

Exploring judicial strategies to protect the right of access to emergency obstetric care in Uganda

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Summary

Maternal mortality and morbidity are serious problems in Africa in general and in Uganda in particular. Evidence shows that emergency obstetric care can play a significant role in the alleviation of these problems. However, in Uganda, there is limited access to such care, prompting an exploration of judicial strategies to protect the right to access emergency obstetric care. The article argues that the absence of an express provision guaranteeing the right in the national constitution is not a bar to its protection by the judiciary. Arguments against the judicial protection of socio-economic rights, generally, and the right in question, in particular, are misguided. Through an examination of relevant constitutional provisions and case law from a number of jurisdictions, the article finds that, in certain circumstances, the Ugandan government may be held accountable in domestic courts for failing to ensure access to emergency obstetric care to all women who need it. The judiciary can — without necessarily undermining the separation of powers — enhance women's access to emergency obstetric care by creatively and purposively interpreting constitutional provisions with a view to holding the government accountable. Nevertheless, judicial strategies must be underpinned by legislative, budgetary and other measures in order to achieve a holistic protection of the right.

1 Introduction

Despite close on two decades of safe motherhood interventions, globally millions of women continue to die in pregnancy and childbirth.¹

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¹ World Health Organisation *World Health Report* (2005).

More than 500 000 women die each year from complications during pregnancy and childbirth, while an estimated 300 million women suffer disabilities.² Maternal mortality rates in Africa are the highest in the world.³ In Africa, a woman faces a one in 16 risk of dying in pregnancy or childbirth during her lifetime, while for her counterpart in Europe the risk is only one in 2 800.⁴ In Uganda, maternal and neo-natal conditions contribute the highest percentage (20,4%) of the total burden of ill health and avoidable death.⁵ The maternal mortality ratio in Uganda is 506 deaths per 100 000 births.⁶

It is now recognised that emergency obstetric care (EmOC) plays a significant role in the reduction of maternal mortality and morbidity.⁷ EmOC refers to care provided in health care facilities to treat direct obstetric emergencies that cause the majority of maternal deaths and injuries.⁸ EmOC services are divided into basic and comprehensive obstetric care services.⁹ A facility is considered basic when it has six signal functions, namely, the administration of antibiotics, oxytocic drugs and the manual removal of the placenta, the removal of retained products and assisted vaginal delivery.¹⁰ To be considered comprehensive, a facility should in addition to the foregoing functions perform caesarean sections and blood transfusions.¹¹ However, in Uganda there is limited access to maternal health care generally and EmOC in particular. Access to EmOC remains extremely low, at 5,1% nationally,¹² far below the United Nations (UN) recommended rate of 15%.¹³ Very few health facilities offer emergency obstetric services.¹⁴ The unmet need for EmOC is 86%.¹⁵ In a study to establish a baseline for the availability, utilisation and quality of EmOC in 197 health facilities in Uganda, Orinda *et al* found that the met need for EmOC was

² As above.

³ As above.

⁴ As above.

⁵ Ministry of Health (Uganda) Health Sector Strategic Plan (2006) 33.

⁶ As above.

⁷ World Health Organisation *Using human rights for maternal and neonatal health: A tool for strengthening laws, policies and standards of care* (2004).

⁸ A Paxton *et al* 'The United Nations process indicators for emergency obstetric care: Reflections based on a decade of experience' (2006) *International Journal of Gynecology and Obstetrics* 192 193.

⁹ As above.

¹⁰ As above.

¹¹ As above.

¹² As above.

¹³ PE Bailey & A Paxton 'Program note: Using UN process indicators to assess needs in emergency obstetric services' (2002) 76 *International Journal of Gynecology and Obstetrics* 299.

¹⁴ As above.

¹⁵ As above.

only 5%, whereas it should at least be 100%, since all women with obstetric complications should be treated.¹⁶

Like most countries in the world, Uganda is currently implementing the Millennium Development Goals (MDGs). One of these goals is the improvement of maternal health, of which the target is a reduction in maternal mortality by three-quarters between 1990 and 2015.¹⁷ Uganda is also a party to human rights instruments that obligate it to protect the right to health, including access to EmOC.¹⁸ The Ugandan Constitution neither explicitly provides for the right to health nor for the right of access to EmOC.¹⁹ However, the Constitution contains a number of provisions which may be utilised by the judiciary to ensure that the state meets its obligation to protect maternal health by enhancing access to EmOC. Against this background, this article explores judicial strategies for the protection of the right of access to EmOC. I argue that, by creatively interpreting existing constitutional provisions, the judiciary may, in certain circumstances, hold the government accountable for a failure to ensure women's access to EmOC.

The article is divided into five sections, the first of which is this introduction. The second justifies why access to EmOC should be considered a human right. It outlines the right to access EmOC within the broader concept of the right to health as stipulated in international and regional human rights instruments. The third section considers the justiciability of the right to access EmOC. In the fourth section, I examine selected provisions of the Ugandan Constitution that have a bearing on the protection of the right. Drawing on case law from a number of jurisdictions, the article concludes that the judiciary may, with a degree of creativity, surmount the challenges surrounding the judicial protection of the right.

2 Access to emergency obstetric care as a human right

2.1 Why should access to emergency obstetric care be considered a human right?

In addition to general health needs, which women share with the rest of

¹⁶ V Orinda *et al* 'A sector-wide approach to emergency obstetric care in Uganda' (2005) 91 *International Journal of Gynecology and Obstetrics* 285-91.

¹⁷ Goal 5 <http://www.dfid.gov.uk/mdg/> (accessed 22 March 2007).

¹⁸ See, eg, the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of Discrimination Against Women; the Convention on the Rights of the Child; the African Charter on Human and Peoples' Rights; the Protocol to the African Charter on the Rights of Women and the African Charter on the Rights and Welfare of the Child.

¹⁹ The Constitution of the Republic of Uganda was promulgated in 1995. Amended by Constitution (Amendment) Act 11/2005 and Constitution (Amendment) Act (No 2), 21/2005.

the population, they have health needs specific to them as women. Their unique roles of reproduction and motherhood require that special attention be paid to their health needs. The right to access EmOC is specific to women. Tomasevski has pointed out that it is a biological fact that women bear children and men do not, and thus:²⁰

Societal and legal protection aims to compensate for this biological difference and accords protection to women. This protection derives from the acknowledgment that child rearing is a societal function, hence compensation is earned by women who perform it; it is not granted to them because they are women.

