

# **Exploring the link between poverty and human rights in Africa**

Edited by

Ebenezer Durojaye and Gladys Mirugi-Mukundi

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*Exploring the link between poverty and human rights in Africa*

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# PREFACE

It is a great honour for me to write the preface to this book, which deals with a very important issue affecting not only our continent but also the world. Poverty is a serious challenge to the realisation of economic and social well-being. It manifests itself in different forms and is reinforced by conflicts, structural inequality, lack of capabilities, high unemployment rate, lack of access to social amenities, food insecurity and unequal pay. It is also as a result of failure to adopt appropriate policies and programmes that will meet the needs of the people or poor implementation of poverty-reduction programmes as well as impediments in accessing justice particularly by vulnerable and marginalised groups. In 2015, the International Community adopted the Sustainable Development Goals (SDGs) with the arching goal of eradicating poverty by 2030. The SDGs contain a number of ambitious goals, which if properly implemented will see us bridging the gaps between the haves and have-nots in our societies. Many governments, including African governments have committed to ensuring that the indicators of the SDGs are met.

At the African regional level, Agenda 2063 aims at eradicating poverty, building shared prosperity through social and economic transformation to ensure that its people live a dignified life free from hunger and poverty. At different fora, our leaders have reinstated their commitments to addressing the scourge of poverty on our continent.

However, as we all know, eradicating poverty goes beyond mere words but require political will and decisive measures from our governments. We are yet to see this happen. In the last decade we have witnessed drastic decrease in the number of people living in poverty worldwide, however, this reduction remains unequal and a significant number of people living in Africa still wallow in abject poverty. It is unacceptable that millions of people should continue to live in extreme poverty. Poverty dehumanises and erodes the confidence of an individual. Therefore, it becomes necessary that all measures taken to address poverty must be grounded in human rights. As noted by the former Special Rapporteur on extreme poverty and human rights, efforts by states to address poverty should not be seen as a charitable act, rather it must be seen as a human rights obligation.

While human rights instruments do not specifically contain a provision on poverty, several of the human rights guaranteed in these instruments are relevant to addressing poverty. Moreover, the Special Rapporteur on extreme poverty and human rights has noted that some of the elements of a rights-based approach to poverty include participation, respect for dignity, equality and non-discrimination, accountability and transparency. Some of these elements are contained in the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on the Rights of Women (Maputo Protocol). Specifically, Article 13 of the Maputo Protocol contains a number of important provisions to ensure economic well-being of women and eliminate poverty. In addition, the African Commission on Human and Peoples' Rights has made efforts to address



the link between poverty and human rights in some of its work. Resolution 73, the Commission expressed concern about the prevailing condition of poverty and under-development in the region and called on states to act appropriately with a view to addressing this challenge. The Commission has expressed a similar sentiment in its Pretoria Declaration on Economic, Social and Cultural Rights, where it emphasised the importance of realising socioeconomic rights as a pathway to poverty reduction in the region. More importantly, the recent development of the Draft Protocol to the African Charter on Social Security and Protection is an important step aimed at combating poverty on our continent.

The chapters in this book would seem to resonate with the approach of the African Commission on Human and Peoples' Rights to promote and protect human and peoples' rights as well as addressing poverty over the years. Apart from adopting a multi-disciplinary approach to addressing poverty, this book places human rights principles at its core. This is a significant contribution to the debate on poverty and human rights on our continent. Researchers, policy-makers, students, institutions, civil society groups and activists will find this book very useful to their work.

**Commissioner Jamesina Essie L. King**

Chairperson Working Group on Economic, Social and Cultural Rights  
African Commission on Human and Peoples' Rights

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*Ebenezer Durojaye\* and Gladys Mirugi-Mukundi\*\**

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*Wherever we lift one soul from a life of poverty, we are defending human rights. And whenever we fail in this mission, we are failing human rights.*

Kofi Annan, United Nations Secretary-General

## 1 Introduction

Poverty remains one of the greatest challenges facing humanity in this century. Despite the fact that the world is blessed with natural and human resources, a significant number of people, particularly in developing countries, still live in abject poverty. Recent developments show that efforts at combating poverty across the globe are yielding positive results as there seems to be a significant decrease in the number of people living in extreme poverty in poor regions. The picture is not all rosy, however, as there remains a great cause for concern as the world's poorest people still live in developing countries.

An estimated 736 million people worldwide – the majority in South Asia and Africa – live in extreme poverty.<sup>1</sup> Indeed, half of these people live in five countries, namely, India, Nigeria, the Democratic Republic of the Congo (DRC), Ethiopia and Bangladesh.<sup>2</sup> Almost 1,4 billion people are living in extreme poverty.<sup>3</sup> The poverty situation in many developing countries, particularly Africa, is exacerbated by famine, conflict, the lack of access to basic services such as health care, water, sanitation and electricity, unemployment and corruption. While the majority of persons living in extreme poverty are found in developing countries, some of them also live in developed countries.

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1 United Nations *The Millennium Development Goals Report* (2011) 5.

2 World Bank 'Understanding poverty' (2019), <https://www.worldbank.org/en/topic/poverty/overview> (accessed 19 August 2019).

3 As above.

Widespread poverty and a lack of coherent responses by governments often translate into the inadequate provision of basic services, such as health care, sanitation and education. Armed conflicts have been singled out as one of the determinants of poverty and human misery in sub-Saharan Africa, affecting more than half the countries of the continent during the past two decades'.<sup>4</sup>

Poverty and inequality are a constant phenomenon persisting in many countries in Africa. As Africa continues to grow economically stronger, poverty and inequality remain 'unacceptably high and the pace of reduction unacceptably slow'.<sup>5</sup> For example, for a long time South Africa had the highest level of income inequality (Gini coefficient) in the world. This is further compounded by the global financial crisis that has had a negative impact particularly on the lives of people already living in poverty.

As a consequence of the 2008 global financial and economic crisis, a growing number of African countries are setting up social safety nets to protect the health and livelihoods of poor and vulnerable people during periods of adversity. The MDG Report 2013, which assessed progress in Africa toward the Millennium Development Goals, observed that while Africa is the world's second fastest growing region, its rate of poverty reduction was insufficient to reach the target of halving extreme poverty by 2015.

In September 2015 the UN General Assembly (UNGA) adopted the Sustainable Developments Goals (SDGs) with approximately 17 goals. The overarching goal of the SGDs is to ensure that no one is left behind in the fight to eradicate poverty worldwide. Indeed, the international community resolved to eradicate poverty in the world by 2030. This is a significant call given the disparity and inequities of our world. While it would seem that the average number of people living in poverty has dropped drastically in some parts of the world, poverty remains widespread in many parts of sub-Saharan Africa.

Indeed, the World Bank observes that 'two regions, East Asia and Pacific and East and Central Europe, have already reduced extreme poverty below 3 per cent.<sup>6</sup> However, Africa remains the poverty capital of the world as more than half of the people living in extreme poverty are from the region.<sup>7</sup> More disturbing is the fact that the region has made no progress in reducing the number of people living in extreme poverty as the figure has increased by 9 million.<sup>8</sup>

4 As above.

5 World Bank 'Africa pulse: An analysis of issues shaping Africa's economic future', [http://www.worldbank.org/content/dam/Worldbank/document/Africa/Report/Africas-Pulse-brochure\\_Vol7.pdf](http://www.worldbank.org/content/dam/Worldbank/document/Africa/Report/Africas-Pulse-brochure_Vol7.pdf) (accessed 19 August 2019).

6 As above.

7 As above.

8 As above.



Poverty is pervasive across the world not because the world lacks the technology or resources to eradicate it, but because governments, particularly those in developing countries, have not exhibited the political will to combat poverty. It is important to point out that poverty is not an inevitable end to be blamed on the poor, but rather a matter of social injustice. People do not wish to be poor; rather, they are often deprived of the opportunity to lead a worthy life. Experience has shown that many developing countries have failed to adopt positive measures that will improve the living conditions of their people and help them to avoid poverty. Poverty is not a sin; it is a failure by existing institutions to create opportunities for disadvantaged groups to live to their fullest potential.

It should be noted that during the World Summit on Social Development in Copenhagen in 1995, the international community committed itself to eradicating poverty in the world.<sup>9</sup> This was reaffirmed in the Millennium Declaration of 2000, establishing the Millennium Development Goals (MDGs) and, more recently, the SDGs.

## 2 Understanding poverty

In ordinary parlance, poverty may be described as a situation whereby a person lacks certain material possessions or amounts of money. The word 'poverty' originates from the Latin word pauper, that is, poor. According to the World Bank, poverty may be described as a deprivation in well-being and comprises different dimensions.<sup>10</sup> These may include a low income or the inability to acquire the basic goods and services necessary for survival with dignity. The World Bank further explains:<sup>11</sup>

Although it is often thought of as a lack of material resources, poverty is correlated closely with all aspects of a person's life: the world's poor are more likely to be malnourished, they have less access to services like education, electricity, sanitation and healthcare, and they are more vulnerable to conflict and climate change. Understanding poverty is thus fundamental to understanding how societies can progress.

More importantly, Cloke et al have noted that poverty encompasses inadequate access to clean water and sanitation, low levels of health and education, inadequate physical security, and a lack of capacity or opportunity to improve one's life.<sup>12</sup>

The World Bank recently acknowledged that extreme poverty has

9 United Nations *Final Report of the World Summit for Social Development (also includes the Copenhagen Declaration and Programme of Action)* A/CONE 166/9.

10 World Bank *World development report* (2018) 6.

11 World Bank *World Development Indicators* (2018), <http://datatopics.worldbank.org/world-development-indicators/themes/poverty-and-inequality.html> (accessed 10 August 2019).

12 P Cloke et al (eds) *Introducing human geographies* (2013).

rapidly declined.<sup>13</sup> According to ‘Poverty in a rising Africa’, a research report by the World Bank, although extreme poverty globally has rapidly declined, the number of people living in extreme poverty is on the rise in sub-Saharan Africa.<sup>14</sup> This is true as seven of the ten most unequal countries in the world are in Africa, most of these in Southern Africa.<sup>15</sup>

Poverty has also been defined as a denial of the choices and opportunities necessary for the enjoyment of an adequate standard of living and as a violation of human dignity.<sup>16</sup> For different people who actually experience poverty first hand, the term ‘poverty’ means different things. Hulme et al point out that the imposition of definitions of poverty from above can become disempowering for the poor.<sup>17</sup> Some of those who suffer from poverty have described poverty in different ways according to their peculiar experiences. To some people, poverty means not having enough to feed and clothe a family while, to others, poverty means not having a school or clinic to attend, not having the land on which to grow one’s food or employment to earn one’s living, or not having access to credit.

Yet others have described poverty to mean insecurity, powerlessness and the exclusion of individuals, households and communities, while to some poverty means susceptibility to violence, and often implying living in marginal or fragile environments, without access to clean water or sanitation.<sup>18</sup> There are different dimensions of poverty, including income, human, absolute/extreme and relative/moderate poverty. Although poverty often is measured by levels of income, it should be noted that poverty goes beyond mere income. It includes various factors, or what Sen refers to as ‘capabilities’, such as access to education, housing, sanitation, health care and life expectancy.

### 3 Nexus between poverty and human rights

We live in such an unequal world where the gaps between the rich and poor are daily expanding. The opportunities for the rich seem to be increasing, while the hopes of rising above poverty for millions of people living in extreme poverty continue to decrease. According to the report by Oxfam, in 2018 about 26 people owned the same as the 3,8 billion

13 New poverty estimates by the World Bank suggest that the number of extremely poor people – those living on \$1,90 per day or less – has fallen from 1,9 billion in 1990 to approximately 736 million in 2015. For details, see <https://blogs.worldbank.org/opendata/number-extremely-poor-people-continues-rise-sub-saharan-africa> (accessed 10 August 2019).

14 For more information, see K Beegle et al *Poverty in a rising Africa* (2016). See ch 4 on inequality in Africa.

15 As above.

16 UN Committee on Economic, Social and Cultural Rights ‘Poverty and the International Covenant on Economic, Social and Cultural Rights’ E/C12/2001/10 United Nations (2001).

17 D Hulme et al ‘Chronic poverty: Meanings and analytical frameworks’ Chronic Poverty Research Centre Working Paper 2 (2001).

18 D Naraya et al *Voices of the poor: Can anyone hear us?* (2000) 5 9.

people who make up the poorest of the world.<sup>19</sup> The report further states that between March/June 2017 and March/June 2018 the wealth of the super-rich grew by \$2,5 billion (€2,2 billion) per day on average, while the bottom half of the world's population saw their wealth dwindle by \$500 million daily over the same period.<sup>20</sup>

The report notes that Africa remains the region with the highest number of people living in extreme poverty (42 per cent compared to 41 per cent in South Asia).<sup>21</sup> The report sums up the situation as follows:<sup>22</sup>

Our economy is broken. Hundreds of millions of people living in extreme poverty while huge rewards go to those at the very top. There are more billionaires than ever before, and their fortunes have grown to record levels. Meanwhile, the world's poorest got even poorer.

This truly calls for drastic measures rooted in the human rights approach to address these imbalances.

While there has been progress in reducing poverty, especially in some middle-income countries, the second United Nations Decade for the Eradication of Poverty (2008-2017) noted that

such progress has been uneven and the number of people living in poverty in some countries continues to increase, with women, children and older persons, as well as other persons in vulnerable situations, constituting the majority of those most affected, especially in the least developed countries and particularly in sub-Saharan Africa.<sup>23</sup>

During the past decade considerable research has been carried out and policy attention been given to the nexus between poverty and human rights in Africa. Pogge illustrates the interconnectedness of poverty and human rights when he states that

most of the current massive under fulfilment of human rights is more or less directly connected to poverty. The connection is direct in the case of basic social and economic human rights, such as the right to a standard of living adequate for the health and well-being of oneself and one's family, including food, clothing, housing, and medical care. The connection is more indirect in the case of civil and political human rights associated with democratic government and the rule of law.<sup>24</sup>

There often is debate over whether poverty on its own constitutes a human rights violation under international law. Some commentators are of the view that the various international human rights instruments do not explicitly recognise poverty as a human right violation. Given its amoebic

19 Oxfam *Annual Report: Public good or private wealth?* (2019).

20 As above.

21 As above.

22 As above.

23 Second United Nations Decade for the Eradication of Poverty (2008-2017) UN Doc A/RES/70/218. For more details, see [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/70/218](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/218) (accessed 19 August 2019).

24 [http://www2.ohchr.org/english/issues/poverty/expert/docs/Thomas\\_Pogge\\_Summary.pdf](http://www2.ohchr.org/english/issues/poverty/expert/docs/Thomas_Pogge_Summary.pdf) (accessed 19 August 2019).

nature, it is difficult to conclude that poverty amounts to a violation of human rights. This would seem to expect too much from the state. While being poor may not amount to a human rights violation, it is incontestable that the failure by a state to create an enabling environment to enable its people to live a dignified life will amount to a deprivation of human rights.

In essence, the failure by a state to adopt measures and policies that can ensure access to basic amenities and social services, such as water, electricity, food, housing and health, and improve the living conditions of the people would amount to a human rights violation. Conversely, where a state adopts stringent or restrictive policies such as austerity measures, which further plunge the people into debt and poverty, the state would be deemed to have failed in its obligation to protect and promote the rights of vulnerable and marginalised groups.<sup>25</sup>

According to the former UN Special Rapporteur on Extreme Poverty and Human Rights, poverty is an urgent human rights concern. For those living in extreme poverty, many human rights are out of reach.<sup>26</sup> She further states that while poverty *per se* may not amount to a human rights violation, it without doubt is a cause and consequence of a human rights violation.<sup>27</sup>

Eliminating poverty and promoting human rights are inter-related objectives of many international treaties and commitments. Indeed, the UN has been in the forefront of adopting a rights-based approach to addressing extreme poverty and inequality in the world. Thus, in 2004 the Human Rights Council established the office of the Independent Expert on Extreme Poverty. This was later converted to a Special Rapporteur in 2008, and Carmona Sepulveda, a Chilean lawyer and academic, became the first person to assume the office of the Special Rapporteur on Extreme Poverty. Since then, the Special Rapporteur has made an important contribution to the discussion on the link between extreme poverty and human rights.

The mandate of the Special Rapporteur on Extreme Poverty was established to give greater prominence to the plight of those living in extreme poverty and to highlight the human rights consequences of the systematic neglect to which they are all too often subjected.<sup>28</sup> In some of the reports by the Special Rapporteur, the emphasis has been placed on the need for states to adopt a rights-based approach to eliminating inequality and removing barriers to leading a dignified and meaningful

25 Eg, in Case 66/2011 the European Committee of Social Rights overturned austerity measures that would have brought wages under the poverty level, citing breaches of labour rights and protection against discrimination.

26 For more details, see <https://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx> (accessed 19 August 2019).

27 See M Sepulveda & C Nyst *The human rights approach to social protection* (2012) 18.

28 For more details, see <https://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx> (accessed 19 August 2019).

life.<sup>29</sup> Some of the reports have addressed issues such as social protection and human rights; unpaid care work among women; the link between inequality and human rights; the right to participation of people living in extreme poverty; the World Bank and extreme poverty; privatisation and human rights; and universal basic income.<sup>30</sup>

All in all, the UN Special Rapporteur on Extreme Poverty and Human Rights proposes that

a human rights definition and understanding leads to more adequate responses to the many facets of poverty, responses that do not trample on rights in the pursuit of growth and development. It gives due attention to the critical vulnerability and subjective daily assaults on human dignity that accompany poverty. Importantly, it looks not just at resources but also at the capabilities, choices, security and power needed for the enjoyment of an adequate standard of living and other fundamental civil, cultural, economic, political and social rights.

In addition, the Human Rights Council in 2012 adopted the Guiding Principles on Extreme Poverty and Human Rights,<sup>31</sup> which provide a framework for states on how to integrate human rights into policies and programmes to address extreme poverty.<sup>32</sup>

In June 2012 the International Labour Organisation General Assembly adopted Recommendation 202 on Social Protection Floors.<sup>33</sup> This was a significant achievement, in the sense that it urges all governments to guarantee universal social protection coverage for all, especially vulnerable and marginalised groups. It further enjoins states to adopt a minimum level of non-contributory social protection as a matter of human rights obligations.<sup>34</sup> Recommendation 202 serves as a catalyst for governments across the world, and particularly in Africa, to addressing poverty through the implementation of social protection programmes that are grounded in the respect for human rights.

At the regional level, efforts are currently underway to adopt a rights-based approach to ending poverty. The African Union (AU) has recognised the importance and issued a 2004 Declaration on Employment and Poverty Alleviation in Africa which was reviewed in September 2014. Furthermore, in 2012 African law makers acknowledged that the 'causes of the poverty [in Africa] are multidimensional, connected in particular to inappropriate economic strategies, to conflicts, to corruption, to external

29 For more details on the reports, see <https://www.ohchr.org/EN/Issues/Poverty/Pages/AnnualReports.aspx> (accessed 19 August 2019).

30 As above (accessed 10 February 2018).

31 See United Nations 'The Guiding Principles on Extreme Poverty and Human Rights', <http://www.ohchr.org/EN/Issues/Poverty/Pages/DGPIIntroduction.aspx> (accessed 20 February 2014).

32 For a detailed discussion on the Guiding Principles, see E Durojaye 'When poverty is not a sin: An assessment of the Guiding Principles on Extreme Poverty and Human Rights (2014) 22 *African Journal of International and Comparative Law*.

33 ILO Recommendation 202 adopted in June 2012.

34 As above.

debts, to natural disasters and to absence of good governance'.<sup>35</sup> More importantly, the inclusion of socio-economic rights in the African Charter on Human and Peoples' Rights (African Charter), the protective and promotional mandate of the African Commission on Human and Peoples' Rights (African Commission) and the establishment of the African Court on Human and Peoples' Rights (African Court) all present a golden opportunity to address poverty from a rights-based perspective in Africa.

While the work of the African Commission has not directly construed poverty as a human rights violation, it has indirectly alluded to this in some of its norms. For instance, the Principles and Guidelines for the Implementation of Economic, Social and Cultural Rights in the African Charter urge African governments to address various socio-economic rights that may lead to improved social conditions and standards of living. In some of its Concluding Observations to states, the African Commission has expressed concerns about high levels of poverty and negative impacts of socio-economic challenges.<sup>36</sup> Furthermore, in some of its jurisprudence, the African Commission has found states to be in violation of human rights for failing to provide social services such as health care, water and electricity.<sup>37</sup>

At the national level, many African governments have framed national development plans and strategies, including poverty reduction strategies. The aim of these strategies is to eradicate poverty and mitigate the impact of underdevelopment by providing direct support to poor and vulnerable people as well as to enhance the capacity of women and girls and empower them to meet the negative social and economic impacts of globalisation. However, more often than not the missing link in these strategies is a lack of a rights-based approach to poverty reduction.

## 4 Significance of this book

From the discussion above, it is clear that poverty has many dimensions and causes, which require different types of action at different levels (international, regional, national and sub-national) if it is to be significantly reduced. In this book, attempts have been made by different authors to explore the subject of poverty from different perspectives.

Some earlier publications on the same issue have explored socio-cultural or economic factors that cause poverty. However, very few

35 Resolution on 'The role of parliaments in implementing poverty reduction strategies' Doc R 133/35/12, 35th African Parliamentary Union, Kigali, Rwanda, 29 & 30 November 2012.

36 See eg Angola '2nd Periodic Report, 1999-2010' 5; Benin '2nd Periodic Report, 2000-2008' 28; Botswana '1st Periodic Report, 1986-200' para 466; Namibia '3rd Periodic Report, 2002-2009' 5; Togo '2nd Periodic Report, 1991-2001'. For a detailed discussion on this issue, see Nkrumah (ch 10 of this edition).

37 See cases such as *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) (*Darfur case*).

publications have focused on poverty from a rights-based perspective in the African region as a whole.

For instance, Fosu et al in *Poverty in Africa: Analytical and policy perspective* explore the extent of poverty in Africa and the institutional constraints to poverty reduction.<sup>38</sup> The book further provides an analysis of poverty, income distribution and labour markets, and offers a range of tools for monitoring poverty and assessing the impacts of various poverty reduction programmes.

Another edited volume by Jones and Nelson<sup>39</sup> focuses on the urban poverty debate at a time when there is renewed interest in urban poverty and management from the World Bank and other multilateral development agencies. With contributions by academia, practitioners and urban poverty specialists, the book adopts a multi-disciplinary approach to the debate, highlighting the need to link policy, institutional and grassroots efforts. Neither of these books, however, adopts a rights-based approach to the discussion on poverty in Africa.

The edited volume by Liebenberg and Quinot tends to explore the nexus between poverty and human rights, but focuses mainly on South Africa.<sup>40</sup> Moreover, contributors to this book are mostly academics and practitioners with legal backgrounds. To that extent, it may be argued that no other book has comprehensively explored poverty from a multi-disciplinary approach.

Thus, this book is significant in the sense that it approaches poverty, which has almost become an albatross to many Africans, from both a rights-based and sociological perspective. It is premised on the fact that African governments are responsible for adopting policies and programmes that will prevent poverty in their countries. In other words, acts or omissions by African governments may either contribute to poverty or aggravate the poverty situation of the people. For instance, it has been established that corruption, mismanagement, inequalities and poor leadership have exacerbated the depressing poverty situation in Africa. This coincides with the Guiding Principles on Extreme Poverty and Human Rights, which state in the Preamble:<sup>41</sup>

Extreme poverty is not inevitable. It is at least in part, created enabled and perpetuated by acts and omission of States and other economic actors ... Structural and systemic inequalities – social, political, economic and cultural – often remain unaddressed and further entrench poverty. A lack of policy coherence at the national and international levels frequently undermines or contradicts the commitment to combat poverty adopted.

38 A Fosu, G Mwabu & E Thorbecke (eds) *Poverty in Africa: Analytical and policy perspective* (2009).

39 S Jones & N Nelson (eds) *Urban poverty in Africa* (1999).

40 S Liebenberg & G Quinot *Law and poverty perspectives from South Africa and beyond* (2011).

41 *Guiding Principles* (n 29).

Therefore, allowing a significant number of the people to wallow in extreme poverty is an indication of the failure of a state to meet its human rights obligations.<sup>42</sup> The main objective of this book is to explore from a rights-based perspective the various dimensions of poverty in Africa. It aims to establish that measures and steps adopted to address poverty in Africa must be grounded in human rights principles and standards. Other objectives include:

- to assess the impact of poverty on vulnerable and marginalised groups;
- to explore the nexus between poverty and the enjoyment of socio economic rights; and
- to discuss the importance of access to justice in addressing poverty in Africa.

## 4.1 The relevance

The book was conceptualised during a Colloquium on Poverty and Human Rights in Africa which took place from 27 to 28 November 2014 at the Protea Hotel, Sea Point, Cape Town, South Africa.

The Colloquium, which was convened by the Dullah Omar Institute, to share evidence-based knowledge and experience on how human rights violations drive and deepen poverty in Africa, resulted into highly-incisive and stimulating presentations and discussions.

According to the participants at the Colloquium, widespread poverty and a lack of coherent responses by governments often translate into the inadequate provision of basic services, such as health care, sanitation and education,

While this book focuses on the link between poverty and human rights in Africa, it does not feature contributions from French or Lusophone speaking countries due to language barriers. This book will be useful to researchers, students, academics, persons in working in civil society organisations, government departments and institutions, the judiciary, international organisations, human rights institutions and bodies and individuals interested in the issue of poverty.

## 5 Overview of the book

The book is divided into four sections of 12 chapters addressing diverse issues relating to poverty in Africa.

### 5.1 Section I: Trends and incidence of poverty in Africa

Chapter 1 of this book by Durojaye and Mirugi-Mukundi serves as the

42 Durojaye (n 30) 468.



introduction and lays bare the purpose and aims of the volume.

In chapter 2 May examines the link between national plans, budgets and poverty reduction in South Africa. May argues that proper planning, policy formulation and research are critical to the realisation of access to food. Using South Africa as a case study, he points out that the national development plan has urged improvements in household food and nutrition. However, he is of the view that for such plans to succeed, it requires more detail and must be grounded in human rights norms. More importantly, he argues that human rights principles need to be incorporated into the budgetary and planning programmes in South Africa in order to realise food security. He identifies some right-based approaches to planning for food security to include food security diagnostics, macro- and micro-economic policies, the appropriate sequencing of policy and multi-year budgeting.

In chapter 3 Sekyere, Gordon, Pienaar and Bohler-Muller focus on the implications of inequality for poverty in South Africa. The authors identify three dimensions of social inequality in South Africa, to include income inequality, poverty and human development, and access to services. The authors lament that more than 20 years after democracy in South Africa the inequality gaps have widened and remain a threat to social and economic development. Relying on the World Bank report, the authors observe that South Africa remains the fourth most unequal country in the world. They identify the main drivers of income inequality in the country as race, gender and geographical location. The authors then examine the link between human development and poverty in the country. The authors observe that there have been mixed progress with regard to indicators on human development in the country. They argue that 'as poverty is a reflection of multiple forms of deprivation in an individual's life, it is important to explore multidimensional subjective poverty measures'. In conclusion, the authors recommend that a holistic approach to measuring inequality with a stronger focus on subjective multi-dimensional indicators might be the way forward to addressing inequality in South Africa

In chapter 4 Bond examines a very important, yet controversial, issue relating to 'state capture' in South Africa and the impact of this on poverty. Building on the preceding chapter, the author further explores the debates around poverty and inequality, on the one hand, and rampant economic corruption, on the other. In a very interesting analysis, the author examines how neo-liberal policies contribute to the poverty situation in the country. He warns that unless the root causes of these miseries and their linkages are addressed, most researchers and commentators will continue to be reduced to repeating simple narratives: Apartheid was a tragedy the legacy of which can be addressed by deracialising capitalism; inequality must be addressed through a more sensible economic policy, a generous social policy and a growing middle class to ensure stability; the way forward is to restore macro-economic discipline, maintain conservative fiscal policy, tackle state and especially parastatal corruption, and rebuild the

credit ratings agencies' confidence in South Africa. However, he provides a contrasting argument based on the following: Apartheid was not economically irrational for capitalism during the twentieth century but was mostly functional – until skilled labour supplies became constrained, the limits of white consumer markets had been reached, and the financial crisis hit hard in 1985; this legacy has continued as evident in the still racially-biased labour market and the structured production of inequality ('uneven development') in nearly all other social spheres; systemic socio-economic corruption is largely due to a factor typically ignored in South African narratives until mid-2017, namely, corporate economic crime.

