



Economic and Social Rights Advocacy (ESRA) Brief

October 2013 - Issue 1



Economic and Social Rights in Uganda: The Status Quo



Acknowledgement

The Economic and Social Rights Advocacy (ESRA) Brief is a biannual publication of the Initiative for Social and Economic Rights (ISER) whose goal is to create awareness, encourage and stimulate national debate around social economic rights as well as act as a knowledge exchange platform for stakeholders and the broader Ugandan populace.

To contribute to future editions of ESRA brief, email the editors at info@iser-uganda.org

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Introduction

The Economic and Social Rights Advocacy (ESRA) Brief is a biannual publication of the Initiative for Social and Economic Rights (ISER). The Brief is intended to create awareness, encourage and stimulate national debate around economic and social rights, as well as act as a knowledge exchange platform for stakeholders and the broader Ugandan populace.

The ESRA Brief provides an opportunity to interrogate the status of economic and social rights primarily, in Uganda and key lessons and challenges from the greater East African Community.

The Brief provides insight into the debates, issues and steps being taken/ road maps being developed with respect to the full realization of social, economic and cultural rights, and it examines the civil society partnerships cultivated to monitor the implementation and accountability of these rights.

In this inaugural issue, ISER Executive Director, Salima Namusobya, makes a case for an organization working exclusively on social and economic rights; ESCRs expert, Associate Professor Mbaziira Christopher gives an overview of the legal status of social and economic rights in Uganda; the Uganda Human Rights Commission (UHRC) writes about monitoring the implementation and accountability for social and economic rights in Uganda; Primah Kwagala of the Centre for Health, Human Rights and Development (CEHURD) paints a picture of the effect of intellectual property rights on access to medicines; Human Rights Network (HURINET) shares about the coalition on ESCRs; WaterAid talks about access to clean water and safe sanitation; Human Rights Advocate Saphina Nakulima discusses why Uganda should ratify the Optional Protocol to the International Covenant on Economic Social and Cultural Rights; and from neighboring Kenya, Faith Rotich of Kituo cha Cheria writes about litigating social and economic rights in Kenya.

It is our hope that this publication will increase awareness about social and economic rights in Uganda.

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Why ISER

By Salima Namusoby, Executive Director, ISER

Economic and Social rights (ESRs) are poorly understood in Uganda with the result that they are rarely enforced. Many ESRs are taken to be mere aspirations or development goals incorporated in the National Objectives and Directive Principles of State Policy, as opposed to rights embedded in the Constitution's Bill of Rights. This despite the fact that Uganda is a party to the International Covenant on Economic, Social and Cultural Rights and other regional and international treaties that provide for these rights under which the country has assumed the duties to respect, protect and fulfill.

According to the United Nations Development Assistance Framework (UNDAF) for Uganda 2010 – 2014, social services, in particular health and education, continue to be functionally weak; furthermore, social protection is fragmented with large, vulnerable population groups not covered. Sound governance, including transparency and accountability, are not yet a universal norm, with the result that 85 percent of Ugandans living in disadvantaged rural areas continue to experience hunger and food insecurity.

The promotion and protection of social and economic rights remains a critical challenge. A significant number of people in Uganda are deprived of clean water, basic primary health care, basic housing and food, among other ESRs. This is due to a number of factors, including poverty, limited knowledge of their rights, or other vulnerability: for example by virtue of being children, persons with a disability, persons in poor health, refugees, minorities, women, or rural populations. Uganda's government has been reluctant to accept legal responsibility for social and economic policy. ESRs are perceived to be privileges rather than rights in the Ugandan context. This is reflected in the inadequate legal protection afforded to these rights at the domestic level, as well as the attitude of government officials who continue to view the limited positive steps taken to implement ESRs as political gifts intended to secure the electoral loyalty of benefitting communities.

Although the UNDAF acknowledges that Uganda has made important progress in the area of human rights, it also states that the most important challenges remain in the area of economic, social and cultural rights. The UNDAF, therefore, underscores the significance of the Uganda Human Rights Commission and other civil society watchdogs to improve state accountability for human rights violations as well as awareness raising and advocacy to improve the performance of state institutions with respect to implementing human right-based policies and laws.

It is against this backdrop that ISER was founded in February 2012 with the objective of addressing the gaps that exist in Uganda with regard to respecting, protecting and fulfilling

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ESRs and improving government accountability for this category of rights. The need for an organization specializing in ESRs was identified following careful consideration of the Ugandan socio-political context, a survey of the civil society landscape, consultations with key stakeholders and a review of ESRs analysis by prominent persons such as activist-scholar Prof. Joe Oloka-Onyango. This scoping exercise highlighted the virtual absence of focused, sustained and coordinated civil society engagement in the area of ESRs limiting civil society efficacy in this field. The majority of organizations working on ESRs either focus on one right or adopt a service delivery or humanitarian approach. Accordingly, ISER aims to fill the gap in ESRs advocacy and promote a human rights-based approach to ESRs in a more sustained and comprehensive manner than currently exists. The organization is of the view that ESRs need to be consolidated and given full recognition and effect through a multifaceted approach.

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Adopting a human rights approach and working collaboratively with others, ISER seeks to address key issues relating to economic and social rights, including among others the inadequate legal and policy framework, limited knowledge, awareness, understanding, recognition, context-relevant information, lack of government accountability, legal enforcement or justiciability, and the lack of adequate monitoring and advocacy of ESRs by civil society.