It is also a fact that pregnancy and childbirth increase the risk of mortality over and above the general population. Paul Hunt, the Special Rapporteur on the Right to the Highest Attainable Standard of Health, stressed that no single cause of death and disability for men between the ages of 15 and 44 is close to the magnitude of maternal mortality and morbidity.²¹ Hunt advocates for the availability and access to EmOC as a human right.²² Fathalla is also of the view that, since women are entrusted with the survival and propagation of the human species, they have a basic right to be protected when they risk their health and life in the process of giving us life.²³

Access to EmOC is therefore not merely a health or humanitarian issue. It is a human rights issue.²⁴ EmOC is essential to the achievement of gender equality and is an integral part of a woman's right to life. Without access to EmOC, a woman risks death or a life of misery if she is lucky to survive. As Hunt points out:²⁵

For every woman who dies from obstetric complications, about 30 more suffer from injuries, infection and disabilities. Over two million women living in developing countries remain untreated for obstetric fistula, a devastating injury of childbirth. Fistula is easy to prevent and easy to treat.

It is therefore critical that medical facilities such as EmOC are made available and accessible to enable women to safely go through pregnancy and childbirth. This will enable them to live a meaningful life and contribute to the socio-economic development of their country. EmOC is not merely a need, as policy makers present it, but a human right.²⁶ Unlike human rights, needs generate promises which may be met

²⁰ K Tomasevski 'Women' in A Eide *et al* (eds) *Economic, social and cultural rights* (1995) 275.

²¹ P Hunt 'Statement to the United Nations General Assembly, Third Committee' (2006).

²² As above.

²³ MF Fathalla *From obstetrics and gynecology to women's health: The road ahead* (1997).

²⁴ For a synopsis of the human rights instruments that provide for EmOC as a human right, see para 2.2 below.

²⁵ Hunt (n 21 above).

²⁶ See, eg, Health Sector Strategic Plan (n 5 above) 33.

through charity or benevolence; they do not impose duties or obligations.²⁷ Translating basic needs into human rights 'increases the moral weight of and political commitment to their fulfilment'²⁸ and gives the needs 'international legal status'.²⁹ Thus, when EmOC is considered a human right, it is possible to identify obligation bearers and rights holders. The latter are able to demand accountability from the obligation bearer, including the state.

2.2 A synopsis of the right to access emergency obstetric care

International and human rights instruments attach importance to the protection of women's unique position of motherhood and reproduction. The Universal Declaration of Human Rights (Universal Declaration) stresses that motherhood and childhood are entitled to special care and assistance.³⁰ The Universal Declaration guarantees women and men the right to a standard of living including medical care.³¹ The International Covenant on Economic, Social and Cultural Rights (CESCR) enjoins state parties to 'recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.³² The Committee on Economic, Social and Cultural Rights (ESCR Committee) stresses that state parties should take measures to improve child and maternal health services, including emergency obstetric services.³³ Such services should be available, accessible, affordable, acceptable and of good quality.³⁴ According to the ESCR Committee, states should remove legal and other obstacles that prevent men and women from accessing and benefiting from health care on a basis of equality.³⁵ States are enjoined to remove restrictions on reproductive health care services.³⁶ The Convention on the Elimination of All Discrimination Against Women (CEDAW) obliges state parties to 'ensure to women appropriate services in connection with pregnancy, confinement and

²⁷ U Jonsson *A human rights approach to development programming* (2004); F Stewart 'Basic needs: Strategies, human rights, and the right to development' (1989) 11 *Human Rights Quarterly* 347.

²⁸ Stewart (n 27 above) 350.

²⁹ As above.

³⁰ Art 25(1) Universal Declaration.

³¹ Art 25(2) Universal Declaration.

³² Art 12(1) CESCR.

³³ The ESCR Committee was interpreting art 12(2), which requires state parties to take steps necessary for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child. See ESCR Committee 'The right to the highest attainable standard of health' General Comment No 14 (2000), EC/12/2000/4 para 14.

³⁴ General Comment No 14 (n 33 above) paras 12 (a)-(d).

³⁵ ESCR Committee 'The equal right of men and women to enjoyment of all economic, social and cultural rights' General Comment No 16 (2005), E/C/12/2005/3 para 29.

³⁶ As above.

the post-natal period, granting free services where necessary'.³⁷ The Cairo Programme of Action underlines, *inter alia*:³⁸

[t]he right of access to appropriate health care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.

The Convention on the Rights of the Child (CRC) also obliges state parties to ensure appropriate pre-natal and post-natal health care for mothers.³⁹

The African Charter on Human and Peoples' Rights (African Charter) guarantees every person 'the right to enjoy the best attainable state of physical and mental health'.⁴⁰ In *Purohit and Another v The Gambia*,⁴¹ the African Commission on Human and Peoples' Rights (African Commission) adopted a broad interpretation of the right to health and declared that the right included 'the right to health facilities, access to goods and services' without discrimination of any kind.⁴² States are obliged to 'take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'.⁴³ The Protocol to the African Charter on the Rights of Women (Women's Protocol) stresses the importance of respecting women's right to health.⁴⁴ States are enjoined to provide adequate, affordable and accessible health care services to women. States are also obliged to strengthen existing pre-natal, delivery and post-natal health services for women during pregnancy and breastfeeding.⁴⁵ Thus, women's right to health in general and their right to access EmOC in particular are recognised at the international and regional levels. In the next section I consider the debate about the legal status of socio-economic rights and argue that the right to access EmOC can be invoked in the courts.

3 Justiciability of the right to access emergency obstetric care

At the Vienna Conference of 1993, it was declared that rights are 'universal, indivisible and interdependent and interrelated' and they must

³⁷ Art 12(2) CEDAW.

³⁸ Para 7.2 Cairo Programme of Action (arose out of the International Conference on Population and Development (1994) UN Doc A Conf 171 13. See also The United Nations Fourth World Conference on Women, Beijing, China, September 1995, para 96 <http://www1.umn.edu/humanrts/instree/e5dplw.htm> (accessed 21 March 2007).

³⁹ Art 24(2)(b) CRC.

⁴⁰ Art 16(1) African Charter.

⁴¹ (2003) AHRLR 96 (ACHPR 2003).

⁴² n 41 above, para 80.

⁴³ Art 16(2) African Charter.

⁴⁴ Art 16.

⁴⁵ Art 14.

be treated 'globally in a fair and equal manner, on the same footing, and with the same emphasis'.⁴⁶ However, skeptics still question the legal existence and validity of socio-economic rights, such as the right to access EmOC.⁴⁷ In its Statement to the Vienna Conference, the ESCR Committee decried the neglect of economic, social and cultural rights.

