A path to realising economic, social and cultural rights in Africa? A critique of the New Partnership for Africa's Development

Christopher Mbazira*

Advocate of the High Court of Uganda; Assistant Lecturer, Faculty of Law, Makerere University; Research Fellow, Socio-Economic Rights Project, Community Law Centre, University of the Western Cape

Summary

The article first sets out the legal framework for the protection of socio-economic and cultural rights in Africa. Some of the reasons that have been advanced for the non-realisation of socio-economic rights as compared to civil and political rights are discussed. Thereafter the article highlights the background of New Partnership for Africa's Development (NEPAD) and gives a brief description of its objectives and framework. It proceeds to look at the institutional set-up of NEPAD, including the operation of the African Peer Review Mechanism as an implementation strategy of NEPAD's objectives. The article examines how NEPAD intends to address the issue of socio-economic rights through, for instance, ensuring an end to conflicts, democracy and good governance, and improvement of infrastructure and education. The article looks at NEPAD's commitment to ensure improved health and protection of the environment. It discusses NEPAD's approach to the advancement of culture and makes a critique of NEPAD's human rights component. NEPAD is Africa's hope for sustainable development and is a programme that commits African leaders to a number of positive undertakings, but NEPAD needs to be integrated with the African human rights system.

* LLB (Hons) (Makerere), Dip LP(LDC), LLM (Pret), LLD Candidate (UWC); cmbazira@uwc.ac.za

1   Introduction

The realisation of socio-economic rights on the African continent, even at a minimum level, remains poor. The majority of Africans live in poverty, disease and ignorance; they lack food and other basic necessities such as water. These conditions have been exacerbated over the last few decades by the HIV/AIDS epidemic in Africa. Historically, the colonisers of Africa were interested in the maximum exploitation of her natural resources without concern for the socio-economic development of the people. Economic and social infrastructures were erected to facilitate economic exploitation in those areas where natural resources existed.

At the time of independence in the 1960s, though the African nationalists appeared to be committed to socio-economic transformation, the consolidation of Africa's independence and sovereignty was at the centre of this commitment. The Charter of the Organisation of African Unity (OAU Charter), formed in 1963, proclaimed the principle of respect for the sovereignty of African states and the principle of non-interference in the affairs of states.[1] Though the OAU Charter was conscious of the responsibility to harness the natural and human resources of the continent for the total advancement of the people in all spheres of human endeavour,[2] this was never an objective of the OAU. What followed were military dictatorships, poor leadership, corruption, political conflicts, globalisation and structural adjustment policies, all of which have acted to hamper Africa's development. The provision of social services broke down, the debt burden increased to unacceptable levels; the state withdrew from the provision of essential services such as education and health; and retrenchment aggravated unemployment and household poverty. HIV/AIDS has also affected the labour market and the quality of life.

A new Africa has, however, emerged and this century was declared the 'African century'[3] with a leadership committed to the transformation of Africa. The OAU has been transformed into the African Union (AU), expanding its objectives to include the promotion of peace, security and stability; the promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights (African Charter)[4] and other relevant human rights instruments; the

---

[1]   Article III Charter of the OAU, sourced at <http://textus.diplomacy.edu/Thina/txtGetXDoc.asp?IDconnv=2830> (accessed 15 September 2003).

[2]   As above, para 4 of Preamble.

[3]   See Message from the Chairperson of the AU, the President of South Africa, Thabo Mbeki, on the occasion of the 40th Anniversary Celebrations of the OAU, 25 May 2003; <http://www.au2002.gov.za/docs/speeches/mbeki030523.htm> (accessed 15 August 2003).

[4]   Adopted by the Eighteenth Assembly of Heads of State and Government of the OAU at Nairobi in July 1981, entered into force on 21 October 1986.

promotion of sustainable development at the economic, social and cultural level; and to include working with relevant international partners in the eradication of preventable diseases and the promotion of good health.[5] To achieve these objectives, African leaders have designed a programme and plan of action, the New Partnership for Africa's Development (NEPAD).[6]

This paper examines the implications of NEPAD for the realisation of economic, social and cultural rights in Africa. The paper is divided into four sections. The first section sets out the legal framework for the protection of these rights in Africa. Section two highlights the background of NEPAD and gives a brief description of its framework. This is followed by an outlay of NEPAD's socio-economic development programmes and their relationship to the realisation of socio-economic rights. The last section provides a critique of NEPAD's possible contribution to the realisation of socio-economic rights. This is followed by a conclusion.

2   The legal framework for the protection of economic, social and cultural rights in Africa

2.1   Introduction

The legal framework of protection of economic, social and cultural rights in Africa derives from the universal and regional levels and filters down to the domestic level. At the universal level, socio-economic rights are protected in a number of instruments. The first important instrument to proclaim this protection was the Universal Declaration of Human Rights (Universal Declaration), which incorporated a wide range of economic, social and cultural rights, without distinguishing them from the civil and political rights. However, this declaration is not a treaty and does not impose binding legal obligations. The promulgation of binding treaties was called for and 1966 saw the adoption of the International Covenant on Civil and Political Rights (CCPR),[7] incorporating civil and political rights, and the International Covenant on Economic, Social and Cultural Rights (CESCR),[8] incorporating economic, social and cultural rights. In addition to CESCR, socio-economic rights are protected in a number of

---

[5]   Art 3 Constitutive Act of the African Union, adopted at Lomé Togo, 11 July 2002, at <http://www.au2002.gov.za/docs/key_oau_act.htm> (accessed 25 August 2003).