## **5.2 Section II: Poverty and socio-economic rights**

This section opens with chapter 5, a contribution by Mbanjo-Mweso who examines the relevance of the right to water to poverty reduction, in general, but particularly among women. She argues that a lack of access to water undermines productivity and ultimately economic growth, thereby deepening the inequalities that characterise current patterns of globalisation that trap vulnerable households in cycles of poverty. According to her, addressing poverty among women and vulnerable groups requires access to water for production and not merely to meet the daily needs of the people. She points out that despite the contentious nature of the right to water, the chapter attempts to argue for the recognition of the right to water for growing food. In conclusion, she argues that states should take more drastic measures to ensure that women have access to water for food production and other usages.

In his contribution Oluduro in chapter 6 discusses the causal link between poverty and environmental degradation and the way environmental pollution aggravates the poverty situation of people. The chapter further examines the legal framework to address environmental pollution and how this may help in reducing poverty in the region. He concludes by urging African governments to take collective action to protect the environment in order to reduce poverty-related activities that continue to damage the environment and puts the people at risk.

## **5.3 Section III: Poverty and vulnerable groups**

The section focuses on the impact of poverty on certain vulnerable groups such as women, older persons and persons with disabilities.

The section commences with chapter 7 where Malherbe examines the need for reform in pension laws and how retirement reforms can be utilised to address poverty of not only older persons, but other members of their households as well. She argues that this can only happen if retirement reforms are made an integral part of the social security reforms that are

based on the realisation of the right to social security. She concludes by noting that attempts at retirement reforms must place the emphasis on principles of human rights and strive towards universal access to social security.

In chapter 8 Chilemba discusses the link between disabilities and poverty. He observes that in many societies, including in Africa, the poverty rates among persons with disabilities are often higher compared to the rates among other members of the population. He further notes that persons with disabilities encounter discriminatory practices in society, which result in a lack of access to social services and perpetuate poverty. The chapter considers how the Convention on the Rights of Persons with Disabilities (CRPD) can serve as a useful tool for addressing poverty among persons with disabilities in Africa. It analyses disability-related legislation in some African countries for realising the rights to equality, employment, education and social security. The chapter concludes by identifying weaknesses in some of the pieces of legislation in addressing poverty among persons with disabilities and provides some suggestions for the way forward.

The feminisation of poverty in Southern Africa is the focus of Chapter 9 by Ntlama. She provides an analysis of the efforts by the Southern African Development Community (SADC) governments through the legal framework – Gender and Development Protocol – in addressing the link between gender inequality and poverty in the sub-region. In applying a qualitative method, the chapter discusses the importance of legal reforms in advancing women's rights in general and addressing gender inequality and poverty. Using the Gender Protocol as the basis of analysis, she observes that although legal reforms are important, they can only be effective if combined with other measures and strategies to address gender inequality in society.

#### **5.4 Section IV: Poverty and access to justice**

The last section of the book considers the importance of access to justice in poverty reduction of vulnerable and marginalised groups. The section discusses the regional and national framework on access to justice for vulnerable and marginalised groups.

In chapter 10 Nkrumah examines the potential of the African human rights system in realising access to justice for disadvantaged groups and how this can potentially reduce poverty in the region. Nkrumah argues that the inclusion of socio-economic rights and the recent Declaration on Employment and Poverty Alleviation in Africa provide the impetus to addressing poverty in the region. He particularly singles out the African Charter as a one of the celebrated regional human rights instruments that guarantees both civil and political rights and socio-economic rights as enforceable rights. According to him, this ensures that the 'substantive

norms provide formal avenues for the quasi-judicial and judicial ambits of the regional human rights architecture to adjudicate on, and enforce socio-economic rights and freedom from poverty'. He concludes by noting that through collaboration and harmonisation of the mandates of the monitoring bodies, the AU human rights system provides the strongest framework for addressing poverty.

In chapter 11, on realising access to justice for vulnerable groups, Balogun identifies some of the challenges relating to access to justice for disadvantaged groups and how this exacerbates poverty. She notes that access to justice and resources is essential to address inequality and poverty in any society. She further points out that African governments should embark on reforms that will ensure access to justice for vulnerable and marginalised groups in rural communities, with a view to addressing poverty. She uses the example of a non-governmental organisation, Centre for Community Justice and Development, as a case to illustrate the importance of addressing poverty through the realisation of access to justice for people in rural communities.

Adams in chapter 12 discusses the role of national human rights institutions in facilitating access to justice for disadvantaged groups in society. Using the South African Human Rights Commission (SAHRC) as a case study, she argues that the Commission has played an important role in ensuring that the government adheres to its constitutional obligations to protect and promote the rights of disadvantaged groups in society. She further discusses the link between poverty and human rights in South Africa and highlights the role of the SAHRC in addressing poverty and ensuring accountability on the part of the government to protect marginalised groups in society. She concludes by noting that despite the promising role of the SAHRC in addressing poverty in the country, the Commission faces challenges that have hampered its effectiveness in this regard.

# CHAPTER 2

## INTEGRATING A HUMAN RIGHTS APPROACH TO FOOD SECURITY IN NATIONAL PLANS AND BUDGETS: THE SOUTH AFRICAN NATIONAL DEVELOPMENT PLAN

Julian May\*

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### Abstract

*Planning for food security and nutrition is an important area of policy development and research. In the case of South Africa, the National Development Plan (NDP) calls for improvements in household food security and nutrition. Although the NDP does not provide details as to how this is to be achieved, this is necessary if the implementation of plans is to also take account of human rights. This has implications for the activities that are to be undertaken as well as the costs that will be associated with these activities. In particular, human rights will need to be accommodated in the budgetary procedures that accompany development planning. Methods through which economic costs and benefits of alternative policies can be planned are discussed. These include food security diagnostics, macro- and micro-economic policies, the appropriate sequencing of policy and multi-year budgeting.*

### 1 Introduction

National development strategies that put forward comprehensive plans have become important instruments through which to coordinate policies intended to improve human well-being. The purpose of such planning activities is to assist in the prioritisation of policies, including the identification of the resources required. Resolving the conflicts that inevitably arise from competing needs should be a component of these plans. These include those that follow from the incompatibilities of a developmental state approach versus market-driven economic growth.

South Africa's National Development Plan (NDP) is one such plan that specifically mentions food security as a goal.<sup>1</sup> A National Policy for

\* Director, NRF-DST Centre of Excellence in Food Security, University of the Western Cape, South Africa. Ideas contained in this chapter were originally presented at an Experts Meeting organised by UNESCO, 'Poverty reduction strategies tackled through the human rights framework: Comments and validation of strategic documents' European Union Institute for Security Studies, Paris, France, 10-11 December 2009. Comments received from Else Øyen of the Comparative Research on Poverty programme at the University in Bergen, and Chifa Tekaya of UNESCO are acknowledged.

1 NPC *National Development Plan 2030: Our future, make it work* (2011a).

Food and Nutrition Security builds on the NDP and seeks to establish a platform for increasing and better targeting public spending in social programmes that impact on food security. Although short on detail, the National Policy also intends increasing food production and distribution, leveraging government food procurement to support community-based food production initiatives and smallholders, and strategically using market interventions and trade measures to promote food security.<sup>2</sup> In some cases, these national plans are complemented by provincial growth and development plans and, in the case of the Western Cape, a provincial Food Security and Nutrition Strategy.<sup>3</sup>

The emphasis placed on food security by these policy documents is appropriate. As a public good carrying culpability in its production and duty in its reduction, a human rights lens on food security can shape the negotiations arising during the planning process. The human rights perspective provides some sense of the minimum norms that should be applied when making decisions. Importantly, a human rights approach obliges governments to use their available resources to achieve rights objectives. This applies even if the measures required imply the reallocation of government resources or broader forms of redistribution such as land reform, free basic education or universal cash grants.

This means that the national budgeting process is one mechanism whereby priorities are presented to the public and the choices made in resource allocation are made transparent and more widely accepted through public participation. The contribution of this chapter is to link human rights to food security and nutrition, to discuss how national development planning is influenced by this relationship, and to identify budget planning activities that can be redesigned to better take account of the human rights approach.

## 2 Human rights and food security

Mathews provides a useful summary of the key principles informing a human rights approach, linking these to the process of human development broadly defined.<sup>4</sup> Many of these principles can comfortably be accommodated within the current discourse of development planning.

- 2 DAAF/DSD 'National Policy on Food and Nutrition Security' (2013) Department of Agriculture and Forestry/Department of Social Development <http://www.nda.agric.za/docs/media/NATIONAL%20POLICYon%20food%20and%20nutrition%20security.pdf> (accessed 7 October 2017).
- 3 DPLG *Provincial Growth and Development Strategy Guidelines* (2005) <http://www.thepresidency.gov.za/docs/pcsa/planning/pgdsguidelines.pdf> (accessed 12 August 2017); Western Cape Government *Household Food and Nutrition Security Strategic Framework* (2016) [www.westerncape.gov.za/files/assets/140916\\_wcg\\_household\\_food\\_and\\_nutrition\\_security\\_strategic\\_framework.pdf](http://www.westerncape.gov.za/files/assets/140916_wcg_household_food_and_nutrition_security_strategic_framework.pdf) (accessed 20 October 2017).
- 4 S Mathews 'UNESCO Expert Group – Development of human rights guidelines and minimum norms for Poverty Reduction Strategy Papers (PRSP) (2007); Committee on Food Security (CFS) *Coming to terms with terminology* (2012) Committee on World Food Security 39th Session Rome, Italy, <http://www.fao.org/docrep/meeting/026/MD776E.pdf> (accessed 17 October 2017)..

Examples include the obligations to take steps, the requirement to monitor and plan, and the importance placed on transparency, empowerment and accountability. Others fit less comfortably within the current praxis and, in some cases, the theorisation of food security and nutrition.

In particular, the principles of universality, inalienability, indivisibility and interdependence are critical components of the human rights approach which proposes that different rights are inseparable. Although recognised as being multi-dimensional, food security is not usually conceptualised in this way and, instead, different components are usually independently measured, analysed or targeted by policy.

For example, the Committee on World Food Security (CFS) states that '[f]ood security exists when all people at all times have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life'.<sup>5</sup>

Four dimensions are identified (availability, access, utilisation and stability). These are hierarchical in nature: Food availability is necessary but not sufficient for access; access is necessary but not sufficient for utilisation; stability is necessary but not sufficient for utilisation.

Durojaye and Chilemba review statements concerning food security provided by the UN Special Rapporteur on the Right to Food and the UN Committee on Economic, Social and Cultural Rights (ESCR Committee).<sup>6</sup> They conclude that the right to food can be understood as 'the right of every person as a consumer to have access at all times, directly or by means of purchase, to adequate food that fosters a fulfilling life of dignity'.<sup>7</sup>

This approach is recognised in South Africa's 2013 National Policy on Food and Nutrition Security Policy in which food security is defined as 'access to and control over the physical, social and economic means to ensure sufficient, safe and nutritious food at all times, for all South Africans, in order to meet the dietary requirements for a healthy life'.<sup>8</sup>

Food security is complex in that some aspects, such as food itself, are economic goods that are privately produced and consumed, while other aspects, such as food safety, are public goods. That is to say, benefits (or costs) are non-rivalrous (consumption by one does not reduce availability for others) or non-exclusive (market transactions do not exclude some from the benefits (or costs) of consumption) or both. Kaul and Mendoza argue that the roles assigned by society to an economic good should be

5 Committee on Food Security (n 4).

6 E Durojaye & EM Chilemba 'Research on accountability and the right to food: Comparative study of India and South Africa' (2017) Centre of Excellence in Food Security Working Paper 3 4, <http://foodsecurity.ac.za/working-papers> (accessed 24 October 2017).

7 As above.

8 Department of Agriculture and Forestry and Department of Social Development *National Policy on Food and Nutrition Security* (2013).

taken into account when determining what is private and what is public.<sup>9</sup> That is to say, society may deem some private goods to be ‘*de facto* public in their consumption’ and, thus, take steps to modify the ‘(non)rivalry and (non)excludability of their costs and benefits through public policy’.<sup>10</sup> By assigning food security as a human right, its operation as a public good is socially assigned, and interventions for its management will need to be adjusted accordingly.

Such interventions will need to recognise that the sequence of economic and social policy reforms may matter, with some sequencing options being more optimal than others.<sup>11</sup> This raises the question as to whether human rights can be displaced in the short run by policies that increase the resource base for the longer term. To some extent this conundrum can be resolved since the human rights approach does accept a process of continuous and progressive realisation, a methodic, irreversible movement forward toward the fulfilment of rights. This provides a conceptual bridge linking the imperfect process of achieving food security to the fulfilment of human rights and the adherence to human rights principles.

For food security, the implication of progressive realisation is that while the South African government may promote policy goals such as economic growth over a more just distribution of resources as necessary precursors, this should not be at the cost of human rights. Further, the principle of non-retrogression means that the South African government may not permit steps to be taken that increase existing levels of malnutrition and hunger. Aligning policy with a human rights approach requires that possible negative outcomes that follow from growth-promoting policies be assessed in terms of their consequences on the existing rights of citizens. While measures that delay the attainment of rights could be acceptable if these measures form part of a progressive realisation, measures that result in retrogression would not.

The human rights framework also provides for minimum core obligations to which governments are obliged to devote ‘maximum available resources’. This refers to a minimum level that must be guaranteed to all people in all contexts.<sup>12</sup> The precise nature of this minimum will vary according to the rights being considered, and at this stage there is consensus neither on the levels nor on whether a definition of these obligations is desirable.

Some of these obligations overlap with existing definitions of food security. In particular, recent approaches that view deprivation in terms

9 I Kaul & RU Mendoza ‘Advancing the concept of public goods’ in I Kaul et al (eds) *Providing global public goods: Managing globalisation* (2003) 80.

10 As above.

11 R Kanbur ‘Economic policy, distribution and poverty: The nature of the disagreements’ (2001) 29 *World Development* 1083; SM Nsouli et al ‘The speed of adjustment and the sequencing of economic reforms: Issues and guidelines for policymakers’ (2005) 32 *International Journal of Social Economics* 740.

12 See General Comment 12 of the ESCR Committee.



of shortfalls in human capabilities have a strong resonance with the human rights approach.<sup>13</sup> However, some of these core obligations are not specified in sufficient detail for strategy development, while others may impose obligations that are neither economically nor politically feasible. Further, while all rights are considered equally important, some can be more directly linked to food security. These include the right to life; the right to the highest attainable standard of health; the right to adequate food; the rights of children to adequate nutrition; housing and personal security; the right to education; and the right to participate in cultural, political, economic and social life.<sup>14</sup>

Finally, as observed, achieving the duties that are implied by minimum core obligations is likely to be more expensive than achieving other aspects of the human rights approach.<sup>15</sup> These are obligations of result requiring improvements in human outcomes, rather than being obligations of conduct requiring only that adequate efforts be made to achieve these improvements.<sup>16</sup>

All this has implications for the preparation of national development plans. Estimating resource requirements is an important component of the planning process along with identifying how these resources are to be obtained. While cost should not be the only consideration when choosing between different policies, aligning poverty reduction with a human rights approach will be made more difficult if this implies a reallocation of resources or assets. Further, if the existing distribution of resources is to be challenged in order to address human rights concerns, there are also the potential threats that might be perceived by the government concerning underlying political and economic stability. Elite capture, rent-seeking behaviour, free riding and corruption will exacerbate resistance to such policies and may slow down or distort their implementation.

This raises a number of important questions when looking at the implications of human rights for economic policy. For example, how might economic growth translate into improvements in the income of the poor without undermining other aspects of their well-being? Alternatively, what are the implications of a growth path in which the poor benefit little, benefit only in terms of certain aspects of well-being, such as access to calorie-dense but nutrient deficient food, while losing out on others, such as health status, leisure or culture; or neither benefit nor lose? It indeed is likely that at least some of those who are poor might experience forms of growth that perpetuate or even produce their poverty. An alternative option to consider is the circumstances under which slower economic growth might be justified in order to prioritise the achievement of

13 S Fukuda-Parr 'Human rights and national poverty reduction strategies: Conceptual framework for human rights analysis of poverty reduction strategies and reviews of Guatemala, Liberia and Nepal' (2007) Economic Rights Working Paper Series Working Paper 2 10.

14 General Comment 12 (n 12).

15 Mathews (n 4).

16 Fukuda-Parr (n 13).

minimum norms and the alleviation of the ill-effects of poverty over the achievement of macro-economic fundamentals.

Considering the implications of the human rights framework when implementing the food security components of the NDP will at least make such trade-offs explicit. It will also provide a mechanism for assessing whether and when these trade foods might be appropriate.<sup>17</sup> Indeed, this might introduce more critical debate on macro-economic policy and its micro-social implications into the planning process. In many instances, the notion of continuous improvement that underpins a human rights approach would disallow options in which deprivation persists or worsens in order to achieve a longer-term objective. Further, the obligation to direct maximum available resources towards meeting core obligations focuses attention on how governments are using available resources.<sup>18</sup>

### 3 Development planning and human rights

Development planning does not confine itself to defining targets and drawing up menus of welfare improving strategies with which to achieve these. The financial consequences of such strategies have to be assessed against current resources and those anticipated in the future. In practice there often are trade-offs between the immediate needs of poverty reduction and the requirements to achieve macro-economic stability and economic growth. Empirical studies have shown that effective economic policies for growth include adherence to fiscal discipline and, thus, low budget deficits, maintaining a competitive currency and a positive balance of payments, low and stable inflation rates, openness to trade and the protection of property rights.<sup>19</sup>

It is widely held that pro-poor growth is also best achieved by the consistent application of these policies, with the implicit proviso that this holds whatever the implications for human rights.<sup>20</sup> The inference is that when necessary, sound economic policies should be prioritised over policies that promote human rights or social justice. The standard set of economic policies can thus be said to dissuade a 'responsible' state from making use of its financial resources for redistributive measures of resources, consequently securing human rights for all. Instead, policies should favour economic growth even if these result in a regression of human rights principles.

However, the notion that a standard set of policies can be identified

17 J Ackerman 'Human rights and social accountability: Social development papers' Participation and Civic Engagement, Paper No 86 (2005).

18 OHCHR *Frequently-asked questions on a human rights-based approach to development cooperation* (2006a); OHCHR *Principles and guidelines for a human rights approach to poverty reduction strategies* (2006b).

19 D Rodrik *One economics, many recipes: Globalisation, institutions, and economic growth*. (2008).

20 D Dollar et al 'Growth still is good for the poor' (2016) 81 *European Economic Review* 68.

that consistently results in growth of any kind, let alone growth that benefits the poor or growth that takes account of human rights obligations, is being questioned.<sup>21</sup> Rodrik suggests that the issue is more the application of sound economic principles that might be translated into a variety of actions depending on circumstances and context.<sup>22</sup> Secure property rights need not imply private property rights; fiscal discipline does not necessarily require fiscal restraint; and the removal of market controls need not necessarily imply privatisation. This suggests that there is more room for policy options than has been suggested in the past. The question then arises as to what strategies can be chosen that meet both the criteria of sound economic principles and those implied by human rights principles.

Thinking through the ways in which economic growth might be expected to assist the food insecure can shed some light on how the human rights component of economic policy can be strengthened. For most policies, growth impacts directly on the situation of those that are poor through the jobs that are created. This is particularly so when growth occurs in labour-absorbing sectors of the economy such as agriculture, construction and clothing and textile manufacturing. Reducing the high rate of unemployment is often used as the motivation for pursuing policies that seek to attract foreign investment and promote exports. It should be borne in mind that in some countries, social security nets associated with formal employment do not automatically accompany such market-oriented approaches. People working in these sectors would then not be eligible for the social protection afforded by pensions, minimum wages, medical schemes, work injury insurance, and so forth.

A related route in which those that are poor can benefit from economic growth is through the creation of opportunities and a better environment for the entrepreneurship and industry of the poor themselves. This can be supported by policies that improve returns on the assets that those who are poor are able to access and use. Once again, a human rights perspective would require that attention be directed towards the implications that might follow from such 'self-exploitation', especially when thinking through the intra-household distribution of work and the benefits of this work. It is quite conceivable that those family members who exercise these decisions will not know those who bear the costs.

An unforeseen consequence of growth may be negative outcomes for women and for children as subsistence crops are displaced by cash crops, children are withdrawn from schools or families urbanise by moving into slums. Once again, policies that encourage entrepreneurship may need to be accompanied by policies that protect the access of children to quality education, strengthen the decision-making power of women over the allocation of resources or improve access to essential services in urban settlements.

21 WM Cole 'Too much of a good thing? Economic growth and human rights, 1960 to 2010' (2017) 67 *Social Science Research* 72.

22 Dollar (n 20).

Another impact of economic growth is through the trickle-down impact of the improved circumstances of the less poor and the rich who are able to consume and invest more. This might increase domestic demand, especially for services such as domestic labour and recreation, and promote the growth of labour-intensive small and medium-sized businesses. As before, policies need to be found that maximise this benefit rather than those that result in elites using their economic and political power in a way that increases the exploitation and marginalisation of the poor. Such policies include minimum wages, unemployment insurance or compulsory pension funds for vulnerable jobs such as domestic workers and farm workers.

A direct way in which economic growth can assist the food insecure is if greater revenue is collected by the state through taxation on the expanded activity that can be used for increased social spending and on further improvements to infrastructure utilised for production and reproduction. With growth, such expenditure can be achieved without the cost of increasing the budget deficit. However, this may be difficult to realise under the auspices of neo-liberal policies that call for tax reform where these imply tax cuts rather than more efficient revenue collection. In order to realise this benefit, policies to foster private investment would need to focus on the provision of infrastructure or ensuring a secure investment regime rather than on the reduction of taxes.

Finally, it must be acknowledged that an indirect benefit for the poor will come about through a more general impact of the policies that have been adopted to promote growth. Stable prices, better access to the cheaper goods being imported, cheaper credit and reduced political instability and violence will be to the benefit of those who are poor.

The discussion so far suggests that the financial implications of a development plan such as the NDP are likely to place pressure on both macro-economic stability and the capacity of government for effective implementation. Further, micro-economic analysis, policy reforms and interventions are required if the poor are to improve their economic status. As already noted, these include interventions that improve the access of the poor to productive assets such as land reform, infrastructure and financial services, as well as measures that reduce the costs of production, including transaction and information costs. However, in many cases the implementation of such policies has been slow or incomplete and for others, the non-poor have largely captured the benefits. This in part is because the development of micro-economic policies to achieve food security rests on an inadequate knowledge base compared to that available for macro-economic policy for economic growth. In particular, the way in which markets in the food sector actually operate has received scant attention.

Ensuring that human rights are taken into account when introducing new micro-economic policies will require the collection and analysis

of data on how households and enterprises operate and manage scarce resources. This will also require that attention be directed towards the analysis of the micro-macro linkages to the achievement of food security so as to identify how households and enterprises react to macro-economic policy and the implications of their reactions for such policy.

## 4 The components of budgeting for human rights

The South African Constitution, together with the many international agreements on human rights that have been signed by the government, places a duty to use available resources to implement policies to protect, respect and fulfil these rights. However, human rights run the risk of becoming disassociated from the planning and negotiations over resources that are undertaken during the implementation of the NDP. A number of steps will assist in more closely aligning the allocation of resources to the achievement of human rights goals.

### 4.1 Diagnostic analysis

Appropriate tools are needed with which to measure the impact of policies on food and nutritional insecurity.<sup>23</sup> The preliminary step for the NDP was a situation analysis.<sup>24</sup> This can easily be extended to include a human rights dimension. An example is the poverty gap indicator that is reported by Stats SA,<sup>25</sup> which can be transformed into an estimate of the minimum cost of eliminating food poverty. Similar indicators can potentially be developed that measure other gaps in the provision of essential needs. The extent of such backlogs can be costed using local pricing structures yielding the total cost of achieving food security and adequate nutrition. This may be compared to the resources available, taking into account the different ways in which delivery can take place.

### 4.2 Identifying interventions and budget prioritisation

Having estimated the minimum cost of achieving food security, a reprioritisation of the national budget will be required. This will need to be complemented by interventions to improve the use of all spheres of government resources as well as the ability to provide incentives and impose sanctions.

Budgets are the principal instruments by which governments (and

23 FG Santeramo 'On the composite indicators for food security: Decisions matter!' (2015) 31 *Food Research International* 63.

24 National Planning Commission (NPC) *Diagnostic overview of the National Development Plan 2030* (2011b).

25 Statistics South Africa *Methodological report on rebasing of national poverty lines and development on pilot provincial poverty lines – Technical Report* (2015).

other agencies) raise and allocate financial resources. Budgets are also the means through which governments provide for (or neglect) basic necessities relating to human rights. As such, the government budget may be thought of as a political declaration of priorities and trade-offs and a record of planning and sequencing decisions concerning the reduction of poverty. Over recent years, the discourse on human rights has increasingly recognised the importance of looking at resource availability and, thus, budgets.

Budget allocations take place in two ways: direct expenditures made by the state on personnel, infrastructure, grants, subsidies and services, foregone income arising from tax breaks and other changes to revenue generation. The annual budget prepared by the government thus is a comprehensive statement of the implementation of its social and economic plans and how these have been prioritised.

Tracking the sources of money used in the budget as well as where it goes is a useful instrument for analysis concerned with food security and human rights. This allows the identification of those who benefit from public resources, as well as how they have benefited, and for how long. Tracking also allows for the identification of the direct and indirect costs of resource allocation decisions, including who is carrying the burden of direct and indirect taxation. Tracking has focused on specific issues, such as gender, the environment or children. Analyses of issue-based budgets such as children's budgets and women's budgets have been found to be extremely useful in identifying funding and policy gaps, areas of social spending that are relatively under-resourced, and as a means for advocacy and policy development.<sup>26</sup> Such budget analyses can pay particular attention to the vulnerable groups that have been identified as targets for assistance, as well as on issues that have been identified as of concern in terms of their implications for human rights.

Food security can be readily included in the analysis of government budgets as a way of depicting how its components relate to national priorities and their realisation. This is not a new suggestion, and Fundar<sup>27</sup> identifies the several advantages of including the analysis of government budgets for a human rights approach, including the following:

- It will add the technical strengths of budget work to the moral arguments of human rights.
- It will help to identify practical problems in funding and implementation and possible solutions to these.
- It will help assess whether government is using available resources

26 APRODEV 'Budgeting human rights: Join the efforts to budget human rights and development group association of protestant development organisations in Europe (2007) [http://www.aprodev.net/main/files/budgeting\\_human\\_rights.pdf](http://www.aprodev.net/main/files/budgeting_human_rights.pdf) (accessed 23 October 2017). Elson (2002) on women's rights.

27 Fundar – Centro de Analisis e Investigacion 'International Budget Project and International Human Rights Internship Programme 2004. Dignity Counts: A guide to using budget analysis to advance human rights', [http://www.iie.org/IHRIP/Dignity\\_Counts.pdf](http://www.iie.org/IHRIP/Dignity_Counts.pdf) (accessed on 18 October 2017).

effectively and efficiently given the constraints that are faced.

- It can lead to proposals for interventions that could improve the protection, respect and fulfilment of human rights, including the cost of these interventions, for government and donor consideration.
- It can be used to strengthen advocacy with legislators, communities and other groupings.

Likewise, Fundar<sup>28</sup> argues that adding the human rights approach can assist with the analysis of budgets:

- by being a reminder that the ultimate goal is human welfare and long term human development;
- by providing a set of values against which budgets can be assessed;
- the approach can lend legitimacy to the budgets and their analysis because of widespread recognition of the need to look at issues of hunger, malnutrition and social justice;
- a human rights approach can assist in choosing between different budgetary and policy options;
- it can also strengthen the demand for transparency and accountability, of particular importance to the PRSP; and, finally
- a human rights approach has the potential to include more partners and thus have a greater impact.<sup>29</sup>

There are several ways in which a food and nutrition analysis of the budget can be undertaken. Some form of participatory public expenditure review (PPER) that focuses on food security would be optimal. Moon suggests that a PPER can enhance budget accountability and will also be building more efficient consultation, both of which would be appropriate objectives from a human rights perspective.<sup>30</sup>

### 4.3 Estimating the financial costs of achieving food security

Estimating the financial cost of the specific interventions that will contribute towards the reduction of poverty at a national level is complex. These costs vary depending upon the existing levels and form of deprivation; the capacity of the sphere of government responsible for implementation; and the cost structures that apply to the country in question. The unintended consequences of introducing interventions to improve food security and nutrition (and of not doing so) will also vary depending upon the macro-economic and socio-political environment, as will the costs of addressing these.

In addition to identifying interventions, the principle of the indivisibility of human rights may influence the sequencing and coverage of these

28 As above.

29 As above; UNFPA/UNIFEM *Budgeting for reproductive rights: Using gender responsive budgeting* resource pack (2006).

30 A Moon *PRSP: Budget process and participatory public expenditure reviews* (2004).

facilities. Thus, while a conventional approach to poverty reduction might sanction the delivery of a service to priority areas, a human rights approach might call for delivery to take place simultaneously, probably increasing the costs of provision in the short run.