States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as if they are far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights.⁴⁸

It has been argued that socio-economic rights are not rights because they are programmatic and must be realised gradually in accordance with broadly formulated government programmes.⁴⁹ According to this argument, in order to be a legal right, it must be inherently justiciable.⁵⁰ Justiciability is the possibility of aggrieved individuals or groups being able to institute claims involving alleged violations of human rights in courts or other related organs.⁵¹ It is argued that the judiciary lacks the legitimacy and competence to adjudicate socio-economic rights, since it is the democratic majority's moral right to allocate resources.⁵² Commentators also point out that judges lack the relevant training and information-gathering tools that are required to decide whether funds have been spent in the way they should and whether such funds have reached the intended beneficiaries.⁵³ Fuller argues that

⁴⁶ Vienna Declaration and Programme of Action, UN GAOR, World Conference on Human Rights, 78th session, 22nd Plenary Meeting, part 1, para 5, UN Doc A/Conf 157/23 (1993).

⁴⁷ See eg C Sunstein 'Against positive rights' (1993) 2 *Eastern European Constitutional Review* 35. See also D Kelly 'The consequences of a "right" to health care' (1994) *Reasons Magazine — The Rights Angle* <http://www.reason.com/news/show/29402.html> (accessed 7 March 2007).

⁴⁸ Statement of ESCR Committee to the Vienna Conference, UN Doc E/ 1993/WW, annex III, para 5.

⁴⁹ See E Vierdag 'The legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 *Netherlands Yearbook of International Law* 69.

⁵⁰ As above.

⁵¹ M Ssenyonjo 'Justiciability of economic and social rights in Africa' (2003) 9 *East African Journal of Peace and Human Rights* 1.

⁵² See eg Sunstein (n 47 above).

⁵³ As above.

certain decisions are 'polycentric' and involve complex resource allocation and are thus unsuitable for adjudication.⁵⁴ The *Economist* put it as follows:⁵⁵

Vague laws [read socio-economic rights] would invite, and indeed require, courts rather than governments to settle arguments about social justice. Advocates may not mind this: The courts they imagine, will give them an extra lever to use in pushing policy in their desired direction. But they must recognise that in practice this amounts to subordinating the popular will to the rule, not of law, but of judges.

It is further posited that, whereas civil and political rights are negative, socio-economic rights are positive.⁵⁶ With positive rights, states are required to take action to provide them and they are therefore costly and non-justiciable. Negative rights merely require freedom from arbitrary interference by the state.⁵⁷ Others argue that treating socio-economic rights as rights undermines the enjoyment of individual freedom and distorts the function of free markets through state intervention in the economy.⁵⁸ In my considered opinion, these criticisms are misguided since, as practice has shown, most, if not all, socio-economic rights are amenable to judicial protection.⁵⁹ This is especially so for vulnerable individuals such as women in need of EmOC.

It cannot be denied that socio-economic rights are subject to 'progressive realisation'⁶⁰ in light of the 'available resources'.⁶¹ Does this render obligations in respect, for example, of the right to health vague and meaningless? CESCR imposes on state parties two obligations of immediate effect: to ensure that relevant rights are exercised without discrimination and to take 'deliberate, concrete and targeted' steps towards meeting their obligations.⁶² State parties must 'move as expeditiously and effectively as possible' and any 'retrogressive measures' must be fully justified.⁶³ The ESCR Committee stated that every covenant right possesses at least justiciable dimensions.⁶⁴ Indeed, each state party has 'a minimum core obligation to ensure satisfaction of, at the very least, minimum essential levels of each of the rights' enumerated in

⁵⁴ LL Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353 395.

⁵⁵ 'The politics of human rights: Does it help to think of poverty or inadequate health care as violation of human rights?' *The Economist* 18 August 2001, 9.

⁵⁶ D McGoldrick *The Human Rights Committee* (1994).

⁵⁷ As above.

⁵⁸ See Kelly (n 47 above).

⁵⁹ On the right to a clean and a healthy environment, see, eg, the *TEAN* case (n 92 below); on the right to education, see *Dimanche Sharon v Makerere University*, Constitutional Petition No 1 of 2003 (unreported).

⁶⁰ Art 2(1) CESCR.

⁶¹ As above.

⁶² Arts 2(1) & (2) CESCR; ESCR Committee General Comment No 3 (1990), UN Doc E/1991/23, Annex III paras 1-3.

⁶³ ESCR Committee (n 62 above) para 9.

⁶⁴ As above.

the Covenant.⁶⁵ The state must use all the resources at its disposal in an effort to satisfy these minimum obligations and especially for 'vulnerable members of society'.⁶⁶ The ESCR Committee has also recommended that 'the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups, is non-derogable'.⁶⁷ In my view, access to EmOC is a core component of the right to health, given that a lack of it may result in the death or disability of large numbers of women. A denial of access to EmOC is a violation of women's right to life. Thus, the state is obliged to ensure that women access EmOC as a right.

Van Hoof has correctly argued that views against socio-economic rights based on cost and the requirement of state intervention are a red herring.⁶⁸ Both civil and political and socio-economic rights involve a specific course of action.⁶⁹ Take, for example, the right to vote and that to a fair hearing which involve the funding of elections, financial support to the judiciary, the construction of courts, and prisons. Can these be denied the status of rights merely because they involve budgetary implications? Alston and Quinn correctly argue that:⁷⁰

The reality is that full realisation of civil and political rights is heavily dependent both on availability of resources and the development of the necessary societal structures. The suggestion that realisation of civil and political rights requires only abstention on the part of the state and can be achieved without significant expenditures is partly at odds with reality.

The main challenge may not necessarily be that socio-economic rights have budgetary implications, but what is at issue is the prioritisation of expenditure. For example, what is the cost to the state of women dying in pregnancy or childbirth because of a lack of access to EmOC? The state's legitimacy is largely a function of its ability to invest in human development. A World Bank study found that maternal health care services are the most cost-effective government health interventions in terms of death and disability prevented and that basic maternal care alone can cost as little as US\$ 2 to US\$ 3 per person.⁷¹ As Busia and Mbaye note, the failure of African countries to address the socio-economic welfare of their people may be due to 'misallocation of

⁶⁵ n 62 above, para. 10.

⁶⁶ As above.

⁶⁷ ESCR Committee (n 33 above) para 47.

⁶⁸ VGJ van Hoof 'The legal nature of economic, social and cultural rights: A rebuttal of traditional views' in P Alston & K Tomasevski (eds) *The right to food* (1984) 74.

⁶⁹ As above.

⁷⁰ 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.