[6]   Adopted at Abuja, October 2001, the NEPAD document can be accessed at <http://www.avmedia.at/cgiscript/csNews/news_upload/NEPAD_2dCORE_2dDOCUMENTS _2edb.NEPAD%FRAMEWORK%20D> (accessed 16 August 2003).

[7]   Adopted and opened for signature, ratification and accession by General Assembly Resolution 200A (XXI) of 16 December 1966.

[8]   Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966.

other universal instruments which have been ratified by most of the African countries. These instruments include: the Convention on the Rights of the Child (CRC),[9] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[10] the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[11] and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CPMWF).[12]

At the regional level, the African Charter[13] protects economic, social and cultural rights together with civil and political rights. Though it was drafted at the time of the ideological controversies of the Cold War (which had led to the adoption of CESCR separately from CCPR),[14] the African Charter recognises the indivisibility and interrelatedness of civil and political rights and economic, social and cultural rights. It is recognised that civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality, and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.[15] This author is of the opinion that the inter-dependence of the rights creates a symbiotic relationship. One category of right cannot survive without the other.

Despite such international and regional protection, economic, social and cultural rights continue to be relegated to the status of secondary rights and are considered unjusticiable. In the subsection that follows, this issue is discussed in detail.

2.2   Relegation of socio-economic rights to secondary status

For many decades, socio-economic rights have been relegated to the status of secondary rights. Civil and political rights are thought to be 'absolute' and 'immediate', whereas economic, social and cultural rights are held to be programmatic; to be realised gradually, and therefore not

---

[9]   Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1990.

[10]   Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979.

[11]   Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965.

[12]   Adopted and opened for signature, ratification and accession by General Assembly Resolution 45/158 of 18 December 1990.

[13]   African Charter (n 4 above).

[14]   The 'Cold War' had led to the division of the world into the eastern and western blocs, with the belief that the eastern bloc was more committed to economic, social and cultural rights and the western was more committed to civil and political rights, and that putting those classes of rights would lead to the non-ratification of such incorporating instrument. But these assumptions were wrong.

[15]   Preamble para 8 African Charter.

to be 'real' rights.[16] Despite the fact that the African Charter recognises the idea that civil and political rights cannot be dissociated from economic, social and cultural rights,[17] in practice the latter rights have not materialised.[18] A number of arguments have been advanced to support the view that socio-economic rights are not justiciable. This rejection may be partly associated with a failure to recognise phenomena such as poverty, malnutrition, illiteracy and unemployment as human rights problems.[19] It has been argued that, unlike civil and political rights, socio-economic rights are not real rights.[20] They do not pass the *practicability test.* This is based on the conception that these rights require vast resources for their implementation. This view, however, is blind to the fact that not all the duties under CESCR are to be implemented immediately.[21] CESCR requires that states 'take steps to the maximum of [their] available resources, with a view to progressively achieving the full realisation of the rights . . .'[22] Although the UN Committee on Economic, Social and Cultural Rights (the Committee) has said that some of the obligations are of immediate effect,[23] this does not mean that states are compelled to do the impracticable. This argument is also blind to the fact that some civil and political rights may be equally impracticable. The right to life, for example, imposes an obligation on the state to provide security to its citizens. But this does not mean that murders are not committed. It is impracticable to provide every citizen with a policeman at his or her guard.

   It has also been argued that socio-economic rights lack the essential characteristics of *absolutism* and *universality*, which are the hallmarks of human rights.[24] However, international law discourse has interpreted the term *universality* in connection with cultural relativity, which takes into account the different cultures and customs prevalent in the different

---

[16]   A Eide 'Economic, social and cultural rights as human rights' in A Eide, C Krause & A Rosas (eds) *Economic social and cultural rights. A text book* (2001) 9 10.

[17]   n 15 above, Preamble para 8.

[18]   The practice of the international financial institutions exacerbated this division by requiring that countries improve their records of civil and political rights, for instance, by holding elections and guaranteeing all the political rights like freedom of association. Nothing was done in the area of economic, social and cultural rights; instead, expenditure geared towards these rights was discouraged.

[19]   P Baehr *Human rights: Universality in practice* (2001).

[20]   See M Cranston 'What are human rights' (1973) as quoted by K Arambulo *Strengthening the supervision of the International Covenant on Economic, Social and Cultural Rights* (1999) 58.

[21]   Arambulo (n 20 above) 59.

[22]   Art 2(1) CESCR.

[23]   General Comment No 3 (Fifth session, 1990) [UN doc E/1991/23] *The nature of the states' obligations* (art 2, para 1 of the Covenant) para 1.

[24]   M Cranston 'Human rights real and supposed' in D Raphael (ed) *Political theory and rights of man* (1967) as quoted by M Craven *The international Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) 10.

states.[25] Yet, most of the rights in CESCR are universal in nature. The right to food, the right to health and the right to education may be considered universal. All people, irrespective of gender, race, social status or nationality, require the realisation of these rights. In addition, this argument does not appreciate the interconnectedness between these rights and some of the civil and political rights such as the right to life and the right to human dignity.[26]

Another argument advanced is that socio-economic rights are not justiciable because their implementation has cost implications. Also, these rights oblige the state to provide welfare to the individual.[27] These views, however, ignore the fact that even civil and political rights have cost implications.

