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ENSURING RIGHTS MAKE REAL CHANGE



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**ESR Review**

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## From the editor:

The African Union declared 2016 the 'Year of Human Rights with a Special Focus on the Rights of Women' in recognition of the fact that it marks a critical juncture in the continent's human rights agenda. 2016 is the 35th anniversary of the adoption of the African Charter on Human and Peoples' Rights (the African Charter) in 1981; the 30th anniversary of the entry into force of the African Charter in 1986; the 29th anniversary of the operationalisation of the African Commission on Human and Peoples' Rights in 1987; and the 10th anniversary of the operationalisation of the African Court.

This second issue of the ESR Review in 2016 includes two feature articles. The first, written by Yuri Ramkissoon, revisits the discourse on the critical imperative of ensuring that the UN Sustainable Development Goals are human rights-based. In the second feature, Chiedza Simbo explores the link between fundamental, elementary, primary and basic education.

These articles are followed by an interview with Professor Sandra Liebenberg (H.F. Oppenheimer Chair in Human Rights Law, University of

Stellenbosch, Co-Director of the Faculty's Socio-Economic Rights and Administrative Justice Research Project), who was recently elected as a member of the UN Committee on Economic, Social and Cultural Rights (CESCR) (2017-2020).

We also provide updates on General Comments 22 and 23 (2016), which relate to the right to sexual and reproductive health and the right to just and favourable conditions of work, respectively. These General Comments are of critical importance to the realisation of the rights of women in Africa.

The issue includes the Concluding Observations of the latest report by South Africa to the United Nations Committee on Civil and Political Rights.

We thank the contributors to this issue of the ESR Review and invite comments and suggestions on innovative ideas on celebrating the rights of women in Africa in 2016 and beyond. The Editorial Board also congratulates Prof. Liebenberg on her election to the CESCR.

*Gladys Mirugi-Mukundi*





## 1

# Are the Sustainable Development Goals human rights-based?

## by Yuri Ramkissoo

### Introduction

In September 2015, 170 countries met in New York at the United Nations Sustainable Development Summit to take forward the post-2015 development agenda and, importantly, adopt the 2030 agenda, which consists of a set of Sustainable Development Goals (SDGs). The SDGs replace the Millennium Development Goals (MDGs), which in contrast are fewer (8 goals and 18 targets) but slightly more measurable. The successor to the MDGs contains 17 goals and 169 targets. There was much criticism of the MDGs' failure to address developmental issues from a human rights perspective.

It is essential to mention that, at its 20th session in November 1965, the General Assembly (GA) adopted resolution 2027 (XX), which recognised the need to devote attention at both national and international levels to progress in relation to human rights, and to encourage the adoption of measures designed to accelerate the promotion of respect for and observance of human rights and associated fundamental freedoms. However, at the conclusion of the application period of the

Unless a state has a clear and intimate knowledge of the nature of problems within communities, it is unlikely that systemic issues will have been captured in the SDGs.

MDGs, global evidence suggests that while some MDGs have been achieved, poverty and inequality have not decreased, let alone been alleviated, particularly in developing nations, where in some cases inequality and poverty have worsened. Clearly, while the MDGs were designed to address global development issues, it was detrimental to the achievement of these goals, ones that they were not framed from a human rights perspective.

This opinion piece seeks to ascertain if the SDGs have effectively incorporated a human rights discourse. It argues that while the SDGs are a vast improvement on the MDGs, there are areas that could have been strengthened substantially and some aspects that are lacking.

### Improvements on the SDGs

#### Engagement

At a basic level, the development of the SDGs followed a much more inclusive process than that of the MDGs. The latter stemmed from an engagement process with mainly OECD countries

and donor agencies. In contrast, the Office of the High Commission on Human Rights (OHCHR) boldly states that "the SDGs are the result of the most consultative and inclusive process in the history of the United Nations". David Hulme (2015) explains that the engagement around the SDGs has been a great improvement on the MDGs, as middle- and low-income countries have been included, whereas engagement on the MDGs was led exclusively by an aid agenda or the interests of high-income and OECD countries. The SDGs were also workshopped with civil society organisations and, importantly, the Human Rights Council to ensure the effective incorporation of human rights principles.

Of concern, however, is the fact that countries that lack strong local constituencies would not have consulted with those communities and civil society organisations representing the most marginalised people to ensure that the latter's concerns were highlighted.

As such, for much of the world, the engagement would have occurred between national governments and state departments, as well as those organisations

with sufficient funding and power to ensure a platform for asserting their agendas. Unless a state has clear and intimate knowledge of the nature and cause of problems within

communities, it is unlikely that all systemic issues will have been captured in the SDGs.

#### Dynamic, holistic and inclusive

The SDGs are built on foundations of social, environmental, political and economic justice, the requisite basis for sustainability and holistic development. Importantly, the SDGs ensure that the alleviation of poverty and inequality lies at the centre of each goal, thereby acknowledging that growth and development at a national and global level is meaningless without the emancipation of those most in need. This calls to mind the adage that a chain is only as strong as its weakest link.

