

CHAPTER 6

THE HUGGER-MUGGER OF ENFORCING SOCIO-ECONOMIC RIGHTS IN GHANA: A THREAT TO THE RIGHTS OF PERSONS WITH DISABILITIES

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Summary

At the heart of the Convention on the Rights of Persons with Disabilities (CRPD) is the reaffirmation of the universality, indivisibility, interdependence and interrelatedness of all human rights, and the open acknowledgement that civil and political rights alone cannot fully protect the inherent dignity and worth of persons with disabilities. Accordingly, the aims of the CRPD cannot be realised unless the socio-economic rights of persons with disabilities are rigorously enforced. Ghana, like most African signatories to the CRPD, operates a human rights regime that pays little attention to socio-economic rights. Socio-economic rights are contained in Chapter VI of Ghana's Constitution (1992). The Chapter, titled the 'Directive Principles of State Policy', has been interpreted by its Supreme Court variously, making it impossible to discern, clearly, whether the rights listed in the Chapter are justiciable. These inconsistent interpretations pose a major challenge to the full implementation of the CRPD. This article seeks to achieve three broad objectives: to explain why socio-economic rights have been effectively unenforceable in Ghana; to show how the current situation poses a threat to the full performance of Ghana's obligations under the CRPD; and to propose some ways of going round the impasse. The article is divided into five parts. Part 1 offers a brief description of the landscape of disability in Ghana. Part 2 unpacks the nature of the obligation that states undertake when they ratify the CRPD. It also explains how these obligations cannot be fully performed unless socio-economic rights are rigorously enforced. Part 3 takes a critical look at Ghana's human rights regime under the 1992 Constitution.

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Part 4 will conduct a brief international comparative analysis on how two countries – India and South Africa – have enforced socio-economic rights. The final Part will conclude by drawing on the experiences from other jurisdictions to suggest mechanisms for going round the impasse.

1 Disability and Ghana's political economy

The disability landscape of Ghana, a lower-middle-income West African country,¹ may not be very different from that of other countries within the sub-Saharan region. Even though the *World Report on Disability* estimates Ghana's disability prevalence rate at 12,8 per cent,² the 2010 census shows that there are 737 743 persons (3 per cent of the total population) with some form of disability, 52,5 per cent of whom are females. Of this figure visual or sight impairment constitutes 40,1 per cent, physical disability 25,4 per cent and emotional, behavioural, and intellectual disability 33,8 per cent. Visual or sight impairment is also the most common form of disability amongst both males (38 per cent) and females (42 per cent).³ The challenges that persons with disabilities face globally – disproportionately higher level of poverty, poor healthcare, low education and unemployment – applies to the 3 per cent of the population of persons with disabilities in Ghana. This is coupled with discrimination, exclusion and ill-treatment, factors which are deeply rooted in cultural and religious beliefs and practices.

In Ghana, especially in the rural areas, disability is believed to be caused by evil spirits or other supernatural forces. For example, a study conducted in the Brong-Ahafo region of the country⁴ reveals a common belief that parents use their children for ritual money, thereby making the parents rich while the children become intellectually disabled.⁵ Also, the practice in the upper regions, where disable babies are labelled 'spirit child' by witch-doctors and killed by poisoning is well documented.⁶ The belief is that such babies are a curse from the evil spirits to their parents; and unless killed, their parents will never attain any form of happiness.

- 1 World Bank 'Data for 2012' <http://data.worldbank.org/country/ghana> (accessed 14 July 2014).
- 2 WHO & World Bank 'World report on disability (main report)' (2011) 273. The Report combines both World Health Survey (2002 -2004) and Global Burden of Disease (2004) to arrive at the figures.
- 3 Ghana Statistical Service 'Report on population and housing census, 2010 (Summary)' 12-13.
- 4 Brong-Ahafo Region is one of the 10 regions of Ghana. The Region has the lowest proportion of persons with disabilities (2,3 per cent).
- 5 Inclusion Ghana 'Report on the level of stigmatization and exclusion of persons with intellectual disability and their families in Ghana' (July 2011) 11.
- 6 Al-jazeera 'Spirit child' (Undercover Investigation) <http://www.aljazeera.com/programmes/peopleandpower/2013/01/201319121124284358.html> (accessed 14 July 2013).

Clements and Read observe that ‘the ways we define and theorize disability [including the causes we attribute to it] crucially determine how we approach matters bound up with it’.⁷ The Brong-Ahafo research reveals that 69 per cent of parents believed that intellectual disability could be cured. However, ‘God is mentioned as the source of cure in a lot of cases’, even though all of the parents who said they ‘went to all kinds of spiritual/miracle churches, prayer camps and to traditional priests for a possible cure of their children’ also reported that ‘their children were not healed after all the spiritual healing they sought after’.⁸ Also, in the upper regions, old women who seem to have behavioural or intellectual challenges are labelled as witches and thrown into ‘Witches’ Camps’.⁹ Modernity and democracy have helped to reduce the prevalence of these harmful cultural and religious practices; but they still persist.

The above notwithstanding, Ghana is touted as a leading example of a rising democracy in Africa.¹⁰ Certainly, there is a direct positive correlation between democracy and quality of human rights protection.¹¹ Ghana’s strides in democratic governance in a continent struggling to come out of dictatorship and civil wars could therefore be explained by a reference to her human rights credentials. Whilst Ghana’s human rights records date back to pre-independence, its current human rights achievements cannot be explained without direct and extensive reference to the 4th Republican Constitution, 1992, which ended almost three decades of military dictatorship.¹² Even though the 1992 Constitution contains both civil and political rights and socio-economic rights, it is only the former that could be pointed at with pride. The socio-economic rights are not just invisible, they are also inoperative.

Ghana is a state-party to the CRPD; and is expected to fully perform all the obligations thereunder. However, what are these obligations? And what is their nature? The next part of this article will unpack these

7 L Clements & J Read ‘Life, disability and pursuit of human rights’ in L Clements & J Read (eds) *Disabled people and the right to life: The protection and violation of disabled people’s most basic human rights* (2008) 2.

8 Inclusion Ghana (n 5 above) 12.

9 See generally: ActionAid *Condemned without trial: Witches camp in Ghana* (2012).

10 USAID Ghana *Ghana Democracy and Governance Assessment Report* (2011) 11. The Report also cites a ranking by an organisation called Freedom House, which ranks Ghana as ‘1 out of 7 on Political Rights (with 1 being the best) and 2 out of 7 on Civil Liberties’.

11 C Davenport & D Armstrong II ‘Democracy and the violation of human rights: a statistical analysis from 1976 to 1996’ (2004) 48 *American Journal of Political Science* 538 538-39; R Lang et al ‘Implementing the United Nations Convention on the Rights of Persons with Disabilities: Principles, implications, practice and limitations’ (2011) 5 *European Journal of Disability Research* 206 211; also see H Fein ‘Life-integrity violations and democracy in the world, 1987’ (1995) 17 *Human Rights Quarterly* 170, where it was found that a full dictatorship too may result in human rights protection.

12 Republic of Ghana ‘Report of the Constitution Review Commission’ (2011) 626; Also see E Gyimah-Boadi *Confronting the legacy of human rights abuse in Africa: Lessons from Ghana* (2004) 10.

obligations by discussing their form and content, more particularly those obligations that touch on socio-economic rights.