ISER has set itself an ambitious mandate; however, as this paper demonstrates, it is a most timely one. For this reason, the organization will work closely and tirelessly with all stakeholders to ensure that Uganda respects, promotes and fulfills social and economic rights in line with its international obligations.

The Status of Economic, Social and Cultural Rights in Uganda: The Huge Potential

Dr. Christopher Mbazira: Associate Professor, School of Law, Makerere University and Coordinator of the Public Interest Law Clinic

Uganda is a signatory to a number of human rights instruments, including those which protect Economic, Social and Cultural Rights (ESCRs) such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples Rights. These instruments protect a variety of ESCRs, ranging from the rights to health, water, education, housing, food, work and social security. Nonetheless, although Uganda has an obligation to translate these rights into domestically protected rights, this has not yet been fully realised. This paper aims to provide an analysis of the current ESCR landscape in Uganda.

The Constitution of the Republic of Uganda has omitted a number of critical rights, which has limited citizen's access – most especially vulnerable persons to ESCR. The Bill of Rights contained in Chapter Four of the Constitution largely protects traditional civil and political rights. Nevertheless, the Bill of Rights has provisions which protect some elements of ESCRs. This includes Article 30 which guarantees everyone the right to education; Article 33(2), compels the state to provide facilities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential and advancement; it further requires the State to protect women, taking into account their maternal functions, which implies the rights to adequate healthcare, reproductive services, and so forth. This is in addition to Article 33(4), which guarantees women the right to equal treatment with men and to enjoy equal opportunities in political, economic and social activities. Article 34(2), guarantees every child basic education

“It is hoped that the recent appointment of new judges to the Constitutional Court is going to bolster the capacity of that Court to protect human rights and the supremacy of the Constitution.”

as the responsibility of the State and the parents of the child; while Article 34(3) provides that no child shall be deprived by any person of medical treatment, education or any other social or economic benefit by reason of religious or other beliefs. Article 34(4), entitles children to protection from social or economic exploitation. In Article 37, every person has a right to belong to, enjoy, practice, profess,

maintain and promote any culture.

It is clear from the above that some fundamental ESCRs are missing from the Bill of Rights. These include the rights to food, housing, water, and social security among others. However, there are elements of these rights in the National Objectives and Directive Principles of State Policy (NODPSP). The NODPSP makes provision for the following rights: protection of the aged;

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right to balanced and equitable development between the rural and urban areas, social justice, economic development, medical services, clean and safe water, food security and nutrition. The legal status of these provisions is bolstered by Article 8A, which provides that Uganda shall be governed based on the principles of national interest and common good enshrined in the NODPSP.

The above provisions, in spite of some weaknesses, create fertile ground for ESCRs to flourish and provide adequate ground for their judicial enforcement. If one was to take a sweeping glance over the Ugandan Justice sector you would see a Judiciary equipped and empowered to deal with the interpretation and application of constitutional provisions. For example the approach taken in the application of the Bill of Rights accords with comparative standards in advanced legal systems; special rules of interpretation, two-stage approach and progressive application of the limitation clause. The Court has also generated good jurisprudence upholding civil and political rights.

However, the approach of the courts in the area of ESCRs has been inconsistent. On the one hand, the High Court has handed down a number of progressive decisions enforcing the right to a clean and healthy environment, thereby contributing significantly to ESCR jurisprudence. On the other hand, however, the Constitutional Court has shied away from determining cases touching on this category of rights. This could be explained by a weak civil society and one which is only recently turning to litigation as a strategy. The failure of civil society to use the judiciary could, in addition to the lack of legal skills, be attributed to the general perception of the judiciary as conservative and resistant to change, and excessively slow in delivering justice due in part to logistical and staffing impediments. However, with the recent rejuvenation of the judiciary and the calibre of the incoming judges assuming positions in the Constitutional Court, these perceptions could change.

On those few occasions in which the Constitutional Court has been confronted with economic and social rights cases, it has been incoherent in its approach. In a 1997 case of **Salvatori Abuki** challenging penal provisions of the Witchcraft Act, the Constitutional Court expanded the scope of the case, holding that the penalty of banishing a convicted witch from their home violated their right to a life as the person would be rendered homeless and destitute. Reference was made to the NODPSP and to Indian jurisprudence.

One would have expected the courts, and particularly the Constitutional Court, to build on the **Abuki** case to grow its jurisprudence. Unfortunately, this has not been the case as demonstrated by a recent case touching on maternal health. The case of **Centre for Health, Human Rights**

and Development & Ors v AG, which arose from the senseless maternal death of mothers at health facilities as a result of both neglect and the absence of medical supplies, sought to enforce the reproductive health rights of women. Reliance was made inter alia on the rights of women and the obligation of the State to protect women taking into account their maternal functions, human dignity, and life. The Constitutional Court declined to hear the case, finding that the political question doctrine barred it from doing so. The case is on appeal; therefore the merits of the case may not be discussed due to the subjudice rule. It suffices to note that in my opinion the court misdirected itself and abdicated its responsibility as the protector of the supremacy of the Constitution.

It is hoped that the recent appointment of new judges to the Constitutional Court is going to bolster the capacity of that Court to protect human rights and the supremacy of the Constitution. The Court should now be in a position to deal with the backlog of cases on its docket and create room for more cases to be filed. Civil society and legal activists should take advantage of these changes to file and argue ESCRs cases before the Constitutional Court in order to catalyze broader social, economic and cultural changes in Uganda.