This aspect of the SDGs is a significant improvement on the MDGs, which sought to monitor development, such as access to water, but not set store by the upliftment of the communities being served. As such, the poorest communities would remain poor even though the MDG would be considered as having been achieved.

Conversely, the targets of the related SDG (Goal 6) speak to universal and equitable access to safe and affordable drinking water for all. The targets relate to water management, quality, and integrated water-use efficiency. Goal 6 does not just simply refer to water as a commodity for human consumption, but addresses the linkages with environmental management and ecosystem protection.

Finally, the targets aim to foster community participation: they seek to “support and strengthen the participation of local communities in improving water and sanitation management”. One can clearly see that Goal 6, for example, emphasises the importance of achieving the overriding goal of ensuring access to water and sanitation for all. However, there are cases where the implementation at local levels in specific countries of such goals and targets lacks the requisite human rights-based planning and engagement with communities.

On the issue of inclusion, the SDGs boast of the inclusion of specific provisions for vulnerable groups of people, such as children and people with disabilities. Furthermore, there is a specific goal dedicated to gender equality. This is notable progress for vulnerable groups, who were largely ignored in the MDGs. Linkages here are important because of the cross-cutting nature of the impact of violations of human rights, particularly on vulnerable groups. This impact, although not explicitly articulated, will have to be acknowledged for effective implementation of the SDGs.

The SDGs bring the provisions of the various international treaties and conventions to life and, to some extent, recognise and encompass the requisite human rights principles. By ensuring that the SDGs neglect no population group, hopefully we can guarantee that no one falls through the cracks.

## Where the SDGs fall short

### Not couched in human rights

Despite the assertion that the SDGs are founded on the Universal Declaration of Human Rights, there is no explicit mention of human rights in the text of the 17 goals. While human rights are implicit in the language used and many of the goals are intrinsically human rights-based, the lack of actual mention of “human rights” is a missed opportunity for explicit and unambiguous articulation and commitment to such universal principles. This lack of purposive articulation is worrying for many developmental organisations and human rights institutions.

As Neil Hicks, an international policy advisor for Human Rights First, explains, “Omission of the actual term is notable and is indicative of a global climate where more and more states are assertively pushing back against universal human-rights standards and labelling international pressure to encourage compliance as unacceptable interference in their sovereignty” (Hicks 2015: 1).

Related to this obvious exclusion is the lack of targeted interventions in relation to human rights and poverty.

While conventional thinking defines poverty according to the amount of money an individual or a family earns per day, progressive measures acknowledge that poverty is more than just a dollar value

They consider the services that people have access to (or lack), manifestations of deprivation such as hunger, and the authority people command (i.e. power relations). Importantly, it is the lack of dignity and franchise that distinguishes the haves and the state from the poor, where the poor do not have the power to make their voices heard. Ensuring that people have money will not change that. What will, is ensuring that people are engaged, allowed a platform to voice their opinions and given access to information which is understandable to them.

In South Africa, we often find that accompanying a lack of access to services, rights and information is a sense of hopelessness or apathy due to the poor responsiveness by state departments to complaints from impoverished communities. This leads to service

The SDGs bring the provisions of the various international treaties and conventions to life and to some extent, recognise and encompass the requisite human rights principles.

delivery protests, violence and further hostility between communities and the state. If the state were to ensure that services were provided to poor communities, and thus meet the SDGs but in a non-participatory manner, all that the state would be doing is making communities passive recipients of welfare-like services. And this does nothing to build communities in terms of knowledge, power and ownership.

Neither does it adhere to basic human rights principles such as adequacy and appropriateness.

Express mention of human rights principles may alter the way in which these goals are implemented and ultimately affect the outcome. Ramcharan explains that a clear pronouncement of human rights wording would send a signal that human rights are essential to the conception and implementation of the SDGs (Ramcharan 2015). He offers the example that “Goal 1 is ‘End poverty in all its forms everywhere,’ and one could easily add ‘enhance human dignity and rights.’ ... Goal 5 is ‘Achieve gender equality and empower all women and girls,’ and one could easily add ‘to achieve the universalisation of their inalienable human rights’” (Ramcharan 2015: 2).

### Numerous and perhaps over-ambitious?

The SDGs consist of 17 goals (nine more than the MDGs) and a mammoth 169 targets. The MDGs had just 21 targets, which countries, particularly developing ones, found difficult to achieve. In fact, while satisfied with the progress made in relation to the MDGs, the United Nations itself conceded in its 2015 MDG report that “although significant achievements have been made on many of the MDG targets worldwide, progress has been uneven across regions and countries, leaving significant gaps. Millions of people are being left behind, especially the poorest and those disadvantaged because of their sex, age, disability, ethnicity or geographic location” (United Nations 2015: 8).

Yuri Ramkissoon focuses on economic, social and cultural rights as a senior researcher at the South African Human Rights Commission. She writes in her personal capacity.