2 States parties' obligations under the CRPD

In December 2006, the CRPD and its Optional Protocol were adopted by the UN General Assembly. By ratifying the Protocol, a state party

[R]ecognizes the competence of the Committee on the Rights of Persons with Disabilities ('the Committee') to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.¹³

Approximately two years later, the CRPD and its protocol entered into force after the required number of states ratified them in accordance with their articles 45 and 13 respectively.

2.1 Content of obligation

The CRPD is unique in several ways. First; it is the only international instrument which comprehensively addresses the issue of disability rights,¹⁴ the subject having been ignored by almost all the seven¹⁵ preceding UN human rights treaties.¹⁶ Second; for decades, the social model, which asserts that environmental (rather than medical) factors are the real causes of disability, has been discussed and largely accepted.¹⁷ However, it is the CRPD that 'formalizes [the] move away from treating people with disabilities through a medical lens and as objects of pity'.¹⁸

13 Art 1, Optional Protocol to the CRPD, 6 December 2006, UN GAOR, 61st Sess, Item 67 (b), UN Doc A/61/6111.

14 Clements and Read (n 7 above) 509.

15 International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (CESCR); the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention on the Rights of the Child (CRC) (except art 23(1)); and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPMW).

16 A Lawson 'The United Nations Convention on the Rights of Persons with Disabilities: New era or false dawn' (2006-2007) 34 *Syracuse Journal of International Law & Commerce* 563 575-76; also, M Stein 'Disability Human Right (2007) 95 *California Law Review* 75 79.

17 R Lang 'The United Nations Convention on the right and dignities for persons with disability: A panacea for ending disability discrimination?' (2009) 3 *ALTER, European Journal of Disability Research* 266 268.

18 M Waterstone 'The significance of the United Nations Convention on the Rights of Persons with Disabilities' (2010 - 2011) 33 *Loyola of Los Angeles International and Comparative Law Review* 1 2; also see J Lord & M Stein 'The domestic incorporation of human rights law and the United Nations Convention on the Rights of Persons with Disabilities' (2008) 83 *Washington Law Review* 449 460.

Further, article 4 sets out the broad tone for the CRPD's implementation. The article requires state parties to take rigorous steps towards the full implementation of the rights and freedoms outlined in the CRPD. These steps include policy and legislative reforms (including repeals) based on consultations with disabled persons; and for the broader purpose of disability mainstreaming. Accordingly, Quinn notes that 'in short, article 4 converts the Convention into a trigger for worldwide disability law reform'.¹⁹

However, it is article 3 which captures the overall purpose of the Convention. It outlines the principles upon which the entire Convention is mounted. Equality and non-discrimination, respect for differences, full and effective participation and inclusion in society; accessibility and recognition of capacity (including evolving capacity) leading to full autonomy and personal independence are stated as the 'General Principles' underlining the CRPD.²⁰ These principles, like the purpose of legislation, may be justifiably treated as aids to interpreting the CPRD. Taken together, it may be clear that the principles are meant not just to undo the entrenched socially-constructed differences between Persons with disabilities and persons without disabilities. They are also meant to trigger concrete state actions that will afford durable compensation for the disadvantages that result from those socially-constructed differences. Of course, these principles are not new to human rights,²¹ and therefore could not be said to, by their mere statement, be unique in anyway. Their uniqueness however becomes apparent when they are read together with the history of disability human rights and the content of some particular provisions in the CRPD.

Under the CRPD, equality and non-discrimination is not to be taken merely on the formal level. Equality must be effective and substantive.²² Since the American with Disability Act, 1990, the anti-discrimination approach has formed the fulcrum around which disability rights protection has revolved.²³ This approach gives prominence to civil and political rights and virtually no attention to socio-economic rights.²⁴ It also treats equality as sameness,²⁵ a premise which constitutes a major fault-line in the

19 G Quinn 'The United Nations Convention on the Rights of Persons with Disabilities: Toward a new international politics of disability' (2009-2010) 15 *Texas Journal on Civil Liberties & Civil Rights* 33 41.

20 Lang (n 17 above) 5.

21 Clements & Read (n 7 above) 509.

22 Lawson (n 16 above) 590.

23 A Kanter 'The United Nations Convention on the Rights of Persons with Disabilities and its implications for the rights of elderly people under international law' (2009) 25 *Georgia State University Law Review* 527 540-42.

24 See generally: A Satz 'Disability, vulnerability, and the limits of anti-discrimination' (2008) 83 *Washington Law Review* 513; also see M Stein 'Same struggle, different difference: ADA accommodations as anti-discrimination' (2004) 153 *University of Pennsylvania Law Review* 579, where it is argued that the anti-discrimination approach forms the theme for the Americans with Disability Act, 1990

25 M Stein 'Disability human rights' (2007) 95 *California Law Review* 75 92.

approach. This is because, persons with disabilities and persons without disability, though equal, are not the same. Indeed, the anti-discrimination approach brought about general awareness in the area of disability rights. That notwithstanding, the approach did not achieve much. It is evident that persons with disabilities still stand at a disproportionately disadvantaged position in relation to the general population. They form as much as 20 per cent of the world's poorest population.²⁶ They lack access to basic amenities like housing, healthcare, food (including clean water) and employment. They are still excluded from the society and are treated with stigma and disrespect. And in spite of the fact that they form probably the largest minority group,²⁷ they are often ignored in policy. For example, the UN Millennium Development Goals, a concerted effort to fight global poverty, did not initially mention disability in any of the 8 Goals or the attendant 21 Targets or 60 Indicators, nor in the Millennium Declaration.²⁸

This disregard for socio-economic rights emanates from the ideological arguments that socio-economic rights are mere political statements which are not amenable to judicial enforcement;²⁹ and that they could only be guaranteed by national policy (rather than law) and achieved progressively when resources are available.³⁰ Ultimately, it is argued that judges lack the democratic legitimacy and the institutional capacity to enforce them.³¹ Civil and political rights on the other hand are seen as negative rights³² that do not require resources for their implementation. They are seen as automatically justiciable and therefore are *rights*.³³

Several years after the Cold War, the dust is beginning to settle. It is now becoming abundantly clear that the distinction between civil and political rights and socio-economic rights is an exaggeration,³⁴ and that the

26 A Elwan *Poverty and disability: A survey of the literature* World Bank Social Protection Discussion Paper Series No 9932 (1999) 15.

27 T Degener 'Disabled persons and human rights: the legal framework' in T Degener & Y Koster-Dreese (eds) *Human rights and disabled persons: Essays and relevant human rights instruments* (1995) 9.

28 See generally: General Assembly Resolution 55/2, UN GAOR 55th Sess, UN Doc A/RES/55/2 (18 September 2000). This grave omission compelled the UN General Assembly to subsequently adopt a new Resolution 'Realizing the Millennium Development Goals for persons with disability' (A/RES/64/131) to fill the gap.

29 M Cranston 'Human rights: Real and supposed' in D Raphael (ed) *Political theory and rights of man* (1967) 43-51.

30 L Sohn 'The new international law: Protection of the rights of individuals rather than states' (1982-1983) 32 *The American University Law Review* 1 18-19.

31 F Michelman 'The constitution, social rights, and liberal political justification' (2003) 1 *International Journal of Constitutional Law* 13 15-16.