These arguments lack merit. It is clear that socio-economic rights cannot be disassociated from civil and political rights and that development cannot be achieved unless it embraces both categories of rights. This calls for a human rights-based approach to development. The UN Independent Expert on the Right to Development has described a rights-based approach as one which embraces the interdependence of rights — civil, political, economic, social and cultural rights — and which follows procedure and norms of human rights laws, and is transparent, accountable, participatory and non-discriminatory, with equity in decision making and sharing the fruits of the process.[28]

There is therefore a need for concerted international efforts to realise these rights. The international community has a duty to ensure the realisation of these rights since the arguments against their realisation have been demystified. It has been argued, rightly in the opinion of this author, that efforts of some African states with respect to the enforcement of civil and political rights would not have materialised without the pressures of the international community, NGOs and civil society, and that similar efforts with respect to socio-economic rights might have achieved similar results.[29] This compels all inter-governmental organisations to co-operate with NGOs and civil society organisations in order to realise these rights.

---

[25] Arambulo (n 20 above) 62.

[26] As above.

[27] Eide (n 16 above) 9–28.

[28] Fourth Report of the UN Independent Expert on the Right to Development, A Sengupta, E/CN 4/2002/WG.18/2, 20 December 2001 sourced at <http://www.unhchr.ch/Huridocda/Hurida.nsf/TestFrame/0469e91a828bdeec125bdf004f004f325e?Opendocument> (accessed 25 August 2003).

[29] See SC Agbakwa 'Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights' (2002) 5 *Yale Human Rights and Development Law Journal* 202.

3   The New Partnership for Africa's Development is born

3.1   Introduction

Initiatives similar to NEPAD have been undertaken on the African continent, in particular the Lagos Plan of Action (LPA) of 1980.[30] LPA was a plan of action born out of the recognition by African Heads of State and Government of the need to take urgent action to provide the political support necessary for the success of measures to achieve self-reliance and self-sustaining development and economic growth.[31] However, though LPA laid out a number of strategies for the development of agriculture, it was based on macro-economic factors and reflected a continuing passion for large infrastructure projects that had been the emphasis of development planning in the early years of independence.[32] In the view of the World Bank, LPA did not give enough room to the private sector and did not concede to reforms necessary in the public sector to stimulate growth.[33] Also notable is the fact that LPA did not say anything about peace, security and good governance, and was for all purposes an 'economistic' document.[34] LPA did not in fact take off. It was overtaken by the International Monetary Fund (IMF) and World Bank development programmes.[35] These programmes saw the introduction of Structural Adjustment Programmes (SAPs), which required countries to undertake structural adjustments in their economies.

After two decades of SAPs, African leaders recognised that the African continent was not benefiting from these programmes, and that Africa's marginalisation in the global economy, bad governance and insecurity were adversely affecting the development of the African economy. This called for a new plan of action. The need for a new programme of action was born as the Millennium Africa Recovery Plan (MAP), conceived in 2000 by Presidents Mbeki of South Africa, Obasanjo of Nigeria and

---

[30]   Adopted at Lagos, July 1980, as Lagos Plan of Action for Economic Development of Africa, 1980–2000 and the Final Act of Lagos 1980, at <http://www.uneca.org/adfiii/riefforts/ref/other2.htm> (accessed 16 August 2003).

[31]   The Monrovia Declaration of Commitment of Heads of State and Government of the OAU on the Guidelines and Measures for National and Collective Self-Reliance in Economic and Social Development for the Establishment of a New International Economic Order, adopted at the 16th ordinary session of the OAU Heads of State and Government at Monrovia, Liberia, July 1979.

[32]   J Oloka-Onyango 'Beyond the rhetoric: Reinvigorating the struggle and cultural rights in Africa' (1995) 26(1) *California Western International Journal* 1.

[33]   See P Anyang'Nyong'o 'From the Lagos Plan of Action to NEPAD: The dilemmas of progress in independent Africa' at <http://www.anc.org.za/ancdocs/pubs/umbrabulo15plan.html> (accessed 15 August 2003).

[34]   As above.

[35]   As above.

Boutefilka of Algeria. This was later merged with President Wade of Senegal's OMEGA plan,[36] to produce the New African Initiative (NAI) in 2001,[37] with its name being changed to NEPAD in the same year.

3.2 What is NEPAD?

NEPAD is a pledge by African leaders, based on a common vision and a firm and shared conviction that they have a pressing duty to eradicate poverty and place their countries, both individually and collectively, on a path to sustainable development and, at the same time, to participate actively in the world economy and body politic.[38] Through NEPAD, African leaders have set an agenda for the renewal of the continent. This agenda is based on national and regional priorities and development plans that must be prepared through a participatory process involving the people of Africa.[39] It is a framework intended, among others, to define the nature of the interaction between Africa and the rest of the world, including the industrialised countries and multilateral organisa-tions.[40] This is born out of the realisation that the continued marginalisation of Africa from the globalisation process and the social exclusion of the vast majority of its people constitute a serious threat.[41]

To achieve NEPAD's objectives, African leaders take responsibility for: strengthening the mechanisms for conflict prevention, management and resolution; promoting and protecting democracy and human rights; restoring and maintaining micro-stability through fiscal and monetary policies; regulating financial markets and private companies; promoting the role of women in social and economic development by reinforcing their capacity in the domains of education and training, revitalising health training and education with high priority to HIV/AIDS; maintaining law and order; and promoting the development of infrastructure.[42]

It is believed that, unlike prior endeavours, NEPAD is realistic in the sense that it recognises the dynamics of the current global economy and its inevitability, and suggests a partnership with the outside world, based on mutual commitments and obligations.[43] NEPAD incorporates

---

[36]   See E Baimu 'Human rights in NEPAD and its implications for the African human rights system' (2002) 2 *African Human Rights Law Journal* 301 302.