The Role of the Uganda Human Rights Commission in Monitoring the Implementation of and Accountability for Social and Economic Rights in Uganda

By Patricia Nduru and Hope Bagota, Directorate of Monitoring and Inspections, Uganda Human Rights Commission

General Comment 10 of the Committee on Economic Social and Cultural Rights (CESCR) on substantive issues arising from the implementation of the ICESCR lays out the various roles of National Human Rights Institutions in the promotion and protection of ESCRs. These roles encompass raising awareness, scrutinizing existing laws and bills, providing technical advice, identification of national bench marks to assess realization of the obligations assumed, conducting research, monitoring compliance and examining complaints of alleged violations.

The wide mandate of the Uganda Human Rights Commission (UHRC) has enabled the institution to take on the roles above with respect to ESCRs such as health, housing, education and the right to a clean and healthy environment. Though the promotion and protection of ESCRs has mainly been effected through the five directorates of the UHRC, the Right to Health Unit was specifically established to monitor the right to health with special emphasis on neglected diseases following the recommendations of the then Special Rapportuer on the Right to Health, Mr. Paul Hunt.

The UHRC has monitored the implementation of ESCRs such as health, housing and education using the criteria of availability, acceptability, accessibility (physical accessibility and economic accessibility) and quality as per General Comment No.3 of CESCR. Though the UHRC has noted that there has been general improvement in the availability of ESCR-related services – for example health facilities, Universal Primary and Secondary Education – it has raised concerns about the quality of the services in question. For instance, in the case of housing, the UHRC noted in its 14th Annual Report 112 that 14.2% of the settlements in urban areas are thatched houses, 17.2% have mud and poles for walls while 29.6% have floors constructed with mud. With regards to health services, the UHRC has noted challenges relating to access to medicines, access to skilled personnel and poor working conditions. In respect of education, the UHRC has noted challenges pertaining to the quality of education, teaching staff, poor working conditions, inadequate support supervision and corruption.

A further concern raised by the UHRC is Parliament's failure to enact the relevant laws to give full effect to ESCR. This makes monitoring and accountability difficult because a wide and potentially conflicting range of indicators can be used to monitor the implementation of various

ESCRs which makes the assessment of trends a challenge. In the same report (UHRC in its 13th Annual Report 2010), UHRC emphasizes that monitoring of ESCR goes hand in hand with analyzing budgetary allocations to the respective sectors.

The UHRC has noted that budgetary allocations of these sectors as a proportion of the Government of Uganda expenditure has progressively declined, which in turn affects wages,



utilities and other operational costs required to effectively implement ESCR. The UHRC is aware that the ICESCR calls for the progressive realization of ESCR which includes immediate steps to be taken by the State within its means – for example policy development – towards the

Students of Mpunge Seed Secondary School attending lessons under the tree. The shs 360m government project is two years behind schedule

fulfillment of these rights. It is therefore essential that at

any level of resource availability, priority is given to ensuring people's basic economic, social and cultural rights and their continual progress.

The UHRC has also noted that existing normative and accountability mechanisms for enforcement of ESCRs are weak and largely not known to the population. The Health Sector, for example, has the Patients Charter, which sets out the rights of patients and health workers, as well as their respective corresponding responsibilities, and sets up a mechanism for the resolution of complaints through a designated person or committee. However, in 2012, the UHRC noted that only 120 out of the 329 health facilities inspected had health workers who had knowledge of the Patients Charter.

In the education sector, although monitoring and supervision by the concerned ministries would play a critical role in strengthening accountability, in 2012, the Ministry of Education and Sports reduced the inspection funds by 25% which inevitably compromised the monitoring

and inspections of schools which would assist in measuring the quality of education.

Legal accountability for ESCR has been met with challenges as evidenced by the Constitutional Case of the ***Centre for Health Human Rights and Development (CEHURD) and 3 Others versus the Attorney General*** where the Constitutional Court declared that the acts and omissions related to the provision of health services was a political question to be left to the discretion of the Executive and Legislature. Further, since the UHRC is still in the initial stages of handling ESCR complaints, there remains a great deal of foundational litigation and adjudication to be delivered to develop Uganda-specific ESCR norms and standards.

Notwithstanding the progress achieved in terms of the realization of ESCRs, which can be noted in respect of the rights to health, housing and education by the availability of such public goods as health facilities and services, the provision of Universal Primary and Secondary Education, serious challenges remain. These include inadequate legal frameworks, insufficient budgetary allocations and weak accountability mechanisms that hinder the promotion and protection of ESCR in Uganda.

Accordingly, the UHRC will continue to fulfill its mandate in terms of monitoring the respect, protection and fulfillment of ESCRs in Uganda, and urges that it is imperative that civil society also continues to engage in advocacy for example by lobbying government to implement the legal and policy reforms necessary to remediate this situation and ensure that all people in Uganda enjoy ESCR to the fullest possible extent.

The Quest for Economic Social and Cultural Rights Enforcement in Uganda: Can the Civil Society Coalition Model Deliver?

John Robert Ekapu, Project Officer ESCRs- Human Rights Network (HURINET) Uganda

Tracing State indifference and civil society absence in the campaign in Uganda

Although Uganda ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1987, it has taken the state over 25 years to submit a report outlining the progress it has made in implementing the rights under this Covenant. The traditional defences advanced by States to justify their slow pace or outright failure to implement ESCRs – for example that ESCRs are vague or ambiguous; that their implementation exhausts State resources; that the progressive realization requirement makes them open-ended and impossible to ever fully attain; or that they are not actually rights but simply aspirations – have also been used by Ugandan authorities to circumvent the responsibilities bestowed upon them by the Covenant.