⁷¹ A Tinker *Safe motherhood as an economic and social investment* (1997). See also 'Maternal Health' http://en.wikipedia.org/wiki/Maternal_health (accessed 21 March 2007).

resources, bad economic policies, fraudulent aggrandisement and a debilitating lack of accountability'.⁷² Adequate investment in maternal health care has positive economic consequences. The World Health Organisation (WHO) estimates that African countries could, in a period of 10 years, achieve a net productivity gain of US \$10 billion if they invested in maternal health care to prevent maternal deaths and disabilities.⁷³

Critics of socio-economic rights argue that the doctrine of separation of powers demands that the executive, legislature and the judiciary should not interfere in each other's mandates. This doctrine is aimed at promoting democracy, enhancing accountability and protecting the rights of citizens against tyranny.⁷⁴ In Uganda, Parliament has the power 'to make laws on any matter for the peace, order, development and good governance of Uganda'.⁷⁵ However, the power must be exercised in accordance with the Constitution, which is the 'supreme law of Uganda'.⁷⁶ Executive authority is vested in the President and Cabinet who must exercise it in accordance with the Constitution and the laws of Uganda for the 'welfare of the citizens'.⁷⁷ Judicial power 'is derived from the people and shall be exercised by the courts . . . in the name of the people'⁷⁸ in accordance with their 'values, norms and aspirations'.⁷⁹ In the exercise of their power, 'the courts shall not be subject to the control or direction of any person or authority'⁸⁰ and 'no person shall interfere with the courts or judicial officers in the exercise of their judicial functions'.⁸¹ All organs and state agencies have to support the judiciary in carrying out its judicial functions.⁸² However, how easily can the line of 'separation of powers' be drawn? Can the executive and the legislature be entrusted with the full protection of socio-economic rights? Who ensures that these branches of government are fully accountable to the population? As Pieterse observes, it cannot be denied that⁸³

⁷² N Busia & BG Mbaye 'Towards a framework for filing communications about economic, social and cultural rights under the African Charter' (1996) 3 *East African Journal of Peace and Human Rights* 30.

⁷³ WHO 'Poor maternal health care to cost Africa \$45 billion over 10 years' <http://www.afro.who.int/press/2002/pr20021025.html> (accessed 21 March 2007).

⁷⁴ For a discussion of the doctrine of separation of powers, see NW Barber 'Prelude to the separation of powers' (2001) 60 *Cambridge Law Journal* 71-72.

⁷⁵ Art 79(1) of Ugandan Constitution.

⁷⁶ n 75 above, art 2.

⁷⁷ Arts 99(1) & (3).

⁷⁸ Art 126(1).

⁷⁹ As above.

⁸⁰ Art 128(1).

⁸¹ Art 128(2).

⁸² Art 128(3).

⁸³ M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 383 387.

... the legislature has a primary role to play in giving content to human rights through the development of legal and policy frameworks ... However, legislatures are typically fairly large bodies made up of popularly elected 'laymen' who often lack the technical expertise necessary for effective socio-economic policy making ... A popular mandate further does not guarantee a commitment to social justice. This is because majority demands are often inimical to the social welfare of minorities. There is also a danger that politicians will pander to the demands of powerful members of society (whose class interests are likely to correspond with those of the politicians themselves) at the cost of the survival requirements of vulnerable or marginalised members of society.

Like in most countries, it is the Ugandan executive, especially the ministries of finance and health, that determine and control the health budget. In a country like Uganda, where the majority of members of parliament belong to the ruling party,⁸⁴ can the legislature effectively check executive excess? Again, Pieterse sheds some light on the exercise of power by the executive and the legislature in the socio-economic domain and the potential of the judiciary to ensure their accountability that⁸⁵

... in technically specialist areas, the executive is the only branch of government that can regularly and credibly lay claim to the expertise necessary to give effect to rights ... However, executive members are usually only indirectly accountable to the citizenry ... There is accordingly a need to develop mechanisms according to which the [executive] may be held accountable to citizens, at least in so far as their actions affect basic human rights. Given the executive's stranglehold over the legislature, citizens increasingly look to the judiciary to ensure executive accountability and for protection of their basic interests ... the judiciary acts both as a watchdog over other branches' adherence to the doctrine of separation of powers as primary protector of citizen's rights within its confines ...

The judiciary has a fundamental responsibility to protect socio-economic rights such as access to EmOC. Courts have the legitimacy and competence to adjudicate socio-economic rights. In my view, the exercise of judicial power through the administration of justice includes issues of social justice such as access to EmOC. In the next section, I consider various strategies that may be employed by the judiciary in Uganda to protect socio-economic rights generally and the right to access EmOC in particular.

4 An exploration of judicial strategies

4.1 A note on judicial enforcement of human rights in Uganda

The Constitution of Uganda contains a number of novel provisions in

⁸⁴ There are 213 members of the National Resistance Movement (NRM) ruling party, 58 members of opposition and 40 independent members. Some of the latter have signed agreements for co-operation with the ruling party.

⁸⁵ Pieterse (n 83 above) 388.

the area of the enforcement of rights. It commands that 'fundamental rights and freedoms of the individual are inherent and not granted by the state'⁸⁶ and 'shall be respected, upheld and promoted by all organs and agencies of government and by all persons'.⁸⁷ The Constitution contains an inclusive clause to cater for human rights, such as the right to access EmOC, which are not explicitly mentioned. It provides as follows:⁸⁸

The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter [Four] shall not be regarded as excluding others not specifically mentioned.

The Constitution permits any person who claims that his or her right has been violated to seek redress in a court. Article 50 provides as follows:⁸⁹

Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.

The Constitution introduces the concept of public interest litigation (PIL), whereby 'any person or organisation may bring an action against the violation of another person's or group's human rights'.⁹⁰ PIL should be viewed as a mechanism to enable previously unrepresented groups and interests to have their voices heard by the judiciary. PIL recognises the vulnerability of disadvantaged persons or groups, such as children and poor women who may not be in a position to file actions in their own names. A person is not required to have a personal interest or injury before lodging a petition or application alleging a violation of other persons' rights. Individuals or civil society organisations working for the public good can bring the violation of specific rights to the attention of the court.⁹¹

PIL challenges the antiquated doctrine of *locus standi* in so far as the violation of human rights is concerned, and several cases have confirmed this. In *The Environmental Action Network Ltd (TEAN) v Attorney-General and National Environment Authority*,⁹² the then Principal Judge overruled a preliminary objection by counsel for the defendants that the petitioners should have brought a representative action under the Civil Procedure Rules. The application was brought by an advocate on behalf of the applicant company and on behalf of the non-smoking public under article 50(2) of the Constitution, to protect their rights to a

⁸⁶ Art 20(1) Ugandan Constitution.

