, 1961); Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966); Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979); Article 10 of the Additional Protocol of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador, 1988) and Article 24 of the Convention on the Rights of the Child (CRC, 1989).

102 Articles 13-14 of the ICESCR.

103 See A. A. Cancado Trindade, 'The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change' in E. Brown Weiss (ed.), *Environmental Change and International Law: New Challenges and Dimensions* (1992) at p.244-312.

104 J Smith, *Visions and Discussions on the Genital Mutilation of Girls: An International Survey*, (1995) at 21-22.

105 Brigit Toebes, 'The Right to Health' in Asbjørn Eide, Catarina K. and Allan Rosas (ed.) *Economic, Social and Cultural Rights* (2001) 169 at 170-5. See also *Chaoulli v. Quebec (Attorney General),* 2005 1 S.C.R. 791, 2005 SCC 35, Canadian "right to health case"; Fact Sheet no.31 on the right to health (OHCHR-WHO): Right to Health Factsheet31; and Commission on Social Determinants of Health - Final Report, 2008.

106 See UN Commission on Human Rights: Economic, Social and Cultural Rights: *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*. Sixty-second Session, Item 10 of the Provisional Agenda, Advance Edited Version, E/CN.4/2006/48, 03 March 2006; *General Comment No. 14:* The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), UN Document E/C.12/2000/4. 11 August 2000; available at [www.unhchr.ch/tbs/doc.nsf/ (symbo...]; Smith G. P, Human Rights and Bioethics: Formulating a Universal Right to Health, Health Care, or Health Protection? (2005) Vanderbilt Journal of Transnational Law 1295; Leary V.A., The Right to Health in International Human Rights Law (1994) 1 Health and Human Rights, Available online at: [www.hsph.harvard.edu/fxbcenter/V...] and Annas, G. J., 'Human Rights and Health: The Universal Declaration of Human Rights at 50' in *Perspectives on Health and Human Rights.*(Edited by Gruskin S, Grodin MA, Annas GJ, and Marks, SP. New York: Routledge, 2005) at pp.63–70.

107 Brigit Toebes, 'The Right to Health' at 176. In fact, the concept of minimum core was developed by the UN Committee on Economic, Social and Cultural Rights charged with the responsibility of monitoring the obligations undertaken by parties to the ICESCR. In the relevant portion the Committee stated that "a State party in which any significant number of individuals is deprived of the essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such minimum core obligation, it would be largely deprived of its *raison d'être".* CESCR General Comment 3 "The nature of States parties obligations (Art. 2, para.1)" 14/12/90 para 10. But note that the South African Constitutional Court in *Treatment Action Campaign and Others* v. Minister of Health and Others 2002(4) BLCR 356 reasoned that the minimum core is accessible immediately upon demand. The minimum core to the Court is subject to reasonableness under Section 26 (2) of the SA Constitution, and not a self-standing right conferred on everyone under Section 26(1). In *Government of the Republic of South Africa and Others* v. *Grootboom and Others* 2000 (11) BCLR 1169, the Court defines reasonable measures as "to be reasonable, measures cannot leave out of account the degree and the extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right". *Ibid* at para. 44.

108 World Health Organisation, *Primary Health Care: Report of the International Conference on Primary Health Care*, Alma-Ata, USSR, 6-12 September 1978, Health For All Series No. 1, 1978, Chapter 3, para. 50.

109 World Health Organisation, *Global Strategy for Health for All by the Year 2000* (Adopted in WHO resolution WHA.34.36), 1981, Chapter 3, at p.31, para. 1.

110 Brigit Toebes, 'The Right to Health' at 177.

111 *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC).

112 *Treatment Action Campaign and Others* v. Minister of Health and Others 2002(4) BLCR 356.

113 Cheadle M.H., Davis, D.M. and Hayson N.R.L., *South African Constitutional Law: The Bill of Rights* at pp.498-505.

114 *Paschim Banga Khet Mazdoor Samity v State of West Bengal* AIR 1996 SC 1225.

115 *Soobramoney v Minister of Health, KwaZulu-Natal* at 1701.

116 Ibid at para. 19.

117 Marius Pieterse, A Different Shade of Red: Socio-Economic Dimensions of the Right to Life in South Africa (1999) 15 South African Journal on Human Rights 372 at 381.

118 Ibid.

119 *Soobramoney v Minister of Health, KwaZulu-Natal* at para. 29.

120 Ngwena, Aids in Africa: Access to Health Care as a Human Rights (2000) 15 SAPL 1 at 14.

121 Two issues were framed for the court, both of which relate to the constitutive elements of the right to health: access to public health service and government measures to prevent the spread of diseases. The specific issues were (a) whether or not government acted unreasonably in refusing to make antiretroviral drug – Nevirapine available in all public health facilities where the attending doctor considered it medically indicated and (b) not setting out a time frame for a national program to prevent mother-to-child transmission of HIV.

122 See de Groot R, 'Right to Health Care and Scarcity of Resources' in *Health Law, Human Rights and the Biomedicine Convention: Essays in Honor of Henriette Roscam Abbing* (Edited by Gevers JKM, Hondius EH and Hubben JH. Leiden: Martinus Nijhoff; 2005) at p.49-59 and Mann J, 'Medicine and Public Health, Ethics and Human Rights' in *Health and Human Rights: A Reader* (Edited by Mann J, Gruskin S, Grodin MA, Annas, GJ. New York: Routledge; 1999) at pp.439–452.

123 *Ibid*.

124 Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Rights* (Oxford University Press, 2008) at 9.

125 *Ibid.,* at 11.

126 AmartyaSen, *Development as Freedom* at 3.

127 *Ibid.,* at 165-7.

128 Fredman, *Human Rights Transformed* at 67.

129 *Ibid*., at 18.

130 "Philosophy of Right" (1942) in S.M. Cahn (ed.) *Political Philosophy: The Essential Texts* (Oxford: Oxford University Press, 2005).

131 Fredman, *Human Rights Transformed* at 25.

132 Campbell, *Rights* at 95.

133 See Jack, Donnelly, "Human Rights: A New Standard of Civilisation?" (1998), 74 *International Affairs* 1.