Another important point to ponder is why there has been virtually negligible advocacy on ESCR by Ugandan civil society: why have NGOs, whose focus has been human rights for over twenty years, been silent on this particular form of right? In part this can be attributed to the lack of expertise on ESCRs outside the academia, which has hampered CSO actors' engagement with the somewhat complicated concepts central to ESCR, for example 'minimum core', 'progressive realization' and so forth. The case of Uganda is the exception rather than the rule, however, as the latter half of the 21st century has seen increased agitation around the world for ESCRs to be implemented by governments. There is an abundance of best practice on which Ugandan organizations can draw, including the campaigns for ESCRs in India and South Africa, to name just a few. However, in order for ESCR advocacy efforts to succeed in Uganda, CSOs need to make this a dedicated, focused and mainstreamed component of their programming rather than a peripheral activity or project as has been the case overwhelmingly in the past.

National Coalition on ESCR

Motivated by the glaring shortcomings above, the CSO fraternity in Uganda opted to use the coalition model as a mechanism of collective advocacy for ESCR realization - hence the establishment of the ESCR coalition. With over 150 member - organizations all over the country, the coalition is governed by a committee consisting of nine organizations namely; Human Rights Network Uganda (host institution), Uganda Joint Christian Council(UJCC), Human Rights and Peace Centre (HURIPEC), Cross Cultural Foundation Uganda (CCFU), Platform for Labour Action (PLA), Action Group for Health, Human Rights and HIV/AIDS (AGHA), Southern and Eastern African Trade Information and Negotiations Institute (SEATINI), and Minority Rights

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Group (MRG).

The coalition model has been instructive in lobbying the government of Uganda to effectively protect, promote and fulfill its obligations as stipulated under the ICESR. The spirit of collective effort and joint venture is regarded as a key tool to make the State fulfill its ESCR obligations. This model has, additionally, proved useful in monitoring, documenting and reporting on emerging ESCR issues in the country. A resounding and affirming endorsement of the coalition's sustained engagement and lobbying of government was in February 2013 when Uganda submitted the initial State report on ESCRs, 20 years after signing onto the ICESCR. The coalition is currently engaged with compiling a CSO shadow' report.

“In an effort to share information and emerging issues on ESCR from the various regions of the country, the coalition has relied heavily on its national dialogues held periodically to facilitate knowledge sharing and exchanges.”

In an effort to share information and emerging issues on ESCR from the various regions of the country, the coalition has relied heavily on its national dialogues held periodically to facilitate knowledge sharing and exchanges. Trainings on ESCR issues, aimed at strengthening the capacity of CSOs to fully engage the State to protect, promote and fulfill its obligations on ESCR, have also been worthy efforts by CSOs with an ESCR mandate.

Members of the coalition are clustered into different thematic groups on the strength of their experience, interest or expertise. These groups include, Right to education, Right to culture, Labour rights and Trade (this list is not exhaustive). Clustering has proven to be an effective means to enhance legitimacy and ownership among coalition members since the approach allows members to assume leadership and management for their respective fields of proficiency. The working group conducts annual strategic planning meetings to garner ideas for advocacy and schedule coalition activities that are later shared among the cluster members with the directives of the respective convener.

Sub-regional coalition: Responding to and tapping into the decentralization platform for ESCR promotion

In the Uganda coalition model, while there has been effective coordination at national level, as evidenced by the progress made in producing the ESCR alternative report and engaging the State to submit its initial report, this success cannot be claimed at district and regional levels. If CSOs are to have a unified voice on ESCR issues in the country, then grass root CSOs have to be part of the debate. The Uganda coalition model has gone a step further to initiate the process

of forming regional coalitions on ESCR that feed into the national level engagements on ESCR. This currently stands at five sub-regional coalitions each headed by an officially elected and credible organization.

This model of sub-regional groupings feeding into the national coalition undermines and indeed counters the elitism and urbanism prevalent in urban-based, national organizations that ascribe to themselves national advocacy responsibilities with little consultation beyond urban centres. By bringing on board regional organizations that are based in rural areas and which work with the most vulnerable, impoverished, hungry and destitute; the coalition obtains credible feedback on how Ugandans want the government to deliver on ESCR. Additionally, the coalition can take steps to ensure that this informs and where appropriate sets the agenda of its national advocacy plan.



Mukono residents que up at Mukono Health Centre for treatment.

Conclusively, one can argue that in a sector such as ESCR, which has been misunderstood and neglected for a considerable period in Uganda, a coalition model of advocacy is an efficient and effective approach, one that ensures that the voices of all citizens – whether from urban or rural settings – reach the

State through sustained campaigns to engage and lobby it to respect, protect and fulfill ESCRs.

Why Uganda Should Ratify the Optional Protocol to ICESCR

Saphina Nakulima – Human Rights Advocate

Economic, Social and Cultural rights (ESCR), which include but are not restricted to the right to work, health, education, food, water, sanitation, housing, social security, a healthy environment and culture constitute the essential elements for a life of dignity and freedom.