⁸⁷ n 86 above, art 20(2).

⁸⁸ Art 45.

⁸⁹ Art 50(1).

⁹⁰ Art 50(2).

⁹¹ GP Mukubwa 'The promotion and protection of human rights in Africa' (2000) 6 *East African Journal of Peace and Human Rights* 130.

⁹² Misc App 39 of 2001.

clean and healthy environment, their right to life and for the general good of public health of Ugandans. The judge referred to cases that have decided that an organisation can bring a public interest action on behalf of groups or individual members of the public even though the applying organisation does not have a direct interest in the infringing act it seeks to have redressed.

Counsel for the defendants also challenged the application on the ground that it did not comply with the law, which requires that the Attorney-General and specified corporations be given a notice of intention to sue of 45 days.⁹³ The judge held that applications alleging infringement of rights and freedoms deserve urgent attention.

The question is: What amounts to 'a competent court' for the purposes of handling violations of human rights? A matter may allege the violation of a right and also necessitate interpretation of the Constitution. Assuming a person or organisation wanted to challenge discriminatory laws and practices that violate women's right to health care, which court would be competent to entertain the matter? The Constitution provides that the Court of Appeal, sitting as the Constitutional Court, shall determine any question as to the interpretation of the Constitution.⁹⁴ The Constitution further provides that:⁹⁵

- (3) A person who alleges that —
 - (a) an Act of Parliament or any other law or anything in or done under the authority of any law; or
 - (b) any act or omission by any person or authority
 is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.
- (4) Where upon determination of the petition under clause (3) of this article the Constitutional Court considers that there is need for redress in addition to the declaration sought, the Constitutional Court may—
 - (a) grant an order for redress; or
 - (b) refer the matter to the High Court to investigate and determine the appropriate redress.

In *Attorney-General v Tinyefuza*,⁹⁶ the Supreme Court held that articles 137 and 50 must be read together because the Constitutional Court is bound to hear cases involving the enforcement of human rights and freedoms. Thus, the Constitutional Court is a competent court within the meaning of article 50. In *Serugo v Kampala City Council and Another*,⁹⁷ it was unanimously held that the jurisdiction of the Constitutional Court is exclusively derived from article 137, but that it may entertain a petition for redress when a right or freedom is infringed.

⁹³ Sec 1 Civil Procedure and Limitation (Miscellaneous Provisions) Act 20 of 1969, as amended.

⁹⁴ Art 137(1) Ugandan Constitution.

⁹⁵ n 94 above, arts 137(3) and (4).

⁹⁶ Const Appeal 1 of 1997, 11-13.

⁹⁷ Const Appeal 2 of 1998.

Such application must be presented in the context of a petition brought under article 137 for the purposes of the interpretation of the Constitution.

In *Simon Kyamanywa v Uganda*,⁹⁸ the appellant was convicted by the High Court for aggravated robbery. The Court of Appeal substituted the conviction for simple robbery and sentenced him to six years' imprisonment with six strokes of the cane. He appealed on grounds that corporal punishment was unconstitutional. By a majority of four to one, the Supreme Court found that, in order to decide on the constitutionality of corporal punishment, the Court would be required to construe the meaning of article 24, an exercise that was clearly an act of interpretation under article 137. The Supreme Court referred the matter to the Constitutional Court for interpretation.⁹⁹ Justice Kanyehamba (dissenting) was of the view that 'any court and any tribunal which is properly constituted has jurisdiction to hear and determine any dispute arising from the application and enforcement of any provision of the Constitution'.¹⁰⁰ According to the judge:¹⁰¹

If it were to be held that every time any matter affecting or related to the provisions of the Constitution had to go to the Constitutional Court for interpretation or construction, the Constitution would become entirely stale and entirely unreliable. The appellant has sought the protection of this Court, and in my opinion, this Court must give him that protection or deny it to him on legal and reasonable grounds.

What the above discussion illustrates is that an individual can sue on his behalf or on behalf of others alleging a violation of such a right as access to EmOC by other persons or by government or its institutions. In my view, this permits a public-spirited individual to challenge laws, policies and other practices that violate women's health rights. If a matter does not involve the interpretation of the Constitution, any other court is 'a competent court' for the purpose of redressing violations of human rights. The *TEAN* case shows how an activist court can relax the laws of standing in order to protect human rights.¹⁰² I now turn to some of the constitutional provisions that may be applied to protect pregnant women's right to access EmOC.

4.2 National Objectives and Directive Principles of State Policy

The 1995 Constitution addresses issues of economic, social and cultural

⁹⁸ Criminal Appeal 1 of 2000 (unreported).

⁹⁹ Constitutional Reference 10 of 2000 (unreported). The decision of the Supreme Court is reported in 2000 (2) *EALR* 426.

¹⁰⁰ n 99 above, 433.

¹⁰¹ n 99 above, 434.

¹⁰² Following the ruling in the *TEAN* case, the National Environment Management Authority (NEMA) enacted regulations against smoking in public places except in designated areas.

rights, for example the right to education,¹⁰³ rights of the family,¹⁰⁴ rights of women,¹⁰⁵ children,¹⁰⁶ minorities,¹⁰⁷ cultural and economic rights,¹⁰⁸ and a right to a clean and healthy environment.¹⁰⁹ However, most of the other socio-economic rights appear in the National Objectives and Directive Principles of State Policy (NODPSP) section. The Constitution provides that the NODPSP shall 'guide all organs and agencies of the state ... in applying or interpreting the Constitution or any other law ...'¹¹⁰ and 'in implementing any policy decisions ...'¹¹¹ The Constitution obliges the state 'to take all practical measures to ensure the provision of basic medical services to the population'.¹¹² The state shall also 'endeavour to fulfill the fundamental rights of all Ugandans to social justice'¹¹³ and especially to ensure that 'all Ugandans enjoy rights and opportunities and access to ... health services ...'¹¹⁴ The question is: What is the legal status of these NODPSPs? Are they justiciable?

Experiences from other jurisdictions, especially India, show that a creative court can effectively apply NODPSP when considering issues of human rights, such as access to EmOC. In *Keshanavanda Bharati v State of Kerala*,¹¹⁵ the Supreme Court stated that although article 37 of the Indian Constitution expressly provides that the Directive Principles of State Policy (DPSP) are not enforceable by any court, they should enjoy the same status as traditional fundamental rights.¹¹⁶

The courts in Uganda may have to consider the 'practical measures' undertaken by the state to ensure that women have access to health care, including medical services such as EmOC. The courts can benefit from the jurisprudence of treaty bodies and case law from other jurisdictions that have considered related provisions.¹¹⁷ In cases involving violations of human rights, the courts must be alive to international

¹⁰³ Art 30.