Therefore, while the broad and aspirational aims of the SDGs are highly commendable, it is worrying that the goals and targets are so numerous and ambitious. One is left to wonder if the SDGs are setting up countries, and ultimately the globe, for failure. Which then raises the question: if there is a failure to achieve the SDGs, will the lives of the poorest people in the world be changed at all? If in the next decade developing countries like South Africa concede that progress is being made but universal poverty has not been eradicated, how will we ensure that those who have always been vulnerable or impoverished have been targeted for development initiatives?

It is important to note that South Africa has a history of celebrating national progress in poverty alleviation and inequality reduction, but that since 1994 the lives of the most impoverished in the country remain unchanged. For example, the state celebrates meeting the MDG to halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation. While that right may indeed have been achieved statistically, the state's measurements do not take into account the number of households that do not have functioning infrastructure, or the quality of the service that has been delivered. Additionally, that state has not provided information disaggregated by district and community, which will illustrate severe under-development at a local level in the poorest communities of the poorest provinces in the country.

A study by the Centre for Applied Legal Studies entitled *Water Services Fault Lines: An Assessment of South Africa's Water and Sanitation Provision Across 15 Municipalities*, highlighted the problem associated with disaggregated data. Despite the fact that at a national level South Africa had improved vastly in the provision of drinking water to households, and that at that stage the MDG (namely, to halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation) was likely to be met, the poorest 15 municipalities in the country had no access to water at all.

Clearly, in South Africa it will be essential to look beyond statistics to ensure that the SDGs are in fact reducing inequality and that we are reaching a group of people who have always been vulnerable and lacked access to services.

### Consumption patterns

The world population continues to grow unchecked, and it is estimated that by 2050 it will reach approximately 9.5 billion (United Nations 2016). We have already exceeded the earth's carrying capacity and are fast depleting finite natural resources like water, minerals and oil on which we are heavily reliant.

Goal 12 of the SDGs aims to "[e]nsure sustainable consumption and production patterns". The targets refer to sustainable consumption and production, the efficient use of natural resources and minimising food wastage. However, despite the specificity of the targets listed under this goal, it remains vague on the meaning of consumption and silent on the differences between developing and developed nations in respect of consumption patterns and population growth, which ultimately fuels consumption. The focus on the "demand side" is not as powerful as it should be.

While it is true that developed nations, particularly in Europe, are taking the lead in the investment and use of renewable energy, the unsustainable consumption patterns of these nations have not been addressed.

The resource-intensive consumption patterns of wealthy individuals and countries is often a taboo subject, given the focus on free-market economic systems, and again is not adequately addressed in the SDGs. States must begin to encourage consumers to question their own needs versus their consumption patterns. For example, a couple without children should indeed question their need for more vehicles than are necessary, or for large vehicles that consume high volumes of petrol. Similarly, water and energy usage should also be questioned and discouraged via steep tariffs for high-volume usage.

Indeed, the United Nations Environment Programme (UNEP) shared this view in its Post 2015 Note, stating that "achieving sustainable consumption patterns is more technically and politically complex than changing production patterns, because it raises important issues such as human values, equity and lifestyle choices" (UNEP 2014: 2).

Until we begin to question the demand-intensity of developed countries and wealthier individuals and communities across the globe, we are not going to achieve sustainable consumption patterns. Ultimately, we will not be able to ensure the sustainable use of finite natural resources and will battle to reduce fossil fuel emissions and manage waste. And it is important to note that it is the poorest communities in the world which suffer the harshest effects of poor environmental practices and climate change.

### 3.4 Private sector accountability

Given how long the list of SDGs is, the lack of goals to ensure private sector accountability and economic reform is extremely disappointing. The solitary explicit mention of business is under Goal 12, target 12.6., which aims to "[e]ncourage companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle". A single target is completely inadequate in the case of a formidable sector that wields substantial power over states and is responsible for minor to gross human rights violations across the globe. This is especially so given the recent progress made by the United Nations in relation to the production of guidelines for private sector operations.

There are additional goals that speak to state responsibilities in relation to economic growth, labour and industrialisation. But these are optional for business. Goal 12.8 seems promising in its aim to "[b]y 2030, ensure that people everywhere have the relevant information and awareness for sustainable development and lifestyles in harmony with nature". However, this target refers mainly to environmental reporting, which is hugely beneficial, but misses the mark in terms of vital social, labour and supply chain information.

At the very least, given the focus on the three spheres of sustainability (economic, social, environmental), targets should have been developed to ensure uninhibited access to information, transparency, and further articulation of guiding principles such as the duty of business to respect and provide remedies. This should also have been combined with human rights-based principles applicable to business, such as ensuring engagement, transparency and so forth.

At best, the SDGs should have aimed to transform inequitable business practices and international agreements that disadvantage developing countries, to assist with alleviating poverty and inequality. For example, targets should have aimed to begin rewording international trade

agreements into which developing countries were coerced by developed ones, or to question the ownership of seeds by one company to assist farmers in developing countries to produce more food at a lower cost.