Uganda being a signatory to the International Covenant on Economic Social and Cultural Rights (ICESCR) clearly indicates the country's commitment to the protection, promotion and fulfillment of ESCRs. However, the respect, protection, and fulfillment of ESCRs remains a major challenge domestically. This is largely because the discourse on ESCRs has not penetrated all levels of society and government. Consequently, advocacy for the enforcement of these rights is not yet robust, such that government feels little pressure to prioritize implementation of ESCRs, which it construes at worst as mere aspirations and at best as development goals that derive from the National Objectives and Directive Principles of State Policy rather than the Bill of Rights in Uganda's Constitution. This perspective fails to take into account the fact that Uganda is a party to regional and international treaties that provide for these rights, and as such impose a duty on the state to respect, protect and fulfill social and economic rights.

The optional protocol to the ICESCR was adopted in December 2008 and opened for signature in September 2009. It came into force on 5 May 2013, following ratification by 10 countries, and

“The Protocol is, therefore, a complaints mechanism that provides people who feel that their rights under the covenant have been violated with an opportunity to bring their grievances to the attention of the UN.”

allows individuals under the jurisdiction of a member State to submit complaints to the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) when a violation of their economic, social, or cultural rights has occurred, and they have exhausted all local remedies. The protocol further allows the UN committee to initiate an inquiry if it receives reliable information indicating grave or systematic violations by a State Party of any of the rights covered by the ICESCR.

The Protocol is, therefore, a complaints mechanism that provides people who feel that their rights under the covenant have been violated with an opportunity to bring their grievances to the attention of the UN. It is therefore important that Uganda ratifies the Optional Protocol, because:

- a. It enhances the accountability measures available to Ugandan citizens whose ESCRs are not fulfilled by the State. However, it should be borne in mind that while the UNCESCR

is empowered to conduct an independent inquiry into the merits of a claim and make recommendations on the appropriate remedy or redress, its decisions as is the case with all UN human rights treaty bodies, are not legally binding as they respect the ultimate sovereignty of member States.

b. It promotes all human rights as equal, universal, and interdependent; and challenges the notion that ESCRs are beyond the purview of court scrutiny, which has positive implications for the development of Uganda's case law on ESCR.

c. It increases public awareness of and provides a more comprehensive and detailed explanation of ESCRs. This makes it easier for people to understand what the contents and scope of any given ESCR, for example the right to education, are.

d. It will encourage Uganda to strengthen the ways in which ESCRs are provided for at national level, by for example, improving its laws, policies, practices and procedures. It will also require Uganda to have adequate domestic mechanisms in place to hear complaints of this nature, in order for the UNCESCR to function effectively as an accountability measure of last recourse.

e. It has the potential to increase domestic compliance with ESCR obligations, press for the national adjudication of cases that involve the violation of ESCR and strengthen the work of local organizations on human rights and social justice. It will help develop the content of ESCRs and corresponding States obligations, as well as give guidance to national and regional courts and human rights institutions in Uganda on how to adjudicate ESCR matters.

Upon its entry into force, the UN High Commissioner for Human Rights, Navi Pillay, and the former Deputy High Commissioner, Kyung-wha Kang, underscored the importance of the Protocol as a tool for enhancing access to justice for victims of violations of ESCRs and recalled that the Protocol effectively places these rights on an equal footing with other human rights in terms of their international legal protection.

Effect of Intellectual Property Rights on Access to Medicines

Primah Kwagala, Centre for Health, Human Rights and Development (CEHURD)

Access to medicines is an integral component of the right to health. However, the availability of and access to medicine remains a considerable challenge in Uganda despite the best efforts of local and international actors, largely because of the exorbitant costs. According to the Uganda Health Sector Strategic Plan 111 2010/11-2014/15, only 30% of the Essential Medicines and Health Supplies (EMHS) required for the basic package (National Minimum Health care Package - NMHCP) are provided for in the national budget. Global Initiatives provide the bulk of resources needed for malaria, HIV and AIDS, tuberculosis, vaccines and reproductive health commodities, with 90% of these medicines imported from developing countries such as India and China and only 10% produced by local industries for the local market.



Mukono district health workers prepares to load medical supplies for delivery to lower health units.

This article will analyze the impeding effect of intellectual property rights on the provision and access to public sector drugs in Uganda, and it will put forward recommendations on how best to enhance access to quality drugs. The article looks at the following questions which must be answered in the affirmative if Uganda is to fully exploit existing intellectual property flexibilities to enhance access to medicines.

Has the Ugandan government put in place measures to regulate and monitor the pricing of medicines

intended for the public sector? Is there an effective accountability process to hold accountable pharmaceutical manufacturers or distributors who fail to comply with pricing regulations? Does Uganda fully exploit generic medicines to bring down the prohibitive cost of medicines?

At the heart of these questions lies patent considerations for the entity that invests in research of a particular disease and discovers a drug to cure it. They may apply for the exclusive rights to manufacture, distribute and sell the drug within a particular country or through a regional

body. In some regions, a regional patent office, for example, the European Patent Office (EPO) and the African Regional Intellectual Property Organization (ARIPO), accepts regional patent applications, or grants patents, which have the same effect as applications filed, or patents granted, in the member States of that region. These rights are called ‘patents’ and according to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) are meant to last at least 20 years.