¹⁰⁴ Art 31.

¹⁰⁵ Art 33.

¹⁰⁶ Art 34.

¹⁰⁷ Art 36.

¹⁰⁸ Arts 37 & 40.

¹⁰⁹ Art 39.

¹¹⁰ NODPSP I(i).

¹¹¹ As above.

¹¹² NODPSP XX.

¹¹³ NODPSP XIV.

¹¹⁴ NODPSP XIV (b).

¹¹⁵ (1973) 4 SCC 225.

¹¹⁶ As above.

¹¹⁷ Generally, the position in Uganda is that international law becomes part of domestic law only where it has been specifically incorporated. However, in recent years, courts have increasingly referred to international law and case law from other jurisdictions, especially where there is an ambiguity or lack of a specific provision on the matter. See eg *Tinyefuza v Attorney-General*, Constitutional Petition 1/1997 (unreported); *Onyango Obbo & Another v Attorney-General*, Const App 2/2002 (unreported).

human rights instruments and apply them to a given case when there is no inconsistency between the international norms and the domestic legal order. In any case, the Constitution enjoins Uganda to respect international law and treaty obligations.¹¹⁸ Consequently, in assessing the 'practicability' of measures the state has instituted to address the question of access to health or medical services, the court has to consider relevant international human rights standards. It may also refer to cases from other jurisdictions in order to answer the following questions, for example:

- To what extent do policy and budgetary measures respect, protect and fulfil the right to access health care services?
- Do these measures prioritise access to EmOC?
- How justified or reasonable are the measures in question?

Courts may face several challenges in determining whether a policy is justified or reasonable. The state may argue that, because of resource constraints, it cannot realise the right in question. However, these challenges are not insurmountable. Courts can draw on their experience in handling administrative cases involving the judicial review of legislative or executive action. Depending on the evidence adduced, the courts can subject policies or budgets to serious scrutiny without necessarily undermining the constitutional mandate of the legislature and executive. The courts will be performing their constitutional mandate to respect, protect and uphold human rights. By entertaining issues involving access to EmOC, the courts will not only be denouncing the injustice of death in pregnancy and childbirth, but guiding the design and implementation of maternal health policies and programmes.

The limits of the right not to be denied access to treatment were considered in the case of *Soobramoney v Minister of Health (KwaZulu Natal)*,¹¹⁹ where the appellant argued that the denial of treatment (dialysis) for renal failure was a violation of his right to life and the right to access health care services, including emergency medical treatment as guaranteed under the South African Constitution.¹²⁰ The appellant alleged that he could not afford medical treatment at private hospitals and thus sought an order directing the public hospital to provide the treatment. The respondents argued that, because of a shortage of resources, the public hospital could only guarantee automatic access to dialysis treatment to patients whose condition could be remedied. The Court found that the condition of the appellant was not 'an emergency which calls for immediate remedial treatment', but 'an ongoing state of affairs . . . which is incurable'.¹²¹ The Court also found

¹¹⁸ NODPSP XXVIII (i) (b).

¹¹⁹ 1998 1 SA 765 (CC).

¹²⁰ Sec 27.

¹²¹ Para 21.

that the Department of Health did not have sufficient funds to meet the requirements of all patients in need of treatment for chronic renal failure and to do so 'would make substantial inroads into the health budget . . . to the prejudice of other needs which the state has to meet'.¹²² The Court highlighted the difficulty of inquiring into resource-allocation decisions and stated:¹²³

[Health funding] choices involve difficult decisions to be taken at the political level in fixing the health budget and at the functional level in deciding the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility is to deal with such matters.

Although the *Soobramoney* case may be criticised for depicting the decision as a medical rather than a political one,¹²⁴ it can be relied on to advance the cause for access to EmOC in Uganda. In my view, the case may have been decided differently had the facts hinged on the need for EmOC. Whereas chronic renal failure may not call for emergency medical attention, a pregnant woman in obstructed labour would certainly require such care. As the Court pointed out, the appellant's condition required a lot of financial resources (approximately R60 000 per annum),¹²⁵ but EmOC may require less expenditure.¹²⁶ In any case, not every pregnant woman needs EmOC since most women deliver normally. Where challenged in court, the government of Uganda has a burden to demonstrate that its decisions were taken rationally and in good faith. However, litigation requires that human rights activists adduce necessary evidence to show that the state is capable of meeting its immediate obligation to ensure access to EmOC.

In a number of cases, South African courts have inquired into the reasonableness of state policy. For example, in *Government of the Republic of South Africa v Grootboom*,¹²⁷ the respondents were evicted from privately-owned land where they had erected shacks for settlement in order to escape floods. After eviction, the respondents returned to these sites but found that others had occupied them. They had been on a waiting list for low-cost housing for a long time without being informed of when the housing would be available. Counsel for the respondent filed an application seeking the High Court's intervention to ensure that the respondents are provided with adequate shelter until they obtain the promised housing. The Court considered the provisions of the Constitution, which guarantee everyone 'the right to have access to ade-

¹²² Para 28.

¹²³ Para 29.

¹²⁴ See eg S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' (2002) 6 *Law, Democracy and Development* 159.

¹²⁵ Para 28.

¹²⁶ n 71 above.

¹²⁷ 2001 1 SA 46 (CC).

quate housing'¹²⁸ and oblige the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'.¹²⁹ The Court held that the right had not been violated. However, the judge relied on the provision that guarantees children the 'right to basic nutrition, shelter, basic health services and social services'.¹³⁰ The Court was of the view that, since the latter is not subject to progressive realisation and availability of resources, it can be enforced immediately. The state had understood its obligation as requiring it to progressively realise the right by providing permanent structures. On appeal, the Constitutional Court had to consider the concept of 'reasonableness' in the area of socio-economic rights. The Court held that, to be considered reasonable, a programme designed for the realisation of socio-economic rights should be 'comprehensive',¹³¹ 'coherent',¹³² 'balanced' and 'flexible'.¹³³ The Court observed that a programme which 'excludes a significant sector of society cannot be said to be reasonable'.¹³⁴ The Court emphasised:¹³⁵

Those whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right . . . If the measures, though statistically successful, fail to respond to the needs of the most desperate, they may not pass the test.