[37]   NAI was approved by the 37th OAU Assembly of Heads of State and Government held in Lusaka, July 2002.

[38]   n 6 above, para 1.

[39]   n 6 above, para 47.

[40]   n 6 above, para 48.

[41]   n 6 above, para 2.

[42]   n 6 above, para 49. The strategies as highlighted in para 69 are expected to lead to economic, growth and increased employment; reduction of poverty and diversification of productive activities, enhanced international competitiveness and increased exports; and increased Africa integration.

[43]   J Ohiohenuan 'NEPAD and dialectics of African underdevelopment' (2002) 7 *New Agenda* 9 10, quoted by Baimu (n 36 above) 303.

democracy and good governance and, unlike LPA, NEPAD is conscious of the 'political economy'.[44] Issues of peace, security and the protection of human rights are considered important to the achievement of NEPAD's objectives.[45]

3.3   The institutional set-up of NEPAD

The implementation of the NEPAD programme is to be overseen by a Heads of State Implementation Committee (HSIC), composed of 14 heads of state.[46] The functions of the HSIC consist of identifying strategic issues that need to be researched, planned and managed at the continental level; setting up mechanisms for reviewing the progress in the achievement of mutually agreed targets and compliance with mutually agreed standards; and reviewing progress in the implementation of past decisions and taking appropriate steps to address problems and delays.[47] To achieve effective implementation, HSIC, with a sense of innovation, established the African Peer Review Mechanism (APRM).

3.3.1   The operation of APRM as an implementation strategy

APRM is an instrument voluntarily acceded to by member states of the AU as an African self-monitoring mechanism.[48] The mandate of APRM is to ensure that the policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the Declaration on Democracy, Political, Economic and Corporate Governance.[49] APRM is the mutually agreed instrument for self-monitoring by the participating member governments.[50] According to APRM's base document:[51]

> The primary purpose of the APRM is to foster the adoption of policies, standards and practices that lead to political stability, high economic growth, and sustainable development and accelerated sub-regional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies and assessing the needs for capacity building.

---

[44]   Anyang'Nyong'o (n 33 above).

[45]   n 6 above, para 49.

[46]   n 6 above, para 201.

[47]   As above.

[48]   Was created at the first meeting of HSIC, held on 23 October 2001.

[49]   New Partnership for Africa's Development, Declaration on Democracy, Political, Economic and Corporate Governance, Assembly of Heads of State and Government, 38th ordinary session of the OAU, 8 July 2002, Durban, South Africa, AHG/235 (XXXVIII) Annex 1, at <http://europa.eu.int/ comm/development/body/eu_africa/ docs/NEPAD_Declaration_07072000.pdf> (accessed 20 August 2003).

[50]   49 NEPAD, the African Peer Review Mechanism (APRM), NEPAD documents at <http://www.avmedia.at/cgiscript/csNews/news_upload/NEPAD_2dCORE_2DOC UMENTS_2edb.APRMNEPAD250902.doc> (accessed 15 August 2003).

[51]   African Peer Review Mechanism, base document, para 3, at <http://www.touchech. biz/nepad/files/document/49.pdf> (accessed 30 March 2004).

APRM has been described as 'the mechanism that is likely to have the most far-reaching implications'.[52] This is because it entrenches a mechanism of accountability by the state. By requiring states to account on how far they have gone to achieve the objects of NEPAD, APRM will be enhancing these rights indirectly. This is because, as will be seen, some of the programmes have a direct bearing on the realisation of certain socio-economic rights. It should be noted, however, that APRM is optional and will apply only to those states that have acceded to it. In fact, so far only 16 countries have acceded to the APRM document.[53] This is in addition to the absence of any enforcement mechanisms to enforce its proposals. However, the importance of APRM as a tool of diplomacy cannot be under-estimated. This will, however, be based on its implementation beyond its being a mere paper tiger.

3.4 NEPAD and socio-economic rights

One of the long-term objectives is to eradicate poverty in Africa and to place African countries, both individually and collectively, on a path of sustainable development.[54] This is done by the adoption of the Millennium Declaration's International Development Goals (IDGs).[55] This includes the reduction of the proportion of people living in extreme poverty by half by 2015, the enrolment of all children of school-going age in primary school by 2015, progress towards gender equality, the reduction of infant mortality ratios, maternal mortality rates and the provision of access to reproductive health care.[56] Strategies include increased employment and African integration.[57]

It is acknowledged that peace, security, democracy and human rights are among the conditions for sustainable development,[58] and commitments are made to guarantee this. When many African countries emerged from colonialism, hopes were high that the era of liberty had dawned. But the current realisation of human rights in Africa has been disappointing, and replicas of authoritarian regime dominate African

---

52   Baimu (n 36 above).
53   The countries are Algeria, Burkina Faso, Cameroon, Republic of Congo, Ethiopia, Gabon, Ghana, Kenya, Mali, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, South Africa and Uganda (March 2004).
54   n 6 above, para 67.
55   See United Nations Millennium Declaration, adopted by UN General Assembly Resolution A/RES/55/2, 18 September 2000, at <http:// www.un.org/millennium/ares552e.pdf> (accessed 26 August 2003).
56   n 6 above, para 67.
57   n 6 above, para 70.
58   n 6 above, para 71.
59   See C Dlamini Human rights in Africa: Which way South Africa? (1995) 7.

leadership.[59] According to the UN Secretary-General,[60] since 1970 more than 30 wars have been fought in Africa, the vast majority of them intra-state in origin. In 1996 alone, 14 of the 53 countries of Africa were afflicted by armed conflicts. Armed conflicts not only disrupt the provision of socio-economic services, but also consume a large percentage of countries' national budgets. For instance, Uganda spends two per cent of its Gross General Product (GDP) on defence,[61] and less than one per cent on education.