#### 4.5 Estimating social and economic benefits

Although the recognition of a human rights approach to food security should not be dependent upon economic benefits exceeding economic costs, there still is merit in quantifying the value added in adopting this approach. In addition to the direct benefits, the protection, respect and fulfilment of human rights are likely to contribute towards the promotion of national ownership.

The indirect costs of hunger and malnutrition are often overlooked, and addressing these will obviously bring about a beneficial change. Both may be economically costly. People who are uncertain as to whether they will be able to meet their food energy needs are unlikely to take risks with the resources that they have available, recognising the consequences if the investment does not yield a return. Hungry children are unlikely to perform well at school, and malnourished children and adults are likely to be susceptible to other forms of disease.

### 5 Public expenditure management for food security

Having described the steps involved in aligning the NDP more closely to a human rights approach, it remains to consider public expenditure management (PEM) actions that link plans to interventions. Fiscal and monetary policy and the annual budget are of particular importance.

#### 5.1 Fiscal and monetary policy

Attention is increasingly being focused on how governments manage their resources. This shift partly reflects the importance that is now attached to issues of governance and the institutions that provide this governance. In addition, 'new' institutional economics have demonstrated the economic cost of a weak institutional structure.<sup>31</sup> The change in donor preference from project-based funding to direct budget support has also necessitated an accompanying concern over how funds are managed.

The annual budget presented by the Minister of Finance is one of the most important financial management tools available to the South African government. When complemented by a public expenditure review, the

31 DC North 'The new institutional economics and Third World development' in J Harris et al (eds) *The new institutional economics and Third World development* (1995) 49.



allocation of resources and their subsequent use can be scrutinised. This shows which sectors and issues the government has prioritised.

Revenue generation is the complementary aspect of government expenditure and is also covered in the budget process. As with expenditure, the analysis of how a government obtains its resources can also be revealing. Taxation is the most obvious form of revenue generation and includes direct forms such as employee or company taxes and indirect taxes such as value added tax (VAT) or sales taxes. In the absence of zero-rated staples, the incidence of the latter tends to fall more heavily on those who are poor. Selective food taxes and rebates can also be used to try to manage consumer expenditure patterns. An example of this is the proposed sugar tax in South Africa.<sup>32</sup>

Revenue is raised at different spheres of government, including provincial and municipal, and includes personal income, company and wealth taxes, as well as local taxes such as property rates or levies. Capital revenues such as rent received from the use of public property or interest received from investments are another possible source of income. As with subsidies, these might also reflect indirect transfers to the wealthy who may be able to make use of public resources at a cost that is below market value.

Public borrowings and domestic or international grants are additional ways in which revenue can be increased from external sources, though potentially at a high cost depending on the interest that would be payable. Government also generates 'extraordinary income' through the privatisation of public assets or the sale of rights such as for mineral, marine resources or tourism, or the sale of state-owned enterprises.

Although not directly related to expenditure management, monetary policies are also relevant. Adjusting interest rates in order to encourage investment, stimulate economic growth, soak up excess liquidity and slow the rate of inflation is a common strategy. Some countries, including South Africa, have opted for inflation targeting in order to encourage stable and predictable rates of price changes that will require further monetary adjustments in order to achieve their targets. A central bank that is independent, also as is the case in South Africa, might increase the risk that the monetary policies may facilitate or work against other initiatives being adopted by the government. This includes those directed at food security and the attainment of other human rights objectives.

These taxes, subsidies, regulations and publically-funded infrastructure have a direct and immediate impact upon the cost of food, the profits to be

32 Government of South Africa 'Budget speech 2016' Pretoria (2016), <http://www.treasury.gov.za/documents/national%20budget/2016/speech/speech.pdf> (accessed 13 August 2017); KD Brownell & TR Frieden 'Ounces of prevention: The public policy case for taxes on sugared beverages' (2009) 360 *New England Journal of Medicine* 1805.

made, and the response of those affected.<sup>33</sup> As a result, policies that affect food security are subject to lobbying, advocacy, collusion and other forms of influence.<sup>34</sup>

## 5.2 Multi-year budgeting

The budgets prepared by different spheres of government are based on an annual cycle of needs identification, planning, sequencing, prioritisation and allocation. To take account of national strategies and global changes, budgets increasingly have to consider events beyond the annual cycle. These include macro-economic trends, longer-term revenue expectations and programmes and spending priorities. The Medium Term Expenditure Framework (MTEF) addresses this by including a multi-year time frame.<sup>35</sup> Government can use this as a planning tool to manage its expenditure over a longer time frame. MTEFs are ‘medium-term’ because their purpose is to provide planning and budgeting information on a prospective basis. In this way MTEF is also an important tool to be used to introduce human rights considerations into the government budgeting process.

The preparation and operation of the MTEF involve a number of components. The first step usually is a ‘top-down’ estimate of the financial and other resources available for public expenditure. This estimate must take account of the requirement of achieving and maintaining macro-economic stability and the options for external support. The second step comprises ‘bottom-up’ estimations of the cost of carrying out the existing and desired policies of the government. In this step, policies that might be desirable from a human rights perspective can be costed, along with the implications of meeting human rights principles such as progressive realisation and non-retrogression. To be effective, the MTEF must provide a framework that reconciles costs over time with revenues over time.

The MTEF has the advantage of being a rolling process that is repeated every year. In this way it is a tool that can reconcile the demands of policy making, planning and budgeting into a single document allowing decisions to be made about what is affordable, what must be prioritised and what different spheres of government and civil society demand. A properly-developed MTEF links the government’s priorities to a budgetary process that takes account of the public expenditure that is sustainable. It also highlights the trade-offs between the competing objectives of different parts of the government, the requirements of donors and the expectations of its citizens. Linking this to the expectations of a human rights approach can make the choices made by decision makers in the budget process

33 T Allan et al ‘The water-food-energy nexus: An introduction to nexus concepts and some conceptual and operational problems’ (2015) 31 *International Journal of Water Resources Development* 301.

34 M Nestle *Food politics: How the food industry influences nutrition and health* (2013).

35 By 2008, 132 countries in the world had adopted elements of MTEFs as one way of managing the use of public funds. See World Bank *Beyond the annual budget* (2013) 24.

more apparent. Finally, the MTEF has the longer-term advantage of linking budgets with the policy choices made, thereby making the desired outcomes more visible by increasing transparency, accountability, and the predictability of funding.

While the MTEF approach might initially appear technocratic, it is a way of ensuring that expenditure management is about appropriate policies in the medium term, rather than about cash management in the short term. Of particular relevance to a human rights approach, the MTEF is way of avoiding the situation where available revenue cash becomes the determining influence on public expenditure rather than the goals and objectives of government and the agreements to which it has committed. This is also a way in which government can monitor its adherence to principles of non-retrogression and indivisibility, as well as a resource for those that monitor the government allocation of resources.

## 6 Conclusion

The successful alignment of the NDP and human rights to achieve food security will ultimately depend upon how the trade-offs of alternative policies can be accommodated within the opportunities for revenue generation. Some sequencing may be necessary, perhaps starting with those issues that require the least debate. An example is the rights of children and the expectation that South Africa should be able to adequately feed and care for its children. From this point of departure, other targets can be identified and addressed, perhaps starting with those that relate to the rights of especially vulnerable groups, including women, the aged and people living with disabilities.

Nonetheless, achieving the greater alignment of the NDP goals regarding food security with the human rights approach presents a challenge. This in part is due to the complexity of the budget process in which the menu of desired interventions has to be balanced against the resources that are required for these interventions, and partly due to the complexity of food security itself. The human rights approach gives rise to its own constraints, including unreliable, inappropriate and inaccurate indicators of the status of rights, reconciling principles of indivisibility against the need for prioritisation, sequencing and temporal trade-offs. Unintended and undesirable consequences may result when litigation drives policy and strategy formulation rather than the observation of sound economic and planning principles.

## References

- Ackerman, J 'Human rights and social accountability: Social Development Papers' *Participation and Civic Engagement, Paper 86* (2005), World Bank, Washington, DC, <http://www.topics.developmentgateway.org/civilsociety/rc/filedownload.do~itemId=1075370> (accessed 25 June 2007)
- Adato, M, Carter, M & May, J 'Exploring poverty traps and social exclusion in South Africa using qualitative and quantitative data' (2006) 42 *Journal of Development Studies* 226
- Allan, T, Keulertz, M & Woertz, E 'The water-food-energy nexus: An introduction to nexus concepts and some conceptual and operational problems' (2015) 31 *International Journal of Water Resources Development* 301
- APRODEV 'Budgeting human rights: Join the efforts to budget human rights' Rights and Development Group Association of Protestant Development Organisations in Europe (2007), [http://www.aprodev.net/main/files/budgeting\\_human\\_rights.pdf](http://www.aprodev.net/main/files/budgeting_human_rights.pdf) (accessed 20 March 2007)
- CFS 'Coming to terms with terminology' (2012) Committee on World Food Security 39th Session, Rome, Italy, <http://www.fao.org/docrep/meeting/026/MD776E.pdf> (accessed 7 March 2017)
- Brownell, KD & Frieden, TR 'Ounces of prevention: The public policy case for taxes on sugared beverages' (2009) 360 *New England Journal of Medicine* 1805
- Chossudovsky, M 'Global poverty in the late 20th century' (1998) 52 *Journal of International Affairs* 293
- Cole, WM 'Too much of a good thing? Economic growth and human rights, 1960 to 2010' (2017) 67 *Social Science Research* 72
- Durojaye, E & Chilemba, EM 'Research on accountability and the right to food: Comparative study of India and South Africa' (2017) *Centre of Excellence in Food Security Working Paper 3*, <http://foodsecurity.ac.za/working-papers> (accessed 8 October 2017)
- DAAF/DSD 'National Policy on Food and Nutrition Security' (2013) Department of Agriculture and Forestry/Department of Social Development, <http://www.nda.agric.za/docs/media/NATIONAL%20POLICYon%20food%20and%20nutrition%20security.pdf> (accessed 7 October 2017)
- Dollar, D, Kleineberg, T & Kraay, A 'Growth still is good for the poor' (2016) 81 *European Economic Review* 68
- DPLG Provincial Growth and Development Strategy Guidelines (2005) <http://www.thepresidency.gov.za/docs/pca/planning/pgdsguidelines.pdf>, (accessed 12 February 2009)
- Elson, D 'Budgeting for women's rights: Monitoring government budgets for compliance with CEDAW (2006) UNIFEM, New York, [http://www.iknowpolitics.org/files/MonitoringGovernmentBudgets\\_CEDAW\\_eng.pdf](http://www.iknowpolitics.org/files/MonitoringGovernmentBudgets_CEDAW_eng.pdf) (accessed 25 June 2007)
- Fukuda-Parr, S 'Human rights and national poverty reduction strategies: Conceptual framework for human rights analysis of poverty reduction strategies and reviews of Guatemala, Liberia and Nepal' (2007) *Economic Rights Working Paper Series Working Paper 2*, The Human Rights Institute, University of Connecticut, Ithaca
- Fundar – Centro de Analisis e Investigacion International Budget Project and International Human Rights Internship Programme 2004. *Dignity Counts: A guide to using budget analysis to advance human rights* [http://www.iie.org/IHRIP/Dignity\\_Counts.pdf](http://www.iie.org/IHRIP/Dignity_Counts.pdf) (accessed 17 March 2007)
- Government of South Africa 'Budget speech 2016, Pretoria' (2016), <http://www.treasury.gov.za/documents/national%20budget/2016/speech/speech.pdf> (accessed 18 May 2017)
- Kanbur, R 'Economic policy, distribution and poverty: The nature of the disagreements' (2001) 29 *World Development* 1083

- Kaul, I & Mendoza, RU 'Advancing the concept of public goods' in Kaul, I, Conceição, O, Le Goulven, K & Mendoza, RU (eds) *Providing global public goods: Managing globalisation* (Oxford University Press 2003)
- Mathews, S 'UNESCO Expert Group – Development of human rights guidelines and minimum norms for Poverty Reduction Strategy Papers (PRSP)' (2007) UNESCO Concept Paper
- May, J 'Keystones affecting sub-Saharan Africa's prospects for achieving food security through balanced diets' (2017) *Food Research International*, <https://doi.org/10.1016/j.foodres.2017.06.062> (accessed 8 October 2017)
- Moon, A 'PRSP: Budget process and participatory Public Expenditure Reviews' (2004), Budget Analysis Workshop, <http://info.worldbank.org/etools/docs/library/113659/2.pdf> (accessed 21 November 2007)
- Nestle, M *Food politics: How the food industry influences nutrition and health* (University of California Press 2013)
- North, DC 'The new institutional economics and Third World development' in *The new institutional economics and third world development Vol 21* (Routledge 1995)
- NPC *National Development Plan 2030: Our future, make it work* (2011a) National Planning Commission Pretoria
- NPC *Diagnostic overview of the National Development Plan 2030* (2011b) National Planning Commission Pretoria
- Nsouli, SM, Rached, M & Funk, N 'The speed of adjustment and the sequencing of economic reforms: Issues and guidelines for policymakers' (2005) 32 *International Journal of Social Economics* 740
- OHCHR 'Frequently-asked questions on a human rights-based approach to development cooperation' (2006a) Office of the United Nations High Commissioner for Human Rights, Geneva, Switzerland
- OHCHR 'Principles and guidelines for a human rights approach to poverty reduction strategies' (2006b) Office of the United Nations High Commissioner for Human Rights HR/PUB/06/12
- Rodrik, D *One economics, many recipes: Globalisation, institutions, and economic growth* (Princeton University Press 2008)
- Santeramo, FG 'On the composite indicators for food security: Decisions matter!' (2015) 31 *Food Research International* 63
- Stats SA *Methodological report on rebasing of national poverty lines and development on pilot provincial poverty lines – Technical Report* (2015) Statistics South Africa Pretoria
- UNESCO/ECOSOC 'Right to education. Scope and implementation. General Comment 13 on the right to education' (art 13 of the International Covenant on Economic, Social and Cultural Rights) (2003).
- UNFPA/UNIFEM 'Budgeting for reproductive rights: Using gender responsive budgeting' Resource pack (2006), [www.unfpa.org/upload/lib\\_pub\\_file/686\\_filename\\_gender\\_eng.pdf](http://www.unfpa.org/upload/lib_pub_file/686_filename_gender_eng.pdf) (accessed 21 November 2007)
- Western Cape Government Household Food and Nutrition Security Strategic Framework (2016), [www.westerncape.gov.za/files/assets/140916\\_wcg\\_household\\_food\\_and\\_nutrition\\_security\\_strategic\\_framework.pdf](http://www.westerncape.gov.za/files/assets/140916_wcg_household_food_and_nutrition_security_strategic_framework.pdf) (accessed 8 October 2017)
- World Bank *Beyond the annual budget* (2013) Washington DC World Bank doi:10.1596/978-0-8213-9625-4



# CHAPTER 3

## IS SOUTH AFRICA WINNING THE WAR ON POVERTY AND INEQUALITY? WHAT DO THE AVAILABLE STATISTICS TELL US?

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### Abstract

*The chapter examines three primary dimensions of social inequality in South Africa, namely, income inequality, poverty and human development, and access to services. We seek to ascertain whether the implementation of a diverse set of policy initiatives since the end of apartheid in 1994 has reduced social inequality. Data from a range of sources (from the objective to the subjective) are used for this analysis. Although many of these programmes have had a positive impact, the data clearly reveal that there remains considerable room for improvement, especially in the areas of job creation, poverty reduction and inequality. The chapter also points out some of the problems with existing measures of social inequality. A more holistic perspective with a stronger focus on subjective multi-dimensional indicators is needed to facilitate a deeper understanding of inequality in South Africa.*

### 1 Introduction

The concept of social inequality consists of several closely-interrelated dimensions. In the South African context, three primary dimensions stand out, namely, income inequality, poverty and human development, and access to services. Twenty-three years (as at the end of 2017) after the political transition from apartheid and the implementation of diverse policy initiatives, social inequality continues to be a key challenge in South Africa.

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## 1.1 Income inequality in South Africa

The World Bank's Gini Index data ranks South Africa as the most unequal country in the world. South Africa's Gini Index increased from 0,64 in 1995 to 0,66 in 2005 and declined slightly to 0,62 in 2014.<sup>1,2</sup> Table 1 shows South Africa's ranking among its BRICS counterparts. The countries are ranked in ascending order, with countries at the top having the highest levels of income inequality.

*Table 1: Income inequality (Gini Coefficient) ranking of BRICS countries*

BRICS Country	Gini Index	Global Rank	Reporting Year
South Africa	0,63	1	2014
Brazil	0,53	9	2017
China	0,39	70	2015
Russia	0,38	79	2015
India	0,36	98	2011

Source: World Bank<sup>3</sup>

Among the BRICS countries, South Africa has the highest income inequality index, while Brazil is second with a Gini Index of 0,53 and a global rank of 9. China, Russia and India follow far behind, although the latest data available for India was in 2011. In the Southern African Development Community (SADC) region, South Africa is closely followed by Namibia and Lesotho, which have Gini Indices of 0,59 and 0,54 respectively. According to available data from the World Bank, six of the ten most unequal countries in the world are in Africa. Considering the prolonged efforts to bring greater social equality to the region by governments and civil society, this fact should be of concern to us.

- 1 The Gini Coefficient (also Gini Index or Ratio) is a prominent measure of income inequality. It leverages a scale of 0 to 1 to derive the deviation from perfect income equality. A Gini Index of 0 implies perfect equality where there are no differences in household or individual incomes, while an index of 1 implies complete income disparity. In practice, the Gini Coefficient is likely to lie between 0,25 and 0,70. The World Bank is the main organisation that provides the Gini Index for a number of countries across the globe although it is indicated that there is some missing data as inequality measures are only available for 130 countries (World Bank 2014).
- 2 World Bank 'World Development Indicators – Gini Index' (2019), <http://data.worldbank.org/indicator/SI.POV.GINI> (accessed 10 June 2019).
- 3 As above.



**Table 2: Income inequality (Gini Coefficient) ranking of SADC countries**

SADC Country	Gini Index	Rank	Reporting Year
Angola	0,43	45	2008
Botswana	0,53	10	2015
Comoros	0,45	31	2013
Congo, Dem. Rep.	0,42	47	2012
Eswatini	0,52	11	2009
Lesotho	0,54	6	2010
Madagascar	0,43	46	2012
Malawi	0,45	32	2016
Mauritius	0,36	97	2012
Mozambique	0,54	7	2014
Namibia	0,59	2	2015
Seychelles	0,47	24	2013
South Africa	0,63	1	2014
Tanzania	0,38	78	2011
Zambia	0,57	4	2015
Zimbabwe	0,43	41	2011

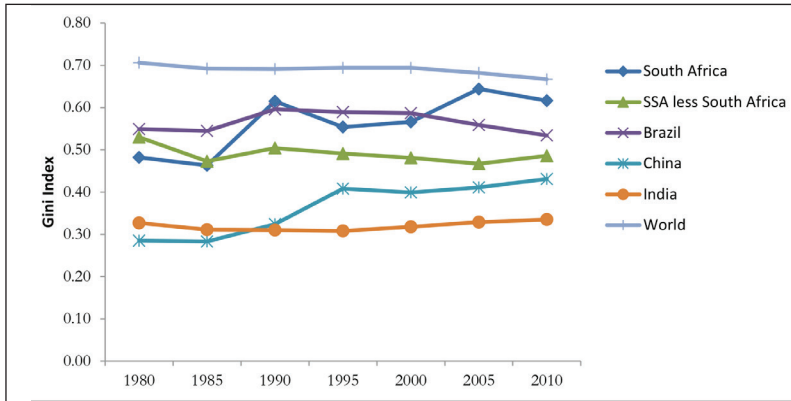
Source: World Bank<sup>4</sup>

Figure 1 details trends in the Gini Index for BRICS countries, sub-Saharan Africa and the world from 1980 to 2010. The index for South Africa shows the greatest variability over the period. South Africa's Gini Index peaks sharply from 1985 towards 1990, a period that saw an intensification of the struggle for independence marked by labour boycotts, mass action, international sanctions and a major disruption of economic activity. It then declines from 1990 towards 1995 as South Africa neared the end of the apartheid regime, and the country began to remove institutional barriers to employment, income and access to formal financial services for the previously-excluded majority.<sup>5</sup> While income inequality remained even in the other countries and regions from 1995 to 2005, the index for South Africa increased from 0,64 in 1995 to 0,69 in 2000. This was due to increases in income inequality in all racial groups between 1995 and 2005, with the largest increase recorded in the 'coloured' group, followed by the Asian group.<sup>6</sup>

4 As above.

5 MM Smal & S de Jager 'The monetary transmission mechanism in South Africa' (2001) *South African Reserve Bank Working Paper* WP/2001/16.

6 H Bhorat, S Goga & C van der Westhuizen 'Growth, poverty and inequality in the

**Figure 1: Gini Index of selected countries and regions from 1980-2010**

Source: Constructed from Edward and Sumner, 2013, Annex table A1, 417

Income inequality declined steadily in South Africa from 2005 to 2010 in line with similar declines in world inequality and inequality in Brazil, but contrary to slightly upwards trends in China, India and sub-Saharan Africa (excluding South Africa). It is argued that the decline in income inequality from 2005 towards 2010 was due to the cumulative impact of several government interventions implemented over time to bridge the gap between the rich and the poor in South Africa.

### 1.1.1 Drivers of income inequality in South Africa

Income inequality in South Africa is driven by several factors. These include race, gender, access to job opportunities, and geographical location in the country.

Racial disparities in income persist. In 2008, Africans who accounted for 79 per cent of the population captured 44 per cent of income and 41 per cent of total expenditure. In comparison, whites who accounted for 9,2 per cent of the population captured 40,3 per cent of income and 40,9 per cent of total expenditure.<sup>8</sup> Deconstructing income deciles by race shows that Africans are spread evenly across the lower income deciles, while the other racial groups are concentrated around the upper income

post-apartheid South Africa: Exploring the interactions' unpublished paper prepared for the SANPAD Conference, The Poverty Challenge 2007, 26-29 June 2007, Elangeni Hotel, Durban, South Africa.

7 P Edward & A Sumner 'The geography of inequality: Where and how much has income distribution changed since 1990?' (2013) *Centre for Global Development Working Paper* 341.

8 S Sharma 'Rising inequality in South Africa: Drivers, trends and policy responses' Consultancy Africa Intelligence (2010), <https://www.consultancyafrica.com> (accessed 13 April 2017).

deciles. Approximately 60 per cent of Asians/Indians and 25 per cent of coloured people are in the top two income deciles, whereas the share of the white population in the top two income deciles is over 80 per cent. By 2010, the top decile of the population accounted for 58 per cent of the country's income, while the bottom decile accounted for only 0,5 per cent and the bottom half for less than 8 per cent of the country's income.<sup>9</sup> Table 3 shows shifts in income inequality by race from 1995 to 2017. Africans have the highest Gini Index, followed by the coloured, Asian and white groups, in that order. Additional studies using the Theil Index<sup>10</sup> confirm that inequality between different races, as opposed to 'within races', has been the main driver of income inequality in South Africa since 1995.<sup>11</sup>

**Table 3: Shifts in inequality by race: Gini Coefficients for 1995-2013**

Category	1995	2005	2017
African	0,55	0,61	0,59
Coloured	0,49	0,56	0,55
Asian	0,45	0,53	0,49
White	0,39	0,47	0,44
Total	0,64	0,66	0,63

Source: Statistics South Africa (1995 and 2005);<sup>12</sup> Global Insight (2018)<sup>13</sup>

This finding is contested by Hoogeveen and Ozler,<sup>14</sup> Bhorat, Leibbrandt and Woolard,<sup>15</sup> using census data of 1996/2001 and Statistics South Africa's Income and Expenditure Survey data for 1995/2000. They found that increasing intragroup inequality within the African group, as opposed to the coloured and Asian groups, was the main driver of inequality in South Africa. By 2005, inequality between races and within races constituted equal drivers of income inequality in South Africa.

*Disparities in employment by race, gender and province. Unemployment*

9 Smal and De Jager (n 5).

10 The Theil Index is an alternative measure of inequality that enables one to measure the contribution of 'within group' (intra-group) inequality on one hand and 'between group' (inter-group) inequality on the other hand to overall inequality.

11 H Bhorat et al 'Understanding contemporary household inequality in South Africa' in H Bhorat et al (eds) *Fighting poverty: Labour markets and inequality in South Africa* (2005).

12 Statistics South Africa Income and Expenditure Survey (1995, 2005) South Africa, <http://www.statssa.gov.za> (accessed 15 March 2017).

13 IHS Global Insight Southern Africa database, <http://www.ihsglobalinsight.co.za/> (accessed 10 June 2018).

14 J Hoogeveen & B Özler 'Not separate, not equal: Poverty and inequality in post-apartheid South Africa' in H Bhorat & R Kanbur (eds) *Poverty and policy in post-apartheid South Africa* (2006) 487.

15 Bhorat et al (n 11).

in South Africa (by the narrow measure) has for a considerable period constantly hovered around 24 to 25 per cent. Table 4<sup>16</sup> depicts trends in unemployment by race and gender from 1996 to 2017. Twenty-three years after democracy, the unemployment rate is above 1996 levels. In 2017, more males were unemployed than in 1996 across all population groups, with the coloured population group experiencing the worst increase in unemployment. Unemployment among the coloured male population group increased by 9 per cent from 1996 to 2017, followed by the African male group (8 per cent), the white male group (3 per cent), and the Asian male group (0 per cent). In contrast, there has been no growth in unemployment among African and Asian female groups, respectively, between 1996 and 2017. The white and coloured groups have seen increases in female unemployment of 2 and 4 per cent respectively. These gender disparities in employment in different population groups drive disparities in household income due to the high positive correlation between household income and wage income. In addition, some households are headed by males and others by females across all the population groups, especially due to the migrant nature of South Africa's employment opportunities. In 2011, female-headed households earned less than 50 per cent of income earned by households headed by males.<sup>17</sup>

Besides racial underpinnings, sources of household income and labour market trends are also major drivers of income inequality in South Africa. Recent research disaggregates household income into four categories: wage income (including self-employment); capital income (dividends, interest, rental income and private pensions); social grants; and remittances. Wage income makes up 70 per cent of total income in South Africa for the higher income deciles, while government grants play a key role for the lower income deciles. Wage income also accounts for 85 per cent of social inequality in South Africa due to the high positive correlation (0,9) between wage income and household income. Capital income accrues only to the top income deciles, while private transfers have largely been crowded out by public transfers.<sup>18</sup> Disparities in employment also emerge across provinces. In the Western Cape where the majority of the coloured population group resides, the unemployment rate in 2017 was almost twice that of the 1996 level.

16 IHS Global Insight (n 13).

17 As above.

18 Smal & De Jager (n 5).

**Table 4: Unemployment rate by race and gender in SA (1996-2017)**

<b>Gender/Population Group (per cent)</b>		<b>1996</b>	<b>2006</b>	<b>2017</b>
African	Male	21%	26%	29%
	Female	33%	36%	33%
	Total	26%	31%	31%
White	Male	3%	4%	6%
	Female	5%	5%	7%
	Total	4%	5%	7%
Coloured	Male	14%	18%	23%
	Female	19%	22%	23%
	Total	16%	20%	23%
Asian	Male	10%	11%	10%
	Female	15%	16%	15%
	Total	12%	13%	12%
<b>Total</b>	<b>Male</b>	<b>17%</b>	<b>22%</b>	<b>25%</b>
	<b>Female</b>	<b>26%</b>	<b>31%</b>	<b>29%</b>
	<b>Total</b>	<b>21%</b>	<b>26%</b>	<b>27%</b>

Source: IHS Global Insight Southern Africa<sup>19</sup>

With the exception of Limpopo, which experienced approximately a 6% decline in unemployment between 1996 and 2017, the rate of unemployment in all the remaining provinces in 2017 was above 1996 levels.

**Table 5: Percentage Unemployment Rate across provinces (1996-2013)**

<b>Province</b>	<b>1996</b>	<b>2006</b>	<b>2017</b>
Western Cape	11%	17%	21%
Eastern Cape	28%	28%	33%
Northern Cape	20%	31%	30%
Free State	18%	28%	34%
KwaZulu-Natal	23%	30%	24%
North-West	19%	26%	27%
Gauteng	19%	24%	29%

19 IHS Global Insight (n 13).

Mpumalanga	22%	28%	31%
Limpopo	26%	30%	20%

Source: IHS Global Insight Southern Africa <sup>20</sup>

It is clear that South Africa has not been winning the war on income inequality since political independence in 1994. From the perspectives of race, gender, geographical location or labour market trends, it clearly emerges that current levels of income inequality are above 1996 levels. This increasing trend in income inequality is driven by deep-seated persistent structural and institutional factors.