32 F Cross 'The error of positive duties' (2001) 48 *UCLA Law Review* 857 863-65; S Bandes 'The negative constitution: A critique' (1990) 88 *Michigan Law Review* 2271 2272.

33 A Dhandha 'The right to treatment of persons with psychosocial disabilities and the role of the courts' (2005) 28 *International Journal of Law and Psychiatry* 155 156.

34 T Campbell 'Poverty as a violation of human rights: Inhumanity or injustice?' in T Pogge (ed) *Freedom from poverty as a human right: Who owns what to the very poor?* (2007); *Airey v Ireland* [1979-80] 2 EHRR 305 316-17.

reluctance to include socio-economic rights in human rights legislation stems from this 'historical construction of an artificial distinction' between the two categories of right.³⁵ There is now an emerging consensus 'that reconciling the two categories of rights is an essential precondition for the realisation of socially embedded human rights'.³⁶

The CRPD, being the first international human rights convention to be drafted following the adoption of the Vienna Declaration and Program of Action, 1993,³⁷ reflects the ideals of that Declaration – a borderless body of human rights. The CRPD, therefore, reaffirms 'the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms'.³⁸ Thus, quite apart from the first generation rights, freedom of expression, of association, the rights to life, to fair trial, and so on, the CRPD also guarantees the second generation rights and does so with great sense of devotion. This striking devotion to socio-economic rights could be gleaned from articles 24 (right to Education), 25 (the right to health), 27 (the right to work and employment) and 28 (the right to adequate standard of living and social protection), amongst others.

Unlike the traditional human rights clauses, the CRPD clauses do not just list the socio-economic rights. The clauses come with a detailed outline of *how* states parties are expected to realise these rights. For example, with respect to the right to education, article 24(2) goes further to spell out the specific steps that the state shall take to realise its obligation. It requires an all-inclusive and unrestricted access to, at least, free compulsory basic education. The article even goes to the extent of listing 'braille, alternative script, augmentative and alternative modes, means and formats of communication ...' as some of the necessary facilities for realising this right.

With respect to the right to work under article 27, the state is specifically required to employ disabled persons in the public sector whilst creating conditions that will encourage the private sector to employ more disabled persons. The principle of reasonable accommodation is self-explanatory.³⁹ Further, the state is to particularly promote 'vocational and professional rehabilitation, job retention and return-to-work programmes

35 P Weller 'Human rights and social justice: The Convention on the Rights of Persons with Disabilities and the quiet revolution in international law' (2004) 9 *Public Space: The Journal of Law and Social Justice* 74 74.

36 P Weller (n 66 above) 82; Vienna Declaration and Program of Action 1993, Art 5; World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc A/CONF. 157/23 (1993).

37 World Conference on Human Rights, 4-25 June 1993, Vienna Declaration and Programme of Action, UN Doc A/CONF. 157/24 (July 12, 1993); A Dhanda 'Legal capacity in the disability rights Convention: Stranglehold of the past or lodestar for the future?' (2007) 34 *Syracuse Journal of International Law & Commerce* 429 432.

38 Preamble of the CRPD (n 13 above) para C.

39 CRPD (n 13 above) art 2(4).

for persons with disabilities'.⁴⁰ This unprecedented specificity runs through the other articles that guarantee socio-economic rights. Comparing these clauses with those of the earlier instruments reveals a different approach to addressing socio-economic rights, namely, that states are no longer left on their own to determine the content of the socio-economic rights. So, when a state signs and ratifies the CRPD, it is clearly not into business-as-usual.

2.2 Nature of obligation

When states sign up to a treaty, the international obligation under the treaty are, by hypothesis, of international concern and no longer exclusively a matter of their domestic jurisdiction.⁴¹ This principle, however, does not mean or suggest, even remotely, that states parties should fold their arms and wait until complaints are brought against them at the international level before actions are taken. What it actually means is that 'the principal responsibility for ensuring fulfilment of the obligations contained in human rights treaties rests with the government concerned'.⁴² Accordingly, Tunkin argues that:

[T]he principal field of struggle for human rights is the internal system of a state, and especially its socioeconomic system. The international protection of human rights, effectuated primarily by international legal means, is, although important, merely an auxiliary means of securing such rights.⁴³

Therefore, it is the state party (not the international community) which must adopt all appropriate domestic legislative, administrative and other measures for the implementation of the rights.⁴⁴ It must take into account the protection and promotion of the human rights of persons with disabilities in all of its domestic policies and programmes. It has the imperative legal obligation to, in its policies and programmes, show clear and detailed commitment to marshalling its available resources towards ensuring that persons with disabilities are fully integrated into all aspects of society life.⁴⁵ This obligation was echoed by the African Commission on Human and Peoples' Rights, namely, that it is the obligation of 'the states party to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all

40 CRPD (n 13 above) art 27(1)(k).

41 A Robertson 'The implementation system: International measures' in L Henkin (ed) *The international bill of rights* (1981) 332 333.

42 P Alston & G Quinn 'The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156 162.

43 G Tunkin *Theory of international law* (1974) 83.

44 A Kanter 'The promise and challenge of the United Nations Convention on the Rights of Persons with Disabilities' (2006-2007) 34 *Syracuse Journal of International Law & Commerce* 287 314.

45 CRPD (n 13 above) art 4(2).

its aspects'.⁴⁶ The CRPD obligations may thus be summed up as, to: repeal or adopt certain laws; mainstream concern for persons with disabilities; launch public awareness campaigns; build or adapt certain infrastructures; train specialised personnel; employ certain individuals; provide certain forms of services or assistance; and consult with the representative organisations of persons with disabilities.⁴⁷

Ghana was one of the first countries to sign up to the CRPD and the Optional Protocol when they were opened for signature on 30 March 2007.⁴⁸ Ghana subsequently indicated its total commitment to the obligations therein when it ratified both instruments on 31 July 2012.⁴⁹ International law, treaty or customary, requires that states perform their international obligations in good faith.⁵⁰ Clearly, it is not good faith for a country to say one thing to the whole world and then proceed to do quite another.⁵¹ The question then is whether Ghana is ready to perform its obligations under the CRPD in full and in good faith.

As explained above, a state party to the CRPD cannot perform its obligations fully without a legal system that respects, protects and fulfils socio-economic rights. Thus, for Ghana to be able to discharge its obligations, it must put in place (if it does not already have) a human right system that does not only protect civil and political rights, but also, and perhaps more essentially, that which protects economic, social and cultural rights. What is Ghana's human rights system like? How does Ghana's Constitution treat human rights in general and socio-economic rights in particular? Does Ghana's Constitution, the source of its laws and legal system, support a full performance of the country's obligations under the CRPD? The answers to these questions form the subject of the next part of this article.

46 *Purohit and Moore v The Gambia*, African Commission on Human and Peoples' Rights, CommNo 241/2001 (May 2003) para 84. The Commission, in this case, was dealing with the right to health, particularly mental health, under articles 16 & 18 of the African Charter on Human and Peoples' Rights (Organization of African Unity (OAU) *African Charter on Human and Peoples' Rights* ('ACHPR or Banjul Charter') 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982)).

47 F Megret 'The Disabilities Convention: Human rights of persons with disabilities or disability rights' (2008) 30 *Human Rights Quarterly* 494 506; Lord & Stein (n 18 above) 457-59.

48 United Nations Enable 'Convention and Optional Protocol Signatures and Ratifications' <http://www.un.org/disabilities/countries.asp?id=166> (accessed 20 July 2013).