Efforts to manage conflict in NEPAD are directed towards the prevention, management and resolution of conflict, peacemaking and peace enforcement, post-conflict reconciliation, rehabilitation and reconstruction, and combating the illicit proliferation of small arms, light weapons and landmines.[62] To further these objectives, a subcommittee on peace and security has been established within NEPAD.[63] If these commitments are fulfilled, then it will promote peace and security and reduce the occurrence of conflicts. Income previously spent on wars and conflicts may be diverted to the realisation of socio-economic rights. A peaceful environment for the enjoyment of socio-economic goods and services may be created.

A commitment is made to democracy and good governance as conditions for sustainable development. The core components of democracy and good governance that have been identified include political pluralism that, among others, allows for the existence of workers' unions.[64] This initiative is to take the form of an administrative framework in line with the principles of democracy, transparency, accountability, integrity, respect for human rights and the promotion of the rule of law.[65] Human rights include socio-economic rights, and the promotion of the rule of law nourishes avenues for enforcement of these rights, not only administratively, but also judicially. This is relevant to the realisation of socio-economic rights, because corruption, lack of accountability and bad leadership are some of the factors that have affected the realisation of socio-economic rights in Africa.

---

[60] Secretary-General 'The causes of conflict and promotion of durable peace and sustainable development in Africa' at <http://www.un.org/ecosocdev/geninfo/afrec/sgreport/> (accessed 26 August 2003).
[61] A Mutumba-Lule 'Uganda defence budget ''too little'' '! *East Africa* 1 July 2003 at <http://www.nationaudio.com/News/EastAfrican/08072002/Regional/Regional140.html> (accessed 25 August 2003).
[62] n 6 above, para 74.
[63] See Communiqué issued at the end of the first meeting of the HSIC, Abuja, 23 October 2001.
[64] n 6 above, para 79.
[65] n 6 above, para 80.

As rightly observed, some African states have had corrupt governments that exploit their own people as viciously as any outsider.[66] For example, the former President of Zaire (now the Democratic Republic of Congo), Mobutu Sese Seko, is believed to have amassed a fortune far in excess of his country's national debt, impinging upon the people of Zaire's economic and social rights to adequate health care, sufficient food and appropriate shelter.[67] This has been the trend in most African countries, where resources that could have been used to achieve socio-economic rights, are siphoned into individual pockets and smuggled into offshore bank accounts.

Military leadership and dictatorship have been the order of governance in most African countries. The military dictatorships in Uganda,[68] the Central African Republic,[69] Ethiopia[70] and Nigeria[71] are fresh in our minds. Nigeria, in particular, presents us with a good case study of how dictatorship and bad leadership can impact on socio-economic rights, as exemplified by the African Commission case of *The Social and Economic Rights Action Center & Another v Nigeria* (*SERAC* case).[72] In this case, the African Commission found that the conduct of the Nigerian government by allowing an oil consortium with which it was in partnership, to exploit oil in such a manner that affected the Ogoni peoples' environment and health, amounted to a violation of the provisions of the Charter. The state placed the military at the disposal of the private actors. Peaceful demonstrations were confronted with force, resulting in the destruction of houses and sources of food. Rights violated included the right to the best attainable state of health, clean and healthy environment, right to adequate food and right to shelter.[73]

In addition to enhancing accountability and reducing incidents of corruption, the commitment in NEPAD to pluralism will improve the realisation of the rights of workers, as enshrined in CESCR and the African Charter.[74] This is relevant because, in so many African countries,

---

[66] G Kent 'Globalisation and food security in Africa' at <http://www.hawii.edu/ 7ekent/ globaFeb99.htm>, quoted by Agbakwa (n 29 above) 195.

[67] Oloka-Onyango (n 32 above).

[68] Under Idi Amin 1971–1979.

[69] Jean-Bedel Bokassa 1966–1979.

[70] Haile Mariam Menghistu 1975.

[71] Sani Abacha 1993–1998.

[72] Communication 155/96.

[73] On the implications of this case, see J Oloka-Onyango 'Reinforcing marginalised rights in an age of globalisation: International mechanisms, non-state actors, and the struggle for peoples' rights in Africa' (2003) *American International Law Review* 852.