The Court decried the fact that a 'significant sector of society' — those in urgent and immediate need of shelter — had not been catered for by the housing programme. To this extent, the Court held that the programme was invalid. The courts in Uganda can adopt such an approach in reviewing government policies and programmes on access to EmOC. Take an example of a pregnant woman who develops complications but lives in a rural area where the nearest facility offering EmOC is 20 kilometres away. Is such a woman not in 'most urgent' need and 'whose ability to enjoy all rights therefore most in peril'?¹³⁶

*Minister of Health and Others v Treatment Action Campaign (TAC)*¹³⁷ is an appeal against an order by the High Court which found that state policy restricting the availability of Nevarapine (a drug to prevent mother-to-child transmission of HIV) breached the right of access to health services. The High Court had ordered national and provincial

¹²⁸ Sec 26(1) South African Constitution.

¹²⁹ n 128 above, sec 26(2).

¹³⁰ Sec 28(1)(c).

¹³¹ Para 40.

¹³² Para 41.

¹³³ Para 43.

¹³⁴ As above.

¹³⁵ Para 44.

¹³⁶ As above. Art 14 of CEDAW obliges state parties to pay attention to special health needs of rural women.

¹³⁷ 2002 5 SA 721 (CC).

governments to make Nevarapine available to pregnant women who had been tested for HIV and counselled in accordance with the prescription of the attending medical practitioner, acting in consultation with the medical superintendent. The High Court also ordered government to take 'reasonable' measures to extend testing and counselling facilities throughout the public health sector. In the Constitutional Court, the appellant argued that the High Court order was a nullity because it breached the separation of powers. The appellants also argued that, in the area of socio-economic rights, the court can only make declaratory orders. The Court repounded:¹³⁸

The primary duty of courts is to the Constitution and the law . . . Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as this constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so.

The Constitutional Court rejected the appellants' argument and reaffirmed the justiciability of socio-economic rights. The Court limited its role to requiring the state to take measures to meet its constitutional obligations. The Constitutional Court had to evaluate the reasonableness of the measures taken. In this way, the judiciary addressed the concerns of a vulnerable group (HIV-positive pregnant women and their children) who had previously been excluded by policy makers. Again, courts in Uganda can use such an approach to scrutinise measures the state has taken to ensure pregnant women access to EmOC. By doing so, the judiciary will be complying with its constitutional mandate: to exercise judicial power in the name of tens of thousands of women who die and are disabled in Uganda due to a lack of access to EmOC.

4.3 Invoking the Bill of Rights

4.3.1 The right to life

The Constitution guarantees the right to life through the prohibition of arbitrary physical extermination of both living and unborn persons.¹³⁹ Life can be taken away in cases of capital punishment.¹⁴⁰ However, the

¹³⁸ Para 113.

¹³⁹ Arts 22(1) & (2).

¹⁴⁰ *Simon Kyamanywa v Uganda*, Constitutional Reference 10/2000 (unreported).

state has a duty to take positive measures to protect and ensure the right to life through the prevention of death. The state must not only prevent the physical termination of life, but must work towards quality and sustenance of life. The Human Rights Committee, for example, explained that the expression 'inherent right to life' should not be 'understood in a restrictive manner, and the protection of this right requires that states adopt positive measures' aimed for example at the reduction of infant mortality and increase of life expectancy.¹⁴¹ Consequently, it is imperative that the judiciary in Uganda interprets the right to life broadly to include socio-economic dimensions, such as access to EmOC.

Indeed, some judges have creatively interpreted the right to life. In *Salvatori Abuki and Another v Attorney-General*,¹⁴² the petitioner challenged the exclusion order, which was made under section 7 of the Witchcraft Act, as being inconsistent and in contravention of the Constitution. He argued that the order deprived him of his property and the right to reside and settle in any part of Uganda. The Court held that the exclusion order was unconstitutional since it threatened the right to life through deprivation of shelter, food and essential sustenance. In *Susan Kigula and 416 Others v Attorney-General*,¹⁴³ the petitioners challenged the constitutionality of the death penalty on the grounds that it violated their right to life, and subjected them to cruel, inhuman, and degrading punishment. The Court held that the death penalty is an exception to the right to life under the Constitution and is therefore constitutional. However, the Court held that a prolonged delay on death row subjected the prisoners to cruel, inhuman and degrading punishment.

The judiciary can breathe life into the constitutional provision on the right to life by seeking guidance from case law from other jurisdictions. In *Paschim Banga Khet Mazdoor Sanity and Others v State of West Bengal and Another*,¹⁴⁴ the claimant suffered serious head injuries as a result of an accident. He was turned away from government hospitals and obtained treatment from a private hospital. The Indian Supreme Court stated:¹⁴⁵

Article 21 imposes an obligation on the state to safeguard the right [to life] of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the state and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life under article 21.

¹⁴¹ UN Human Rights Committee General Comment 6, art 6 (right to life), 1982, HRI/Gen/1/Rev 2, 6-7, para 5.

¹⁴² Constitutional Petition 2/1997 (unreported).

¹⁴³ Constitutional Petition 6/2003 (unreported).

¹⁴⁴ (1996) 4 SCC 37.

¹⁴⁵ As above.

It should be noted that in *Soobramoney*, counsel for the appellant relied on the *Paschim Banga* case in arguing that the denial of treatment to his client amounted to a violation of the right to life. The South African Constitutional Court distinguished the two cases on grounds that, whereas in *Paschim Banga* the claimant required urgent treatment, in *Soobramoney*, the condition was chronic and did not demand such treatment. The Court confirmed the positive duty on the state to create emergency health facilities. The Court noted that the purpose of the constitutional provision on emergency medical treatment¹⁴⁶

... seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities. A person who suffers a sudden catastrophe which calls for immediate attention, such as the injured person in *Paschim Banga* ... should not be turned away from a hospital which is able to provide the necessary treatment. What the section requires is that remedial treatment that is necessary and available be given immediately to avert that harm.

In *Cruz Bermudez and Others v Ministerio de Sanida y Asistencia Social (MSAS)*,¹⁴⁷ HIV-positive persons challenged the government for its failure to protect their right to life and health under the Venezuelan Constitution. The Supreme Court ordered the Ministry of Health (i) to provide medicines prescribed to all HIV-positive Venezuelans by government doctors; (ii) to cover the costs of HIV blood tests in order for patients to obtain the necessary anti-retroviral treatments and treatment for opportunistic infections; (iii) to develop policies and programmes for treatment of affected patients; and (iv) to allocate the budget in order to implement the Court's decision.

In handling access to emergency treatment issues, the judiciary in Uganda should not shy away from holding government accountable, even if it means passing a decision with far-reaching budgetary consequences, as in the *Cruz Bermudez* case. In seeking to hold the government accountable for failing to ensure access to EmOC, the judiciary will be protecting pregnant women's right to life. In my view, EmOC is so fundamental to a pregnant woman's dignity and life that no qualification should be permitted. EmOC is neither a chronic nor an incurable condition, such as was the case in *Soobramoney*. It is a core component of women's right to health which the state is obliged to provide either from locally generated resources or through external assistance.