The Gini Index, the main measure of income inequality, does not capture the additional nuances in terms of underlying drivers of income inequality. The Gini Index has also come under severe criticism as an inaccurate measure of income inequality and as a basis for the ranking of countries. This is attributable to a number of reasons.

### 1.1.2 Limitations of the Gini Index

The measurement of income inequality using the Gini Index has a number of drawbacks. The first is the concept of 'income'. Income can be defined at the household level weighted by household size or different scales, or at individual level taking into consideration financial holdings or only wage earnings. Each of these gives a different measure of income and different levels of income inequality. Thus, differences in income concepts can lead to differences in measures of income, inequality and the ranking of countries. In addition, the Gini Index based on individual incomes is different from the Gini Index based on household incomes for the same country.<sup>21</sup> As a result, country rankings entail some subjectivity in use and interpretation. Income in the informal sector is also excluded from the measurement of income inequality using the Gini Index. In most developing countries, the informal sector accounts for almost 90 per cent of employment creation. In agro-based subsistence-driven economies, income could exist in different forms where money might not necessarily be the medium of exchange.<sup>22</sup>

Countries also have different income tax regimes: regressive, proportional and progressive, with some more redistributive than others. There are further differences in tax instruments, income tax brackets and tax rates, all of which determine differences in net household disposable

<sup>20</sup> As above.

<sup>21</sup> K Deininger & L Squire 'A new data set measuring income inequality' (1996) 10 *World Bank Economic Review* 565.

<sup>22</sup> F Schneider et al 'New estimates for the shadow economies all over the world' (2010) 24 *International Economic Journal* 443.

income. These underlying differences in the determinants of household income are not captured by the Gini Index as a measure of income inequality and a basis for comparing income inequality between countries.

In addition, the Gini Index is a relative measure which fails to capture absolute differences in income. Research has also found that it is possible for the Gini Index of a country to rise due to increasing income inequality while the number of people living in absolute poverty is actually declining.<sup>23, 24</sup> Thus, although the level of income inequality has increased, the Gini Index fails to capture the fact that absolute levels of income have also increased. Similarly, the Gini Index could reflect a lower level of income inequality in a scenario where there is a decrease in all incomes in a given society. Furthermore, two countries could have different income distributions but the same Gini Index. In a country where the lowest 50 per cent have no income and the other 50 per cent have equal income, the Gini Index is 0,5. In another country where the lowest 75 per cent account for 25 per cent of the total income and the top 25 per cent have 75 per cent of the income the Gini Index will also be 0,5. Consequently, the Gini Index could be quite misleading as a basis for ranking the level of inequality between countries.<sup>25</sup>

The Gini Index also does not capture government transfers, benefits or other interventions aimed at bridging inequality between rich and poor. This is of particular relevance to an assessment of poverty in South Africa. Subsidised housing, health care, education and social grants for the aged, incapacitated and single mothers are interventions that subsidise household incomes, to some extent reducing income inequality.<sup>26</sup>

Statistically, the Gini Index is biased downwards especially for countries with small populations.<sup>27</sup> Small countries usually have less economic diversity and therefore lower Gini coefficients. Economic indices such as the Gini Index are calculated for a number of countries, based on which they are ranked, after which general inferences are drawn, thus presenting an incomplete picture of a particular country's 'global ranking'. These drawbacks render the Gini Index quite simplistic and controversial as a basis for measuring income inequality, ranking and comparing income inequality between countries.

23 This is because the Gini Index violates the Pareto improvement principle. The Pareto improvement principle explains that income inequality could increase with an increase in all incomes in a given society.

24 JW Mellor 'Dramatic poverty reduction in the Third World: Prospects and needed action' (1989) International Food Policy Research Institute 18-20.

25 LG Bellù & P Liberati 'Inequality analysis - The Gini Index' (2006) Food and Agriculture Organization, United Nations.

26 Borat (n 11).

27 G Deltas 'The small-sample bias of the Gini Coefficient: Results and implications for empirical research' (2003) 85 *The Review of Economics and Statistics* 226.

## 2 Poverty and human development trends in South Africa

The second dimension of social inequality that stands out in South Africa relates to poverty and human development.

### 2.1 South African Social Attitudes Survey: Perceptions of poverty

Any effort to measure poverty involves a definition of poverty and a classification as to what represents a poor quality of life. One possible measure of living standards, for instance, is the Human Development Index (HDI), a popular tool of policy makers and scholars. However, the HDI encompasses only three rather basic aspects of human welfare, making a value judgment of what constitutes human development. Moreover, although the HDI reflects a conceptualisation of the quality of life beyond simple income and expenditure, the construction of the index involves trade-offs, and some scholars question the choice of the HDI's three dimensions, namely, life expectancy at birth, education and per capita income.<sup>28,29</sup> Attempts to address these concerns have seen a number of alternatives to the HDI (such as the Multidimensional Poverty Index) proposed since 2000. As in the case of the HDI, these measures use amalgamations of objective, often-continuous variables (for instance, malnutrition and child mortality).

An alternative to such objective measures would be the use of subjective measures of poverty.

Despite Sen's arguments against the subjective view of poverty,<sup>30</sup> a subjective approach to poverty measurement has in recent years gained prominence. Researchers in South Africa have become increasingly aware of the fact that poverty cannot be reduced to finite numbers, and should rather be conceived of as a subjective reality. According to Kingdon and Knight,<sup>31</sup> an approach that examines the individual's own perception of deprivation is the best available guide to forming a definition of poverty. However, during the post-apartheid period, there has been a tendency among the media and officials to focus on poverty in 'money-metric' terms. Household surveys in South Africa have tended to collect objective data on household income, expenditure and assets in an effort to measure poverty, ignoring subjective indicators. Recent survey research, however,

28 S Anand & A Sen 'The income component of the Human Development Index' (2000) 1 *Journal of Human Development* 83.

29 G Ranis et al 'Human development: Beyond the Human Development Index' (2006) 7 *Journal of Human Development* 323.

30 A Sen 'A decade of human development' (2000) 1 *Journal of Human Development* 17.

31 GG Kingdon & J Knight 'Subjective well-being poverty versus income poverty and capabilities poverty?' (2006) 42 *Journal of Development Studies* 1199.



has provided new insights into subjective deprivation in South Africa.

As poverty is a reflection of multiple forms of deprivation in an individual's life, it is important to explore multidimensional subjective poverty measures. There is a 'relative' component to subjective measures of poverty.<sup>32</sup> The measure proposed by Alkire and Foster<sup>33</sup> involves identifying a subjective deprivation cut-off point for different domains of poverty. These domains are (i) food consumption; (ii) housing; (iii) clothing; (iv) health care; and (v) children's schooling. The method used by Alkire and Foster, therefore, asks whether respondents' households have less than adequate access to each domain. However, an individual's general perception of his or her well-being or economic status is informed by the perceived well-being of others.<sup>34</sup> For example, individuals may think that they are worse off than their reference group, and hence feel relatively deprived, even if they actually are better off.

Multidimensional subjective poverty indicators were introduced into the South African Social Attitudes Survey (SASAS)<sup>35</sup> questionnaire in 2007. Table 6 depicts the share of the group that identified deprivation in each of the six domains listed in the table. Cell percentages represent the proportion that reported deprivation by domain. Using this simple method, the contours of poverty and inequality between groups can be identified. In an early study of poverty, Klasen<sup>36</sup> identified the poor as predominately black Africans, women and those living outside formal urban areas. More than 23 years into democracy, similar patterns continue to be evident, with these groups more likely to identify deprivation than their counterparts, regardless of the domain under discussion. These groups are also more likely to experience multiple forms of subjective deprivation.

Trend analysis suggests that levels of subjective deprivation have declined between 2007 and 2017. The largest declines were noted among formal rural dwellers. In particular, the share of formal dwellers that reported deprivation in the food, clothing and health care domains fell by approximately one-fifth between 2007 and 2016. On the other hand, households in traditional authority areas witnessed an increase in their reported level of transport and health care deprivation. This trend is even more evident when rural female-headed households are examined.

32 M Pradhan & M Ravallion 'Measuring poverty using qualitative perceptions of consumption adequacy' (2000) 82 *Review of Economics and Statistics* 462.

33 S Alkire & J Foster 'Understandings and misunderstandings of multidimensional poverty measurement' (2011) 9 *Journal of Economic Inequality* 289.

34 Given the legacy of colonialism and apartheid, it is not surprising that perceptions of relative standing (eg position in the income distribution) are likely to differ considerably depending on the reference group with which an individual compares his or her well-being.

35 SASAS is a repeated cross-sectional instrument that has been conducted annually by the Human Sciences Research Council since 2003. Each round has a sample of about 3 000 adults (16 years and older) living in South Africa. The sample is then weighted to be nationally representative using mid-year population estimates issued by Statistics South Africa.

36 S Klasen 'Poverty, inequality and deprivation in South Africa: An analysis of the 1993 SALDRU survey' (1997) 41 *Social Indicators Research* 51.

Nonetheless, the deprivation gender gap appears in rural households to have shrunk over the period 2007 to 2017. In 2017 women identified on average fewer domains where they felt deprived than in 2007.

A decline in subjective deprivation among vulnerable groups in South Africa could indicate changing expectations among these groups. However, it is far more likely that such a decrease suggests the success of government programmes that have targeted these groups in this period. It can also be observed from Table 6 that in each subjective deprivation domain Africans generally experienced the highest level of deprivation across the survey period, followed by coloureds, Asians and whites, in that order. Households in urban informal areas have higher levels of deprivation in each subjective measure compared to households in urban formal areas, although deprivation levels declined across the survey period for both categories of households. The provinces depict a mixed picture illustrating disparities in quality of life depending on geographical location in South Africa. A more precise interpretation of the results may require further research into the underlying drivers of the trends we observe in the SASAS survey data. Consequently, SASAS is capturing cross-sectional data on multidimensional subjective poverty, providing a unique, long-term account of the pace, underlying drivers of poverty trends and direction of change in the country.

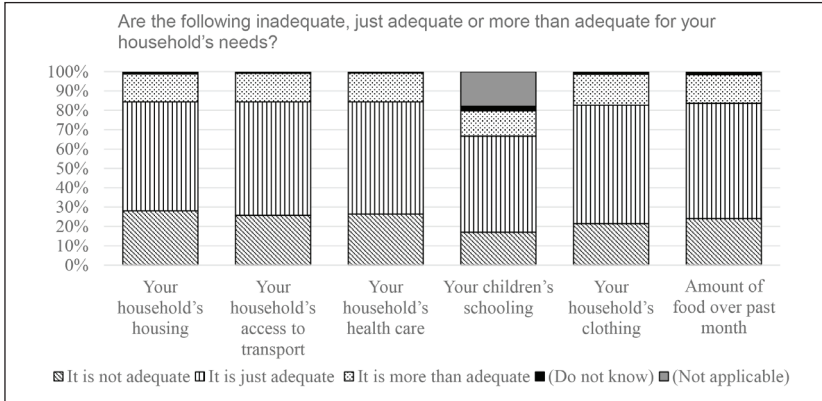
In spite of the declines in deprivation shares in most subjective measures of poverty since 2007, the levels in 2017 remain challenging. Figure 2 presents data on subjective multidimensional poverty from the 2018 SASAS round. The data presented indicate how South Africans self-assess their needs and suggest the general sense of deprivation felt by many in the country. The results show that in the 2018 round, approximately one-third of the adult public lived in a household that was deprived in terms of transport and housing as well as the amount of food available in the past month prior to the survey. More than half of the adult population resided in a household that identified one domain in which they felt deprived. About one-quarter reported living in a household that reported three or more forms of deprivation. One-twentieth of South Africans lived in a household that acknowledged deprivation in all five domains (that is, chronic or extreme poverty). It is possible to decompose the individual contribution of each domain in order to construct a composite indicator of subjective poverty, assigning weights to different domains of poverty showcased in Figure 2. This approach, however, was not explored here.

**Table 6: Multidimensional subjective deprivation shares across subgroups**

	Housing		Transport		Health care		Children's schooling		Clothing		Amount of food over the past month	
	2007	2017	2007	2017	2007	2017	2007	2017	2007	2017	2007	2017
<b>Gender</b>												
Male	37%	28%	27%	31%	27%	32%	16%	14%	31%	23%	32%	25%
Female	43%	32%	34%	31%	34%	29%	27%	20%	37%	29%	38%	27%
<b>Race Group</b>												
Black African	46%	34%	35%	34%	34%	34%	25%	19%	40%	29%	41%	29%
Coloured	32%	19%	23%	32%	24%	22%	16%	13%	21%	17%	23%	18%
Indian/Asian	25%	8%	19%	8%	22%	11%	17%	2%	22%	9%	17%	6%
White	9%	12%	7%	11%	11%	11%	4%	6%	8%	10%	8%	13%
<b>Geographic Type</b>												
Urban formal	33%	24%	24%	23%	24%	23%	17%	14%	26%	19%	23%	23%
Urban informal	56%	54%	40%	42%	40%	43%	32%	20%	47%	36%	52%	37%
Trad Auth Area	46%	37%	38%	46%	38%	43%	28%	23%	44%	39%	50%	29%
Rural formal	50%	37%	43%	39%	46%	24%	21%	18%	44%	23%	46%	24%
<b>Provincial Residence</b>												
Western Cape	27%	23%	19%	25%	19%	18%	16%	12%	20%	14%	20%	14%
Eastern Cape	57%	37%	49%	45%	50%	35%	43%	23%	54%	31%	60%	34%
Northern Cape	47%	34%	40%	46%	42%	30%	21%	11%	41%	25%	32%	35%
Free State	53%	19%	41%	21%	44%	22%	27%	11%	45%	18%	38%	19%
KwaZulu-Natal	36%	43%	30%	49%	28%	47%	19%	28%	33%	39%	34%	34%
North-West	33%	16%	30%	19%	27%	16%	21%	14%	34%	14%	31%	15%
Gauteng	36%	27%	24%	18%	26%	25%	15%	13%	27%	19%	21%	28%
Mpumalanga	47%	28%	28%	29%	26%	21%	25%	18%	44%	37%	62%	21%
Limpopo	37%	31%	26%	41%	25%	44%	12%	12%	27%	31%	30%	20%

Source: South African Social Attitudes Survey 2007; 2017<sup>37</sup>37 South African Social Attitudes Survey 2007; 2017, [www.hsrc.ac.za/sasas](http://www.hsrc.ac.za/sasas) (accessed 10 June 2019).

**Figure 2: Multidimensional subjective poverty in South Africa**



Source: South African Social Attitudes Survey 2018<sup>38</sup>

## 2.2 Human development

South Africa's progress in human development has been mixed, with its overall index declining steadily from 1996 to 2013. Table 7 details trends in a few human development indicators from 1996 to 2013. In 2012/2013, life expectancy at birth for both male and female was below 1996 levels and much worse a decade after independence. Total life expectancy at birth depicts a similar trend, as does maternal mortality and net primary enrolment rate.

**Table 7: South Africa: Millennium Development Goals (1996-2015)**

MDG Indicator	1996	2006	2015
Human Development Index	0,69	0,64(2005)	0,69
Life expectancy at birth (female)	64	53	65,5
Life expectancy at birth(male)	58	50	58,5
Life expectancy at birth(total)	61	52	62
Under 5 mortality rate (per 1000 live births)	62	77	34
Maternity mortality rate(per 100000 live births)	140 (1995)	160 (2005)	138
Adult literacy rate ( % of people 15 & over)	82	89 (2007)	94

38 South African Social Attitudes Survey 2018, [http:// www.hsrc.ac.za/sasas](http://www.hsrc.ac.za/sasas) (accessed 10 June 2018).

Net primary enrolment rate ( %of age group)	95 (1995)	90	84
Urbanisation	55	60	64,8

Source: United Nations<sup>39</sup>

In contrast, the under five mortality rate (per 1 000 live births) and adult literacy rate (percentage of people 15 years and over) have seen significant improvement since 1996. Table 8 depicts trends in human development by population group. The growth rate of the African population group has remained rather consistent and tended to, on average, stay below 2 per cent per annum from 1996 to 2017. The African group is the least developed population group as depicted by the United Nations Human Development Indices. Its level of development has been below the national average since 1996 to date. The highest percentage of the population group living under the food poverty line is also attributable to the African population group – again above the national average. This group also registers the lowest level of urbanisation in South Africa. The coloured group follows next.

**Table 8: Poverty and human development indicators by population group in SA (1996-2017)**

		1996	2006	2017
Population Growth Rate (%)	African	1,6%	1,4%	1,7%
	White	-0,3%	-0,4%	-0,3%
	Coloured	1,7%	1,3%	1,2%
	Asian	1,2%	1,4%	1,1%
	Total	1,4%	1,2%	1,5%
Human Development Index	African	45,7	45,6	59,1
	White	86,2	87,4	91,4
	Coloured	56,7	59,0	68,0
	Asian	72,7	74,2	80,7
	Total	55,2	54,6	65,3
Poverty Indicators ( % living below food line)	African	41,8%	32,8%	33,4%
	White	0,2%	0,2%	0,3%
	Coloured	21,2%	14,4%	13,5%
	Asian	0,3%	2,0%	1,8%
	Total	34,4%	27,2%	28,2%

39 United Nations Development Programme Human Development Report (2013) 'The Rise of South: Human Progress in a Diverse World' UNDP, New York, USA.

Urbanisation (% pop)	African	46,0%	49,2%	56,8%
	White	91,9%	91,5%	94,2%
	Coloured	86,5%	87,8%	93,4%
	Asian	96,6%	97,9%	99,0%
	Total	55,9%	57,9%	64,0%

Source: IHS Global Insight Southern Africa<sup>40</sup>

The white, coloured and Asian groups are highly urbanised, significantly above the national average. Compared to the African and coloured groups, the white and Asian population groups register much lower levels of population growth and relatively much higher levels of human development. The white population group has registered a negative population growth since 1996. As at end of 2017, this group had the highest level of development, the lowest level of poverty (less than 1 per cent of the national average) and the highest level of urbanisation. Disturbingly, the percentage of the Asian population living under food poverty line has increased fivefold between 1996 and 2017. These disparities in the quality of life reflect the underlying trends in unemployment by population group and income distribution deciles in South Africa detailed in earlier parts above.

### 3 Access to services

South Africa continues to experience social agitation involving demands for better service delivery to households. Such agitation, sometimes violent, is evident across all provinces. However, an analysis of service provision over time shows significant improvement in access to services as well as dynamic challenges due to population growth, rural-urban migration and immigration to South Africa from neighbouring African states.

#### *Table 9: Trends in access to different types of services*

There has been a steady increase in the use of flush toilets and improved ventilated pit toilets from 1996 to 2017. This has translated into a decline in the number of people using pit toilets, the bucket system and those with no toilet facilities.

40 IHS Global Insight Southern Africa database, <http://www.ihsglobalinsight.co.za/> (accessed 10 June 2019).

**Table 9.1: Access to different types of toilet facility (00'000)**

Type of toilet	1996	2006	2017
Flush toilet	49,4	75,9	105,6
	(54%)	(59%)	(66%)
Ventilated Improved Pit toilet	2,6	10,4	23,0
	(3%)	(8%)	(14%)
Pit toilet	23,0	27,7	24,0
	(25%)	(21%)	(15%)
Bucket System	3,6	2,8	3,0
	(4%)	(2%)	(2%)
No toilet	13,0	12,8	5,0
	(14%)	(10%)	(3%)
<b>Total</b>	<b>91,6</b>	<b>129,6</b>	<b>160,6</b>

Note: Percentage of the national total in parenthesis.

Source: IHS Global Insight Southern Africa<sup>41</sup>

Access to water has been consistently extended to households across South Africa. Table 9.2 shows significant increases in the number of people with access to water inside their dwellings, in their yards or 200 metres away from their houses. This has translated into a significant decline in the number of people who have access to water more than 200 meters away from their dwellings, although the number is still higher than in 1996. This could be attributed to migration and population growth. The number of people with no access to formal piped water has also increased steadily over the period.

**Table 9.2: Access to water (00'000)**

	1996	2006	2017
Piped water inside dwelling	37,7	53,3	75,2
	(41%)	(41%)	(47%)
Piped water in yard	19,3	40,4	47,4
	(21%)	(31%)	(30%)
Communal piped water (200m from dwelling)	10,0	11,3	16,5
	(11%)	(9%)	(10%)
Communal piped water (<200m from dwelling)	6,7	8,6	8,8
	(7%)	(7%)	(5%)

41 South African Social Attitudes Survey (n 38).

No formal piped water	17,8	16,1	12,7
	(19%)	(12%)	(8%)
<b>Total</b>	<b>91,6</b>	<b>129,6</b>	<b>160,6</b>

Note: Percentage of the national total in parenthesis.  
Source: IHS Global Insight Southern Africa<sup>42</sup>

**Table 9.3: Households with no electrical connections (00'000)**

	1996	2006	2017
Western Cape	1,2	1,0	0,5
	(12%)	(7%)	(3%)
Eastern Cape	7,7	6,0	2,6
	(61%)	(38%)	(14%)
Northern Cape	0,6	0,3	0,3
	(27%)	(12%)	(8%)
Free State	2,1	1,1	0,7
	(33%)	(13%)	(7%)
KwaZulu-Natal	7,1	6,6	3,2
	(42%)	(27%)	(12%)
North-West	2,8	1,6	1,2
	(44%)	(18%)	(11%)
Gauteng	3,7	4,9	4,5
	(17%)	(15%)	(10%)
Mpumalanga	2,5	1,6	1,2
	(37%)	(17%)	(10%)
Limpopo	4,7	2,8	0,9
	(53%)	(22%)	(6%)

Note: Percentage of the provincial total in parenthesis.  
Source: IHS Global Insight Southern Africa<sup>43</sup>

A nationwide extension of the electricity grid has seen increases in the number of households connected to the national grid across all provinces. As at end of 2017, only 9 per cent of households across all nine provinces in South Africa did not have access to electricity. The percentage of households with access to refuse removal has increased over the period, albeit marginally in most provinces.

42 As above.

43 As above.



**Table 9.4: No access to waste removal (00'000)**

	1996	2006	2017
Western Cape		1,4	1,9
	(13%)	(10%)	(10%)
Eastern Cape	7,9	9,7	10,1
	(64%)	(62%)	(54%)
Northern Cape	0,8	0,7	1,0
	(34%)	(26%)	(30%)
Free State	2,4	2,2	2,0
	(36%)	(28%)	(23%)
KwaZulu-Natal	9,2	11,6	12,8
	(54%)	(48%)	(46%)
North-West	4,1	4,9	4,7
	(64%)	(57%)	(42%)
Gauteng	3,0	4,1	4,4
	(14%)	(12%)	(10%)
Mpumalanga	4,2	5,4	6,8
	(62%)	(56%)	(56%)
Limpopo	7,7	10,7	11,9
	(87%)	(84%)	(76%)

Source: IHS Global Insight Southern Africa<sup>44</sup>

## 4 Addressing social inequality in South Africa

South Africa has implemented several programmes aimed at mitigating social inequality in all its forms.

### 4.1 Addressing income inequality in South Africa

Post-apartheid South Africa has extended the reach and depth of its social protection schemes aimed at improving the distribution of the gains from growth. Beneficiaries of South Africa's social assistance programmes increased from 2,7 million to approximately 16 million in 2013, consisting of the aged (2,9 million), child support grants (11,3 million) and the disabled (1,1 million) and others. Social grants serve as the main source of income especially for many poor and low-income households.

44 As above.

**Table 10: Poverty rate and poverty gap 1993 to 2013**

	Poverty Line (nominal rand)	Poverty Rate without social grants	Poverty Rate with social grants	Poverty gap reduction as % of GNI
<b>1993</b>				
Food	88,71	0,41	0,33	0,95%
Lower	131,27	0,5	0,45	1,29%
Upper	193,61	0,6	0,57	1,59%
<b>2013</b>				
Food	336,18	0,43	0,25	1,48%
Lower	497,45	0,5	0,38	1,99%
Upper	733,69	0,58	0,52	2,44%

Source: Statistics South Africa.<sup>45</sup>

Social grants reduced poverty by 45 per cent for the lower poverty line from 1993 to 2013. As per the food poverty measure, poverty levels declined from 33 per cent in 1993 to 25 per cent in 2013. Recent research by Stats SA shows that in 2017, 20 per cent of South African households have severe inadequate access to food. In terms of cost to the budget, social assistance in South Africa amounts to R120 billion representing 3,4 percent of gross domestic product (GDP). Social insurance schemes have also been reformed by establishing an unemployment insurance fund (UIF) which now covers previously-excluded groups such as domestic workers, seasonal farm workers and other categories.

South Africa has implemented another transfer system that requires recipients to meet certain human capital development conditions. The conditional cash transfer (CCT) system is aimed at reducing poverty and inequality as well as developing the next generation. The criteria to qualify as a recipient includes enrolling children into schools, ensuring regular medical checks and the necessary vaccinations. Thus, CCTs addressed multiple policy challenges, such as poverty and education or poverty and health.<sup>46</sup> Research has revealed that CCT programmes have also been highly successful in countries such as Brazil.

In recognition of the fact that labour market developments are located at the heart of income inequality in South Africa, other schemes have targeted employment creation. These include the Expanded Public Works Programme (EPWP) launched in 2004, which provides temporary work to the unemployed, most of whom are either unskilled or low-skilled.<sup>47</sup> The

<sup>45</sup> Statistics South Africa Statistical Release: National Poverty Lines 2018.

<sup>46</sup> Smal & De Jager (n 5).

<sup>47</sup> As above.

EPWP also entailed education and skills development with the objective of assisting beneficiaries to improve their skill set, rendering them more employable after leaving the programme. The EPWP exceeded its target of creating 1 million jobs by 600 000 work opportunities as at the end of 2009. By 2013 it had created three million work opportunities.<sup>48</sup>

Criticism of the EPWP is that it focuses on the short average duration of jobs (four months) and a brief skills development phase (8-12 days).<sup>49</sup> It has produced low-skilled labour and cannot serve as a means of providing long-term employment in response to South Africa's unemployment crisis. This has increased calls for industrialisation as a means of creating long-term employment and value-adding labour market capacity development in South Africa.

Indeed, a primary objective of successive South African governments since the onset of democracy has been to create jobs in order to reduce poverty and income inequality. Several programmes have also aimed at ensuring high and sustainable economic growth, an equitable distribution of the gains from growth, and bridging the gap between rich and poor through social safety nets and more efficient service delivery. They include the Reconstruction and Development (RDP) programmes of the early 1990s; the land reform strategy aimed at redistributing land to deprived households; the Growth, Employment and Redistribution (GEAR) strategy in 1996; the Accelerated and Shared Growth Initiative for South Africa (ASGISA) in 2005; the National Industrial Policy Framework from which emerged the Industrial Policy Action Plan (IPAP) in 2007; the New Growth Path (NGP) in 2010; and in 2011 the National Development Plan (NDP) 2030, South Africa's long-term socio-economic development roadmap.

The aim of these programmes has been to undertake specific growth-enhancing projects and effectively redistribute the gains from growth once achieved. While, for instance, the Broad-Based Black Economic Empowerment (BBBEE) programme has seen the emergence of a growing black middle class, it has also contributed to deepening intra-race inequality within the African group, aggravating income inequality as a whole. As at 2008, 59 per cent of income inequality in South Africa was driven mainly by differences within races, and 41 per cent by differences between races.<sup>50</sup> A more recent development in 2018 is the introduction of a minimum wage policy aimed at ensuring that the lowest-paid earn some form of living wages that can meet their basic expenditure needs. However, the official rate of ZAR 20 per hour has been met with significant contention and resistance by organised labour and civil society organisations that still deem this level of wages as 'slave' wages, not adequately reflective of the

48 *SA News* (2014) 'EPWP a success story'.

49 A McCord 'The expanded public works programme' Conference: 'Overcoming Unemployment. Giving effect to the Right to Work Campaign' (2006) District Six Museum 12-15 June 2006.

50 Smal & De Jager (n 5).

poverty level and challenges working households face in South Africa.

## **4.2 Addressing human development challenges**

A large number of initiatives have been implemented in the areas of education, health and rural development, largely in line with achieving set targets under the Millennium Development Goals (MDGs) to which South Africa is a signatory. Significantly, favourable outcomes can be observed, but are beyond the scope of this chapter.

## **4.3 Addressing service delivery**

Likewise, as detailed above, significant achievements have been made in increasing access to water, sanitation, electricity and refuse removal. Nevertheless, several challenges remain in achieving 100 per cent access to services in South Africa, which have been attributed to rapid rural-urban migration; the density of informal settlements; difficulties in installing bulk infrastructure in remote areas; a decline in the functionality of municipal infrastructure due to poor maintenance; and a shortage of licensed land fill sites to receive refuse removed. In addition, access does not always mean actual enjoyment of all of these services beyond free basic minimum allowances.