[74] Art 15 of the African Charter is very vague and needs elucidation; it is not clear what exactly it guarantees, because it does not appear to go beyond the guarantee of the right to work under favourable conditions. It provides: 'Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.'

workers' unions have been suppressed because of their incessant demands for socio-economic reforms.[75]

The sectoral priorities identified for improvement have diverse implications for the realisation of socio-economic rights. All infra-structure sectors are to be worked on with the objective of improving accessibility and affordability.[76] Energy, not only for commercial use, but also for domestic use, is acknowledged as a necessity for sustainable development, and commitment is made to reverse environment degradation associated with the use of traditional fuels in rural areas.[77] This will enhance the realisation of the right to a clean and healthy environment.[78] Sustainable access to water and sanitation, with attention to the poor, will improve the quality of life of people. Although the right to water is not guaranteed by the African Charter, it is by CESCR, and just as the rights to food and shelter have been read into the Charter by the African Commission, so may the right to water.[79]

A commitment is made to bridge the gap in education by ensuring realisation of universal primary education, curriculum development, expanded access to education and promoting networks of specialised research and institutions of higher education.[80] The implication of this is also that it may be used to elaborate on the vague right to education as guaranteed in the African Charter.[81] This is important, because the right to education is a right that has not received adequate attention; it is a right that has not been enforced even by the African Commission, despite the fact that many Africans are illiterate.

It is noted that one of the major impediments facing African development efforts is the widespread incidence of communicable diseases, in particular HIV/AIDS, tuberculosis and malaria. Unless these epidemics are brought under control, real gains in human development will remain impossible.[82] An estimated one million people die from

---

[75]   Lesotho presents a good example of the suppression of workers' unions and the role of trade unions in championing not only political reforms but socio-economic transformation as well. The proliferation of Export Processing Zones (EPZ) and Special Economic Zones (SEZ), by which companies negotiate with states to exclude certain labour regulations, has made the formation of trade unions impossible in those areas. See J Oloka-Onyango & D Udagama 'Globalisation and its impact on the full enjoy-ment of human rights' Preliminary report to the UN Sub-Commission on the Protection and Promotion of Human Rights <http://www.globalpolicy.org/socecon/un/wtonite.htm> (accessed 1 September 2003).

[76]   n 6 above, paras 96–102.

[77]   n 6 above, para 108.

[78]   Art 24 African Charter.

[79]   By the African Commission in the *SERAC* case, discussed later in this paper.

[80]   n 6 above, para 117.

[81]   Art 17 African Charter.

[82]   n 6 above, para 125.

malaria in Africa[83] every year and five Africans die every minute as a result of HIV/AIDS.[84] Combating HIV/AIDS is vital for any serious poverty alleviation effort in Africa. For instance, in Botswana, where one out of every three adults is living with HIV/AIDS, one quarter of the households is expected to lose a breadwinner within 10 years and *per capita* income of the poor will fall by 13%.[85] Africa compares very poorly in the health sector. Only 16 doctors are available per 1 000 inhabitants, as against 253 in the industrialised countries.[86] Commitments are made by NEPAD to ensure improved health by, among others, mobilisation of resources and committing them to this cause. Particular attention is focused on the struggle against HIV/AIDS.[87]

These efforts have, however, been criticised as being based on foreign support without an indigenous focus.[88] Indeed, this criticism is well founded. Part of the actions to be taken is to lead the international campaign for increased financial support for the struggle against HIV/AIDS and other communicable diseases.[89] Africa should begin to eradicate its problems by making use of the locally available resources. Over-dependence on foreign aid has for a number of decades retarded Africa's socio-economic development mainly because of the conditions attached to such aid.

An initiative to protect the environment is also to be taken, as the environment is accepted as a prerequisite to sustainable development.[90] The core objective of this measure is 'to combat poverty and contribute to socio-economic development in Africa'.[91] A healthy environment is believed to greatly contribute to employment, socio-economic empowerment and the reduction of poverty.[92] This initiative cannot be undermined, considering the weak nature of the right to a clean environment. At a global level, neither the Universal Declaration nor CESCR lends support to the idea of the existence of a substantive right to a clean environment.[93] Africa has taken the lead to strengthen this right,

---

[83] World Health Organisation Africa Malaria Report at <http://www.rbm.who.in/amd2003/amr2003_toc.htm> (accessed 25 August 2003).

[84] G Neville 'The millennium development goal: Towards a civil society perspective on reframing poverty reduction strategies in Southern Africa' paper presented at the Southern Africa MDGs Forum, Johannesburg, 2–4 July 2003 (on file with author); see also 5 per minute campaign 2003 at www.actsa.org.

[85] C Akuke 'Africa and NEPAD: What about HIV/AIDS' at <http://www.web.ca/7Eicoef> (accessed 23 August 2003).

[86] n 6 above, para 126.

[87] n 6 above, paras 123 & 124.

[88] Akuke (n 85 above).

[89] n 6 above, para 124.

[90] n 6 above, para 135.

[91] n 6 above, para 136.

[92] As above.

[93] See G Hindl 'Human rights and protection of the environment' in Eide *et al* (n 16 above) 303 306.

and NEPAD's efforts to give it content should be commended. A clean and healthy environment not only lends a hand to the reduction of poverty, but also to the realisation of the right to health. The violation of the right to a clean environment inevitably leads to a violation of the right to health because of the health hazards that are caused.

It is hard to discern from the NEPAD document whether it really advances the right to culture. It provides as follows:[94]

> Culture is an integral part of development efforts on the continent, it is essential to protect and affectively utilise indigenous knowledge that represents the major dimensions of the continent's culture, and to share this knowledge for the benefit of human kind. The New Partnership for Africa's Development will give special attention to the protection and nurturing of indigenous knowledge, which includes traditional-based literacy, artistic and scientific works, inventions, scientific discoveries, designs, marks, names and symbols, undisclosed information and all other traditional-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. The term also includes genetic resources and associated knowledge.