Patents form a section of ‘intellectual property rights’ that protect inventions, which is a product or a process that in general, provides a new way of doing something or offers a new technical solution to a problem. Patents provide the patent owner with the legal means to prevent others from making, using, or selling the new invention for a limited period of time. The property protected by patents are usually not something you can touch but can create tangible benefits that serve as incentives towards the promotion of innovation and research into diseases and their cures. The entities which own drug patents are given a right to determine the price of the drug so as to recover the expenses incurred in researching the drug. In many instances, however, patent holders seek to make excessively inflated profits with little regard for the negative impacts on vulnerable and impoverished populations.

The rules established under the WTO TRIPS agreement establish minimum levels of protection that each government has to give to the intellectual property of fellow WTO members. When the agreements came into being, some governments were unsure of how these TRIPS rules would be interpreted, and how far their right to use them would be respected. The African Group (all the African members of the WTO) were among the members pushing for clarification. They agreed that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. They underscored countries’ ability to use the flexibilities that are built into the TRIPS transitional clauses, including compulsory licensing (when a government allows someone else to produce the patented product or process without the consent of the patent owner) and parallel importing (products marketed by the patent owner or with the patent owner’s permission in one country and imported into another country without the approval of the patent owner.) They also agreed to extend exemptions on pharmaceutical patent protection for least-developed countries until 2016. These agreements are known as the Doha declaration.

As a result of the Doha declaration and recent extension granted by WTO in June 2013 to members of least developed countries, governments have put in place laws and policies to ensure access to medicines for all. This is because the agreement allowed developing countries to manipulate or make use of the research and processes created by established pharmaceutical companies as a means to build their capacity to produce drugs for their populations. Countries like China,

India, and Kenya have utilized this policy space to build their capacity to manufacture drugs. For least developed countries like Uganda, a period of up-to 2021 has been given to ensure we develop our legal, structural and research and manufacturing capacity. That means we too can exploit these rights to copy the manufacturing processes of drugs, to reverse engineer, to import and to produce drugs even under patent protection to our benefit.

These flexibilities in the WTO -TRIPS Agreement have been beneficial because in 2000, the WHO reported that the price of a first line drug for HIV/AIDS cost an average of \$10,000 (at least Ug. Shs.30,000,000) per person per year. With many Ugandans living on or below the poverty line, it is little wonder HIV/AIDS was considered a death sentence. When the International trade rules as interpreted by the council of ministers at DOHA came into effect in 2001, India put in place industries to reverse engineer these drugs and produced them at a much cheaper price. The same drugs which were costing at least \$10000 (Ug.shs.25,000,000) per person per year today cost

less than \$67 (Ug. Shs. 167,500) per person per year! The beauty of making proper use of the TRIPS flexibility to copy versions of 'brand name' or 'originator' drugs to make 'generic' versions of the very same kinds of medicines is what makes a difference in the price of medicine. The 'brand name' or 'originator' drug is expensive because it is inclusive of research costs and the 'generic'



or copy version is not fake, it simply does not include research costs of the first innovator; hence the difference in pricing.

The government of Uganda needs to put in place a legal and policy framework to promote access to medicines. More importantly, however, it needs to understand the dynamics of drug pricing, and seize the opportunities available to it under the international pricing regime. For example,

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the government could make full use of flexibilities to reverse engineer drugs locally, parallel import from cheaper countries and in so doing enhance access to quality drugs for Ugandans who cannot afford brand name drugs. Progressive realization of the right to health entails that governments not only put in place structures for service provision, but also ensure that there is affordable, available and accessible services even in terms of price access for the populace. Only once this is the case can we claim to have succeeded in facilitating access to medicines and thereby fulfilling the right to health in Uganda.

A Call to Government to Improve Access to Clean Water and Safe Sanitation

James Kiyimba, Grace Alupo and Rebecca Alowo, WaterAid Uganda

On 22 March 2013, Uganda joined the rest of the world in marking the 20th anniversary of World Water Day. WaterAid Uganda, an international Non – Governmental Organisation together with the Uganda Water and Sanitation NGO network (UWASNET) convened a National Sanitation Week to call on politicians and their local governments to deliver on their promise to ensure access to clean water and safe sanitation.

The commitments, by the government of Uganda, to improve access to water and sanitation are captured in a number of national, regional and international instruments. In the National Development Plan 2010/11 -2014/15 (NDP), the government of Uganda commits itself to providing water within easy reach and to improve sanitation. The NDP also lists performance and outcome indicators in this regard including water quality and equity. Under the United Nations Millennium Declaration, the government made a commitment to halve, by 2015, the

“...the total cost – due to disease and other related consequences – is UGX 386 billion per annum; the equivalent of 1.1% of Uganda’s Gross Domestic Product (GDP).”

proportion of people without access to safe drinking water and basic sanitation. Moreover Policy Objective 11 of the Strategic Sector Investment Plan for the Water and Sanitation Sector in Uganda (2009) seeks to achieve sustainable provision, based on management responsibility and ownership by the users, of safe water within easy reach and hygienic sanitation facilities to

77% of the population in rural areas and 100% of the urban population by the year 2015.

A WaterAid report, ***“Keeping Promises: why African leaders need now to deliver on their past water and sanitation commitments,”*** highlights the fact that nearly all Sub-Saharan governments have failed to honour a 2008 African Union commitment to spend at least 0.5% of their GDP on sanitation and hygiene, and to put in place separate budget lines for water and sanitation spending to improve accountability and track progress. Uganda is additionally a signatory to the eThekweni Declaration and AfricaSan Action Plan of 2008 under which 32 African countries made commitments to establish specific public sector budget allocations for sanitation and hygiene programmes, committing at least 0.5% of GDP to sanitation and hygiene and developing and implementing sanitation information, monitoring systems and tools to track progress at local and national levels.