Finally, one or more targets should have required states to hold private sector companies accountable for human rights violations and the transgression of other national laws and policies that ultimately exacerbate levels of poverty and inequality in those countries.

## Conclusion

Ultimately, as in the case of the MDGs, the devil will be in the detail. Despite the numerous goals and targets and gaps therein, if strong partnerships are developed between the state, civil society and the private sector, and effective plans of action developed, valuable progress can be made in alleviating poverty and inequality. The role of independent organisations, such as Chapter Nine (C9) institutions in South Africa, will be vitally important to monitor progress in relation to the SDGs, disaggregate data by demographics like gender and disability, and ensure adherence to human rights principles.

While C9 institutions sometimes have limited room or authority to undertake extensive mandates, effective partnerships will be the key in realising all or part of the SDGs. As the Danish Institute for Human Rights states:

Many NHRIs [National Human Rights Institutes] face obstacles when it comes to promoting human rights accountability in development contexts, including narrowly drawn mandates, constraints on their independence, and limited technical capacity.

In order to unleash their potential, these barriers will have to be lifted. States and other sources of support to NHRIs should assist them in strengthening their capacity, mandate and independence, as a worthwhile investment in a very distinctive and constructive part of the SDG implementation and accountability architecture (Jensen et al. 2015: 6).

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## Introduction

The development of the right to education can be tracked from the 1948 Universal Declaration of Human Rights, which mentions the terms “fundamental” and “elementary education”, to the International Covenant on Economic, Social and Cultural Rights (1966), which refer to “primary education”, to the World Declaration on Education For All and Framework for Action to Meet Basic Learning Needs (1990), which introduced the term “basic education”.

2

Exploring the link between fundamental, elementary, primary and basic education by Chiedza Simbo



This article intends to explore the link between the terms “fundamental”, “elementary”, “primary” and “basic” education, which all relate to the education of children. It is often not clear whether these terms have the same meaning. Clarifying their meaning and the links between them makes policy and law-making easier; it will also make it possible for the public to understand their entitlements as provided for in various national and international laws.

## Definition of education in international law

The Recommendation Concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedom (Recommendation), adopted by and binding upon UNESCO, defines “education” as follows:

The word education implies the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge. This process is not limited to any specific activities.

This definition acknowledges that education is a process of learning and development through social interaction. It is a process which develops and benefits both individuals and communities. The definition is strikingly similar to the provisions of General Comment 1 to the Convention on the Rights of the Child (CRC) (2001) article 29(1), which states that education goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society.

The acknowledgement above is that education involves both formal education through schools and informal education through a series of life experiences that allow human beings to develop within their societies.

## Origins of the terms elementary, fundamental and primary education in international law

Elaborating on the provision of the right to education, article 26 of the Universal Declaration of Human Rights (Universal Declaration) states that everyone has the right to education at the elementary and fundamental stages, and that education shall be free and compulsory only at elementary stages. The International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), an implementing instrument of the socio-economic rights provided by the Universal Declaration, clarifies the provisions of the Universal Declaration by stating that everyone has the right to an education and primary education must be free and compulsory.

The clarifications by the ICESCR did not provide a link between elementary, fundamental and primary education. Rather, a new twist was established in international law. The Universal

Declaration provided for free education at the elementary and fundamental stages, while the ICESCR provided for free education only at primary level.

The Universal Declaration provided for compulsory education only at elementary level while the ICESCR provided for compulsory education at primary level. The link, if any, between compulsory primary education and compulsory elementary education was not explained.

Many international instruments enacted after the ICESCR adopted the term “primary education” and not “elementary” or “fundamental education”. The need to provide free and compulsory primary education and not free elementary and/or fundamental education became more pronounced in international instruments. The CRC, which is deemed the “most authoritative international legal instrument for the protection of children’s human rights, with almost universal acceptance” and “the most rapidly and widely ratified international human rights treaty in history”, alludes only to the term “primary education”, stating that it must be compulsory and free.

Following the use of the preferred term “primary education” rather than “elementary” or “fundamental” education, countries in their own ways welcomed and acknowledged the use of the term. Today, the Lesotho Constitution states that, as a matter of state principle, the government must endeavour to make education available and ensure the adoption of policies, which promote the provision of compulsory and accessible primary education.

The Iraqi Constitution also provides for the right to free and compulsory primary education. The Namibian Constitution provides free and compulsory primary education, while the Constitution of Malta states that as a matter of government directive, primary education shall be free and compulsory in all state schools. The term “elementary education”, however, has remained in use in countries such as the United States, where it is used to refer to the education of children. The link between the terms “elementary”, “fundamental” and “primary” education was later clarified, as will be explained.

## The Origins of the term basic education in international law

Following the provision of free and compulsory primary education, international law coined the term “basic education”. The World Declaration on Education For All and Framework for Action to Meet Basic Learning Needs (1990) (World Declaration) became the foundational document that defined this term. It stated that basic education is the acquisition of basic learning needs. Following the provisions of the World Declaration, in 1990 African states considered with concern the critical socio-economic situation of the African child. The African Charter on the Rights and Welfare of the Child was established to promote and protect the rights and welfare of the child. It required that state parties endeavour to provide free and compulsory basic education. Since 1990, the term “basic education” has been used to refer to the education of the child.