49 United Nations Enable 'Convention and Optional Protocol Signatures and Ratifications' <http://www.un.org/disabilities/countries.asp?id=166> (accessed 20 July 2013).

50 United Nations *Vienna Convention on the Law of Treaties* (VCLT), UN Doc A/Conf.39/27; 1155 UNTS 331(1969), art 31(1); G Schwarzenberger & E Brown *A manual of international law* (1976) 7.

51 J O'Connor *Good faith in international law* (1991) 124.

3 Human rights in Ghana

Human rights under the 1992 Constitution is built around two main Chapters. Chapter V (articles 12-33), which is titled 'Fundamental Human Rights and Freedoms' and Chapter VI which is titled 'Directive Principles of State Policy'.

3.1 The 'Fundamental Human Rights and Freedoms'

Chapter V of the Constitution contains the traditional civil and political rights. The right to life (article 13), to personal liberty (article 14), to respect for human dignity (article 15), to protection from slavery and forced labour (article 16), to privacy (article 18), to fair trial (article 19), to ownership and protection of private property (article 20), to freedom of association, of movement (including assembly), of expression (including speech), to hold and practice culture, religion and politics (article 21); to equal access to education (including free compulsory basic education (article 25)). It also contains women's rights (article 27), children's rights (article 28) and the rights of persons with disability (article 29) and of the sick (article 30). This Chapter also contains some socio-economic rights, namely, the right to satisfactory, safe and healthy condition of work (including equal pay for equal work); the right to leisure and to paid public holidays; and the right to form and join trade unions (article 24). Free secondary education, technical and vocational training are to be introduced and realised progressively (article 25).

All these rights are to be enjoyed equally by all persons within the territory of Ghana and without discrimination on 'ground of gender, race, colour, ethnic origin, religion, creed or social or economic status'.⁵² Article 17(4)(a) provides that nothing

shall prevent Parliament from enacting laws that are reasonably necessary to provide for the implementation of policies and programs aimed at redressing social, economic or educational imbalance in the Ghanaian society.

Clearly, this Clause, a mirror to the Rawlsian 'difference principle'⁵³ – permits the state to embark on affirmative action and programmes to redress socio-economic unevenness in the country.

Also, Chapter V has a clearly-outline enforcement mechanism. Where a person alleges that his or her rights under Chapter V have 'been, or is

52 Republic of Ghana *Constitution 1992*, art 17(1); also see Hon Justice J Taylor 'The scope of human rights in Ghana' (1993-95) 19 *Review of Ghana Law* 84 92.

53 The 'difference principle' states that social and economic inequalities may be justifiable if they are meant to bring the least advantaged members of society at par with the other members of the society. See J Rawls *On justice as fairness: A restatement* E Kelly (ed) (2001) 42-43.

being or is likely to be contravened ... that person may apply to the High Court for redress'.⁵⁴ The remedies available to such persons includes (but are not limited to) 'orders in the nature of *habeas corpus*, *certiorari*, *mandamus*, prohibition, and *quo warranto*'.⁵⁵ In *Awuni and Others v West African Examinations Council*⁵⁶ the Supreme Court held that 'redress' may include monetary compensation, even against the state. Fulfilling the charge in article 33(4), the Rules of Court Committee has enacted Order 67 of the High Court (Civil Procedure) Rules, 2004 (CI 47) to regulate the enforcement of the Chapter V rights.

Yet, the most encouraging provision is that which creates an opening for rights which, even though are not mentioned under Chapter V but which are nonetheless 'considered to be inherent in a democracy and intended to secure the freedom and dignity of man',⁵⁷ to be enforced as if they were expressly mentioned in the Chapter. The implication of this is that the 1992 Constitution is open to the admission of new rights. This, indeed, is a bold acknowledgment of the fact that there are no limits to the lists of human rights. Accordingly, the Supreme Court in *Ahumah-Ocansey v Electoral Commission; Centre for Human Rights and Civil Liberties (CHURCIL) v Attorney-General and Electoral Commission (Consolidated)*⁵⁸ had used the article 33(5) criteria to admit the right of prisoners to vote as a distinct right into the Chapter.

3.2 The Directive Principles of State Policy (DPSP)

The second Chapter which, together with Chapter V, forms the core of the human rights regime of the 1992 Constitution is Chapter VI (articles 34-41). The Chapter is titled 'The Directive Principles of State Policy'. It contains the rights to 'just and reasonable access by all citizens to public facilities and services' (article 35(3)); to 'economic development ... maximum welfare, freedom and happiness ... adequate means of livelihood and suitable employment and public assistance to the needy' (article 36(1)); and to 'fair and realistic remuneration' (article 36(2)(a)). Also the state is required 'as a fundamental duty' to 'assure the basic necessities of life for its people' (article 36(2)(e)); to 'safeguard the health, safety and welfare of all persons in employment' (article 36(10)); and to 'provide educational facilities at all levels' (article 38(1)).

The entry of the DPSP into Ghana's constitutional law could be traced to Chapter IV of the 3rd Republican Constitution, 1979, where they were primarily designed to achieve two main objectives. First, to 'enumerate a set of fundamental objectives which a people expect all bodies and persons

54 Art 33(1).

55 Art 33(2).

56 [2004] 1 *Supreme Court of Ghana Law Reports* 471.

57 Art 33(5).

58 [2010] *Supreme Court of Ghana Law Reports* 575 614.

that make or execute public policy to strive to achieve'; and, second, to 'constitute, in the long run, a sort of barometer by which the people could measure the performance of their government'.⁵⁹ Quite apart from these two objectives, the DPSP also 'elaborated the social and economic aspects of human right – aspects which are of particular relevance to the conditions of Africa and the developing world generally'.⁶⁰ They also propose 'specific provisions relating to the rights of categories of persons whose situation call for special guarantees and protection in the Constitution'.⁶¹ These purposes were again cited for the inclusion of the DPSP in the 1992 Constitution. According to the Committee of Experts, who deliberated and proposed the Constitution for acceptance, the DPSP are the:

[c]ore principles around which national political, social and economic life will revolve. This is precisely what the Directive Principles of State Policy seeks to do. Against the background of the achievements and failings of our post-independence experience, and our aspirations for the future as a people, the Principles attempt to set the stage for the enunciation of political, civil, economic and social rights of our people.⁶²

The DPSP, per the proposals of the drafter of the two Constitutions (1979 and 1992), were meant to follow the India approach.⁶³ That the DPSP were not intended to be justiciable was very clear from the *travaux préparatoires* to the two Constitutions.⁶⁴ However, unlike the Indian situation, this intention of non-justiciability was not written into either Constitutions. What is rather found in the 1992 Constitution is a provision that the DSPS

shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.⁶⁵

This clearly leaves the status of the DPSP in a dilemma as to whether the rights contained in the Chapter could be enforced through a court action. It may be argued that not carrying the intention into the final Constitution is an indication that the intention was rejected and dropped; thus making them justiciable as any other provision of the Constitution.