This paragraph does not advance culture in a holistic manner as understood. In Africa, culture is understood to encompass not only knowledge, but practices as well. Despite the inclusion of the right to culture in CESCR and the African Charter, cultural practices have received more condemnation than protection. It is true that most cultural practices infringe on a number of rights, especially those of children and women. However, the wholesale dismissal of African culture is unwarranted. One author has observed that this results in a disavowal of culture both as a human right and as a context for the enjoyment of all other rights, and that excluding culture from references of human rights reinforces the marginalisation of the poor and under-privileged.[95]

The realisation that Africa has been marginalised in the process of globalisation and the strategy to achieve African integration is well directed.[96] This is because the realisation of economic, social and cultural rights in Africa has suffered in the past because of the globalisation trend.[97] One of the effects has been domination of world

---

[94]   n 6 above, para 140.

[95]   CA Odinkalu 'Analysis of paralysis or paralysis by analysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 326 331.

[96]   n 6 above, para 69.

[97]   The UN Secretary-General, Kofi Annan, has pointed out that '[g]lobalisation has an immense potential to improve people's lives, but it can disrupt — and destroy — them as well. Those who do not accept its pervasive, all-encompassing ways are often left behind.' See K Annan Partnership for Global Community: Annual Report of the Working Organisation, New York, United Nations, 1998 para 168, 59 sourced at <http://www.un.org/ecosocedev/geninfo/afrec/sgreport> (accessed 26 August 2003).

trade by Transnational Corporations (TNCs), leading to the growth of international capitalism driven by market forces,[98] perpetuating an ideology of selfishness and exploitation of resources.[99] According to Udombana:[100]

> Globalisation has both enriched and endangered people's lives. In some parts of the world, it has created opportunities to create or expand wealth, acquire knowledge and skills, and improve access to goods and services; in short it has improved the quality of life of millions of people out of poverty. However, Africa cannot give such positive testimony regarding the benefits of globalisation, as its citizens have been buffeted by the storm of globalisation . . . [T]here is nothing inherent in the process that automatically reduces poverty and inequality.

From the early 1980s, the IMF and the World Bank embarked on a move to jumpstart Africa's economies so as to overcome underdevelopment.[101] Africans were required to reform their economy by adopting the SAPs. With these policies, African countries had to reduce their imports; devalue their currencies; deregulate capital movements; privatise state utilities;[102] dismantle social programmes by cutting government expenditures on social services, such as health care and education; remove subsidies on market staples; and be receptive to foreign investors.[103] The basic and fundamental right of the state to decide its future was undermined.[104] This culminates in a violation of the right to self-determination.[105]

---

[98]   NJ Udombana 'How should we then live? Globalisation and the New Partnership for Africa's Development' (2003) 20 *Boston University International Law Journal* 293. This, however, is not to say that any particular market ideology is favourable for the realisation of economic, social and cultural rights. The Committee on Economic, Social and Cultural Rights has said that in terms of the political and economic systems, the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of, a socialist or a capitalist system, or a mixed or other system; that the rights are susceptible to realisation within the context of a wide variety of political and economic systems. See General Comment No 3 (Fifth session, 1990) UN Doc HRI/GEN/1/Rev 1 para 8.

[99]   As above.

[100] As above.

[101] Anyang'Nyong'o (n 33 above).

[102] On the effects of privatisation, see Oloka-Onyango & Udagama (n 75 above).

[103] See SC Agbakwa 'A path least taken: Economic and social rights and the perspective of conflict prevention and peace building in Africa' (2003) 47(1) *Journal of African Law* 38.

[104] A Adedeji 'From Lagos Plan of Action to the New Partnership for African Development and from the Final Act of Lagos to the Constitutive Act: Wither Africa?' Keynote address presented at the African Forum for Envisioning Africa held in Nairobi, Kenya, 26–29 April 2002, sourced at <http://www.worldsummit2002.org/texts/AdebayoAdedeji2.pdf> (accessed 25 August 2003).

[105] Oloka-Onyango (n 32 above).

3.5   A critique of NEPAD's human rights component

Church leaders meeting at the Southern African Catholic Bishops Conference stated that, whereas NEPAD's analysis of the nature of Africa's socio-economic and political developments was on the mark, the whole plan was ambitious and its proposals relating to economic globalisation dubious.[106] According to Rights and Democracy,[107] while a number of NEPAD's objectives are laudable, its core strategies strengthen and consolidate many of the same factors that have created obstacles to a sustainable and equitable development in Africa. They stressed that it fails to adequately define democracy or to examine the relationship between development, peace, democracy and the realisation of human rights. They stressed further that it fails to address effectively the external constraints which impede national and regional initiatives to alleviate poverty and promote growth in Africa. The most important criticism that has been directed towards NEPAD is its failure to take a rights-based approach. Economic, social and cultural rights are vaguely referred to in terms of greater access to services instead of as concrete, inherent rights.[108] There is nothing in the NEPAD document about integrating human rights in the development process.[109] This is contrary to the understanding that, if human rights are to be realised, they have to be streamlined in all activities, including development. According to the UN Secretary-General, Kofi Annan,[110] human rights are integral to the promotion of peace and security, economic prosperity and social equity. This is particularly relevant to the enforcement of socio-economic rights, because of their recognition as non-justiciable rights in so many constitutions of African countries.[111]

NEPAD differs from its predecessors such as the LPA in that it considers peace, security and human rights as critical to Africa's development. It is, however, in the same way as the African Charter for Popular Participation,[112] an initiative of the Heads of State and Government. As a

---

[106]   Wisani Wa Ka Ngobeni 'Bishops blast NEPAD's plan' *Mail & Guardian* 8 March 2002, sourced at <http://www.web.ca/7Eiccaf> (accessed 22 August 2003).