# **5 Conclusion and summary of findings**

This chapter has considered the concept of social inequality in South Africa from three dominant perspectives within the South African concept, namely, income inequality; poverty and human development; and access to services. Although South Africa's 'war' on social inequality is being undertaken on several fronts, some difficulties remain due to persistent structural and institutional challenges driving disparities and social stratification in South Africa. These disparities transcend race and income measures, to include access to employment opportunities, education, quality health care and necessities such as electricity, water and sanitation. The uneven distribution of the gains from growth also means that the quality of life and availability of income earning opportunities are further driven by geographical location and inherited and persistent spatial disparities. Consequently, South Africa remains the most unequal country in the world in terms of income, obviously worse than its BRICS counterparts. By virtue of South Africa's unique political history, income inequality is further influenced by racial and gender dynamics, which further drive multidimensional inequality in its different forms. Income inequality trends have not really improved over the past decades since independence, and has actually worsened in some provinces in South Africa since 1996. Income inequality by race two and a half decades after

political independence depicts that Africans still have the highest Gini Index followed by the coloured, Asian and white populations, in that order. Further research shows that inequality between races as well as within races are equal drivers of income inequality in South Africa, with the African population group having the most severe inequality within race. Male-headed households earn more than female-headed households, depicting the impact of gender inequality.

With respect to poverty and human development, there is an increasing need to adopt a multidimensional approach to capture the subjective multiple forms of deprivation that depict poverty in the South African and developing country context, for that matter. In this regard, research has shown that the individual's own sense of deprivation should be the best guide to defining what poverty is and how it should be measured. Consequently, the South African Social Attitudes Survey, conducted by the Human Science Research Council on perceptions to poverty, uses some subjective poverty indicators such as access to housing, transport, health care, schooling, clothing, and the amount of food in the past month. The results of the 2018 round show that many of the adult population were deprived in terms of food security, quality of housing and access to transportation. More than half of the adult population indicated that they were deprived in one of the six domains. Three or more of the domains were identified by one-quarter of the adult population as areas in which they were deprived. One-fifth suffered from chronic or extreme poverty in which they identified themselves as households deprived in all six domains targeted in this study. In terms of human development, South Africa's overall index has declined below 1996 levels, although with a mixed picture. While there have been declines below 1996 levels in life expectancy (overall, male and female) and net primary school enrolment rate (percentage of age group), there have been improvements in other human development indices. For instance, infant and maternal mortality levels have also improved while efforts to bring HIV infections under control are still ongoing. Inter-race comparisons also indicate that the African group have the highest population growth rate, the lowest human development index, the highest percentage of people living with food poverty and the lowest level of urbanisation. The African group is closely followed by the coloured population group. The white and Asian groups register higher levels of human development, lower levels of poverty, and a lower and sometimes negative population growth. These racial differences in the quality of life mirror the underlying patterns in unemployment by population group and income distribution in South Africa.

Access to basic services has seen significant improvements across all races due to interventions by government. There has been an increased use in flush toilets and improved ventilated pit toilets leading to huge declines in households using pit toilet and bucket systems. Households with access to water, electrical connections and refuse removal have more than tripled compared to 1996 levels.

Several policy and programme interventions have been implemented by government to mitigate social inequality in South Africa. Social protection schemes have been implemented to bridge the gap in the quality of life between rich and poor post-independence. Beneficiaries include the aged, child support grants and the disabled. For many poor households this is either the main source of income or a key component of total household income. In addition to addressing income inequality, social grants have helped to reduce poverty significantly from 1993 to date by approximately 45 per cent. Additional interventions have targeted high and sustainable economic growth, improved education and skills development, equitable distributions of the gains of growth, social safety nets and more efficient service delivery. These include the Expanded Public Works Programme (EPWP) launched in 2004, to provide temporary work to the unemployed, most of whom are either unskilled or low-skilled, and develop their capacity to make them more employable. Others are the Reconstruction and Development (RDP) programmes of the early 1990s; the land reform strategy aimed at redistributing land to deprived households; the Growth, Employment and Redistribution (GEAR) strategy in 1996; the Accelerated and Shared Growth Initiative for South Africa (ASGISA) in 2005; the National Industrial Policy Framework from which emerged the Industrial Policy Action Plan (IPAP) in 2007; the New Growth Path (NGP) in 2010; and in 2011 the National Development Plan (NDP) 2030, South Africa's long-term socio-economic development roadmap. While each of these programmes has made some level of impact, the statistics clearly reveal that there is much more room for improvement, especially in the areas of job creation, poverty reduction and inequality. However, this is not entirely attributable to a failure in government interventions to address social inequality. Some of the indices used to measure progress made, such as the Gini Index, for example, do not capture the positive impact of government interventions on social inequality. A more holistic perspective to measuring inequality with a stronger focus on subjective multi-dimensional indicators might characterise South Africa differently.

## References

- Alkire, S & Foster, J 'Understandings and misunderstandings of multidimensional poverty measurement' (2011) 9 *Journal of Economic Inequality* 289
- Anand, S & Sen, A 'The income component of the Human Development Index' (2000) 1 *Journal of Human Development* 83, [http://www.tandfonline.com/doi/abs/10.1080/14649880050008782#.VRkR\\_vmUc0c](http://www.tandfonline.com/doi/abs/10.1080/14649880050008782#.VRkR_vmUc0c) (accessed 30 March 2015).
- Bellù, LG & Liberati, P 'Inequality analysis – The Gini Index' (2006) Food and Agriculture Organisation, United Nations
- Bhorat, H, Goga, S & Van der Westhuizen, C 'Growth, poverty and inequality in the post-apartheid South Africa: Exploring the interactions' unpublished paper prepared for the SANPAD Conference The Poverty Challenge 2007, 26-29 June 2007, Elangeni Hotel, Durban, South Africa
- Bhorat, H, Leibbrandt, M & Woolard, I 'Understanding contemporary household inequality in South Africa' in Bhorat, H et al (eds) *Fighting poverty: Labour markets and inequality in South Africa* (UCT Press 2001)
- Blomquist, N 'A comparison of distributions of annual and lifetime income: Sweden around 1970' (1981) 27 *Review of Income and Wealth* 243
- Buehnb, A, Claudio, E, Schneider, F & Montenegro, E 'New estimates for the shadow economies all over the world' (2010) 24 *International Economic Journal* 443
- Deininger, K & Squire, L 'A new data set measuring income inequality' (1996) 10 *World Bank Economic Review* 565
- Deltas, G 'The small-sample bias of the Gini Coefficient: Results and implications for empirical research' (2003) 85 *The Review of Economics and Statistics* 226
- Edward, P & Sumner, A 'The geography of inequality: Where and how much has income distribution changed since 1990?' (2013) Centre for Global Development Working Paper 341
- Hoogeveen, J & Özler, B 'Not separate, not equal: Poverty and inequality in post-apartheid South Africa' in Bhorat, H & Kanbur, R *Poverty and policy in post-apartheid South Africa* (HSRC Press 2006)
- IHS Global Insight Southern Africa database, <http://www.ihsglobalinsight.co.za/> (accessed 10 June 2019)
- Kingdon, GG & Knight, J 'Subjective well-being poverty versus income poverty and capabilities poverty?' (2006) 42 *Journal of Development Studies* 1199
- Klasen, S 'Poverty, inequality and deprivation in South Africa: An analysis of the 1993 SALDRU survey' (1997) 41 *Social Indicators Research* 51
- McCord, A 'The expanded public works programme' Conference Overcoming Unemployment. Giving effect to the Right to Work Campaign' District Six Museum, 12-15 June 2006
- Mellor, JW 'Dramatic poverty reduction in the Third World: Prospects and needed action' (1989) International Food Policy Research Institute 18-20
- Posel, DR & Casale, DM 'Relative standing and subjective well-being in South Africa: The role of perceptions, expectations and income mobility' (2010) 104 *Social Indicators Research* 195
- Pradhan, M & Ravallion, M 'Measuring poverty using qualitative perceptions of consumption adequacy' (2000) 82 *Review of Economics and Statistics* 462
- SA News (2014) 'EPWP a success story' [hppts://www.sanews.gov.za/south-africa/epwp-success-story](http://www.sanews.gov.za/south-africa/epwp-success-story) (accessed: 10 June 2019)
- Sen, A 'A decade of human development' (2000) 1 *Journal of Human Development* 17
- Sharma, S 'Rising inequality in South Africa: Drivers, trends and policy responses' Consultancy Africa Intelligence (2010), <https://www.consultancyafrica.com> (accessed 13 April 2014)
- Smal, MM & De Jager, S 'The monetary transmission mechanism in South Africa' (2001) South African Reserve Bank Working Paper WP/2001/16

South African Social Attitudes Survey (2007, 2017), <http://www.hsrc.ac.za/sasas> (accessed 10 June 2019)

Statistics South Africa Income and Expenditure Survey (1995, 2000) South Africa  
Statistics South Africa Statistical Release. National Poverty Lines (2018) South  
Africa

United Nations Development Programme Human Development Report 2013  
'The rise of South: Human progress in a diverse world' UNDP New York, USA

World Bank 'World development indicators – Gini Index' (2019), <http://data.worldbank.org/indicator/SI.POV.GINI> (accessed 10 June 2019)



# CHAPTER 4

## WHO REALLY ‘STATE-CAPTURED’ SOUTH AFRICA? REVEALING SILENCES IN POVERTY, INEQUALITY AND STRUCTURALLY-CORRUPT CAPITALISM

Patrick Bond\*

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### Abstract

*The ‘state capture’ of South Africa’s parastatal agencies and government departments typically has been seen in a binary mode, with a narrative critical of two competing factions (‘Zuptas’ and ‘WMC’) within the African National Congress. A review of post-apartheid financial and corporate influences over public policy ranging from macro-economics to social grants, as well as analytical shortcomings of status quo analysts, suggests a different kind of state capture. The neo-liberal bias of state policy is especially obvious when World Bank interventions – including the recalculation of inequality rates – are compared to the suffering of growing numbers of poor and unemployed people. But even if their grievances are ignored, this is suffering that is not silent. Creative resistances have emerged, often revealing a surprising counter-power against the state and capital.*

### 1 Introduction

Unless there are illusions that the renewed leadership of the African National Congress (ANC) under President Cyril Ramaphosa will reform anti-poverty policies, it is vital to consider the narratives of poverty and inequality that emerged in the 1994-2019 era. This assists us to understand policy limitations that resulted in widespread socio-economic violence against the vast majority of South Africans. These policies are anticipated to continue with no substantive changes, aside from worsening austerity, parastatal commercialisation and privatisation, and other neo-liberal (pro-corporate) policies.

The credit ratings agencies’ ‘junk’ (non-investment grade) ratings onslaught against South African state and parastatal securities mostly occurred against Jacob Zuma’s government in mid-2017 after he fired Finance Minister Pravin Gordhan, but the business sector’s crisis of confidence persisted into Ramaphosa’s rule starting in February 2018.

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Dating back a quarter of a century, the entire post-apartheid era's record of worsening poverty and inequality is vital to consider, not only the 2009-2018 era of Zuma's mismanagement. During this period of political freedom, the extreme forms of structurally-corrupt capitalism consolidated in a fusion of two major political forces: the 'White Monopoly Capital' (WMC) business elite which carefully blended old and new money without disrupting accumulation processes; and a new upstart network centred on the Gupta brothers and their state allies, nicknamed the 'Zuptas' (with a second network of ANC leaders benefiting from bribes doled out by the parasitical, Watson-controlled Bosasa company). The latter entails a more explicitly disruptive agenda of patrimonial accumulation.

The explicit distinction between the two modes of influencing state policy (WMC and Zuptas) so common in the recent era – and repeated in a fierce debate between Ace Magashule and Mavuso Msimang – disguises more than it reveals. According to ANC Secretary-General Magashule, delivering the Walter Sisulu Memorial Lecture in May 2019,

[o]ur mandate is to expropriate land without compensation, our mandate is to nationalise the Reserve Bank, our mandate is to transform the financial institutions and banks in order to serve the needs of our people, our mandate is to implement national health insurance, our mandate is to implement the minimum wage, our mandate is to stop retrenchment of the working class, our mandate is to stop privatisation of state own enterprises, our mandate to achieve free and universal education, our mandate is the transfer of the political and socio-economic power into the hands of the overwhelming majority of our people, Africans in particular, and the black people in general.<sup>1</sup>

Addressing Magashule's own corruption, Msimang replied that Magashule and those applauding him engaged in

fatuous factional platitudes ... in that crass act, the little people involved managed to desecrate the memory of the ANC's pre-eminent unifier and national builder ... These exalted airheads took turns rubbishing the Zondo and other commissions into state capture; denouncing WMC, and other such populist slogans. In their myopia, they forgot that it was their revered President Jacob Zuma who appointed the Zondo Commission, albeit against his will. A video clip currently doing the rounds in WhatsApp chatrooms has Zuma making derisive references to the commissions set up by President Cyril Ramaphosa to probe the rampant levels of corruption, the abiding legacy of his administration ... The ANC no doubt deserves the leaders it elects. Riddled with poisonous factions, it gave Magashule its thumbs-up for the Secretary-General position; this, despite the baggage he was already carrying in corruption allegations. Magashule has a mission: He wants all and sundry to know that his loyalty lies not with Ramaphosa but first and foremost with Jacob Zuma. He took the first available opportunity after the December 2017 Nasrec conference to let his supporters in Pietermaritzburg know that the Ramaphosa presidency would last but a short five years and that 'the real ANC would be back after five years. It's just a matter of five years. So, let us

1 A Magashule 'Walter Sisulu Memorial Lecture' Mangaung, 18 May 2019, <https://www.politicsweb.co.za/archive/we-are-surely-coming-for-what-is-ours--ace-magashule> (accessed 28 May 2019).

focus. Let's work hard. *Mayibuye iANC* that we know.'

In September 2018 Magashule was on his disruptive trail again as part of a clandestine group, involving Zuma, Supra Mahumapelo, former North West premier; Meogko Matuba, ANC Women's League Secretary-General, and Thanduxolo Sabelo of the KZN ANC Youth League, who met at the Maharani Beach Hotel. And so he has continued despite pitiful claims of working for a united ANC ... Books imputing scandal are written about our Secretary-General; his former office as premier is raided by the Hawks in search of evidence that might disclose acts of corruption; like the immediate past-President, he is a self-confessed friend of the Gupta brothers, the nemesis of every decent South African; the list continues *ad nauseam*.<sup>2</sup>

Indeed, for those suffering wishful thinking about an ANC leadership that will probably come to be known as the 'Ramazupta' regime because of this power balance, or for those researchers intent on legitimating existing power structures when studying poverty, inequality and the state's willingness to address these maladies, apparently some things simply *cannot be named*. These include deep-seated processes of capitalist corruption and theft that are sometimes termed 'accumulation by dispossession'.<sup>3</sup> To do so would threaten received diagnostic wisdom and require a radically new socio-political strategy, in addition to upsetting an important methodology recently established by the World Bank: rejigging the Gini Coefficient to pretend that there are dramatic improvements in inequality as a result of state social spending.

More honest experts despair about how difficult it is to address post-apartheid inequality under conditions of neo-liberalism, including a team led by Thomas Piketty in the *World Inequality Report 2018*.<sup>4</sup>

In contrast to Brazil and the Middle East, inequality increased significantly over the past decades in South Africa. The trade and financial liberalisation that occurred after the end of apartheid, coupled with the failure to redistribute land equally, can help to explain these dynamics.

For having dogmatically promoted macro-economic neo-liberalism and the failed willing seller, willing buyer land reform policy, World Bank staff stand implicated, and hence their silence discussed in coming pages is entirely comprehensible.<sup>5</sup> The Bank's role in South African accumulation by dispossession – with major investments and loans in apartheid (billions committed from 1951-1967), and post-apartheid at Lonmin (\$150 million in commitments), Medupi (\$3,75 billion) and CPSNet1 (22 per cent of ownership) – also helps to explain the exceptionally optimistic tone

2 M Msimang 'Cry the beloved ANC!' *Daily Maverick* 21 May 2019, <https://www.dailymaverick.co.za/article/2019-05-21-cry-the-beloved-anc-ace-magashules-lecture-should-not-have-been-done-in-walter-sisulus-name/> (accessed 28 May 2019).

3 D Harvey *The new imperialism* (2003).

4 F Alvaredo et al *World Inequality Report 2018* (2018) 75, <http://wir2018.wid.world/files/download/wir2018-full-report-english.pdf> (accessed 28 May 2019).

5 P Bond *Elite transition* (2014).

adopted.

This chapter considers South Africa's main debates around poverty, unemployment and inequality, on the one hand, and rampant economic corruption, on the other. By ignoring the roots of these miseries and failing to address their interlinkages, most mainstream researchers and commentators are reduced to reiterating a simple narrative:

- Apartheid was a tragedy whose legacy can be addressed by deracialising capitalism.
- In the process, inequality must be addressed through more sensible economic policy, a generous social policy and a growing middle class to ensure stability
- Redistribution policy – especially social grants and progressive taxation – is sound.
- Yet implementation difficulties continue, what with the ruling party's 'cadre deployment' wrecking the civil service, among other capacity constraints.
- Outright corruption – the Zuma-Gupta patrimonial nexus – is also debilitating.
- So the way forward is to restore macro-economic discipline, maintain conservative fiscal policy, tackle state and especially parastatal corruption, and rebuild the credit ratings agencies' confidence in South Africa.

This chapter, in contrast, offers a very different interpretation based on the opposite narrative:

- Apartheid was not economically irrational for capitalism during the twentieth century but instead was mostly functional – until systemic protest and sanctions began to become debilitating, skilled-labour supplies became constrained, the limits of (mainly white) consumer markets were reached, and financial crisis hit hard in 1985.
- Today that legacy continues in its most profound manifestations, including the still racially-biased labour market, migrancy and the structured production of inequality ('uneven development') in nearly all other social spheres.
- The inequalities of wealth and income that soared after apartheid ended reflected a series of neo-liberal policy choices, in a context of the economy's hastened integration into the world economy on disadvantageous terms.
- Implementation shortcomings also partly reflect policy distortions.
- Systemic socio-economic corruption is largely due to a factor typically ignored in South African narratives until mid-2017, namely, corporate economic crime.
- Finally, if a different power balance emerges – one more sensitive to the interests of poor and working-class people, especially women, the youth, the elderly and environmental activists – then new macro-economic, social and ecological policies should be adopted (with the objective of changing relationships between national and global circuits of capital, restructuring the dominant fractions of capital, and escaping from the dominance of international credit rating agency analysis, diagnosis and policy advice).

To generate the second narrative requires identifying several gaping silences in the first, especially insofar as corporate corruption and neo-patrimonialism have generated large state flows of resources into the

hands of the wealthy. That is the objective of this chapter.

## 2 Inequality, the state and its ‘capture’

In his book *The anti-politics machine* Stanford University anthropologist James Ferguson criticised the World Bank’s understanding of Lesotho as a ‘traditional subsistence peasant society’. Ferguson observed how, in the process, apartheid’s migrant labour system was explicitly *ignored* by the Bank, although remittances from Basotho workers toiling in mines, factories and farms across the Caledon River accounted for 60 per cent of rural people’s income. Ferguson concluded that ‘[a]cknowledging the extent of Lesotho’s long-standing involvement in the modern capitalist economy of South Africa would not provide a convincing justification for the “development” agencies to “introduce” roads, markets and credit’.<sup>6</sup> Using Michel Foucault’s discourse theory, Ferguson showed why some things *could not be named* by the Bank: To do so would violate a dogma, namely, that the central problems of poverty can be solved by applying market logic. Yet it was that most important of market relationships – (super)exploited labour – that *caused* so much misery.

In several 2014-2018 reports about South African inequality, World Bank staff and consultants have claimed that Pretoria’s progressive taxation and pro-poor social spending have dramatically reduced the Gini inequality coefficient, even if not adequately.<sup>7</sup> In an oft-repeated conclusion, the main Bank consultant, Nora Lustig, ignores most state transfers to the rich yet praises South Africa for ‘the combination of a large redistributive effort with transfers targeted to the poor and direct taxes targeted to the rich’.<sup>8</sup> In their book compiling inequality research from eight countries, Inchauste and Lustig confirm that ‘South Africa is the most redistributive of all the countries examined here. Nevertheless, it

6 J Ferguson *The anti-politics machine* (1994).

7 G Inchauste & N Lustig ‘The distributional impact of taxes and transfers’ Washington DC, World Bank (2017), <https://openknowledge.worldbank.org/handle/10986/27980> (accessed 28 May 2019); G Inchauste et al ‘The distributional impact of fiscal policy in South Africa’ Policy Research Working Paper WPS 7194 (2015); N Lustig ‘Inequality and fiscal redistribution in middle-income countries’ CEQ Working Paper 31, New Orleans, Center for Inter-American Policy and Research, Department of Economics, Tulane University, and Inter-American Dialogue (2015); N Lustig ‘Inequality and fiscal redistribution in middle-income countries’ (2016) 7 *Journal of Globalization and Development* 17-60; I Woolard et al ‘How much is inequality reduced by progressive taxation and government spending?’ *Econ3x3* (2015), <http://www.econ3x3.org/article/how-much-inequality-reduced-progressive-taxation-and-government-spending#sthash.nuwTTm2n.dpuf> (accessed 28 May 2019); World Bank Fiscal policy and redistribution in an unequal society. South Africa Economic Update 6, 1 November 2014, <http://documents.worldbank.org/curated/en/2014/11/20339043/south-africa-economic-update-fiscal-policy-redistribution-unequal-society> (accessed 28 May 2019); World Bank ‘South African poverty and inequality assessment discussion note’ (2016) <http://ccs.ukzn.ac.za/files/World-Bank-South-Africa-CN-Discussion-Note-28-Jan-2016.pdf> (accessed 28 May 2019); World Bank Jobs and inequality (2018), <http://documents.worldbank.org/curated/en/368961522944196494/pdf/125011-REPLACEMENT-PUBLIC-SAEU-APRIL-2018-Edition-11.pdf> (accessed 28 May 2019).

8 Lustig (2016) (n 6) 20.

remains the most unequal country after taxes and social transfers – even more so than other countries before any fiscal intervention.<sup>9</sup>

How to handle this paradox? Like those Bank staff who ignored the most basic realities of Basotho workers' economic insertion into the circuits of (apartheid era) South African capital yet mull over why poverty persists, so too do the new analyses explicitly ignore the most obvious facets of post-apartheid South Africa's neo-patrimonial power relations: *those resource transfers that benefit mainly white, wealthy households, corporations and their investors*. Bank data and methodology are deficient, and the conclusion that Bank staff reached – that Pretoria's fiscal policy is extremely redistributive towards poor people – is hasty and unfounded.

The World Bank's 2014-2018 publications were also highly political, for they were (and are) prone to be abused so as to promote a budget-cutting agenda. To illustrate, '[y]ou have to look at both the taxing and the spending sides of government policy – and, on that basis, South Africa can claim to have one of the world's most redistributive public purses', claimed *Business Day* associate editor Hilary Joffe.<sup>10</sup> Others to endorse the Bank's inequality reduction claims included Investec Bank chief economist Brian Kantor, BrandSouthAfrica manager Simon Barber (in the journal *Foreign Policy*), commentator Jonathan Katzenellenbogen, Rothschilds banker, and former finance and planning minister Trevor Manuel.<sup>11</sup> There are scores of other economists and even political economists who have since then uncritically cited the Bank's analysis (some 67 mainly positive citations were recorded by mid-2019, including by otherwise critical scholars such as Padayachee and Breckenridge).<sup>12</sup>

On the one hand it is a pleasing narrative, especially that South Africa's otherwise disreputable state machinery indeed is ensuring a degree of resource transfer to the poorest citizens, in spite of all the grievances so regularly expressed in service delivery protests. On the other hand, this

9 Inchauste & Lustig (2017) (n 6) 9.

10 H Joffe 'World Bank tax study holds important lessons for SA' *Business Day* 12 November 2014, <http://www.bdlive.co.za/opinion/columnists/2014/11/12/world-bank-tax-study-holds-important-lessons-for-sa> (accessed 28 May 2019).

11 S Barber 'South Africa's ANC moves from detente to entente with a dynamic private sector' *Foreign Policy* 18 November 2014, <http://www.foreignpolicy.com/sponsored/southafricaat20/in-south-africa-a-new-plan-for-private-sector-growth> (accessed 28 May 2019); B Kantor 'Address poverty in SA and let inequality look after itself' *ZAeconomist* 20 November 2014, <http://www.zaeconomist.com/sa-economy/address-poverty-in-sa-and-let-inequality-look-after-itself/> (accessed 28 May 2019); J Katzenellenbogen 'SA's choice: Crisis or reform?' *PoliticsWeb* 11 November 2014, <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=797617&sn=Detail&pid=71616> (accessed 28 May 2019); T Manuel 'Confronting the challenge of poverty and inequality' Helen Suzman Memorial Lecture, Gibson Institute for Business Studies, University of Pretoria, 7 November 2014, <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=798431&sn=Detail&pid=71616> (accessed 28 May 2019).

12 K Breckenridge 'Biometric capitalism and the future of history' Inaugural lecture, 19 May 2017, <http://www.wits.ac.za/news/latest-news/inaugural-lectures/2017/biometric-capitalism-and-the-future-of-history.html>; V Padayachee 'Inequality, macroeconomics and financial instability' (2017) 31 *International Review of Applied Economics* 429-436.

echo chamber is more important because it brazenly justifies the creeping austerity that became obvious at the time the Bank began publishing its reports on inequality.

By early 2015 the country's highest-profile economist, Iraj Abedian, warning of imminent credit rating agency downgrades to junk status, made a prominent call – on the front page of *Business Day* the very day of that year's budget speech – to avoid this outcome by cutting social grants 'way below inflation'.<sup>13</sup> The tone for this early version of austerity was partly set by the World Bank, for even after cuts in the social wage were made in February 2015, the Bank's Woolard et al remarked that 'South Africa's fiscal deficit and debt indicators signal that there is limited fiscal scope to spend more to achieve even greater redistribution'.<sup>14</sup>

In response to the question 'how much is inequality reduced by progressive taxation and government spending,' the World Bank answers that the Gini coefficient (which measures income inequality) is reduced from a 0,77 market income level to 0,59, having adjusted household incomes 'comprehensively' so as to assess the impact of government revenue and expenditure.<sup>15</sup> This leaves two immediate problems for our consideration (prior to exploring the matter of corruption). First, the Bank and Van der Berg research cannot be considered 'comprehensive', because countervailing data simply is *ignored* (repeatedly so). Second, nevertheless, a variety of neo-liberal commentators have regurgitated this wild Gini reduction claim in the course of their own efforts to promote fiscal austerity, consistent with the agenda of the so-called WMC bloc. Judging by the 2015 version by Woolard et al of the claim in the South African e-zine *Econ3x3*, my own and other attempts to get to the bottom of the methodology and number crunching have been utterly futile, for they are also ignored.<sup>16</sup>

Second, the Bank and others maintain these views by refusing to acknowledge the underlying realities of 'state capture' by WMC. Even in mid-2019, as this chapter goes to press, the leading research published so far on this vital matter not only is sub-standard due to incompleteness, but is politically biased in a way that continues to increase inequality in the world's most unequal large country.<sup>17</sup> However, the over-reach of WMC alongside the Gupta-centred nexus gives new opportunities for rethinking

13 L Ensor 'Nene urged to make real commitment to fiscal discipline' 24 February 2015, <http://www.bdlive.co.za/economy/2015/02/24/nene-urged-to-make-real-commitment-to-fiscal-discipline> (accessed 28 May 2019).

14 Woolard et al (n 7) 8.

15 Woolard et al (n 7).

16 As above; P Bond, 'Bretton Woods Institution narratives about inequality and economic vulnerability on the eve of South African austerity' (2015) 45 *International Journal of Health Services* 415; D Forslund 'World Bank finds itself in a Gini fix' *Mail&Guardian* 17 March 2016, <https://mg.co.za/article/2016-03-17-world-bank-finds-itself-in-a-gini-fix> (accessed 28 May 2019).