According to the Government of Uganda, Ministry of Water and Environment, Water and

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Environment Sector Performance Report 2012, access to safe water within 1km in the rural areas was 64% (a slight decline from the 65% reported in 2011). For the urban areas, access to safe water increased from 66%, within 0.2km in 2011 to 69% in 2012. Access to household latrine coverage in the rural areas has remained at approximately 70% over the previous two years. However, there are wide disparities between regions: most of the districts in the Karamoja region, for example, have sanitation coverage of less than 20% – an indication that the sanitation MDG target in such areas is still far from being met.

A 2012 study; ***Economic Impacts of Poor Sanitation in Africa*** by the Water and Sanitation programme (WSP) of the World Bank estimates that the total cost [of poor sanitation] – due to disease and other related consequences – is UGX 386 billion per annum; the equivalent of 1.1% of Uganda's Gross Domestic Product (GDP).



A boy fetches water from a community well at Ntawo village, Mukono Municipality.

In order to effectively deliver on its promise to provide clean and accessible water and hygienic sanitation, the Ugandan government needs to assign greater funds to this end and ensure that it is targeted to meet the needs of the poorest, most vulnerable communities. It needs, further, to put into place systems which ensure that national and district local government is transparent, accountable and able to demonstrate impact with respect to expenditure on water

and sanitation services. Finally, access to water and hygienic sanitation should be a priority of the Ugandan government beyond the 2015 target.

The Right to a Clean and Healthy Environment: The Need for Air Standards

Adapted from ISER policy advocacy brief No. 4 (http://www.iser-uganda.org/images/stories/Downloads/ISER_policy_advocacy_brief_4.pdf)

“A safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation. Without a healthy environment, we are unable to fulfill our aspirations or even live at a level commensurate with minimum standards of human dignity.”(OHCHR)

Article 39 of the Constitution of the Republic of Uganda provides for the right of every Ugandan to a clean and healthy environment. Section 3(1) of the National Environment Act also restates that every person has a right to a healthy environment. Violation of the right to a clean and healthy environment adversely affects the enjoyment of a broad range of human rights, including the rights to life, health, food and water.

The right to a clean and healthy environment has been upheld in several cases in Uganda including ***The Advocates Coalition for Development and Environment V Attorney General (AG) and National Environment Management Authority (NEMA)*** (High Court Misc. Appln No. 0100 of 2004), where the court held that the right to a healthy environment entitles Ugandans to a right to an environment adequate for their health and wellbeing. In ***Uganda Electricity Transmission Company Ltd V De Samaline Incorporation Ltd***, (High Court Misc. Cause No. 181 of 2000), the court elaborates the right to clean and healthy environment as follows: ‘... the right to a clean and healthy environment must not only be regarded as a purely medical matter. It should be regarded as a holistic social cultural phenomenon because it is concerned with physical and mental well-being of human beings... a clean and healthy environment is measured in both an ethical and medical context. It is about linkages in human well-being. These may include social injustice, poverty, diminishing self-esteem, and poor access to health services. That right is not restricted to a clinical model’.

At the African level, in the case of ***Social and Economic Rights Action Center v. Nigeria (Ogoniland Case)***, communication No. 155/96, para. 67; the African Commission on Human and Peoples’ Rights found that environmental harm can give rise to violations of the right to life. The Government of Uganda has the obligation to protect its people from infringement of human rights not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by non-state actors, including

private businesses. This duty calls for positive action on the part of government in fulfilling its obligations under domestic and international human rights instruments.

According to section 52 of Uganda's National Environment Act, every person has the duty to manage any waste generated by his or her activities or the activities of those persons working under his or her direction in such a manner that he or she does not cause ill health to the person or damage to the environment. The section further requires every person whose activities generate waste to employ measures for the minimization of waste through treatment, reclamation and recycling. Failure to do this is an offence.

Section 24 of Uganda's National Environment Act requires the Ugandan National Environment Authority (NEMA) to establish air quality standards, take measures to reduce existing sources of air pollution by requiring the redesign of plants or the installation of new technology or both to meet the requirements of air quality standards established under the law, and make guidelines

to minimize emissions of greenhouse gases and identify suitable technologies to minimize air pollution.

“NEMA has not yet come up with the air quality standards to control air pollution in the country- an indication that the government of Uganda is in violation of its obligations to protect the right to a clean environment under both domestic and international law.”

Notably, NEMA has not yet come up with the air quality standards to control air pollution in the country- an indication that the government of Uganda is in violation of its obligations to protect the right to a clean environment under both domestic and international law. By failing to come up with air quality standards and ensuring their implementation, the government of Uganda is failing to protect and fulfill the constitutional right to a clean and

healthy environment, which has an impact on other rights including the right to health and the right to life.

In June 2011, the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights presented to it by the Special Representative of the United Nations Secretary-General, Professor John Ruggie. This move established the Guiding Principles as the global standard of practice that is now expected of all States and businesses with regard to business and human rights. While they do not by themselves constitute a legally binding document, the Guiding Principles elaborate on the implications of existing standards and practices for States and businesses, and include points covered in international and domestic law.

The Framework of the guiding principles rests on three pillars. The first pillar concerns the

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duty of States to protect against human rights abuses committed by third parties, including businesses, through appropriate policies, regulation and adjudication. The second pillar is the corporate responsibility to respect human rights and the third is the need for greater access by victims of human rights violations to an effective remedy.