[107]   Rights & Democracy 'Human rights and democratic development in Africa: Policy considerations for Africa's development in the new millennium' at <http://www.ichrdf.ca> (accessed 27 August 2003).

[108]   As above.

[109]   Baimu (n 36 above) 310.

[110]   Secretary-General Report to the General Assembly, Renewing the United Nations: A Programme of Reform A/51/950, 14 July 1997, para 78.

[111]   See the Constitutions of Ghana and Nigeria which include them as Directive Principles of State Policy.

[112]   Adopted by the International Conference on Popular Participation in the Recovery and Development Process in Africa, Arusha, Tanzania, 12–16 1990. This conference was organised by the Economic Commission for Africa together with the UN. The Charter acknowledged the importance of citizens' participation in the process in decision making. Participation was also given a definition and strategies set to

result of this, it has encountered some problems in gaining legitimacy.[113] This is a serious shortcoming, because by its nature, the realisation of rights requires the participation of beneficiaries. It is for this reason that NEPAD has in many circles been viewed as dubious economic globalisation.[114]

It is also important to note that, despite its commitment to human rights, NEPAD does not in any manner establish a direct nexus with the African human rights system. One author has argued that NEPAD is part of the human rights system because it is subordinate to the AU.[115] This is only a derived link which does not in any manner define with precision, if at all, the relationship of the two. There is need for the APRM to make reference to the African Commission on matters relating to human rights, this is because the African Commission is in a better position to conduct a human rights audit based on impartial evidence.[116] This would also avoid the problem of creating parallel institutions, which poses a danger of conflicting conclusions on questions of human rights. Special reference should have been made to the African human rights system and a commitment made to strengthen it. It is hard to resist the temptation to conclude that the reference to human rights in NEPAD is rather perfunctory and not a genuine commitment.

Despite such shortcomings, NEPAD cannot be dismissed as having no positive influence on the realisation of socio-economic rights. Socio-economic rights, unlike the civil and political rights, are couched in very vague and wide language in international instruments, which makes their enforcement difficult.[117] In addition to the elaboration of the legal obligations deriving from these rights, there is a need to establish institutions to realise these rights, and NEPAD is one such institution and administrative set-up. It cannot, however, be concluded that NEPAD follows a holistic and logical elucidation of socio-economic rights in the African Charter. The failure to streamline human rights in the development process is another important shortfall. Reference to the

---

achieve it. See K Oteng Kufor 'The African Charter of Popular Participation in Development and Transformation: A critical review' 2000 18(1) *Netherlands Quarterly of Human Rights* 1.

[113] See Anyang'Nyong'o (n 24 above), who, however, adds that this critique need not be carried to its absurd conclusion because it is the nature of leaders that they must lead first and foremost in ideas.

[114] n 92 above.

[115] Baimu (n 36 above) 312.

[116] By art 45 of the African Charter it is the African Commission that is charged with the duty to promote human rights, which it has done, among others, through its promotional visits.

[117] Compare the right to be heard under sec 7 of the African Charter and the right to health under sec 16 for a detailed discussion of the nature of socio-economic rights provisions. See M Scheinin 'Economic and social rights as legal rights' in Eide *et al* (n 16 above) 29.

African Charter and other human rights instruments is in itself not sufficient.

NEPAD's failure to address head-on some of the external factors that are impacting on the full realisation of the right to health cannot go without comment. In particular, the idea of compulsory licensing to ensure the production of cheap generic drugs stands out in the debate.[118] The recent successful pressure on the World Trade Organisation to allow developing countries to import cheap generic drugs should have been spearheaded by African leaders and merely by pressure from civil society.[119]

4 Conclusion

More than 15 years have passed since the African Charter came into force, but there is no evidence of the full realisation of all the rights in the Charter. Socio-economic rights have suffered the most. This is due to a number of reasons, as has been discussed above. NEPAD is viewed as Africa's hope for sustainable development, and as a programme that allows Africa to benefit from the forces of globalisation that have left Africa marginalised. The new programme commits the African leadership to a number of undertakings which, if effected, would have positive implications for the realisation of socio-economic rights. However, if human rights are to be advanced through NEPAD, they need to be streamlined in all the programmes. The NEPAD programme needs to be integrated with the African human rights system. APRM should prioritise the realisation of socio-economic rights. Endeavours to improve health and to eradicate diseases should be internally focused, instead of relying on external sources. This applies to all the initiatives to provide funding for NEPAD's programmes. Heavy reliance should be placed on the exploitation of African vast resources for such funding.

On the whole, NEPAD has positive implications for the realisation of socio-economic development in Africa, but its success is dependent on being enforced in a holistic manner. As seen above, initiatives similar in nature to NEPAD have not been enforced.

---

[118] It is believed that in international commerce, countries are permitted to use patents without permission of the patent holder in return for a reasonable royalty on sale, and this principle is believed to be part of the Trade-Related Aspects of Intellectual Property Rights (TRIPS). See Human Development Report 2001, at <http://hdr.undp.org/reports/global/2001/en/> (accessed 28 August 2003).

[119] See WTO decision 'Implementation of paragraph 6 of the Doha Declaration on Trips and Public Health' at <http://www.wto.org/english/tratop_e/implem_para6_e.htm> (accessed 2 September 2003).