It may equally be contended, on the other hand, that the DPSP are by tradition not justiciable; and that there was no need, in fact, that it would

59 See Republic of Ghana *Report of the Committee of Experts on the 1992 Constitution* (1992) para 95.

60 Republic of Ghana (n 59 above) para 139.

61 As above.

62 Republic of Ghana (n 59 above) para 94.

63 See Republic of Ghana *Proposals for Draft Constitution of Ghana* (1991) General Introduction para 7.

64 Republic of Ghana (n 59 above) para 95.

65 Art 34(1).

be mere superfluity, to state expressly in the Constitution that they were not justiciable. Be that as it may, it really does not matter now which view is superior. Suffice it to say that this dilemma continues to heavily afflict the Supreme Court of Ghana, even today and possibly into the foreseeable future.

3.2.1 Justiciability of the DPSP and the Supreme Court

The first time that the justiciability of Chapter VI came into question before the Supreme Court was in *New Patriotic Party v the Attorney-General*⁶⁶ (31st December case), a case that had no link with human rights. In 31st December, the Plaintiff, a political party, complained that the use of public funds by the Government every year to commemorate the anniversary of a *coup d'état* on every 31st day of December was a violation of articles 3(3), (4), (5), (6), (7), 35(1) and 41(b) of the Constitution. Both article 35 and 41 are found in Chapter VI of the Constitution. The Attorney-General objected to the jurisdiction of the Supreme Court on the ground, *inter alia*, that the whole of Chapter VI was not justiciable and therefore articles 35 and 41 could not ground a cause of action. On this issue, the 9 judges on the panel were divided into all the three different positions possible – for, against and neutral.

Adade JSC took the position that the entire Constitution, including Chapter VI, was a legal document and thus was as justiciable as any other provision of the Constitution. He stated:

I do not subscribe to the view that chapter 6 of the Constitution, 1992 is not justiciable: it is. First, the Constitution, 1992 as a whole is a justiciable document. If any part is to be non-justiciable, the Constitution, 1992 itself must say so. I have not seen anything in chapter 6 or in the Constitution, 1992 generally, which tells me that chapter 6 is not justiciable.⁶⁷

Another Justice, Bamford-Addo JSC, took a contrary view. To her, the principles were to serve merely as a barometer to public authorities. She explained:

Now I come to the spirit of the Constitution, 1992. The plaintiff, apart from article 3, relied also on articles 35(1) and 34(b) of the Constitution, 1992, provisions under the 'Directive Principles of State Policy' to ground its claim. But the said principles are not justiciable and the plaintiff has no cause of action based on these articles. Those principles were included in the Constitution, 1992 for the guidance of all citizens, Parliament, the President, judiciary, the Council of State, the cabinet, political parties or other bodies and persons in applying or interpreting the Constitution, 1992 or any other

66 [1993-1994] 2 Ghana Law Reports 35.

67 31st December (n 66 above) 66.

law and in taking and implementing any policy decisions, for the establishment of a just and free society.⁶⁸

It is worth mentioning here that both Justices based their two opposing conclusions on the *travaux préparatoire* to the 1992 Constitution. The 7 remaining Justices did not offer any opinion on the issue. They think, and it appears so, that those articles under Chapter VI which were relied up on by the Plaintiff were irrelevant to the determination of the case.⁶⁹

It took four years, after *31st December*, for the Supreme Court to have another opportunity to consider the issue whether or not Chapter VI of the 1992 Constitution was justiciable. This was in *New Patriotic Party v Attorney-General*⁷⁰ (*CIBA* case). In *CIBA*, too, the same political party sued the Attorney-General, challenging the constitutionality of the Council of Indigenous Business Associations (CIBA) Law, 1993 (PNDCL 312 or the CIBA Law). The CIBA Law compels indigenous businesses of a kind to belong to an association which is basically controlled by the Government. The Plaintiff contends that the law was inconsistent with articles 21(1)(e), 35(1) and 37(2)(a) and (3) of the Constitution and consequently void. Article 21(1)(e) protects the right to freedom of association and is found under Chapter V of the Constitution. However, articles 35(1) and 37(2)(a) & (3) fall under Chapter VI.⁷¹ Unlike *31st December*, *CIBA* has everything to do with human rights, particularly socio-economic rights. Accordingly, *CIBA* provides a much better context for the purposes of this discussion.

The Attorney-General, again, objected on the ground that articles 35 and 37, being part of Chapter VI, were not justiciable and therefore could not be enforced by a court action. This time, Bamford-Addo JSC, having a second bite at the cherry, took the opportunity to explain her earlier general position in *31st December*, that no provision under Chapter VI is justiciable or enforceable. The learned Justice explained that:

... there are exceptions to this general principle. Since the courts are mandated to apply them [the DPSP] in their interpretative duty, when they are read together or in conjunction with other enforceable parts of the Constitution, 1992, they then in that sense, become enforceable.⁷²

68 *31st December* (n 66 above) 149.

69 For example, Abban JSC (as he then was) observed at 102 of the report that: '[T]he provisions of articles 35(1) and 41(b) of the Constitution, 1992 had no relevance, whatsoever, to the subject matter before the court. Reference to those articles, with due respect, was totally misconceived.'

70 [1997-1998] 1 Ghana Law Reports 378.

71 Article 35(1) declares Ghana as a 'democratic state dedicated to the realization of freedom and justice'. Article 37(2)(a) directs the state to enact appropriate laws to assure the enjoyment of the 'rights of the people to form their own associations free from State interference'. Article 37(3) requires that the state 'be guided by international human rights instruments which recognize and apply particular categories of basic human rights to development processes'.

72 *CIBA* (n 70 above) 394.

The learned Justice, thus, proceeded on presumption that the provisions of Chapter VI are generally not justiciable; but may be only when they are read in conjunction with other enforceable provisions outside Chapter VI.⁷³ In this regard, she specifically mentioned the 'substantive guaranteed human rights and freedoms set out in Chapter V of the Constitution'. She subsequently applied this formula by reading article 35(1)(e) and 37(2)(a) & (3) (both under Chapter VI) in conjunction with article 21(1)(e) (under Chapter V) to find that the CIBA Law was an 'erosion' of the right to freedom of association.

With the exception of one Justice, Kpegah JSC, who did not think the Plaintiff had *locus standi*, 3 of the 5 Justices who sat on the case concurred with Bamford-Addo JSC's position. In fact, one of the Justices, Atuguba JSC, put the position more clearly. He explained that the DPSP are 'rules of construction to be applied when interpreting other provisions of the Constitution, 1992, just as at common law there is a great body of rules for the construction of statutes' ... and that it is irrelevant that 'some of the provisions of the Directive Principles of State Policy may after all pass for supplementary 'rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned'.⁷⁴ The overall implication of this formula is that no one may know beforehand that a provision under Chapter VI is enforceable.

In 2008, Chapter VI came up again for the Supreme Court's consideration, in *Ghana Lotto Operators v National Lottery Authority*⁷⁵ (*Lotto* case). A group of private lotto operators challenged the constitutionality of the National Lottery Act, 2006 (Act 722). The Act establishes the National Lottery Authority (NLA) to regulate, supervise, conduct and manage National Lotto. It also prohibits the operation of lottery by persons other than the NLA. The Plaintiffs' claim was that the regulation and prohibition offend article 36(2)(b), which falls under Chapter VI of the Constitution. Article 36(2)(b) requires the state to follow an economic objective by 'affording ample opportunity for individual initiative and creativity in economic activities and fostering an enabling environment for a pronounced role of the private sector in the economy'. The Plaintiffs therefore argued that, to the extent that it excludes private persons from engaging in lottery business, the law violates the economic objective spelt out in article 36(2)(b). Again, the Defendant challenged the justiciability of article 36(2)(b) in particular and Chapter VI as a whole.