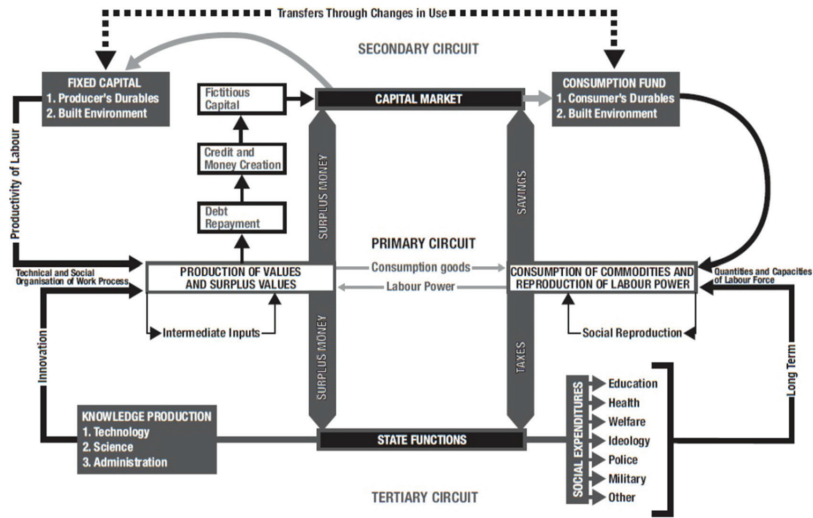
17 H Bhorat et al *Betrayal of the promise*, Stellenbosch 2017, [https://www.scribd.com/document/349418506/Betrayal-of-the-Promise#from\\_embed](https://www.scribd.com/document/349418506/Betrayal-of-the-Promise#from_embed) (accessed 28 May 2019).

our analysis and politics.

### 3 The political economy of the capitalist state

To begin, what must we do to properly frame the thorny question of whether state taxation and spending are progressive or regressive? The main roles for a state in modern societies such as South Africa are not only the minimal necessary functions for reproducing capitalism, but assuring that legal contracts are honoured, facilitating exchange through a well-functioning monetary system and maintaining a monopoly of violence. As David Harvey’s diagrammatic representation of ‘three circuits of capital’ shows (Figure 1), there are many other activities beyond the factory that ensure that a market system generates surpluses at the point of production, in the primary circuit of capital, even if they are ‘realised’ elsewhere, in the secondary and tertiary circuits.

Figure 1: The state within modern capitalism’s three circuits



Source: David Harvey<sup>18</sup>

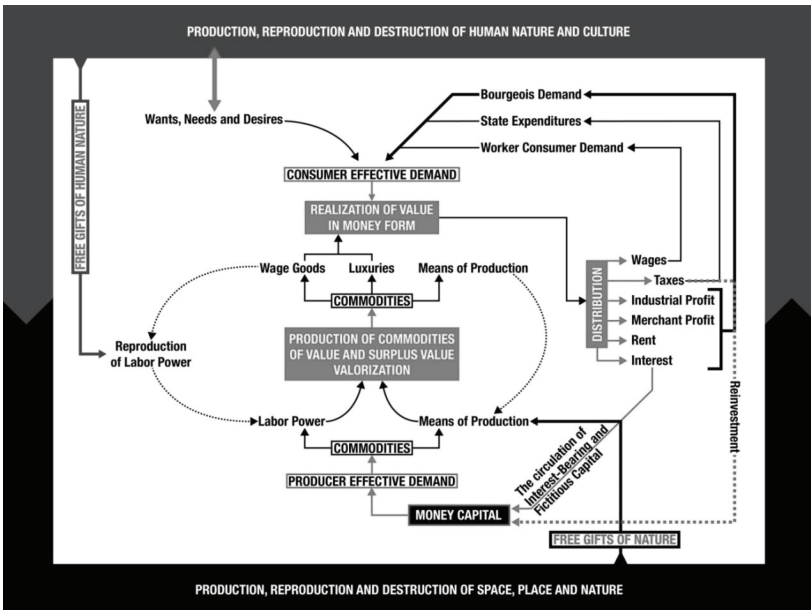
To facilitate capital flows into the primary circuit at the right speed and in the proper amount, states typically provide financing and regulation support. The secondary circuit is where states manage the built environment. In the tertiary circuit, the state often is most visible: Levels of taxation are established, science and technology are subsidised,

18 D Harvey *Marx, capital and the madness of economic reason* (2017).



security forces are funded, and the labour force is renewed by judicious spending on the quantities and capacities of workers available for the market (through education, health, welfare and ideological inputs). Bank staff might have avoided the embarrassment of only counting pro-poor state spending, by considering these other vital functions of a state to the capitalist system’s ongoing reproduction. By 2017 Harvey actively integrated into capital’s primary, secondary and tertiary logics two other dimensions: the highly-gendered socio-cultural reproduction of labour and ecological characteristics representing ‘free gifts’ within capitalist/non-capitalist relations (Figure 2). These are also facilitated by state action (or inaction).<sup>19</sup>

*Figure 2: Capital in the context of social reproduction and environment*



Source: David Harvey.<sup>20</sup>

Harvey had revived the theory of imperialism by tracing the capitalist/non-capitalist relationships back to Marx’s idea of primitive accumulation, including

conversion of various forms of property rights (common, collective, state, etc) into exclusive private property rights; suppression of rights to the commons ... colonial, neo-colonial and imperial processes of appropriation of assets

19 As above.  
20 As above.

(including natural resources) ... and ultimately the credit system as radical means of primitive accumulation.<sup>21</sup>

Such forms of primitive accumulation were often dismissed by vulgar Marxists as merely examples of 'cheating in exchange' (or simply plunder in many cases). By implication, they argued, these kinds of profiteering power grabs distract attention from the most profound process of accumulation: capital's exploitation of labour at the point of production.

However, a more sophisticated approach to the state's management of crisis tendencies – including their geographical displacement ('shifting'), temporal displacement through credit ('stalling') and accumulation by dispossession ('stealing') – suggests that we must consider all the functions of the state in this sort of analysis of fiscal incidence, especially those that directly benefit capital. That challenge is precisely what the World Bank and its consultants chose to ignore, as discussed in the next part.

As the final parts point out, the Bank was not alone. After all, the idea of state capture by a patrimonial set of corporate elites goes back at least to the Marx-Engel Communist Manifesto framing in 1848: 'The *executive* of the modern state is but a *committee* for managing the common affairs of the whole *bourgeoisie*.' According to then ANC Treasurer Zweli Mkhize, who at the time (October 2017) was speaking to the Johannesburg Mining Indaba, '*This issue of state capture is a huge embarrassment. We take it as a form of corruption. This is something we have not experienced before.*'<sup>22</sup> Yet state capture of the apartheid state by WMC certainly was experienced before, and capture of the post-apartheid treasury by the financial industry – especially three international credit ratings agencies – was entirely obvious. Transcending a unilateralist interpretation of corruption is vital to understanding the broader generation of inequality.

## 4 World Bank inequality denialism

As noted above, there are many sites where the Bank's inequality research can be read and debunked. A few myths appear durable. According to the Bank,<sup>23</sup>

South Africa spent more than other countries on its social programs, with this expenditure successfully lifting around 3,6 million individuals out of poverty (based on US \$2,5 a day on a purchasing power parity basis) and reducing the Gini coefficient from 0,76 to 0,596 in 2011.'

Were millions lifted out of poverty? In reality, many more millions were *pushed down into* poverty since 1994, especially thanks to neo-liberal policies such as the Growth, Employment and Redistribution policy, in which two

21 Harvey (n 18) 145.

22 L Majiet & S Motha 'State capture a huge embarrassment: Zweli Mkhize' Johannesburg, *Jacaranda FM* 4 October 2017, <https://www.jacarandafm.com/news/news/state-capture-huge-embarrassment-zweli-mkhize/> (accessed 28 May 2019).

23 World Bank 'South African poverty and inequality assessment discussion note' (n 7).

Bank economists played central roles.<sup>24</sup> That failed strategy, which made South Africa far more vulnerable to global capitalist crisis, is today barely mentioned, and only as historical artefact. It dramatically reduced South Africa's resilience to cope with general economic meltdowns, volatile funding inflows, rapid currency devaluations, commodity market crashes and illicit (and licit) financial outflows.<sup>25</sup>

In contrast, the macro-economic context was regularly labelled in the mainstream media as one of 'stability' at least until 2008. Indeed, even though the budget deficit had exceeded 6 per cent in 2009, Moody's upgraded South Africa's investment-grade rating. Although it had dropped to around 4 per cent in 2017-2018, a junk rating was imposed on South Africa by Standard&Poors once a more Zuma-aligned finance minister – Gigaba – was appointed and the incumbent, Gordhan, was fired.

To bean-count poverty, the Bank used a South Africa poverty line of \$2,5 per day, or R15,75 per day (R473 per month) in 2011 currency, the date of the last available poverty census data (when the R/\$ rate peaked at a strong 6,3). That is much lower than StatsSA's estimate of the Upper Bound Poverty Line (UBPL), when food plus survival essentials cost R779/month in 2011, or R26/day. The percentage of South Africans living below the poverty line then was 53 per cent. At the University of Cape Town SA Labour and Development Research Unit, Josh Budlender et al argued that StatsSA was too conservative and the ratio of poor South Africans actually was closer to 63 per cent.<sup>26</sup>

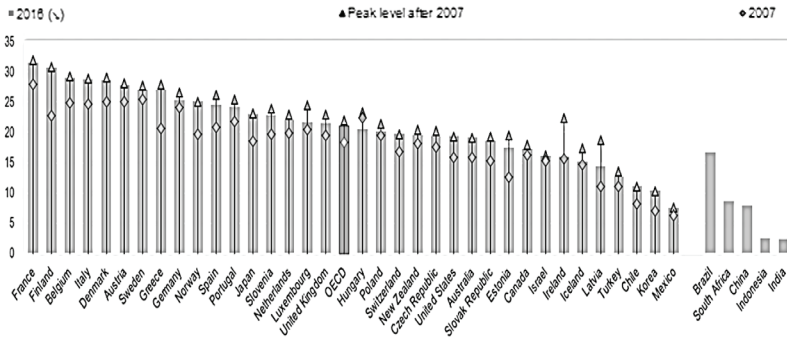
If so, it is extremely doubtful that a net 3,6 million people (more than 7 per cent of South Africans) were lifted out of poverty from 1994-2011; it is perhaps plausible only if the Bank's much lower R473 per month poverty line is used. Ignoring local realities, in which the number of poor people has soared by at least ten million (given the population increase since liberation), the Bank imports its own exceedingly ungenerous standards as to what it means to suffer poverty.

24 Bond (n 5).

25 As above.

26 S Budlender, I Woolard & M Leibbrandt 'How current measures underestimate the level of poverty in South Africa' *The Conversation* 3 September 2015, <https://theconversation.com/how-current-measures-underestimate-the-level-of-poverty-in-south-africa-46704> (accessed 28 May 2019).

**Figure 3: Public social spending as a percent of GDP, 2007, peak level after 2007 and 2016**



Source: OECD 2017<sup>27</sup>

Next, consider the Bank's claim that Pretoria 'spent more than other countries on its social programmes', which does not specify 'other'. Of the world's 40 largest countries measured regularly by the Organisation for Economic Cooperation and Development, only four had *lower* social spending ratios than South Africa, as a share of gross domestic product (GDP) (Figure 3). (That ranking has not altered substantially in recent years.) The overall OECD country average spending is 22 per cent. South Africa has lagged in the 8 per cent range, less than half of the level of Brazil. Indeed, from 2012-2016 five social democratic countries – France, Finland, Belgium, Italy and Denmark – regularly spent 30 per cent of GDP on social spending. Within a peer group assessed by the OECD, only Indonesia and India rank substantially lower. There have not been convincing assessments of whether OECD 'social spending' – including free tertiary education in some sites, and generous pensions for civil servants – genuinely is redistributive. The South African case, however, has some spectacular instances of neo-patrimonial – or 'crony capitalist' or 'corporate welfare' – examples to consider.

These claims lead to the proposition – without caveat – that from 1994-2011 social spending cut the Gini Coefficient from 0,77 to 0,59. However, this claim depends upon a profound silencing: The Bank does not bother to calculate pro-corporate subsidies and other state spending that raise rich people's income indirectly (for instance through capital gains). According to the Bank, '[t]he social wage refers to the redistributive elements of the government budget'. There is no mention of redistributive elements within

27 Organisation for Economic Cooperation and Development *Educational opportunity for all: Overcoming inequality throughout the life course* (2017), [http://www.keepeek.com/Digital-Asset-Management/oecd/education/educational-opportunity-for-all/public-social-spending-as-a-percentage-of-gdp\\_9789264287457-graph6-en#.Wjz9gXlx3Z4#page2](http://www.keepeek.com/Digital-Asset-Management/oecd/education/educational-opportunity-for-all/public-social-spending-as-a-percentage-of-gdp_9789264287457-graph6-en#.Wjz9gXlx3Z4#page2) (accessed 28 May 2019).

state spending that are biased *towards the wealthy*: For example, defence, public order and safety that in at typical year (in this case, 2015) cost 13 per cent of the national state budget; debt servicing (paid to the state's creditors often as deferred income) worth 10 per cent; and 'economic affairs' worth 9 per cent, of which 60 per cent was economic infrastructure.

To illustrate why such pro-corporate state spending biases income distribution, it should be clear that capital gains (enjoyed mainly by richer people) often accrue via rising corporate share value for those firms or wealthier households in the vicinity of a new road, railroad, port or airport. These gains are simply ignored by the Bank, along with a variety of corporate tax breaks that also benefit the rich. Also ignored is systemic corruption by corporations, which in 2016 were estimated by high-ranking treasury official Kenneth Brown to be overcharging on an annual R600 billion worth of state procurement contracts by 35 to 40 per cent.<sup>28</sup>

Indeed, treasury has made two major shifts in fiscal policy since apartheid: lowering corporate taxes dramatically, from a standard rate on profits of 56 per cent in 1994 to 28 per cent by 2010, a fact that went unmentioned by the Bank; and acquiescing to 'illicit financial flows' that have increasingly escaped South Africa through false invoicing and other tax avoidance strategies. These illegitimate profits also increase shareholders' capital gains, hence contributing to inequality. The Washington non-governmental organisation (NGO) Global Financial Integrity estimated that illicit flows cost South Africa an annual \$21 billion from 2004-2013 (the seventh worst level in the world), peaking in 2009 at \$29 billion.<sup>29</sup> These are also not mentioned by the Bank.

However, the Bank was impressed by South Africa's

provision of free basic services (mainly water, sanitation, electricity, and refuse removal), and social protection mainly in the form of social grants, primary health care, education (specifically no-fee paying schools), enhancing access to productive assets by the poor (eg housing and land), as well as job creation through the Expanded Public Works Programme.

But the Bank team evades the devils in the details, thus failing to discover how such spending is also biased.

To illustrate, 'free basic water' was first piloted in Durban during the late 1990s and became national policy in 2001. But after a tokenistic 6 free kilolitres per month, the price of the second block of the water within the tariff was raised dramatically (a typical municipal tactic). By 2004 the overall price of water to Durban residents had doubled (even after inflation is discounted). In response, the lowest-income third of households cut back monthly consumption from 22 to 15 kilolitres, while the highest-income third cut back by only 3 kilolitres per month (from 35

28 World Bank 'South African poverty and inequality assessment discussion note' (n 7).

29 D Kar & J Spanjers *Illicit financial flows from developing countries: 2004-2013*, <http://www.gfintegrity.org/report/illicit-financial-flows-from-developing-countries-2004-2013/> (accessed 28 May 2019).

to 32 kilolitres). This data, drawn from what is still the most rigorous local research on water pricing (by a local municipal official), apparently cannot be cited by the Bank, as it would unveil the extreme degree of municipal-scale neo-liberalism.<sup>30</sup>

Another unmentionable feature of services pricing concerns the Bank's biggest-ever project loan: \$3,75 billion granted in 2010 to Eskom to finance the corruption-riddled, oft-delayed Medupi coal-fired power plant. Repayment of that loan plus other financing has raised the price of electricity to poor people by more than 250 per cent since then. However, tellingly neither the loan, the borrower, the project nor the soaring cost of electricity is mentioned by the Bank, nor are Eskom's special pricing agreements with BHP Billiton and Anglo that set their electricity prices a tenth as high as what poor households pay. As the latter pay ever higher prices, they are compelled to buy less electricity and to turn to dirty forms of energy – wood, coal and paraffin – which in turn impose yet higher healthcare or productivity costs on black residents, especially women.<sup>31</sup>

The Bank's pro-rich bias extends across much state 'social' spending, but the divergent *quality* of fiscal policy is never measured, even though then treasury deputy director-general Andrew Donaldson in 2014 admitted that most public spending combined with semi-privatised systems 'entrenches inequality between rich and poor'.<sup>32</sup> Such a finding – even on a high-profile economists' e-zine where the same Bank team published its research in October 2015 – dare not be cited by Bank staff.

Without addressing these kinds of rebuttals to their arguments, it is surreal for the Bank to repeatedly declare that '[n]ot only are South Africa's main fiscal instruments progressive overall, the degree and structure of progressiveness is such that these instruments achieve significant reductions in income inequality'.<sup>33</sup> As one reflection of how dubious the alleged social spending benefits are for recipients, the country's single largest budgetary commitment is to education. Yet the quality of a public school depends mainly upon its location, and access in turn mainly depends upon residential proximity. Both race and class segregation of cities and towns therefore determined whether a young learner would obtain a good education as a function of being within a 5 kilometre catchment radius of a decent school.

Most South African public schools produce an extremely low-quality education. The World Economic Forum's *Global Competitiveness Report 2015-16* rated South African education as the worst of 140 countries in terms of science and mathematics training, and 138th in overall quality. If

30 P Bond 'Water, health and the commodification debate' (2010) 42 *Review of Radical Political Economics* 445.

31 P Bond *Politics of climate justice* (2012).

32 A Donaldson 'Enabling growth: Redistribution priorities for South Africa' *Econ3x3* 12 November 2014, <http://www.econ3x3.org/article/enabling-growth-redistribution-priorities-south-africa> (accessed 28 May 2019).

33 Woolard et al n 7) 15.

education spending is meant to be a proxy for human capital investment (in terms of Bank logic), in many cases the result is better considered *disinvestment*.<sup>34</sup> As leading educationalist Nicholas Spaull remarked after studying 1994-2011 outcomes,

with the exception of a wealthy minority, most South African pupils cannot read, write and compute at grade-appropriate levels, with large proportions being functionally illiterate and innumerate. As far as educational outcomes, South Africa has the worst education system of all middle-income countries that participate in cross-national assessments of educational achievement.<sup>35</sup>

The wealthy minority's public schools are sufficiently funded and produce extremely good education in part because of top-up systems in which parents contribute further funds. Thus, it could just as easily be argued that inequality is *amplified* (not mitigated) by the tokenistic manner in which public education is provided to the low-income majority. This is not really a controversial assertion, even if ignored by Bank researchers. As even Donaldson acknowledges,

[i]n areas such as education, health care and urban transport, service provision tends to evolve in differentiated ways ... the result is a fragmented, unequal structure in which the allocation of resources and the quality of services diverge.<sup>36</sup>

Combined with semi-privatised systems, such public spending, he admits, 'entrenches inequality between rich and poor'.

Indeed, access to most municipal services – for instance, rubbish collection which occurs regularly in mainly white neighbourhoods, but rarely if at all in the shack settlements that house a third of a typical city's residents – reflects extreme *quality* differentiation that results not only from racial apartheid, but from ongoing segregatory processes associated with market-related residential locations. Durban set a 'sanitation line' to divide the more than two million residents within the city's 2001 city limits who would be serviced with flush toilets, from those in former KwaZulu-Natal peri-urban areas that would be compelled to use a low-quality form of dry sanitation known as urine diversion toilets (in effect, a new bucket system). As Forslund pointed out in his critique of the Bank, it is the low quality of state services that drives many white, upper-class citizens away from public facilities, *hence making it appear that the beneficiaries of the services are overwhelmingly poor and black*.<sup>37</sup>

This story is fairly typical of maldistributed state resources. Many of the largest spending categories are even more biased to supporting corporations, such as the Presidential Infrastructure Coordinating Commission's proposed Strategic Investment Projects, promoted strongly

34 World Economic Forum *Global Competitiveness Report 2015-16* (2015), <http://reports.weforum.org/global-competitiveness-index/> (accessed 28 May 2019).

35 N Spaull 'South Africa's education crisis' Centre for Development and Enterprise Working Paper, Johannesburg, October 2013.

36 Donaldson (n 32).

37 Forslund (n 16).

in the National Planning Commission's National Development Plan.<sup>38</sup> The first two of these are a coal export line from Limpopo to Richards Bay and the South Durban Dig-Out Port, costing R800 billion and R250 billion, respectively, which eventually aim to extract and export 18 billion tonnes of coal and to increase container traffic by a factor of eight, respectively.

Could South Africa's treasury spend more on genuinely redistributive infrastructure and services? In relative terms, Pretoria's capacity to serve its citizenry steadily shrunk in comparison to the size of the economy, for across the terrain of social and public policy, government's 'general services' role in GDP rose from 16,2 per cent in 1994 to 17,3 per cent in 1998, but fell back to 15,8 per cent by 2002 and 13,7 per cent in 2012. Reflecting the cost-recovery approach to service delivery and hence the inability of the state to properly roll out *and maintain* these functions, the category of GDP components termed 'electricity, gas and water' declined steadily from 3,5 per cent to 2,4 per cent to 1,8 per cent of GDP from 1994 to 2002 to 2012. The cutbacks were not due to the elimination of fraud and waste (certainly not in Eskom's case, given its corruption-riddled management); instead, the state was underspending in general, compared to peers.<sup>39</sup>

Had there been political will – instead of a cynical stinginess by a succession of finance ministers – state fiscal support for the social wage would not have been terribly difficult to raise in absolute and relative terms. This was partially attempted, but in a tokenistic way, by broadening the inherited, formerly racially-delineated social programmes such as the child grant and pension, to include all South Africans. The expansion entailed a fiscal commitment that was actually quite limited, with state social spending never exceeding a 3 per cent increase in GDP beyond 1994 levels. As the Financial and Fiscal Commission reported, even dating back to 1983, social transfers rose from only 1,8 to 4,5 per cent of GDP through 2007 and, as a result, 'post-1994 expansion of the grants system has not threatened fiscal sustainability'.<sup>40</sup> From an inherited budget deficit of -7,3 per cent in 1993, the treasury shrunk the deficit and even achieved a primary budget surplus of more than 1 per cent by 2008, before the subsequent economic meltdown forced a renewal of (moderate) deficit spending.

As the most common subsidy in the most households, the child support grant 'now reaches 11,7 million children. Grant payments have risen from 2,9 per cent of GDP and now amount to 3,1 per cent', according to the World Bank.<sup>41</sup> However, if raising the number of welfare grant recipients from 2,6 million in 1994 to 16 million two decades later was achieved by adding a meagre 0,2 per cent of GDP, then the amounts provided are merely tokenistic. The child grant was only R425 per month in 2019-2020,

38 National Planning Commission 'National Development Plan: Our future – Make it work' Executive Summary, Pretoria, Office of the Presidency, 2012.

39 Bond (n 5).

40 Financial and Fiscal Commission 'Submission for the division of revenue 2011/12' Midrand, 6 September 2011, [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/100602FFC\\_0.ppt](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/100602FFC_0.ppt) (accessed 28 May 2019).

41 World Bank *Fiscal policy and redistribution in an unequal society* (n 7).



that is, about a third of the StatsSA (after-inflation) upper-bound poverty line and far less than the R50 per day that would represent a more realistic poverty measure. There is no mention of such tokenism by the Bank – only a remark that such spending may now be ‘unsustainable.’

Indeed, the Bank endorses the South African government’s ‘apparently sound policy’ on redistribution. As a result, pervasive poverty and inequality must therefore be blamed on weak implementation. The Bank cites a lack of state capacity, poor logistic management, corruption, collusion, cronyism, political interference and unsuitable public administration models. What cannot be named is that a great many socio-economic policies adopted – often with Bank fingerprints (such as GEAR) –not only are tokenistic but thoroughly ‘neo-liberal,’ that is, market-oriented and hence advancing the economic agenda of the already wealthy.

The Bank’s 19 000-word ‘South African poverty and inequality assessment discussion note’ refuses to even mention research by South African political economists most critical of post-apartheid neo-liberal policies, for instance, Sampie Terreblanche, Hein Marais, Gillian Hart and William Gumede (whose books are among the most cited academic works about South Africa’s transition).<sup>42</sup> The reason for wilful blindness by the Bank could be related to these writers’ attempts to explain why South African capitalism causes poverty and inequality, namely, the extreme neo-apartheid exploitation systems amplified after apartheid by neo-liberal policies the World Bank deems ‘sound’.

The Bank’s chief consultant on this kind of research, Nora Lustig, was asked (by the author) why more accurate assessments of the state’s pro-corporate fiscal beneficiaries – as listed above – were not attempted, so as to offset the extreme bias generated by only incorporating social spending. She replied: ‘Your questions are very valid. Regretfully, we have yet to figure out a solid methodological approach to allocate the burden/benefit to households of the list of interventions you list.’<sup>43</sup>

Numerous other analysts have likewise failed to enquire critically into the race, gender and class incidence of state budgets, for instance, in 2016 including Keith Gottschalk; Leon Schreiber; Ongama Mtimka; and Alan Hirsch. Other high-profile researchers – Hirsch; Stephen Devereux; Jeremy Seekings; Seekings and Nicoli Natrass; and Frans Cronje; have generously praised South African social policy as pro-poor.<sup>44</sup>

42 World Bank ‘South African poverty and inequality assessment discussion note’ (n 7).

43 Lustig (2016) (n 7).

44 K Gottschalk ‘South Africa’s finance minister tackles wastage, boosts confidence’ *The Conversation* 24 February 2016, <https://theconversation.com/south-africas-finance-minister-tackles-wastage-boosts-confidence-55338> (accessed 28 May 2019); A Hirsch *Season of hope: Economic reform under Mbeki and Mandela* (2015); A Hirsch ‘South Africa’s budget promises will require buckets of political capital’ *The Conversation* 25 February 2016, <https://theconversation.com/south-africas-budget-promises-will-require-buckets-of-political-capital-55395> (accessed 28 May 2019); L Schreiber ‘South Africa budget 2016: Nifty political footwork may not be enough’ *The Conversation* 24 February 2016, <https://theconversation.com/south-africa-budget-2016-nifty->

In sum, the World Bank and similarly ideologically-inclined researchers have meticulously measured *selected* elements of state taxation and spending which have an inequality-reducing effect in a *selected* component of well-being (household income) – as measured using a *selected* quantitative measure, the Gini coefficient – but this is not a satisfactory basis from which to draw overarching distributional conclusions.

Bank staff and researchers have at the same time ignored systemic state-induced inequalities that shape distributions of income and of wealth (including capital gains) and broad human welfare. Indeed, the ‘market distribution’ or ‘pre-fiscal’ distribution of income is already the systemic outcome of an inequality-producing economy that, in all likelihood, is substantially shaped and supported by state action that has long favoured wealthier people and the corporations in which they invest.

## 5 The fight between hostile brothers: The ‘Zuptas’ and ‘White Monopoly Capital’

The argument so far is that the South African state by no means is a generous redistributive vehicle responsible for inequality reductions. One reason is the class character of society and, by implication, the state. The final part of this argument entails linkage of the subsidisation of the wealthy, on the one hand, with, on the other, the rise of corruption within a state whose waste of resources not only is prodigious but distributionally regressive. The latter point is ideologically contested, in a manner that is worth contemplating, for if a full accounting of the bias towards subsidising the wealthy were to be rapidly researched, the relative weight of two major fractions of the capitalist class would be unveiled: WMC and the Zuptas.

However, first, in this context, it is vital to be aware of the way in which Mkandawire criticises mainstream neo-patrimonialism theory as applied to African ruling elites: ‘Neo-patrimonialism can be interpreted as building on methodological communalism where the community serves as the foundational unit of analysis and from whence macro-level phenomena are derived.’<sup>45</sup> The warning is useful, yet once one considers

political-footwork-may-not-be-enough-55344 (accessed 28 May 2019); O Mtimka ‘South African finance minister forced to walk a difficult political tightrope’ *The Conversation* 25 February 2016, <https://theconversation.com/south-african-finance-minister-forced-to-walk-a-difficult-political-tightrope-55345> (accessed 28 May 2019); J Seekings ‘Visions, hopes and views about the future: The radical moment of South African welfare reform’ in S Dubow & A Jeeves (eds) *South Africa’s 1940s: Worlds of possibilities* (2005) 44; J Seekings & N Nattrass *Policy, politics and poverty in South Africa* (2015); S Devereux ‘Social protection in South Africa: Exceptional or exceptionalism?’ (2011) 32 *Canadian Journal of Development Studies* 414; F Cronje ‘SA service delivery “no failure”’: SAIRR’ *Press statement*, Johannesburg, 11 September 2012, <http://nepadwatercoe.org/south-africa-sa-service-delivery-no-failure-sairr/> (accessed 28 May 2019).