4.3.2 Freedom from discrimination

It is trite that discrimination against women in their personal and family life is rampant. It is also true that the majority of women delay in seeking medical care due to, *inter alia*, socio-cultural factors. Women's lack

¹⁴⁶ n 119 above, para 20.

¹⁴⁷ (1999) Case 15789.

of power within the family and deeper and broader gender discrimination contribute to their delay in seeking care. There is evidence to show that because of patriarchy, women may seek their husbands' or in-laws' consent before seeking care.¹⁴⁸ Because of the skewed division of labour, women may delay seeking care because they have to perform domestic work, which is neither recognised nor valued by policy makers.¹⁴⁹ Women, especially from rural areas, may delay in accessing EmOC because of a lack of money for transport and dues demanded by a health facility. When they reach the facility, women face delays in receiving care from the providers.¹⁵⁰ These delays mask discrimination against women, which is prohibited by the Constitution.¹⁵¹

Being party to CEDAW, Uganda should take appropriate measures, without delay, to 'eliminate discrimination against women by any person, organisation or enterprise'.¹⁵² The ESCR Committee comments that, to eliminate discrimination against women, states should develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span.¹⁵³ The strategy should include the provision of a full range of high-quality and affordable care with the major goal of reducing women's health risks, especially the reduction of maternal mortality.¹⁵⁴

The state must be challenged in court to show what steps it has taken to eliminate both *de jure* and *de facto* discrimination in so far as such discrimination inhibits women from accessing health care, including EmOC. As Cook observes, the norm of non-discrimination requires the state to take appropriate action to monitor, prevent, control and discipline acts by private (third) parties through its own executive, legislative and judicial organs.¹⁵⁵ The judiciary has a duty to scrutinise state policies or programmes with a view of finding out the extent to which they address delays encountered by women in seeking and receiving care. The courts can require the state to tackle domestic violence which prevents women from seeking care, by reminding the state of its constitutional obligation to take steps to ensure that people are not

¹⁴⁸ S Thaddeus & D Maine 'Too far to walk: Maternal mortality in context' (1994) 38 *Social Science and Medicine* 1091.

¹⁴⁹ S Tamale 'Gender trauma in Africa: Enhancing women's links to resources' (2004) 48 *Journal of African Law* 50.

¹⁵⁰ Thaddeus & Maine (n 148 above).

¹⁵¹ Art 21 Ugandan Constitution.

¹⁵² Art 2(e).

¹⁵³ ESCR Committee General Comment No 14 para 21. See also CEDAW General Recommendation No 24 (1999) para 6.

¹⁵⁴ As above.

¹⁵⁵ R J Cook 'State accountability under the Convention on the Elimination of Discrimination Against Women' in R J Cook (ed) *Human rights of women, national and international perspectives* (1994).

subjected to 'any form of torture or cruel, inhuman or degrading treatment or punishment'.¹⁵⁶

The Constitution permits positive discriminatory policies and programmes 'aimed at redressing social, economic, educational or other imbalances in society'.¹⁵⁷ One of the ways of achieving this goal is to 'provide facilities and opportunities necessary to enhance the welfare of women'.¹⁵⁸ The state is obliged to 'protect women and their rights, taking into account their unique status and natural maternal functions in society'.¹⁵⁹ Thus, the Constitution recognises women's distinctive characteristics and vulnerabilities. I cannot think of a better 'facility' or 'opportunity' to enhance the 'welfare' of a pregnant woman than the assurance that she can easily access good quality health care, including EmOC. The judiciary has the mandate to inquire into what the state or its organs have done or plan to do to protect women's rights, such as the right to access EmOC.

The judiciary may also challenge laws and practices that promote gender discrimination. In *Uganda Association of Women's Lawyers and 5 Others v Attorney-General*,¹⁶⁰ the petitioners challenged the constitutionality of sections 4, 5, 21, 22, 23 and 26 of the Divorce Act. The Constitutional Court unanimously held that the provisions were inconsistent with the equality and non-discrimination provisions of the Constitution, and were in effect null and void. Justice Mpagi Bahigeine noted that the divorce law is archaic in content and a colonial relic in substance 'where the traditional patriarchal family elevated the husband as the head of the family and relegated the woman to a subservient role, of being a mere appendage of the husband, without a separate legal existence'.¹⁶¹ In *Uganda v Yiga Hamidu and Four Others*,¹⁶² the accused were charged with rape. One of the accused alleged that he could not rape his wife, since consent is always presumed on the part of the wife. Justice Musoke Kibuuka rejected this defence and convicted him of rape. Although marital rape is not an offence under the Penal Code, the judge argued that the constitutional provisions on equality in marriage¹⁶³ and the promotion of the dignity of women¹⁶⁴ in effect amended section 123 of the Penal Code.

¹⁵⁶ As above.

¹⁵⁷ Art 21(4)(a).

¹⁵⁸ Art 33(2).

¹⁵⁹ Art 33(3).

¹⁶⁰ Constitutional Petition No/2003.

¹⁶¹ n 160 above 7.

¹⁶² High Court Criminal Session Case 0055 of 2002.

¹⁶³ Arts 31(1) & (3).

¹⁶⁴ Arts 33(1) & (6).

5 Conclusion

The judiciary has a fundamental role to play in the protection of socio-economic rights such as the right to access EmOC. A lack of an express provision of the right in the national Constitution is not a bar to its protection by the judiciary. Through judicial activism and creativity, the judiciary may scrutinise government policies with a view to determining the extent to which they promote and protect the right. The judiciary may seek guidance from international human rights instruments and case law from other jurisdictions and also creatively interpret NODPSP and provisions such as the right to life and to non-discrimination. Judges in Uganda should learn from their counterparts in India, who have simplified the procedure of bringing claims alleging the violation of socio-economic rights before the courts. The judiciary in India converts letters written by ordinary citizens, on behalf of impoverished groups, into writ petitions.¹⁶⁵

Obtaining a judgment may be possible, but enforcing it might be difficult. Thus, in addition to adducing substantive evidence challenging government policy, human rights lawyers and activists must mount a serious campaign to ensure that the executive respects court orders. They should publicise the orders in the media and engage the international community in order to exert pressure on the state to respect court judgments by designing and implementing measures that ensure enhanced access to EmOC within a fixed time schedule.

¹⁶⁵ U Baxi 'Judicial discourse: The dialectics of the face and the mask' (1993) 35 *Journal of the Indian Law Institute* 7.