This time all the 9 Justices on the panel were unanimous on the issue of justiciability. The Court recounted Adade JSC's position in *31st December* that the entire Constitution as a legal document is justiciable.

73 J Mubangizi 'The constitutional protection of socio-economic rights in selected African countries: A comparative evaluation' (2006 -2008) 2 *African Journal of Legal Studies* 1 17.

74 *CIBA* (n 70 above) 442.

75 [2007-2008] Supreme Court of Ghana Law Reports 1088.

However, unlike Adade JSC, the Court did not think that all the clauses under Chapter VI were as justiciable as all the other clauses of the Constitution. The Court, speaking through Date-Baah JSC, stated:

The Constitution is a legal document containing the most important rules on political governance. The courts have the responsibility of ensuring that these rules are complied with. To my mind, therefore, the starting point of analysis should be that all the provisions in the Constitution are justiciable, unless there are strong indications to the contrary in the text or context of the Constitution.⁷⁶

The Court went on to state that some particular provisions under Chapter VI may, by their very nature, not lend themselves to judicial enforcement and that '[t]he very nature of such a particular provision would rebut the *presumption of justiciability* in relation to it'.⁷⁷ However, perhaps, the most important statement that the Court made in the case is that:

The rights set out in chapter 6, which are predominantly the so-called ESC rights, or economic, social and cultural rights, are becoming, by international practice and the domestic practice in many jurisdictions, just as fundamental as the rights in chapter 5. The enforceability of these ESC rights is a legitimate purpose for this court to seek to achieve through appropriate purposive interpretation. We therefore think that the interpretation that we give to article 34 should take into account this purpose of achieving an expansion of the range of enforceable human rights in Ghana.⁷⁸

Clearly, this statement demonstrates the Court's readiness to accord socio-economic rights in the Constitution their rightful place in the comity of human rights. Thus, even though the Court in this case did not find a violation of article 36(2)(b) by Act 277, it indicated strongly that where

a government introduces legislation which is flagrantly at odds with any of the objectives set out in the article, we believe that this Court has jurisdiction to strike down the provisions in the legislation which are incompatible with the objectives concerned.⁷⁹

Welcomed as this statement may be, it is clearly not enough. It is even no real step at all when viewed through the lenses of socio-economic rights in general and Ghana's obligations under the CRPD in particular. Copious in the statement is the reference to 'legislations which are flagrantly at odds' with the DPSP. This makes it necessary to ask what actions the Supreme Court of Ghana in particular and the courts of Ghana in general may take when the measure is not a 'legislation'; and more importantly when it is not 'flagrantly at odds' with a right.

⁷⁶ *Ghana Lotto Operators* (n 75 above) 1099.

⁷⁷ (n 75 above) 1107.

⁷⁸ (n 75 above) 1104-05.

⁷⁹ (n 75 above) 1113.

The statement, we respectfully submit, seeks to treat socio-economic rights as civil and political rights, negative rights, with which the state cannot interfere. Indeed, it may be easy to envisage a situation where the government will put in place policies, programmes and legislations which may make it possible for persons to be evicted from homes without notice, thus violating a negative duty not to interfere in people's right to housing. However, these are extremely rare and unlikely situations. What seems to be the obligation under the CRPD, as pointed out in the previous parts of this work, is for state parties to take specific *positive* steps towards ensuring progressive realisation of the rights to healthcare, food, housing, education and employment of persons with disabilities.

Viewed from this angle, the statement made by the Court could hardly be said to be friendly to the realisation of socio-economic rights in general and Ghana's obligations under the CRPD in particular. But this is exactly the situation that the Supreme Court has put Ghanaians and, particularly, the about 1 million persons with disabilities in Ghana. It is necessary to turn and review how socio-economic rights are treated by courts in other jurisdictions.

4 Socio-economic rights enforcement in India and South Africa

Ghana is not entirely alone, and certainly not the first to be in this dilemma. The issues *whether* socio-economic rights are, first, justiciable; and second, *how* to enforce them, plague other national constitutions. It may not be true to say that other countries have completely resolved this dilemma. It is however true to say that some countries have made some remarkable progress in the area. Of particular mention are India and South Africa.

4.1 India

Like Ghana, the Indian Constitution has a chapter on DPSP – Part IV – also containing socio-economic human rights. Part IV sets forth 'the humanitarian precepts that were ... the aims of the Indian Social Revolution.'⁸⁰ Also, according to Robinson, the DSPP is an attempt 'to create an ongoing, controlled revolution by laying an architecture in which massive social and economic transformation could take place within the limits of a liberal democracy'.⁸¹

80 G Austin *The Indian Constitution: Cornerstone of a nation* (1966) 75.

81 N Robinson 'India and the rise of the good governance court' (2009) 8 *Washington University Global Studies Law Review* 1 5.

Article 37 of the Indian Constitution, however, provides that '[t]he provisions contained in this Part shall not be enforceable by any court'; the principles are only to serve as a guide to 'the State'⁸² in its functions. Essentially, the state is to have the DPSP in mind while determining the limits to place on the Fundamental Rights.

When matched against the civil and political rights listed in Part III (the Fundamental Rights) of the Constitution, the Indian courts originally took the position that the rights in Part IV 'run subsidiary to the Chapter on Fundamental Rights'.⁸³ However the decision of the Supreme Court in *Kesavananda Bharati v State of Kerala*⁸⁴ altered this position and held that notwithstanding that they are not to be enforced, the DPSP enjoy the same status as the Fundamental Rights.⁸⁵ In fact, one of the Justices, Mathew J, went a step further to hold that '[i]n building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles'.⁸⁶

The express injunction in article 37 notwithstanding, the Supreme Court has, through interpretation, made orders that have resulted in effectively enforcing the socio-economic rights in the same manner as the civil and political rights.⁸⁷ This is based on the understanding that:

The Fundamental Rights have themselves no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgement, curtailment and even abrogation of these rights in circumstances not visualised by the constitution makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV.⁸⁸

Thus, today, one may safely argue that no court in India would cede jurisdiction on the sole ground that an alleged human rights violation is in respect of a socio-economic right.⁸⁹

Specifically in respect of disability rights, the Supreme Court of India has made some significant progress. This progress, one may argue, is

82 'The State' is defined in art 12 to include 'the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India'.

83 *State of Madras v Champakam Dorairajan* (1951) SCR 525 531.

84 (1973) 4 SCC 225.

85 See para 672.

86 See para 1769.

87 *Francis Coralie Mullin v the Administrator, Union Territory of Delhi* (1981) 2 SCR 516; *Chameli Singh and Others v State of UP and Another* (1996) 2 SCC 549; *Olga Tellis v Bombay Municipal Corporation* (1965) 3 SCC 545; *Shantistar Builders v Narayan Khimalal Toame* (1990) 1 SSC 520; *Daily Rated Casual Labour Employed under P & T Department v Union of India* [1988] 1 SCR 598

88 *Kesavananda Bharati v State of Kerala* (n 84 above) para 1776.