45 T Mkandawire ‘Neopatrimonialism and the political economy of economic performance in Africa: Critical Reflections’ (2015) 67 *World Politics* 563–567.

other more populist labels regarding the same phenomenon – ‘crony capitalist’ or ‘corporate welfare’ – the logic of neo-patrimonial state capture becomes clear.

In South Africa the fear of the specific Zuma-Gupta form of state capture began in 2011 with the replacement of numerous state-owned enterprise directors with men close to the Gupta brothers, by Minister of State Enterprises Malusi Gigaba. The immigrant brothers showed how powerful their connections were in 2013, when a provincial politician rerouted R30 million from agricultural development accounts to fund a wedding, one which became notorious because the main party of guests from India used Zuma’s official air force airport. The auditing firm that approved this financial arrangement, KPMG, in 2017 suddenly found itself the subject of extreme disapproval. That same politician became national mining minister in 2015 and immediately joined the Guptas in Switzerland to pressure Glencore to sell the Optimum coal mine to the Zupta’s Oakbay firm.

Concern about what was being called the ‘Zupta’ nexus rose to a new level when in December 2015 Zuma fired finance minister Nhlanhla Nene, following his refusals to countenance Eskom’s nuclear build programme – said to be worth R1,4 trillion – as well as other parastatal projects. Nene’s successor, Desmond van Rooyen, was understood to be close to the Gupta family and, thus, within four days Zuma was pressured by bankers (from ABSA, Goldman Sachs, Investec as well as Standard Bank’s Shanghai co-owners) to switch Van Rooyen with Gordhan. Resentment by Zuma was palpable, but apparently he feared the extreme wrath of what soon became known as WMC.

By 2016 the Guptas and Zuma’s son Duduzane (who was the brothers’ main black partner) had called in Bell Pottinger, the London consultancy, to craft public perceptions against WMC. (The phrase had existed in South Africa’s left and nationalist traditions, but at a very low level of public awareness.) A large cache of e-mails from within the Zupta network revealed much of the Gupta strategy. When Bell Pottinger’s (white) team began working, they engaged in ethically dubious activities including Twitter ‘sock-puppet’ robots, and as these were discovered, within 18 months the company was itself suffering such reputational damage that its clients left and it went into receivership.

Meanwhile, as a more durable reflection of state capture, the critical problem for budgetary management was that the existing management failures – for instance, within Eskom and Transnet in relation to power plant and pipeline megaprojects (where costs had risen by tens of billions of rands) – soon became costly. A R600 billion state guarantee facility had existed for many years so as to give lenders confidence in relation to Eskom, South African Airways and other deficit-ridden state enterprises. However, these institutions’ repeated financial crises became ever more serious.

In one project, the manufacture and installation of coal-fired power plant boilers worth R60 billion, the Japanese firm Hitachi was prosecuted by the United States Securities and Exchange Commission for what was considered a bribe of the ANC's funding arm known as Chancellor House, so as to win the 2010 contract in what had become a disputed tender. Although the US agency had reached an agreement whereby Hitachi paid a \$19 million fine to the US government, no one in South Africa bore responsibility. Gordhan then was finance minister, and by then there certainly appeared a culture of corporate corruption facilitated by the state.

By 2017 a number of dubious consultancies began to be exposed through the leaked e-mails, including McKinsey's at Eskom via a Gupta front company, Trillian Management Consulting, but in spite of the involvement of Bell Pottinger, KPMG and McKinsey, throughout the period until mid-2017 elite society's main line of cleavage was Zupta versus WMC. However, in mid-2017 that line was blurred at a public discussion in the University of the Witwatersrand's Great Hall, by two of South Africa's leading economic personalities, Gordhan and Abedian.<sup>46</sup>

There, for the first time, the either/or narrative gave way to both/and. The enabling role of international auditing firm KPMG in the scandal was a useful handle, but instead of focusing on one firm, they made an unusually passionate case against WMC (although the two obviously would not name it as such given its controversial recent past). A very few voices have made the same point, such as the leading trade union federation's policy director Neil Coleman who asked, 'Do we have to choose between a predatory elite and WMC?'<sup>47</sup> The question became especially poignant in December 2017 when Cyril Ramaphosa was elected ANC President in a close contest with Nkosazana Dlamini-Zuma, but was joined by a new deputy, the controversial David Mabuza, as well as Secretary-General Ace Magashule and his deputy Jessie Duarte, in a combination that epitomised the fusion of WMC and the Zuptas.

Condemning firms far beyond the Zupta nexus in late 2017, Gordhan explained the deeply-rooted character of South Africa's culture of corporate corruption.<sup>48</sup> He despaired of internal reform and industry self-regulation, and concluded that 'mass protest action' is required against big capital and parastatals, perhaps to the bitter end, such as Bell Pottinger experienced. Protest against corporate injustice remains one of South Africa's greatest strengths, the World Economic Forum indirectly acknowledged the same day as Gordhan and Abedian spoke, in its *Global*

46 University of the Witwatersrand 'KPMG: What lessons have we learnt?' Johannesburg, 29 September 2017, <https://www.youtube.com/watch?v=qB6eIh27qgE> (accessed 28 May 2019).

47 N Coleman 'Do we have to choose between a predatory elite and white monopoly capital?' *Daily Maverick* 21 April 2017, <https://www.dailymaverick.co.za/opinionista/2017-04-21-do-we-have-to-choose-between-a-predatory-elite-and-white-monopoly-capital-part-one/#.Wj0JgHlx3Z4> (accessed 28 May 2019).

48 University of the Witwatersrand (n 46).

*Competitiveness Report 2017-18*.<sup>49</sup> Dating back to 2012, South African workers have been considered the world's most confrontational in the Swiss-based forum's survey of 14 000 executives, a position they lost only in 2018 (coming in fifth).

On the other side of the class struggle, the accountancy firm PriceWaterhouseCoopers (2018) regularly names Johannesburg's corporate rulers as the world's most prone to corruption – especially procurement fraud, money-laundering, asset misappropriation and bribery – and acknowledges that 80 per cent of these managers engage in crime (such as the 35-40 per cent overcharging on state procurement). Indeed, government politicians and bureaucrats are often blamed first for corruption, yet according to Transparency International (TI) they are amateurs compared to the world-leading private sector. South Africa as a whole was only perceived as seventy-third least corrupt out of 175 countries in 2019 (Figure 4), and according to TI, the worst post-apartheid degeneration occurred during 1996-1999 (from twenty-third to thirty-fifth) under Nelson Mandela, and during 2003-2008 under Thabo Mbeki (from thirty-fifth to fifty-fifth).<sup>50</sup> Both adopted economic policies considered exceedingly friendly to WMC, for example, dropping crucial exchange controls, casualising the labour market and lowering the corporate tax rate. These policies, continuing under Zuma, were so lucrative that the International Monetary Fund regularly reported that South African firms had average profit rates amongst the top five of all major economies.<sup>51</sup> The World Bank acknowledged that the highest-income 1 per cent doubled their consumption of national income from 10 to 12 per cent in 1990-1994 to 18 to 20 per cent since 2008.<sup>52</sup>

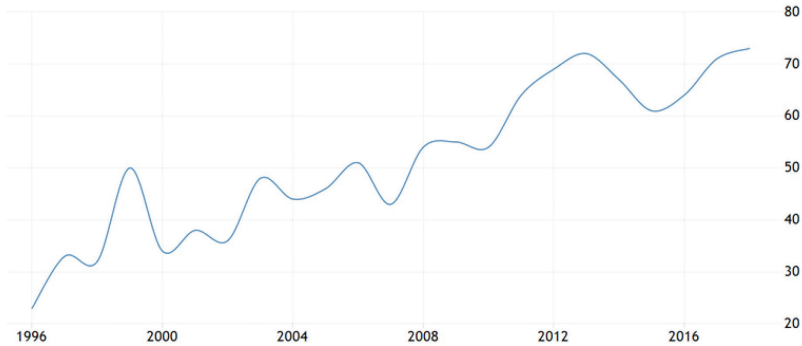
49 World Economic Forum *Global Competitiveness Report 2017-18* (2017), <http://reports.weforum.org/global-competitiveness-index/> (accessed 28 May 2019).

50 Transparency International 'Corruption perceptions index' (2019), [https://www.transparency.org/cpi2018?gclid=EAIaIQobChMIuejz5ob\\_4AIVF4uyCh0zsgdDEAAYASAAEgILCfD\\_BwE](https://www.transparency.org/cpi2018?gclid=EAIaIQobChMIuejz5ob_4AIVF4uyCh0zsgdDEAAYASAAEgILCfD_BwE) (accessed 28 May 2019).

51 International Monetary Fund 'South Africa: 2016 Article IV Consultation' (2016).

52 World Bank *Taking on inequality* (2016).

**Figure 4: South African state corruption index, 1996-2018 (out of 175 countries)**



Source: Transparency International (December 2018)<sup>53</sup>

The dilemma here, according to Gordhan, was a neo-patrimonialism within white business: ‘There’s a particular culture in the dominant part of business in South Africa, or some sections of that business, that we’ve inherited from our past, in the sanctions-busting era. Elements of that DNA are still persisting, 23 years later.’ He asked plaintively, ‘Are we able to actually say that firms are able to command the kinds of leadership that is required to change the culture after many years of doing things in a particular way, within large companies?’ Abedian, who in 2017 quit insurance company Munich Re’s local board due to its ongoing KPMG contracts, confirmed: ‘There is an embedded culture where national resources are for the benefit of the rich ... What we should be doing first is looking at the actions of those who sit on boards of insurance companies, banks and investment companies.’<sup>54</sup>

In contrast to no-holds-barred truth-telling by Gordhan and Abedian, many others retain an either/or Gupta/WMC bias. As Oxford political lecturer Jonny Steinberg complained in *Business Day* in mid-2017, debates he was then having with (pro-Zuma) interviewees were frustrating:

It seems that we believe what we believe; any new evidence simply fills the contours of the story we are already telling. Mine is that an unholy alliance of politicians and bureaucrats in hock to a rich family has hijacked public institutions. Theirs is that global corporations have stolen SA.<sup>55</sup>

<sup>53</sup> Transparency International ‘Corruption perceptions index’ (2019).

<sup>54</sup> University of the Witwatersrand (n 46).

<sup>55</sup> J Steinberg ‘KPMG and McKinsey sagas do not shift voters’ beliefs’ *Business Day* 29 September 2017, <https://www.pressreader.com/south-africa/business-day/20170929/281500751447457> (accessed 28 May 2019).

Likewise a group of academics led by Mark Swilling and Ivor Chipkin had issued a major 2017 report on corruption that focused entirely on that unholy alliance, not mentioning the broader context or WMC practitioners.<sup>56</sup>

Far more balance was achieved in a 2017 article by Brunette et al of the Public Affairs Research Institute. Pointing out that the rise of right-wing politicians in India and Brazil was due in part to personalistic campaigns against their predecessors, they argued:

Zuma is at the head of a mass political tendency. He expresses a radical, right-wing or capitalist Africanism, one that emerges from prominent black business and professional associations and parts of the African National Congress party machine. Instead of debating and analysing this tendency's merits, anti-corruption politics shifts discussion to whether it is legitimate at all. Our contention is that this is an illegitimate, disenfranchising move.

Anti-corruption politics is also increasingly the vehicle for another political tendency. Given its need to build a broad coalition, this tendency expresses a moderate non-racialism or a social liberal Mandelalism. But for many, especially younger South Africans, these expressions can barely be connected to their realities. This political tendency, instead, is rooted firmly with an elite, comprising the businesses and professionals that have been the primary beneficiaries of the post-apartheid regime.

Both anti-Zuma moderates and Zumaist radicals have co-ordinated sophisticated media campaigns to keep their narratives alive. These have been premised on 'public spectacles': rallies, marches and counter-marches, court cases, press conferences, seminars, pickets, sleep-outs, occupations, church services and funerals. More worrying is the crescendo of tactical leaks, revelations and political statements, often overwrought in their coverage, and transparently collaborative efforts of politicians, activists, editors and journalists. The polarised discourse around Zumaist ideas has limited alternative visions for the country...

Among moderates, the terms 'WMC' and 'radical economic transformation' are rejected as ideological hokum. In the same breath, we are bluntly introduced to the 'mafia state', the product of a 'silent coup', the result of 'state capture', leading to 'state failure'. Many of these odious soliloquies are delivered with thinly-veiled racism, using long-expired terminology once applied to post-colonial African states. Others only intend to sanitise opportunists with their own pasts, no doubt positioning for the next round of primary accumulation. They strongly protect the national treasury and move it beyond reproach, outside of politics – the demonstrably anti-poor effects of its business-friendly economic approach remain uncritically ignored.

Both elite groups claim to be for the poor, but neither is concerned about giving power to the poor. Instead, they are making weapons to use against poor people should they come into power.<sup>57</sup>

56 Bhorat et al (n 17).

57 R Brunette et al 'Elite struggle over Zuma is making weapons against the poor' *Daily Maverick* 14 June 2017, <https://www.dailymaverick.co.za/article/2017-06-14-op-ed-elite-struggle-over-zuma-is-making-weapons-against-the-poor/#.Wj0M6Xlx3Z4> (accessed 28 May 2019).

## 6 Social resistances

Breaking out of the binary constructed by both elite groups is vital, just as is the proper accounting of whom the state's spending benefits most. The utter incapacity of the World Bank to conduct such studies is evident, but upon requesting data on distributional incidence of state spending from StatsSA, their staff confirmed that no such analysis was ever conducted.

In turn, it is up to South Africa's legions of social activists to balance the power wielded by both sets of elites. The activists' hostility to multinational corporate exploitation is by no means new. Since the origins of white-settler profiteering during the Dutch East India Company invasion in 1652, later amplified by the likes of Cecil Rhodes and Ernst Oppenheimer's Anglo American Corporation, resistances arose from grassroots, labour, communist and nationalist (both Boer and black) activists:

- hundreds of Western multinational corporations and banks – which ignored anti-apartheid sanctions called initially by Albert Luthuli;
- pharmaceutical corporations which denied access to life-saving AIDS medicines – until the Treatment Action Campaign demanded an end to monopoly patents, thus raising average life expectancy from 52 in 2004 to 64 a dozen years later;
- post-apartheid's public-private partnerships including municipal water firms (Suez, Biwater and Veolia) and Gauteng's highway e-toll managers (Kapsch Trafficom) – which were repelled by unions, township activists and the Organisation Undoing Tax Abuse;
- the Zurich-based FIFA organisation – whose 2010 World Cup ran into numerous local protests;
- collusive construction, bread and cell-phone companies, and bankers manipulating the currency – all prosecuted by the Competition Commission, in turn fuelled by social outrage;
- Lonmin's labour exploitation and illicit financial outflows – fought by the mining union AMCU, as well as other unions and lawyers successfully suing major mining corporations for silicosis and asbestosis damages;
- the World Bank in several controversial roles – as apartheid lender (Jubilee 2000 and Khulumani demanded reparations), Lonmin investor (Marikana grassroots feminists and the Wits Centre for Applied Legal Studies), primary creditor for Eskom's corruption-riddled Medupi coal-fired power plant (Lephalale community critics and Earthlife Africa) and lead owner of Net1-CPS, the social-grant disburser which illegitimately debit-ordered millions of poor people (until Black Sash forced its CEO's firing in mid-2017);
- three credit ratings agencies from Manhattan (Standard&Poors, Fitch and Moody's) and allied financiers who since 1994 influenced the treasury to make repeated cutbacks in social spending, infrastructure and higher education – fiercely contested (albeit indirectly) via myriad service delivery protests and the #FeesMustFall student movement; and
- three Gupta brothers from Saharanpur, Uttar Pradesh and then Johannesburg, along with their allies in British, US and German corporations – demonised and forever brand-degraded.



In all these confrontations the system's self-correcting mechanisms appear broken. The World Bank's Inspection Panel showed itself to be toothless on several occasions. If South Africa's Independent Regulatory Board of Auditors belatedly 'finds KPMG guilty,' Abedian wrote in 2017, 'the maximum penalty will be a paltry R20 000. Big deal!'<sup>58</sup> Instead, calls for much stronger corporate punishment were regularly heard in 2017. According to *Daily Maverick* columnist Richard Poplak, 'We need to go after the likes of KPMG and Bell Pottinger, and bury them – not just because they're complicit in Zuma's state capture project, but because they're shitty institutions that do shitty work and they deserve to die.'<sup>59</sup> At the mid-2017 event, Gordhan applauded that day's national anti-corruption marches by labour and Communists. As he argued to the Wits audience, 'While debates like these are important, in our political culture it's mass action that eventually counts, it's the involvement of people who are willing to put some effort into bringing about changes, that actually makes a difference.'<sup>60</sup>

The involvement of people is indeed vital, and to the extent that there have been genuine victories against neo-liberalism, these are deeply instructive as to the core elements of a more robust and enduring post-neo-liberal politics. They include early service delivery protests which catalysed a free basic services policy providing at least tokenistic supplies of water and electricity (at least 25 litres per person per day and 50 kWh per household per month), a small monthly welfare grant to 17 million people (nearly a third of the population), and – much more substantively – the commoning of HIV/AIDS medicines.<sup>61</sup>

South Africa's successful campaign for HIV/AIDS medicines reflects four features that any political agenda against poverty and inequality should embrace: *decommodification* (of drugs costing over \$15 000 per year that are now free); *destratification* of access (now numbering over three million South Africans); *deglobalisation of capital* (generic medicine production facilities now exist in many African cities); and *global solidarities* against powerful multinational forces. Jumping scale, South Africa's Treatment Action Campaign (TAC) confronted global Big Pharma, the South African and US governments, and the World Trade Organization. In 2004 prior to medicines access, life expectancy was 52 years, and a decade later it rose to 62: an extraordinary post-neo-liberal victory.

The future of a South African post-neo-liberalism depends upon whether resistance politics continue to focus upon these four themes, and

58 I Abedian 'The KPMG failure – Ethical test for SA business and company directors' *Daily Maverick* 11 September 2017, <https://www.dailymaverick.co.za/article/2017-09-11-op-ed-the-kpmg-failure-ethical-test-for-sa-business-and-company-directors/> (accessed 28 May 2019).

59 R Poplak 'The end of law, the end of democracy' *Daily Maverick* 20 September 2017, <https://www.dailymaverick.co.za/article/2017-09-20-trainspotter-the-end-of-law-the-end-of-democracy/> (accessed 28 May 2019).

60 University of the Witwatersrand (n 46).

61 Bond (n 5).

whether the activists collectivise their experiences, moving from local to national terrains of struggle. Ongoing mass campaigns in water, electricity and university education for many years had faced fiscally conservative finance ministers, especially Manuel, Nene and Gordhan. The latter rejected student demands for R25 billion in additional annual spending to make higher tertiary education free. In October 2015 a few thousand students won stunning short-term victories after national protests on consecutive days at parliament in Cape Town, the ANC's national headquarters in Johannesburg and the President's Pretoria office.

In addition to a (real) 5 per cent fee cut, nearly all universities also agreed to 'in-sourcing' of low-paid university workers. Then in late 2017, Zuma's last promise as ANC leader was to find R15 billion in the 2018 budget and, from there on, around R40 billion per year to offer 90 per cent of students free education, by raising state funding of tertiary education from 0,68 per cent to 1 per cent of GDP. To be sure, this was a populist gesture widely interpreted as consolidating support for the Zupta camp in the following day's ANC presidential race between Ramaphosa and Dlamini-Zuma, but it was still declared as a victory by students and their supporters.

Like the fight for a policy ensuring free basic supplies of water and electricity, the campaign for free tertiary education teaches the importance of scale-jumping, in a myriad of physical micro-space contestations, because they were only successful by moving from micro-sites to generate a sense of national purpose. Yet there are evident limits to the thousands of township-based 'service delivery protests' that occur each year. In part due to localism, community activists often do not identify the source of harm (for instance in the national treasury) beyond the immediate geographical settings of the slums.

Two more caveats are in order, regarding the possibility of a national power shift, without which the activists are likely to remain within their issue-specific silos. First, residents' grievances against immigrants have sparked tragic conflict. The xenophobic attacks that became national news in 2008, 2010 and 2015 were only one of the dangers of turning inward against the Other close at hand. This violence targeted immigrant workers as well as shop keepers from Somalia, Ethiopia, Pakistan and Bangladesh, whose economies of scale had swamped the market and threatened local residents' much smaller 'spaza shops'.<sup>62</sup> Second, an epidemic of domestic, gendered violence among a patriarchal South African working class is another self-destructive way that the scale of politics of social grievances has telescoped backwards, in this case into the home.

Another major factor must be mentioned in any consideration of worsening South African inequality: the 'Fourth Industrial Revolution' (4IR). The phrase encapsulates a new round of technological disruptions

62 As above.

(including job displacement) caused by robotics, artificial intelligence, big data surveillance and marketing algorithms (such as socio-political manipulation), blockchain (allowing crypto-currencies to undermine national monetary sovereignty), nanotech and biotech, and so forth. The 4IR's popularisation in South Africa began in 2017 when the Swiss-based World Economic Forum held an Africa-wide conference in Durban, following the network's introduction of 4IR technological 'leap-frogging' advocacy in Kigali in 2015.

In South Africa the concept has been appropriated by quite destructive forces, so social resistance is not far behind. The 2018 Brazil-Russia-India-China-South Africa (BRICS) summit in Sandton was an opportunity for BRICS Business Council Chairperson Iqbal Survé and his *Independent* media group to assiduously promote the 4IR. A few weeks before the summit he had hoped to launch his own Sagarmatha 'unicorn': the term for a \$1+ billion initial public offering fund-raised by a tech firm on a stock market, in this case based on his controversial Ayo tech base which enjoyed major state pension fund subsidisation (Sagarmatha is a Nepalese word for Mt Everest). However, Survé had vastly over-reached, with subsequent critiques of his ethics and accounting gimmicks destroying the venture as the Johannesburg Stock Exchange prohibited its listing, and he was fired from the BRICS body within months. (Under the influence of Survé and the BRICS South African *sherpa* Anil Sooklal, the body even adopted what ultimately was a hollow 2018 theme: 'BRICS in Africa: Collaboration for Inclusive Growth and Shared Prosperity in the 4th *Industrial Revolution*'.)

The demise of the main South African propagandist for the 4IR was not the concept's only problem. Given how much renewed unemployment, poverty and inequality were likely to emerge from fresh bursts of capital-intensity, and given how serious South African activists were about *socialising advances in technology for broader gains, not corporate profits*, it is useful to consider several 'Fourth Industrial Counter-Revolutions' that were either successful or that are now underway.

**Table 1: The Fourth Industrial Revolution in South Africa, and counter-revolutionaries**

<b>4IR: Fourth Industrial Revolution trends</b>	<b>SA manifestations of degenerate 4IR</b>	<b>4ICR: Fourth Industrial Counter-Revolutionaries</b>
rampant application of Intellectual Property and monopoly patents, thereby excluding poor people from life-saving innovations, especially in public health services	Big Pharma corporations supplied Anti-RetroViral (ARV) medications for AIDS, but at a cost of R100 000 annually (before 2004), aided and abetted by South African leaders Thabo Mbeki, Alec Erwin and Manto Tshabalala-Msimang, by Al Gore and Bill Gates from the U.S, by Western states and by the World Trade Organisation's Trade Related Intellectual Property System (WTO TRIPS).	<i>Treatment Action Campaign</i> , their <i>labour allies and lawyers</i> , the <i>Constitutional Court</i> , courageous <i>journalists</i> , some senior <i>African National Congress (ANC) officials</i> , and <i>generic medicines firms</i> together rejected IP barriers to ARV access and won WTO TRIPS exemptions in 2001, compelling roll out of free drugs to 5 million, thus raising life expectancy from 52 to 65 since 2005 (1998-2005).
elitist education, driving more working-class people into debt or out of tertiary education	Black, working-class students suffered greater rates of 'financial exclusion' at universities, as well as post-school debt defaults.	# <i>FeesMustFall</i> won tuition waivers for 90% of university and technikon students (2015-17).
social media mind-manipulation	Bell Pottinger, the broadcaster ANN7 and the Gupta brothers' bot army declared war on those politicians, journalists and civil society who were allegedly associated with 'White Monopoly Capital' (albeit making such claims without a genuine left agenda, purely as a juvenile Zumite defence mechanism).	SA's opposition parties (especially the <i>DA</i> and <i>EFF</i> ), journalists (especially <i>amaBhungane</i> and <i>Sunday Times</i> ) and nearly all other activists in left-wing, centrist and right-wing civil society, as well as Johann Rupert and allied Western Multinational Corporations, together gave Bell Pottinger and ANN7 corporate death sentences, and sent the Guptas into Dubai exile (2016-17).

gradual repression of liberal rights and of social justice activism	The Department of State Security engaged in worsening repression during the Mbeki-Zuma regimes, including the (ill-fated) Protection of State Information Bill.	# <i>Right2Know</i> battled against the ‘Secrecy Bill’ and, alongside conscientious ANC MPs, prevented it from becoming formal law in 2013 (2011-19).
surveillance of citizens’ movements by states and capital	SA National Road Agencies Ltd (Sanral) and Kapsch established ‘e-toll gantries’ across Gauteng’s highways to enforce payment for road use, <i>even though apartheid and post-apartheid housing markets force working people to live far from city centres.</i>	<i>Organisation Undoing Tax Abuse (Outa)</i> , and <i>Congress of SA Trade Unions (Cosatu)</i> successfully protested in the streets and courts to protect the vast majority of Gauteng road users who boycotted gantries and e-toll bill payment (2010-19).
ultra-commodification of everything, using advanced financial technology	The World Bank’s International Finance Corporation and CPS Net1’s strategy of ‘financial inclusion’ included raiding millions of poor people’s monthly social grants – so as to debit for microfinance, cellphone and other undesired ‘services’	<i>Society</i> , disgusted by revelations of abuse collected by <i>Black Sash</i> and its lawyers, acted on behalf of 17 million monthly victims, compelling the state to make the SA Post Office distributor of grants (resulting in massive losses for CPS Net1) (2013-18).
danger of excessively job-killing robotics	Major banks – catalysed by Nedbank – launched automation to replace thousands of workers with hundreds of robots	<i>SA Society of Banking Officials (Sasbo)</i> protested the jobs massacre, but so far unsuccessfully (2018-19).
danger of excessive technological control through robotics and Artificial Intelligence (AI)	The leading South African expert, Elon Musk, warns, ‘AI is a fundamental risk to the existence of human civilization... the danger of AI is much greater than the danger of nuclear warheads.’	<i>Musk’s</i> consciousness-raising includes a film ( <i>Do You Trust This Computer?</i> ), regular public statements as well as a twar with Mark Zuckerberg, calling for greater protective regulation against AI abuses (2017-19).

danger of geo-engineering and nanotechnology especially applied to the climate crisis	South Africa has been a pilot site for extreme levels of GMO agriculture and zany climate strategies (such as Carbon Capture and Storage, and dropping iron filings into the ocean to create algae blooms)	<i>Biowatch</i> monitors genetic engineering, while <i>Earthlife Africa</i> , <i>groundWork</i> and progressive environmentalists oppose 'false solutions' to climate chaos, while demanding mass replacement of coal and nuclear power with renewables
danger of blockchain and crypto-currency distortion of state monetary sovereignty	One poll (by Hootsuite, in February 2019) found 10.7% of SA internet users invest in Bitcoin and other crypto-currencies, the highest rate in the world (the global average is 5.5%); the three crypto exchanges are Luno, Altcoin Trader and OVEX	<i>Cosatu</i> and the <i>National Union of Metalworkers of SA</i> (Numsa) regularly advocate much stronger exchange controls, especially against the Illicit Financial Flows that are amplified by crypto-currencies
pro-4IR corporate control of mass media	<i>Independent</i> newspapers engaged in relentless 4IR propaganda (without any hint of its adverse effects), especially as Iqbal Survé pushed his failing 'Sagarmatha unicorn' and Ayo tech businesses, while serving as 2018 head of the BRICS Business Council until the Council was fired in October 2018	# <i>Right2Know</i> organisation and academics (e.g. <i>Jane Duncan</i> and <i>Mike Kwet</i> ) remain vigilant about corporate media power (2012-19), and various <i>competing media organisations</i> blew the whistle on the Public Investment Commission's subsidisation of Ayo and the <i>Independent</i> group.

The 4IR may ultimately represent one of those sites of struggle where progressive South Africans can again lead the world towards social justice. However, disunity in the ranks remains a brake on progress. Considering the fast-shifting terrains of battle, across a myriad of issue areas, political forces representing two distinct ideologies are emerging to fight neo-liberalism in the period ahead. First, the fight-back against white South Africans' resurgent and often virulent racism returned popularity to the Black Consciousness philosophy of Steve Biko. This form of identity politics began re-ascending in 2015 with the impressive #RhodesMustFall student campaign on Cape Town's Table Mountain, a struggle that toppled

the Cecil Rhodes statue at Africa's leading university.