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## The link between elementary, fundamental and basic education

The Universal Declaration refers to “elementary and fundamental” education. Establishing the link between “elementary and fundamental education” and basic education, General Comment 13 to the ICESCR states that “fundamental education corresponds (resembles) to basic education as set out in the World Declaration on Education for all. Individuals who have not received or completed the whole period of their primary education have a right to fundamental education, or basic education”. By stating that persons who have not received primary education also have a right to “fundamental education or basic education”, and that “fundamental education corresponds to basic education”, General Comment 13 suggests that fundamental education is basic education.

To clarify that fundamental/basic education is not primary education, General Comment 13 goes on to state that fundamental/basic education is acquired at all stages, including but not confined to the primary school stage; it can also be offered to adults. General Comment 13 further clarifies the link between primary education and basic education. Supporting the view of UNICEF, it states that “primary education is the most important component of basic education”, indicating that primary education is not basic education; instead, there is a “close correspondence between the two”.

This “close correspondence”, which makes primary education the most important component of basic education, is described by the World Declaration, which states that “the main delivery system for the basic education of children outside the family is the primary school”.

Primary education is the stage where basic education is first introduced. In other words, if any person, or more specifically a child, wishes to acquire basic education, they go to primary school.

Although countries such as Zimbabwe and South Africa provide for the right to basic education, they do not expressly provide a link between primary education and basic education in their constitutions or legislation. However, the Namibian Education Act accepts the link provided by international law, clarifying that “basic education is the education provided for from the level of the first grade to the level of the twelfth grade and includes adult education, special education and any education declared by the minister to be basic education”.

Recognising the importance of primary education as the point at which basic education is introduced, the World Declaration reinforces the international position that primary education must be “universal to ensure that the basic learning needs of all children are satisfied”.

Commenting on the requirement to provide compulsory and free primary education as an avenue to the provision of basic education, General Comment 11 (1999) to the ICESCR notes that the ICESCR has an element of compulsion,

and emphasises that neither the state, parents nor guardians must treat the need for children, including girls, to attend primary school as optional. It further notes the importance of providing free primary school education, stating that any fee imposed upon a child and other direct education costs are disincentives that jeopardise the enjoyment of the right to basic education. In addition to direct costs, indirect costs such as levies and exorbitantly expensive uniforms can also fall in the category of school fees.

The discussion above links primary education with fundamental and basic education. The link between elementary education and primary, fundamental or basic education has not been clearly established at international level. Guidance can be sought from the provisions of General Comment 13 to the ICESCR, which states that primary education has two distinctive features: it is “compulsory” and “available free to all”. If primary education has these two distinctive features, juxtaposed with the provisions of the Universal Declaration, elementary education also has two distinctive features: that it is compulsory and free. The fact that elementary and primary education have the same distinctive features may lead to the conclusion that primary education is elementary

Although countries such as Zimbabwe and SA provide for the right to basic education, they do not expressly provide a link between primary education and basic education in their constitution or legislation.

education. Such a conclusion would mean that, in accordance with the Universal Declaration, primary education is compulsory and free while fundamental or basic education is free but not compulsory.

In summary, it can be concluded that under international law, basic education or fundamental education includes but is not limited to primary school. Basic education goes beyond primary education to include adult basic education. It can be concluded as well that under international law, particularly following the provisions of the Universal Declaration, the element of compulsion extends only to primary or elementary education, whereas the free education element extends to fundamental and basic education. Such a reading of international law contradicts the provisions of the African Charter on the Rights and Welfare of the Child, which is regional instrument and one stating that basic education must be free and compulsory. The international law provisions differ from the provisions of the African Charter in that the latter extends the element of compulsion to basic education and not only primary education.

The extension of the element of compulsion by the African Charter can be attributed to the paramount importance of acquiring basic education as it was reiterated by the World Declaration. With consideration that the World Declaration stated that basic education can be provided beyond the primary school, it became important for African states to ensure that children compulsorily acquire basic education regardless of whether or not it is offered in primary school, secondary school or neither of the two. Further, the World Declaration and the African Charter were drafted around the same time and the persuasions for every child in Africa to get basic education at any schooling stage of their life could not have been more convincing.

The approach of the African Charter was significant in that it extended the bare minimum approach (assuming the provision of primary school is the minimum) advanced by international law and puts African children in an advantaged position where they must compulsorily and freely acquire basic education beyond the primary school. The difference between the international law approach and the African Charter's approach is even more significant in a continent where the education of the girl child is often not prioritised even if it may be free. Some parents of African children particularly the girl child often see the provision of labour by children or their marriage to be more important than their education. Providing for compulsory and free basic education was a sure way to ensure that children are in school for the entire basic education years or even beyond schooling years.