89 *Dharwad PWD Employees Association v State of Karnataka* [1990] 1 SCR 544, 549-50.

attributable to the Court's jurisprudence on the enforcement of socio-economic rights as outline above. For example, in *Javed Abidi v Union of India*,⁹⁰ the Court ordered that 'those suffering from the aforesaid locomotor disability to the extent of 80 per cent and above would be entitled to the concession from the Indian Airlines for travelling by air within the country'. The Court's jurisprudence may be traced in line of cases, including *BR Kapoor & Anrv Union of India & Others*⁹¹ (on access to healthcare), *Amita v Union of India*⁹² (on employment rights), *National Federation of Blind v Union Public Service Commission*⁹³ (on affirmative action), *Bhagwan Dass & Another v Punjab State Electricity Board*⁹⁴ (on employment rights), and *Sukhvinder Singh v Union of India & Others*⁹⁵ (on pension entitlements). Accordingly, it is suggested that the Indian Rights of Persons with Disability Bill, 2014, when passed into law, would have a substantial backing from the Supreme Court in particular and the judiciary in general.

4.2 South Africa

A review of the South African experiment presents slightly different regime from the Ghanaian and the Indian regimes. Unlike the latter two, the structure of the South African Constitution does not distinguish between the two categories of rights.⁹⁶ Socio-economic rights are under the same Chapter II of the Constitution as the civil and political rights. This arrangement makes the South African Constitution unique in the sense that the question whether the socio-economic are justiciable cannot be advanced from the text of the Constitution – that question was answered before the coming into force of the Constitution.⁹⁷

This leaves only the issue of *how* to enforce the socio-economic rights to be addressed. Consequently, the Constitutional Court has over the years devised mechanisms of how to enforce socio-economic rights.⁹⁸ This mechanism includes active court supervision of the enforcement socio-economic rights.

90 (1998-1999) 1 SCC 467.

91 (1989) 2 SC 330.

92 (2005) 13 SCC 721.

93 (1993) 2 SCR 556.

94 (2008) 1 SCC 579.

95 Civil Appeal No. 5605 of 2010.

96 Mubangizi (n 73 above) 4.

97 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa (Re Certification)* (1996) 4 SA (CC) 744 para 77; see E Christiansen 'Adjudicating non-justiciable rights: Socio-economic rights and the South African Constitutional Court' (2006/7) 38 *Columbia Human Rights Law Review* 321 359.

98 *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal* (1998) 1 SA (CC) 765; *Government of Republic of South Africa v Grootboom* (2001) 1 SA (CC) 46; *Minister of Health v Treatment Action Campaign (No 2)* (2002) 5 SA (CC) 721.

In respect of disability rights, specifically, much may not be said about the Constitutional Court. This is substantially due to the fact that the Court is pretty much younger; and is yet to see cases that touch specifically on socio-economic rights of persons with disabilities. Suffice it to say, however, that the Court's foundational approach to the enforcement of socio-economic rights is more likely than otherwise to set it on the path that will, at least, not stifle disability rights, particularly those aspects that involve socio-economic rights.

5 Recommendations and conclusion

5.1 Recommendations

We have noted in the previous parts that justiciability of socio-economic rights involves two sub-questions. First, *whether* they could be enforced; and if so, second, *how* to enforce them.⁹⁹ We have also established from the international comparative analysis in part 4 that the South African Constitutional Court in *Re Certification*¹⁰⁰ had relieved itself of the first question by holding, even before the Constitution came into force, that socio-economic rights are justiciable. The Court had since been preoccupied with the second question relating to how to enforce these rights. In this regard, the Court has built, or perhaps, is in the process of building, for itself and for the international human rights community an enviable jurisprudence.¹⁰¹

We have also considered a different situation, the Indian situation, where the Constitution expressly injuncts the courts from adjudicating upon the DSPS. In this second scenario, we have shown that the Indian Court has found three methods of going round the first hurdle: the expansionist approach, enforcement of legislation and enforcement of the DSPS by and of themselves. Accordingly, the Indian courts have enforced the DSPS in a manner that is almost the same as how they enforce the 'Fundamental Rights'.

In particular, we have argued that the Indian Court's jurisprudence on the enforcement of socio-economic rights is a chief contributory factor to its relatively progressive approach to the rights of Persons with disabilities. Based on the Indian experience, we have suggested that the South African Court, whose approach to the enforcement of socio-economic rights is

99 D Landau 'The reality of social rights enforcement' (2012) 53 *Harvard International Law Journal* 189 196; also see Christiansen (n 97 above) 359.

100 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa (Re Certification)* (1996) 4 SA (CC) 744 paras 77-78.

101 Landau (n 99 above) 198-200; also see B Ray 'Engagement's possibilities and limits as a socioeconomic rights remedy' (2010) 9 *Washington University Global Studies Law Review* 399 400.

acclaimed to be one of the most progressive, may be even more progressive with time.

We have pointed out in part 3 of this essay that Ghana's Supreme Court started its journey by creating an avoidable hurdle for itself, namely, that the DSPS are not justiciable by and of themselves.¹⁰² We noted that the Court spent its first 15 years under the 1992 Constitution working its way round this hurdle. As explained, the current position of the Court is that the socio-economic rights under Chapter VI of the Constitution, the DSPS, enjoy a 'presumption of justiciability'.¹⁰³ This, we submitted, means that there are instances, which instances are yet to be spelled out, where the presumption may be rebutted in which case a socio-economic right may not be justiciable. Accordingly, the Court is yet to cross the first hurdle, after which it will have to start building its own processes with respect to *how* to enforce socio-economic rights.

The above situation, we have argued, poses a major challenge, not just to the enforcement of socio-economic rights in general, but also to the successful implementation of the CRPD in particular. In other words, as it stands, the socio-economic rights that form the cutting edge of the CRPD is clamped *ab initio* by the Supreme Court of Ghana. The natural consequence of this clamping is that the about 1 million persons with disabilities in Ghana, notwithstanding the coming of the CRPD and all its positives attributes will continue to endure the disadvantages of disability. To avert this consequence, the following should be done:

5.1.1 Constitution amendment

The position of Ghana's Supreme Court on the justiciability issue has been highly dependent on the composition of the panel of judges sitting on the cases. The implication therefore is that the current position may vary again, for better or for worse, depending on the orientation of the individual justices constituting the panel. This is because, the Supreme Court has the power to vary or depart from its own previous decisions.¹⁰⁴ Thus, the first (and perhaps the most definitive recommendation) is that the Constitution be amended to expressly state that socio-economic rights in general and Chapter VI (the DSPS) are justiciable. This will require that Chapter VI of the Constitution, too, be assigned an enforcement mechanism just as Chapter V (the 'Fundamental Human Rights and Freedoms') has.

This will, firstly, put the matter beyond the discretion of any individual justice and ultimately beyond the Supreme Court. Secondly, such

102 *CIBA* (n 70 above) 394.

103 *Lotto* (n 75 above) 1107.

104 Republic of Ghana (n 52 above) art 129(3).

amendment will carry the Supreme Court swiftly across through the current impasse. This will then bring the Ghana Court closer to the Indian and the South African Courts, having only to deal with the second sub-question – *how* to enforce these rights.

It may be argued that such an amendment may open a floodgate for all sorts of claims to be brought, compelling the judiciary to veer off into the province of the executive and the legislative arms of government, which arms have the exclusive control over the state's power to make policies and allocate resources. Genuine as this concern may be, we argue, it is an exaggeration of the situation. The practice is not novel.