NEMA should fast track the process of coming up with the National Air Quality standards to be able to better manage pollution in the country and enforce the law in case of violations. NEMA should also conduct regular inspections of factories to ensure that there is compliance with regulations

Litigating Social and Economic Rights: The Kenyan Experience

Faith Rotich, Programme Officer , Kituo cha Sheria Kenya

The Constitution of Kenya, which was promulgated after a referendum held in August 2010, set the scene for broad legal reforms. One of these was the inclusion, in the Bill of Rights, of provisions from The International Covenant on Economic, Social and Cultural rights (ICESCR), reversing the position of Kenya's previous Constitution, which had been silent on economic, social and cultural rights (ESCRs).

Article 43 of the Constitution provides that, ***“(1) Every person has the right— (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; (b) to accessible and adequate housing, and to reasonable standards of sanitation; (c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities; (e) to social security; and (f) to education. (2) A person shall not be denied emergency medical treatment and (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.”***

With the introduction of Article 2(5) and (6) in the Constitution, the general rules of international law, as well as treaties and conventions ratified by Kenya, now form part of the laws of Kenya. The Constitution goes further to provide that the Bill of Rights is an integral part of Kenya's democratic State and is the framework for social, economic and cultural policies. Courts must, therefore, interpret these provisions in a manner that favors the enforcement of rights.

In the light of the widespread prevalence in Kenya of gross inequalities, poverty, and the marginalization of certain communities, it became apparent that there was a need to introduce measures to promote equality between all citizens, and protect those living on the periphery of society. Enshrining the ICESCRs provisions in the Constitution provided the State with the legal framework to meet its obligation to protect, promote and fulfill its citizen's ESCRs. The grounding of ESCR in the constitution has, moreover, provided an avenue to litigate ESCRs-related cases before Kenyan courts, thereby ensuring access to and respect for ESCRs; as well as redress where the rights in question are violated. Critics opposed to the inclusion of ESCRs within Kenya's Bill of Rights, appealed to the notion that this had the potential to open a flood gate of litigation, which would place additional strain on an already burdened court roll. Given the high costs associated with litigation, this seems improbable; however, time will attest to

whether or not this was a legitimate concern.

ICESCRs are subject to progressive realization, with the result that many States justify non-fulfilment on the grounds of financial incapacity. In contrast, Article 20(5) of the Kenyan Constitution obligates the State to show that resources are not available in the event of non-fulfilment. Kenya's Constitution further provides that in allocating resources for ESCR, the State must ensure the widest possible enjoyment of rights and give priority to vulnerable groups.

In *John Kabui Mwai and others v Kenya National Examination Council and others* Petition No.15 of 2011, the court, while noting resource challenges in the fulfillment of the right to education, stated that the realization of this right was necessary to ensure that the conditions of poor and less advantaged citizens are improved and set pace for a generation that is free from socio-economic impoverishment. The court's handling of social and economic rights is steadily changing for the better as litigation of these rights gains momentum.

“Kenya's Constitution further provides that in allocating resources for ESCR, the State must ensure the widest possible enjoyment of rights and give priority to vulnerable groups.”

In the recent case of *Musa Dagane & others v Attorney General & others*, petition No.56 of 2009, the High Court at Embu gave compensation to members of a minority clan known as Bula Fot who had in the past faced several unlawful evictions by the state. The court issued a permanent injunction restraining the State from any such further evictions, and awarded each petitioner a sum of Ksh.8,066,000 (over USD 90, 0000) as special damages and a further Ksh.250,000 (about USD 3,000) in general damages.

In another right to housing case, *Mitu-Bell Welfare Society v Attorney General and others*, Petition No.164 of 2011, the High Court directed the State to resettle residents pending compensation noting that, “It was a clear case of violation of human rights following the November 19, 2011 demolition of the village, which was also carried out despite a stay order where a whole community was deprived of its residence and business premises,” and that, “forceful eviction without a relocation option is illegal, irregular and oppressive and in violation of the Constitution and affected access to education, water, healthcare amongst other basic human needs.” This interpretation of rights as mutually reinforcing and indivisible demonstrates a progressive development in Kenya's adjudication of ESCRs.

However, this positive movement should not be overstated: some courts are still reluctant to recognize the enforceability of ESCRs. This has been attributed to the resistance of judges who

served before the new Constitutional dispensation.

Balancing competing and equally imperative ESCRs is another challenge confronting Kenyan courts. In the right to housing case - ***Satrose Ayuma and others v the Attorney General and others***, Petition No.65 of 2010 the High Court, while providing an interim judgment halting the eviction of the Petitioners, noted the challenge of balancing the rights of citizens entitled to adequate housing as provided by the Constitution on the one hand, against the private right of title holders on the other hand, to be free from the unlawful encroachment of illegal settlements on their property.

The Constitution of Kenya 2010 now provides a framework for the respect, protection and fulfillment of ESCRs. With respect to the right to housing, however, despite the constitutional provisions, laws are yet to be passed to govern housing and evictions. It is hoped that with the on-going legal reforms, measures will be taken by the State to alter this situation.





ISER

Facilitating Social Justice

About the Initiative for Social and Economic Rights - Uganda

ISER is a registered national Non – Governmental Organization (NGO) in Uganda founded in February 2012 to ensure full recognition, accountability and realization of social and economic rights primarily in Uganda but also within the East African region.

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