## Conclusion

The terms in international law regulating the provision of education for children are many and have evolved to the point where it is generally accepted that children must be provided with free primary or elementary education. The consensus for free primary education has also been extended to the provision of free fundamental or basic education by the Universal Declaration and the African Charter. The Universal Declaration, unlike the African Charter, does not, however, make basic education compulsory. This discussion aimed to provide a clear link between the terms used to regulate the provision of education for children in international law.

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# 1 Interview with Prof. Sandy Liebenberg

The ESR Review interviews Prof Sanda Liebenberg, who recently got appointed as a member of the UN Committee on Economic, Social and Cultural Rights.

**First, we would like to congratulate you on your election as a member of the UN Committee on Economic Social Cultural and Rights. This is an honour well deserved.**

Thank you.



## **You started the Socio-Economic Rights Project (SERP). What really motivated you to start the project, and what were you hoping to achieve?**

I founded the SERP shortly after the end of my secondment to the Technical Committee of South African's Constitutional Assembly. During my service on the Technical Committee, I was deeply involved in the debates, research and drafting of the socio-economic rights provisions in the 1996 Constitution. The entrenchment of a holistic set of socio-economic rights as judicially enforceable rights in the Bill of Rights was a historic and internationally significant achievement.

I realised, however, that if these rights were to make a meaningful contribution to people's struggles against poverty and the socio-economic legacy of apartheid, there had to be organisations in South Africa which focused on breathing life into these rights. SERP was founded with the aims of deepening research, popular education, advocacy and support litigation in the area of socio-economic rights. In addition to advocacy on important policy and legislation such as the child support grant and new Housing Act, the SERP was involved as amicus curiae in the leading early decisions of the Constitutional Court on socio-economic rights – Grootboom, TAC and Modderklip.

There are now a number of NGOs and social movements doing important work on socio-economic rights in South Africa. It is almost 12 years since I moved from UWC to Stellenbosch University, and it is gratifying to see that the SERP is still going strong and making an important contribution to rights-based struggles against socio-economic deprivation.

## **It has been 20 years since the adoption of the Constitution, often described as one of the most progressive in the world. As one of the persons involved in the drafting of the Constitution, what is your assessment of the implementation of its socio-economic rights provisions?**

Important legislation and policy has been adopted by the post-apartheid government, which has undoubtedly contributed to improving people's access to basic services and resources. In addition, the South African Constitutional Court has handed down internationally admired decisions around socio-economic rights.

In particular, it has developed what I consider to be one of the most protective legal frameworks in the world against evictions, which risk exposing poor people to homelessness.

However, there have also been disappointing cases in which the Court has not adequately interrogated the impact of certain programmes on the health, dignity and life chances of impoverished communities. Institutions like the South African Human Rights Commission also play an important role in monitoring the progressive realisation of socio-economic rights, and in highlighting systemic problems through research and public participation.

Despite these achievements, it is well known that deep patterns of poverty and inequality persist in South Africa. Particularly concerning is the high level of youth unemployment and the quality of education in township schools as well as the poorer provinces. There is much work to be done if the socio-economic rights in the Bill of Rights are not to have a hollow ring to those bearing the burden of poverty and social exclusion (to paraphrase the late Chief Justice Arthur Chaskalson in the Soobramoney case).

## **The Constitutional Court has developed the concept of reasonableness to measure government's commitments to realising socio-economic rights, now being adopted by international and regional human rights bodies. What's your view on this? Do you really think this is the right way to go?**

Reasonableness is a widely used judicial tool in international and comparative law for reviewing government obligations in various areas of law, including human rights law. It plays a role in assessing the positive duties of states in relation to civil and political rights, such as the right to vote, and in evaluating whether government agencies have exercised "due diligence" to prevent, investigate and remedy human rights violations by private bodies. It also plays a central role in assessing whether limitations to fundamental rights are justifiable.

Reasonableness is also playing a prominent role in the socio-economic rights jurisprudence of regional and international treaty-bodies.

It is explicitly adopted as the standard of review which the UN Committee must apply under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. This Protocol provides for an individual-complaints mechanism and represents a historic development in the international protection of economic, social and cultural rights.

The problem is not with a reasonableness model of review as such, but rather with its application. It can be applied in a way which is highly deferential of government's acts or omissions, and simply takes the state's justifications for its conduct at face-value. As a human rights tool, reasonableness review must be integrally linked to the purposes and values which socio-economic rights aim to foster. These include ensuring that people are able to live in security, dignity, and to participate as equals in all spheres of society.

It is very important that courts and treaty bodies engage in a rigorous analysis of the impact of government acts or omissions on the lives of those affected by them. This includes also ensuring that there are adequate participatory channels in place for hearing the voices of those whose rights are at stake. The South African jurisprudence of "meaningful engagement" has much untapped potential in this regard.