In 2008, Langford concludes after analysing about 2 000 judicial and quasi-judicial decisions across 29 national and international jurisdictions that

courts have ordered the reconnection of water supplies, the halting of forced evictions, the provision of medical treatments, the reinstatement of social security benefits, the enrolment of poor children and minorities in schools, and the development and improvement of state programmes to address homelessness, endemic diseases and starvation.¹⁰⁵

The European Court of Human Rights had rejected an argument that seeks to draw a 'water-tight' distinction between the enforcement of socio-economic rights and civil and political rights.¹⁰⁶ Also, the Inter-American Court of Human Rights in *Acevedo Buendia et al v Peru*,¹⁰⁷ has reaffirmed that socio-economic rights under article 26 of the American Convention are justiciable. We have already stated the African Commission's position on the subject.¹⁰⁸ All this points strongly to one direction that socio-economic rights are no more non-justiciable,¹⁰⁹ and that the only question that may be asked is how they are enforced.

5.1.2 Expansionist approach

While awaiting a constitutional amendment, we recommend that the Court adopt the Indian expansionist approach. This approach involves the reading of socio-economic rights into civil and political rights, particularly the right to life. In *Grootboom*, the South African Court rejected the invitation thrown to it by the Applicants to adopt the expansionist

105 M Langford 'The justiciability of social rights: From practice to theory' in M Langford (ed) (2008) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 3; also for similar findings see generally: V Gauri et al *Courting social justice: judicial enforcement of social and economic rights in the developing world* (2010); R Gargarella et al *Social transformation in new democracies: An institutional voice for the poor* (2006).

106 *Airey v Ireland* [1979-80] 2 EHRR 305 31617.

107 1 July 2009 Series C No 198 para 99.

108 See *Purohit v The Gambia* (n 46 above).

109 N Robinson (n 81 above) 62-63.

approach of the Indian Court.¹¹⁰ The court did so on the reasoning that the Constitution had already provided for justiciable rights to health, for which reason there was no need to read the right to health care into the right of life. It is therefore quite clear that where the socio-economic rights are, by constitution, not justiciable, courts may read them into the civil and political rights, in particular the rights to life.

Ghana's position, as we have showed in this work, leaves us in doubt whether socio-economic rights are really justiciable. In this sense, it is suggested strongly that Ghanaian courts adopt the Indian expansionist approach by reading the socio-economic rights in Chapter VI of the Ghanaian Constitution into their related civil and political rights in Chapter V. In any case, and as we have noted in the previous chapters of this work, it is now clearer that the distinction between the two category of rights is not 'water-tight'.

5.1.3 Enforcement by legislation

Article 29 of Ghana's Constitution provides for the right of persons with disabilities. There is also a National Policy on Disability, 2000. In August, 2006, about 6 months before the CRPD was adopted, Ghana's Persons with Disability Act, 2006, (Act 715) came into force. These provisions, however, are largely anti-discriminatory in nature and focus largely on civil and political rights. That notwithstanding, they, Act 715 in particular, guarantee some socio-economic rights, namely the rights to employment,¹¹¹ education¹¹² and health.¹¹³

The above provisions notwithstanding, Ghana's Constitution Review Commission in its 2011 Report recommended that steps should be taken 'without further delay in order to operationalize the rights of persons with disabilities in the Constitution and the Persons with Disabilities Act'.¹¹⁴ A gap analysis commissioned by the Ghana Federation for the Disabled (GFD) and published in 2013 concludes that Ghana's Persons with Disabilities Act is 'lacking in certain vital provisions contained in the UNCRPD without which Ghana cannot boast of a robust regime for effectively protecting the rights of persons with disability'.¹¹⁵

Thus clearly, the provisions in the Persons with Disabilities Act are far from meaningful; the reason being that they remain largely unenforced and perhaps unenforceable. Indeed, it cannot be authoritatively stated that this

110 See *Soobramoney* (n 98 above) para 19.

111 Sec 9.

112 Sec 18 & 19.

113 Sec 31 & 32.

114 Republic of Ghana (n 12 above) para 450.

115 LADA Group *Gap Analysis Report on the Persons with Disability Act 2006 (Act 715) and the United Nations Convention on Rights of Persons with Disabilities (UNCRPD)* (April 2013) 19 (A copy on file with writer).

situation is solely due to the unwillingness of the Ghanaian courts (the Supreme Court in particular) to enforce these rights. What however could be asserted is that the enforcement of these rights by the courts will make the provisions meaningful. It is therefore recommended that the Supreme Court adopt the approach of the Indian Court, where Acts are enforced in place of the non-justiciable Constitutional provisions.¹¹⁶

5.1.4 Education and awareness creation

It is true that law, including court decisions, is a tool for social (including attitudinal) change. But it is also very true that law alone is not a panacea to social change. Deliberate efforts on the part of the state and civil society directed at positively affecting attitudes of people towards persons with disabilities is a strong accompaniment. The Ministry of Education and the Ghana Education Service should design a subject or, at least, a topic on disability rights. This topic if taught at the basic level of education throughout the country will go a long way to make the future generation of citizens understand disability.

6 Conclusion

The discussion has not been about whether socio-economic rights are enforceable in the same manner as civil and political rights, neither has it been about which of the two categories of rights takes precedence over the other. The central issue considered in this essay is whether socio-economic rights are justiciable in Ghana; if so, to what extent. If not, then, why and how to make them justiciable like in India, South Africa or elsewhere.

The discussion reveals that the question whether socio-economic rights are justiciable involves two 'sub-questions'. First, *whether* they are enforceable, namely, whether they could form the basis of a court action at all. If so, then, *how* they may be enforced. Ghana's current position on these issues is that there is a 'presumption of justiciability' in favour of socio-economic rights. This means that there are circumstances where some socio-economic rights may not be justiciable. This position, a product of about two decades of inconsistent jurisprudence of the Supreme Court, is an improvement over what used to be the case in prior to the *Lotto* case.

We have, however, also argued that this position is insufficient and not in line with current trends in the field. We demonstrated this by looking at

116 See *Bandhua Mukti Morcha v Union of India*[1984] 2 SCR 67 103-04.

the CRPD, an instrument which highlights the current thinking,¹¹⁷ namely, that human dignity (of persons with disabilities) cannot be adequately protected without taking socio-economic rights, too, seriously. We argued further that Ghana's current position on the enforcement of socio-economic rights poses a major challenge to the realisation of the aims of the CRPD in particular and the human rights enforcement in general.

To overcome this challenge, Ghana should amend its Constitution to make Chapter VI, which contains socio-economic rights, justiciable. This will put a definite answer to the first sub-question, whether socio-economic rights are enforceable. The courts of Ghana will then look to India, South African or elsewhere to adopt the best of the mechanisms that are being used to enforce socio-economic rights. This will supply the answer to the second sub-question, *how* to enforce socio-economic rights. This, we submit, will put Ghana on the way to meeting its obligations, fully, under the CRPD. Until this is done, we believe that Ghana's human rights credentials, which already lags behind, cannot be advanced further.

117 The UN Secretary-General *Secretary-General's Message on the Adoption of the Convention of the Rights of Persons with Disabilities* delivered by M Brown, Deputy Secretary General, UN Doc SG/SM/10797, HR/491 1, L/T/4400 (13 December 2006); where the CRPD was described as 'remarkable and forward-looking document'.