### **South Africa recently ratified the ICESCR almost 20 years after signing the instrument. What possible changes do you foresee in terms of realisation of socio-economic rights at the national level?**

The ratification of this Covenant – an integral part of the "International Bill of Rights" – is very welcome. I also hope that government decides soon to ratify the abovementioned Optional Protocol to the Covenant. Having ratified the Covenant, government is obliged under international law to ensure that all its laws and policies are consistent with the obligations imposed by the Covenant. It will have to report to the UN Committee on Economic, Social and Cultural Rights on a periodic basis on the measures it has taken to ensure the realisation of the rights in the Covenant.

Whilst there are many similarities between the Covenant and the economic, social and cultural rights in the South African Constitution, there are also rights in the Covenant which are not explicitly protected in the South African Bill of Rights, such as the right to work, in article 6 of the Covenant. In addition, all spheres of government will have to take into account the Committee's specific interpretation of the various Covenant rights in their General Comments and Concluding Observations on State Reports.

Particularly important in this regard is that government departments define and implement social protection floors for all socio-economic rights to give effect to the Committee's concept of minimum core obligations. The South African Constitution requires the courts to consider international law and to interpret legislation in ways that are consistent with international law. Accordingly, it is also to be expected that the South African courts will pay close attention to the obligations in the Covenant and their interpretation by the Committee on Economic, Social and Cultural Rights, in the development of South African socio-economic rights jurisprudence. This will further ensure alignment between South African domestic law and international human rights law.

### **As one of the newly elected members of the CESCR, what are your views about the committee and what changes do you hope to see?**

The Committee has made tremendous strides and has truly come of age. Since its establishment in 1985, it has made a substantial contribution to developing the normative content of socio-economic rights in many areas through its concluding observations, general comments, statements and letters as well as recently its jurisprudence under the Optional Protocol.

Its two most recent general comments concern the rights to sexual and reproductive health and to just and favourable conditions of work (General Comments No. 22 and 23). Most recently, at its 58th session in June, it adopted an important statement on the obligations of states and multilateral lending institutions under the Covenant in the context of public debt and austerity measures.

Given global cut-backs in social programmes under the yoke of austerity measures, this statement provides important normative guidance on the obligations of borrowing states, international lending organisations as well as member states of international financial organisations. When my term on the Committee officially starts in 2017, I would like to investigate ways in which both the concluding observations of the Committee on state reports as well as its views under the Optional Protocol can be rendered more effective and meaningful for the beneficiaries of the Covenant rights.

Furthermore, a substantial priority for the Committee is to build up a coherent jurisprudence on economic, social and cultural rights under the Optional Protocol, which entered into force on 5 May 2013. This is essential to the credibility of the Optional Protocol as well as to global efforts to provide effective remedies for violations of economic, social and cultural rights.

I also perceive a need to elaborate on the relationship between the rights in the Covenant and environmental sustainability, particularly the multiple challenges of climate change, which have a disproportionate impact on poor and marginalised communities.

### **Since the entry into force of the Optional Protocol to the ICESCR, how would you assess the jurisprudence of the CESCR so far?**

Thus far the Committee has decided four communications under the Optional Protocol – two in which it adopted views on the merits, and two which it ruled inadmissible. In *I.D.G. v Spain*, the Committee found a violation of the right to adequate housing in article 11 of the Covenant in that the Spanish judicial authorities have not taken sufficient steps to bring mortgage-enforcement legal proceedings to the personal notice of the author.



This meant that she was unable to adequately defend her right to housing in the courts. The Committee also found that there were insufficient legislative safeguards in place to protect the housing rights of those facing loss of their homes in mortgage enforcement proceedings. It is gratifying to see the Committee referencing a number of important South African jurisprudence pertaining to mortgage bonds and housing rights.

The second merits decision was made in *Rodríguez v Spain* and concerned a complaint by a prisoner that his non-contributory disability benefit had been reduced by the cost of his upkeep in prison. He alleged a violation of the right to social security (article 9 of the Covenant) as well as the prohibition on discrimination in the enjoyment of this right (article 2). The Committee found no violation of the right to social security on the basis that the reduction was reasonable and proportionate and did not leave the complainant without minimum essential social security benefits. It also rejected the discrimination claim.

Both cases indicate that the Committee is drawing on the concepts it has developed in its general comments in “adjudicating” individual complaints regarding economic, social and cultural rights. One of the challenges that the Committee faces as an international body is to gain a sufficiently detailed understanding of the domestic facts and context of particular communications. This is important both for assessing the impact of the particular measures on the complaints as well as the credibility of the State Parties’ justifications for its position. In this regard, third party submissions (similar to amici curiae submissions) can play an important role in enriching the Committee’s deliberations under the Protocol. This point is well illustrated by the third-party submissions by ESCR-Net, an international network of NGOs and social movements focusing on economic, social and cultural rights, in the *I.D.G. v Spain* communication.

## Socio-economic rights are now accorded more recognition worldwide, especially in national constitutions, but concerns remain. What would you consider to be the major challenges regarding the implementation of these rights?

The recognition of socio-economic rights as fundamental rights in a country’s highest law is important as it creates channels for legal and political accountability for the realisation of these rights. However, to be effectively implemented [it] means that these rights and their underlying values must be consciously integrated in all decision-making which affects people’s socio-economic well-being.

This includes budgetary processes, legislation and policy-making as well as decisions relating to trade, investment and the regulation of multinational corporations. In addition, without being claimed, rights mean very little on the ground. It is important that strong organisations are built and sustained which can support impoverished communities in their struggles to claim their socio-economic rights and demand accountability for their realisation.

## Any suggestions for the way forward?

In South Africa black people still bear the burden of poverty and unequal access to socio-economic resources and services. In addition, poverty, inequality and environmental degradation are massive global challenges. We must use all the opportunities and channels which socio-economic rights create to redress these injustices and help build a more just and sustainable country and world.

# UPDATES

## General Comments by the United Nations Committee on Economic, Social and Cultural Rights

The United Nations Committee on Economic, Social and Cultural Rights (the Committee) has published two General Comments on its interpretation of the provisions of articles 12 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Comments codify the Committee’s views on these issues in order to give states which have ratified the Covenant a clear understanding of their obligations and to indicate to government officials, legal practitioners and civil society where policy, laws and programmes may be failing and how they can be improved. The two General Comments are as follows:

### General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the ICESCR)

In its General Comment No. 14 (2000) on the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), the Committee addressed in part the issue of sexual and reproductive health. Considering the continuing grave violations of this right, however, the Committee is of the view that the issue deserves a separate General Comment. The present General Comment is aimed at assisting States Parties in their implementation of the Covenant and fulfilling their relevant reporting obligations. It primarily concerns the obligation of States Parties to ensure every individual’s enjoyment of the right to sexual and reproductive health, as required under article 12, but is also related to the various barriers that impede enjoyment of this right.

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f22&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f22&Lang=en)

## General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the ICESCR)

The Committee acknowledges that the right to just and favourable conditions of work has yet to be fully realised. Almost 50 years after adoption of the International Covenant on Economic, Social and Cultural Rights, which recognises this right, the level of wages remains low in many parts of the world and the gender pay gap remains a global problem. Other international and regional human rights treaties and related international legal instruments, including ILO conventions and recommendations, also recognise the right of everyone to the enjoyment of just and favourable conditions of work.

### For more information:

General Comments by the United Nations Committee on Economic, Social and Cultural Rights (CESCR). See [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11).

## UN Human Rights Committee to review South Africa's record on civil and political rights

As the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are marking their 50th anniversary in 2016, South Africa's human rights record was reviewed for the first time by the UN Human Rights Committee on 7 and 8 March in Geneva. The Committee was established under the ICCPR to monitor the implementation of the Covenant by States Parties.

South Africa submitted a report to the Committee on the implementation of its human rights obligations. The following non-governmental organisations sent reports for the Committee's consideration: the African Policing Civilian Oversight Forum; Right2Know; the Legal Resources Centre; the African Gender Institute, the Health and Justice Research Unit, and the Women's Health Research Unit, all based at the University of Cape Town; the Centre for Constitutional Rights, based at the FW de Klerk Foundation; the Civil Society Prison Reform Initiative and the Women and Democracy Initiative, both based at the Dullah Omar Institute at the University of the Western Cape; Gay and Lesbian Memory in Action; Gender DynamiX; IRANTI; Just Detention International – South Africa; Lawyers for Human Rights; Lesbian, Gay, Bisexual Organisation (Northern Cape); Limpopo LGBTI Proudly Out; NICRO; Scalabrini Centre of Cape Town; Sex Worker Education and Advocacy Task Force; Sonke Gender Justice; Triangle Project; and the Wits City Institute at the University of the Witwatersrand.

Issues raised by these NGOs include the struggle for protection of the rights of transgender and intersex persons, participatory democracy, criminal justice and human rights, the rights of migrants and asylum seekers, and violence against women and LGBTI people in South Africa. Obligated to submit a report every four years, South Africa has not submitted a single report since ratifying the ICCPR in 1998. In terms of the obligations under article 40 of the Covenant, South Africa's initial report was due for submission to the Committee on 9 March 2000. South Africa submitted its report only in late 2014.

South Africa's poor track record in reporting to UN treaty-monitoring bodies prompted the UN Human Rights Committee to take the exceptional measure of reviewing South Africa without having received an input from the government. This measure is usually reserved for states that have shown a general and systematic disregard for the international human rights system. According to Lukas Muntingh of the Dullah Omar Institute, the fact that South Africa is late on reporting on all but one of the major human rights treaties gives the impression that the government is either unwilling or incapable, or both, of producing the required reports.

### For more information:

International Covenant on Civil and Political Rights (ICCPR) 116 Session (7 Mar 2016 - 31 Mar 2016). See [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1016&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1016&Lang=en).

Cross cutting issues raised in five Alternate Reports to the Initial Report by South Africa under the International Covenant on Civil and Political Rights. See [http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT\\_CCPR\\_CSS\\_ZAF\\_23068\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23068_E.pdf).