Second, there is a resurgent class-community fusion (perhaps with environmental justice opportunities) emerging, which initially surfaced in response to state violence against labour, notably the massacre of 34 platinum mineworkers at Marikana on behalf of the Lonmin mining house in 2012. One result was a split between renewed socialist sensibilities of the country's largest union, the National Union of Metalworkers of SA (NUMSA), and the residual nationalist loyalties of the Congress of SA Trade Unions. The fusion of metalworker socialism, anti-neo-liberal social movement traditions and community radicalism briefly surfaced under the rubric of the name 'United Front' in 2014-2015, to connect a multitude of left-leaning civil society groups.

However, NUMSA shifted its sometimes whimsical attention to a different sphere by 2018-2019: the Socialist Revolutionary Workers Party. That turned out to be yet another damp squib, as the party won only 25,000 votes in the May 2019 election, around half of what was needed to even get a sole parliamentary seat. Thus, while sometimes promising as fragmentary insurgencies, resistance politics have thus far been small-scale and momentary, just as was witnessed across the world during the 2008-2015 anti-neo-liberal upsurges, especially the 2011 uprisings, urban protests and Occupy Movement.

Amidst this turmoil the multi-faceted South African left is most visibly represented by an unprecedented round of radical electoral politics, inspired partly by the support of more than a million voters for the Economic Freedom Fighters and its leader, former ANC Youth League president Julius Malema, in the 2014 elections. From 6 per cent in 2014, the party won 8 per cent in 2016's municipal elections and helped unseat ANC regimes in Johannesburg and Tshwane. In 2019 the party won 11 per cent in spite of renewed evidence of corruption and attacks on journalists. Part of the formula Malema and other EFF members of parliament adopted with some success during Zuma's reign was a willingness to launch ferocious attacks on ANC personalities, on neo-liberalism and on ingrained corruption. In terms of his party's popularity and impact, Malema may have found the route to a national post-neo-liberal political presence, although many left-liberals believe the EFF's deviant characteristics are so severe as to warrant the label 'fascist'.

The final organised left force to note is the South African Communist Party (SACP). However, it has mainly 'tailed' the ruling party, playing an occasionally decisive role in internal leadership squabbles, but not contributing to the theory or practice of socialism beyond insiderism. This is likely to change, however, given that Ramaphosa will be compelled to impose more extreme forms of austerity (partly due to state-owned enterprise failure), in a context in which his ANC leadership colleagues David Mabuza, Ace Magashule and Gwede Mantashe remain controversial both for corruption and, certainly in Magashule's case, for

fronting Zuma-era political forces. As the forces pulling centrifugally on the ANC, SACP and Congress of SA Trade Unions strengthen in coming years, the fractures will grow and the main economic and fiscal decisions will even more decisively favour capital.

In a country facing such intense geographical, social and sectoral segregation as South Africa, as well as fragmented left politics, the challenge of unifying local grievances and the forces they have birthed into a national ideology of post-neo-liberalism remains. The fight may be considered most fierce when it takes on poverty, inequality and state capture – that is, social democratic and liberal reforms. Nevertheless, that ideology in this part of the world takes the name, first and foremost, of socialism. The class struggle cannot stop there, obviously, and must now also firmly grapple with full human liberation on grounds of race, gender, sexual preference, different-abledness and socio-ecological relations. If anywhere on earth the conditions are ripe and contradictions are reaching breaking point, it is in South Africa.



## References

- Abedian, I 'The KPMG failure – Ethical test for SA business and company directors' *Daily Maverick* 11 September 2017, <https://www.dailymaverick.co.za/article/2017-09-11-op-ed-the-kpmg-failure-ethical-test-for-sa-business-and-company-directors/> (accessed 20 December 2017)
- Alvaredo F, Chancel, L, Piketty, T, Saez, E and Zucman, G *World Inequality Report 2018*, Paris, World Inequality Lab (2017), <http://wir2018.wid.world/files/download/wir2018-full-report-english.pdf>, (accessed 20 December 2017)
- Barber, S 'South Africa's ANC moves from detente to entente with a dynamic private sector' *Foreign Policy* 18 November 2014, <http://www.foreignpolicy.com/sponsored/southafricaat20/in-south-africa-a-new-plan-for-private-sector-growth> (accessed 20 December 2017)
- Bhorat, H, Chipkin, I, QObo, M, Mondli, L & Swilling, M *Betrayal of the Promise* (2017) Stellenbosch, [https://www.scribd.com/document/349418506/Betrayal-of-the-Promise#from\\_embed](https://www.scribd.com/document/349418506/Betrayal-of-the-Promise#from_embed) (accessed 20 December 2017)
- Bollen, S, Artz, L, Vetten, L & Louw, A 'Violence against women in metropolitan South Africa: A study on impact and service delivery' Monograph 41, September 1999, Institute for Security Studies
- Bond, P 'Water, health and the commodification debate' (2010) 42 *Review of Radical Political Economics* 445
- Bond, P *Elite transition* (Pluto Press 2014)
- Bond, P 'Bretton Woods Institution narratives about inequality and economic vulnerability on the eve of South African austerity' (2015) 45 *International Journal of Health Services* 415
- Brunette, R, Nqaba, P, Pearson, J & Phadi, M 'Elite struggle over Zuma is making weapons against the poor, *Daily Maverick* 14 June 2017, <https://www.dailymaverick.co.za/article/2017-06-14-op-ed-elite-struggle-over-zuma-is-making-weapons-against-the-poor/#.Wj0M6X1x3Z4> (accessed 20 December 2017)
- Budlender, S, Woolard, I & Leibbrandt, M 'How current measures underestimate the level of poverty in South Africa' *The Conversation* 3 September 2015, <https://theconversation.com/how-current-measures-underestimate-the-level-of-poverty-in-south-africa-46704> (accessed 20 December 2017)
- Cronje, F 'SA service delivery "no failure": SAIRR' Press statement, Johannesburg, 11 September 2012, <http://nepadwatercoe.org/south-africa-sa-service-delivery-no-failure-sairr/> (accessed 20 December 2017)
- Coleman, N 'Do we have to choose between a predatory elite and white monopoly capital?' *Daily Maverick*, 21 April 2017, <https://www.dailymaverick.co.za/opinionista/2017-04-21-do-we-have-to-choose-between-a-predatory-elite-and-white-monopoly-capital-part-one/#.Wj0JgH1x3Z4> (accessed 20 December 2017)
- Devereux, S 'Social protection in South Africa: Exceptional or exceptionalism?' (2011) 32 *Canadian Journal of Development Studies* 414
- Donaldson, A 'Enabling growth: Redistribution priorities for South Africa' *Econ3x3* 12 November 2014, <http://www.econ3x3.org/article/enabling-growth-redistribution-priorities-south-africa> (accessed 20 December 2017)
- Ensor, L 'Nene urged to make real commitment to fiscal discipline' 24 February 2015, <http://www.bdlive.co.za/economy/2015/02/24/nene-urged-to-make-real-commitment-to-fiscal-discipline> (accessed 20 December 2017)
- Everatt, D 'Lessons from KPMG: Be on guard, South Africans are on your case' *The Conversation* 21 September 2017, <https://theconversation.com/lessons-from-kpmg-be-on-guard-south-africans-are-on-your-case-84478> (accessed 20 December 2017)
- Ferguson, J *The anti-politics machine* (University of Minnesota Press 1994)
- Financial and Fiscal Commission 'Submission for the division of revenue

- 2011/12' Midrand, 6 September (2011), [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/100602FFC\\_0.ppt](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/100602FFC_0.ppt) (accessed 20 December 2017)
- Forslund, D 'World Bank finds itself in a Gini fix' *Mail&Guardian* 17 March 2016, <https://mg.co.za/article/2016-03-17-world-bank-finds-itself-in-a-gini-fix> (accessed 20 December 2017)
- Gottschalk, K 'South Africa's finance minister tackles wastage, boosts confidence' *The Conversation* 24 February 2016, <https://theconversation.com/south-africas-finance-minister-tackles-wastage-boosts-confidence-55338> (accessed 20 December 2017)
- Harvey, D *The urbanisation of capital* (Johns Hopkins University Press 1985)
- Harvey, D *The new imperialism* (Oxford University Press 2003)
- Harvey, D Marx, capital and the madness of economic reason (Profile Books 2017)
- Hirsch, A *Season of hope: Economic reform under Mbeki and Mandela* (International Development Research Centre 2005)
- Hirsch, A 'South Africa's budget promises will require buckets of political capital' *The Conversation* 25 February 2016, <https://theconversation.com/south-africas-budget-promises-will-require-buckets-of-political-capital-55395> (accessed 20 December 2017)
- Inchauste, G & Lustig, N 'The distributional impact of taxes and transfers: Evidence from eight developing countries' (2017) Washington DC, World Bank, <https://openknowledge.worldbank.org/handle/10986/27980> (accessed 20 December 2017)
- Inchauste, G, Lustig, N, Maboshe, M, Purfield C & Woolard, I 'The distributional impact of fiscal policy in South Africa' (2015) Policy Research working paper WPS 7194. Washington DC, World Bank Group
- Inchauste, G & Lustig, N *The distributional impact of taxes and transfers* (2017) Washington DC, World Bank, <http://documents.worldbank.org/curated/en/947831504161332955/pdf/119229-PUB-PUBLIC-pubdate-8-24-17.pdf> (accessed 20 December 2017)
- International Monetary Fund 'South Africa: 2016 Article IV Consultation' (2016) Washington DC
- Joffe, H 'World Bank tax study holds important lessons for SA' *Business Day* 12 November 2014, <http://www.bdlive.co.za/opinion/columnists/2014/11/12/world-bank-tax-study-holds-important-lessons-for-sa> (accessed 20 December 2017)
- Kantor, B 'Address poverty in SA and let inequality look after itself' *ZAeconomist* 20 November 2014, <http://www.zaeconomist.com/sa-economy/address-poverty-in-sa-and-let-inequality-look-after-itself/> (accessed 20 December 2017)
- Kar, D & Spanjers, J *Illicit financial flows from developing countries: 2004-2013* (2015), Washington DC, Global Financial Integrity, <http://www.gfintegrity.org/report/illicit-financial-flows-from-developing-countries-2004-2013/> (accessed 20 December 2017)
- Katzenellenbogen, J 'SA's choice: Crisis or reform?' *PoliticsWeb* 11 November 2014, <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=797617&sn=Detail&pid=71616> (accessed 20 December 2017)
- Lustig, N 'Inequality and fiscal redistribution in middle-income countries: Brazil, Chile, Colombia, Indonesia, Mexico, Peru and South Africa. Evidence from the Commitment to Equity Project (CEQ)' (2015) CEQ Working Paper 31, New Orleans, Centre for Inter-American Policy and Research, Department of Economics, Tulane University, and Inter-American Dialogue
- Lustig, N 'Inequality and fiscal redistribution in middle-income countries: Brazil, Chile, Colombia, Indonesia, Mexico, Peru and South Africa' (2016) 7 *Journal of Globalisation and Development* 17
- Majiet, L & Motha, S 'State capture a huge embarrassment: Zweli Mkhize' *Jacaranda FM* (2017), <https://www.jacarandafm.com/news/news/state-capture-huge-embarrassment-zweli-mkhize/> (accessed 20 December 2017)

- Manuel, T 'Confronting the challenge of poverty and inequality' Helen Suzman Memorial Lecture, Gibson Institute for Business Studies, University of Pretoria, 7 November 2014, <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=798431&sn=Detail&pid=71616> (accessed 20 December 2017)
- Mkandawire, T 'Neopatrimonialism and the political economy of economic performance in Africa: Critical reflections' (2015) 67 *World Politics* 563
- Mkokeli, S 'Overpricing is where the real leakage is, Treasury's Kenneth Brown says' *Business Day* 6 October 2016
- Mtimka, O 'South African finance minister forced to walk a difficult political tightrope' *The Conversation* 25 February 2016, <https://theconversation.com/south-african-finance-minister-forced-to-walk-a-difficult-political-tightrope-55345> (accessed 20 December 2017).
- National Planning Commission 'National Development Plan: Our future – Make it work' (2012) Executive Summary, Pretoria, Office of the Presidency
- Organisation for Economic Cooperation and Development *Educational opportunity for all: Overcoming inequality throughout the life course* (OECD 2017), [http://www.keepeek.com/Digital-Asset-Management/oecd/education/educational-opportunity-for-all/public-social-spending-as-a-percentage-of-gdp\\_9789264287457-graph6-en#.Wjz9gXlx3Z4#page2](http://www.keepeek.com/Digital-Asset-Management/oecd/education/educational-opportunity-for-all/public-social-spending-as-a-percentage-of-gdp_9789264287457-graph6-en#.Wjz9gXlx3Z4#page2) (accessed 20 December 2017)
- Poplak, R 'The end of law, the end of democracy' *Daily Maverick* 20 September 2017, <https://www.dailymaverick.co.za/article/2017-09-20-trainspotter-the-end-of-law-the-end-of-democracy/> (accessed 20 December 2017)
- Schreiber, L 'South Africa Budget 2016: Nifty political footwork may not be enough' *The Conversation* 24 February 2016, <https://theconversation.com/south-africa-budget-2016-nifty-political-footwork-may-not-be-enough-55344> (accessed 20 December 2017)
- Seekings, J 'Visions, hopes and views about the future: The radical moment of South African welfare reform' in Dubow, S & Jeeves, A (eds) *South Africa's 1940s: Worlds of possibilities* (Double Storey Books 2005) 44
- Seekings, J & Nattrass, N *Policy, politics and poverty in South Africa* (United Nations Research Institute on Social Development 2015)
- Spaull, N 'South Africa's education crisis: The quality of education in South Africa 1994–2011' Centre for Development and Enterprise Working Paper, Johannesburg, October 2013
- Steinberg, J 'KPMG and McKinsey sagas do not shift voters' beliefs' *Business Day* 29 September 2017, <https://www.pressreader.com/south-africa/business-day/20170929/281500751447457> (accessed 20 December 2017)
- Transparency International 'Corruption perceptions index' Berlin (2016), [https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](https://www.transparency.org/news/feature/corruption_perceptions_index_2016) (accessed 20 December 2017)
- University of the Witwatersrand 'KPMG: What lessons have we learnt?' Johannesburg, 29 September 2017, <https://www.youtube.com/watch?v=qB6elH27qgE> (accessed 20 December 2017)
- Woolard, I, Metz, R, Inchauste, G, Lustig, N, Maboshe, M & Purfield, C 'How much is inequality reduced by progressive taxation and government spending?' *Econ3x3* 2015, <http://www.econ3x3.org/article/how-much-inequality-reduced-progressive-taxation-and-government-spending#sthash.nuwTTm2n.dpuf> (accessed 20 December 2017)
- World Bank 'Fiscal policy and redistribution in an unequal society. South Africa Economic Update (2014) 6 Washington DC, World Bank Group, 1 November 2014, <http://documents.worldbank.org/curated/en/2014/11/20339043/south-africa-economic-update-fiscal-policy-redistribution-unequal-society> (accessed 20 December 2017)
- World Bank 'South African poverty and inequality assessment discussion note'

- (2016a) Washington DC, <http://ccs.ukzn.ac.za/files/World-Bank-South-Africa-CN-Discussion-Note-28-Jan-2016.pdf> (accessed 20 December 2017)
- World Bank 'Taking on inequality' Washington DC: World Bank Group (2016b)
- World Economic Forum *Global Competitiveness Report 2015-16 Davos (2015)*, <http://reports.weforum.org/global-competitiveness-index/> (accessed 20 December 2017)
- World Economic Forum *Global Competitiveness Report 2017-18 Davos (2017)*, <http://reports.weforum.org/global-competitiveness-index/> (accessed 20 December 2017)

# CHAPTER 5

## POVERTY, WOMEN AND THE HUMAN RIGHT TO WATER FOR GROWING FOOD

*Ngcimezile Mbano-Mweso\**

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### Abstract

*Access to water is very important to the sustenance of human beings. The Human Development Report 2006 states that the lack of access to water undermines productivity and economic growth, reinforcing the deep inequalities that characterise current patterns of globalisation and trapping vulnerable households in cycles of poverty. In order to reduce poverty, therefore, the guarantee of access to water that goes beyond health considerations but also a guarantee of water for some productive uses needs to be recognised.<sup>1</sup> The human right to water has emerged as an unenumerated right in international law amidst much criticism and vague content. This chapter explores whether the human right to water for growing food can be included in the normative content of the human right to water.*

### 1 Introduction

There are numerous global partnerships, conferences, strategies and plans that demonstrate the commitment to remove the scourge of world poverty.<sup>2</sup> One core factor to achieve this is access to water from which poor people, especially women, draw multiple benefits. Such benefits include enhanced livelihood security, the generation of wealth, reduced health

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1 See RP Hall et al 'The human right to water: The importance of domestic and productive water rights' (2014) 20 *Science and Engineering Ethics* 849; see also J Thompson et al *Drawers of water II: 30 years of change in domestic water use and environmental health in East Africa* (2001) 31, arguing that the productive use of water is beneficial to rural households for both health and livelihood; RP Hall et al 'The productive use of rural piped water in Senegal' (2014) 7 *Water Alternatives* 480 492, revealing that in rural Senegal three-quarters of households are engaged in water-based economic activities that contribute to half the household income. B van Koppen 'Multiple-use water services to advance the Millennium Development Goals' (2006) *Research Report* 989.

2 Eg, Millennium Development Goals adopted by world leaders in the UN Millennium Declaration Resolution A/55/L.2 (2000). This has been replaced by the Sustainable Development Goals adopted by the UN General Assembly at the UN Sustainable Development Summit 2015, <https://sustainabledevelopment.un.org/post2015/summit> (accessed 15 August 2017).

risks and vulnerability.<sup>3</sup> Water is also an important aspect in improving sustainable food production in order to reduce poverty, hunger and malnutrition.<sup>4</sup> There are many productive uses of water at the household level that comprise mainly small-scale activities predominantly involving small home gardens for growing vegetables and fruit.<sup>5</sup> Home gardens are a source of nourishment and contribute to achieving a balanced diet from the different types of vegetables and fruit; they are also a source of income through the sale of the produce which contributes to livelihood essentials such as clothes, school fees and medicines.<sup>6</sup> This is most beneficial for women who represent the majority living in extreme poverty and who are the ones that manage such small gardens for their families.<sup>7</sup> A lack of access to water is recognised as both a cause and consequence of poverty and inequality. It is the poor countries and poor people living in low-income, informal or illegal (peri-urban) and rural areas that tend to have lower levels of access to an improved water supply.<sup>8</sup> The Human Development Report of 2006 states that the lack of access to water undermines productivity and economic growth, reinforcing the deep inequalities that characterise current patterns of globalisation and trapping vulnerable households in cycles of poverty.<sup>9</sup> The United Nations General Assembly (UNGA) has recognised the human right to water for personal and domestic uses.<sup>10</sup> In order to reduce poverty, this human right to water must also guarantee water for some productive uses.<sup>11</sup> The human right to water has emerged as an unenumerated right in international law amidst much criticism and vague content. This chapter explores whether the human right to water for growing food can be included in the normative content of the human right to water.

- 3 See generally Poverty-Environment Partnership (PEP) 'Linking poverty reduction and water management' (2006), [http://esa.un.org/iys/docs/san\\_lib\\_docs/povety%20reduction%20and%20water.pdf](http://esa.un.org/iys/docs/san_lib_docs/povety%20reduction%20and%20water.pdf) (accessed 12 September 2014).
- 4 UN-Water 'Water and Food' (2014), <http://www.unwater.org/topics/water-and-food/en/> (accessed 16 December 2014). See also generally B van Koppen et al 'Fixing the leaks in women's human rights to water: Lessons from South Africa' in A Hellum, P Kameri-Mbote & B van Koppen (eds) *Water is life: Women's human rights in national and local water governance in Southern Africa* (2015) 457.
- 5 Other productive uses of water at the household level include livelihood raising, brick-making and beer brewing, which all contribute to livelihood. Thompson et al (n 1) 31; E van Houweling et al 'The role of productive water use in women's livelihoods: Evidence from rural Senegal' (2012) 5 *Water Alternatives* 658.
- 6 Van Houweling et al (n 5) 658; Van Koppen (n 1) 9-10.
- 7
- 8 See WHO/UNICEF *Progress on drinking water and sanitation* (2014) vi, stating that 748 million people, mostly the poor and marginalised, lack access to an improved drinking water source.
- 9 UNDP Human Development Report *Beyond scarcity: Power, poverty and the global water crisis* (2006) 47 27.
- 10 *Right to water* (2002) UN Doc E/C.12/2002/11(GENERAL COMMENT 15); UN General Assembly (UNGA) 'The human right to water and sanitation' (2010) A/RES/64/292.
- 11 See Hall et al 'The human right to water' (n 1); see also Thompson et al (n 1); Hall et al 'The productive use of rural piped water in Senegal' (n 1) 480 492, see also Van Koppen (n 1) 9-11.

## 2 The human right to water

### 2.1 Recognition in international law

In international law women are guaranteed a human right to water explicitly in the two main instruments dealing with women's rights at the global and regional level. First, in 1979 the UNGA guaranteed water supply for rural women as a human right to ensure an adequate standard of living in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>12</sup> CEDAW, a landmark international agreement that affirms principles of human rights and equality for women, recognises the rural and urban divide and specifically aims to address discrimination or disadvantage based on locality or geography.<sup>13</sup> CEDAW is among the few human rights instruments at the global level that guarantee the human right to water, but specifically for rural woman. In article 14 state parties are enjoined to take into account the particular problems faced by rural women and the significant roles that they play in the economic survival of their families, including their work in the non-monetised sectors of the economy, and to take all appropriate measures to ensure the application of the provisions of CEDAW to women in rural areas. It then calls for the provision of infrastructure and basic needs, including education, health care, water, sanitation, electricity, transport, and communications infrastructure, as conditions for adequate living. Such basic needs are recognised under the right to an adequate standard of living guaranteeing necessary conditions of life sufficient for well-being and human development in terms of physical, moral and mental development.<sup>14</sup> It has been connected to the conditions necessary to enable a person to live in dignity, to participate in society and to make a living for themselves and their families.<sup>15</sup>

The survival and livelihood interest that the right to adequate standard of living guarantees is best expressed in the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>16</sup> Article 11(1) requires states to provide for 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'. The

12 Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 art 14. This provision is part of efforts to eliminate discrimination against women in rural areas and to ensure participation in and benefit from rural development on the basis of equality with men.

13 LR Pruitt 'Deconstructing CEDAW's article 14: Naming and explaining rural difference (2010-2011) 17 *William and Mary Journal of Women and the Law* 347.

14 M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1998) 293.

15 See IT Winkler *The human right to water: Significance, legal status and implications for water allocation* (2012) 43.

16 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

United Nations (UN) Committee on Economic, Social and Cultural Rights (ESCR Committee) established that the human right to water is implicitly included in the list of rights required to ensure an adequate standard of living in article 11(1).<sup>17</sup> In its General Comment 15, which is regarded as the most authoritative elaboration of the human right to water, the ESCR Committee relies mainly on the interdependence of human rights, especially the rights to an adequate standard of health, food, life and dignity, to arrive at an independent right to water in mainstream human rights instruments.<sup>18</sup>

Of interest for purposes of this article is the right to an adequate standard of living, understood as a right to a livelihood contributing to the continuous improvement in living conditions. Water is essential for survival by meeting basic human needs, but also as an enabling resource for livelihoods. As alluded to above, for poor households in the rural and peri-urban areas water supports livelihoods through small home gardens, livestock rearing and micro-enterprises. Further, an adequate supply of good quality water within a reasonable distance frees up time that would otherwise be spent in fetching water, contributes to good health, better education opportunities and ultimately enables people to work.<sup>19</sup> This is crucial for poor people, particularly women, who constitute the majority of the poorest.

The Convention on the Rights of Persons with Disabilities (CRPD) similarly recognises the importance of water for livelihood and social protection.<sup>20</sup> In article 28(2)(a) water is explicitly guaranteed as part of the right to social protection. This right guarantees social support and security for poverty reduction and alleviation, preventing social exclusion and promoting social inclusion.<sup>21</sup> Winkler asserts that social protection and an

17 See TS Bulto *The extraterritorial application of the human right to water in Africa* (2014) 25, stating that the human right to water has emerged as a new right amidst much criticism and controversy due to the lack of an express provision in main human rights instruments. However, after decades of incremental recognition and varying levels of commitment to the human right to water, the UN General Assembly and UN Human Rights Council (HRC) in 2010 memorialised the international consensus on this right by declaring the right to safe drinking water and sanitation a human right. See generally UN Committee on Economic, Social and Cultural Rights General Comment 15, Right to water (2002) UN Doc E/C.12/2002/11; UN General Assembly The human right to water and sanitation (2010) A/RES/64/292; see also GS McGraw 'Defining and defending the right to water and its minimum core: Legal construction and the role of national jurisprudence' (2011) 8 *Loyola University Chicago International Law Review* 127 144, stating that by 2010 every member state of the UN had acknowledged the human right to water at least once whether by national legislation, declaration, treaty signature or membership of a supportive international organisation.

18 See generally General Comment 15 (n 17). See also MAS Salman & SA Mcinerney-Lankford *The human right to water: Legal and policy dimensions* (2004) 43.

19 S Copra 'The right to food and water: Dependencies and dilemmas' (2010) Paper prepared for the Institute for Human Rights and Business, [http://www.ihrb.org/pdf/Right\\_to\\_Food\\_and\\_Water\\_Dependencies\\_and\\_Dilemmas.pdf](http://www.ihrb.org/pdf/Right_to_Food_and_Water_Dependencies_and_Dilemmas.pdf) (accessed 14 July 2012).

20 Convention on the Rights of Persons with Disabilities, 13 December 2006, entered into force 3 May 2008.

21 See ESCR Committee General Comment 19: The right to social security (art 9 of the Covenant), 4 February 2008, E/C.12/.



adequate standard of living are inextricably linked and cannot be clearly separated, hence the recognition of both rights in article 28 of CRPD.<sup>22</sup>

At the African regional level, women's human rights to water have also been specifically provided for in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).<sup>23</sup> Unlike CEDAW, the Protocol does not limit this right to rural women. It recognises the human right to water for women in the context of the right to food. Article 15 on the right to food security obliges state parties to take appropriate measures to provide all women with 'access to drinking water, sources of domestic fuel, land, and the means of producing nutritious food'. Although only water for drinking is explicitly mentioned, water is essential to food security as no food can be produced without it. Food security in many ways contributes to poverty reduction and development such as contributing to personal health and to reducing the burden of families' health costs. The production of nutritious food also requires water beyond water for drinking, hence, arguably, there is an implicit recognition of the need for water for food as well, beyond what is explicitly provided for. Although the African Charter on Human and Peoples' Rights (African Charter), the main human rights instrument under the African human rights system, does not provide for an explicit human right to water, the African Commission on Human and Peoples' Rights (African Commission) has established that the right is implied in the protection of other rights.<sup>24</sup> The African Commission has derived the human right to water from a number of explicitly-guaranteed rights, including the rights to life, dignity, work, health, development and to a satisfactory environment.<sup>25</sup>

Bulto argues that the teleological approach undertaken by the African Commission in its jurisprudence for an implied human right to water in the protection of other explicitly-provided rights failed to establish an

22 Winkler (n 15) 44.

23 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted on 11 July 2003, entered into force 25 November 2005). See F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Law Journal of Civil Rights and Social Justice* 11 for an appraisal of the impact and implementation of the Protocol.

24 See African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986). See also African Commission on Human and Peoples' Rights 'Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights' (Nairobi Guidelines) (2011), [http://www.globalschool.co/files/recursos/fi\\_name\\_documento.41.pdf](http://www.globalschool.co/files/recursos/fi_name_documento.41.pdf) (accessed 22 March 2014).

25 Arts 4, 5, 16, 22 & 24 African Charter. See Nairobi Guidelines (n 24) para 87; *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 47; *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) paras 208-209; *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (Endorois case). See also African Commission Resolution on the Right to Water Obligations ACHPR/Res.300 (EXT.OS/XVII) 20 adopted at its 17th extraordinary session held from 19-28 February 2015 in Banjul, The Gambia.

independent human right to water.<sup>26</sup> The recent developments by the African Commission, however, point to an independent human right to water that creates its own obligations for states. This is evident from the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in Africa,<sup>27</sup> the Reporting Guidelines for Economic, Social and Cultural Rights in Africa<sup>28</sup> and the Resolution on the Right to Water Obligations which develop the content of the right to water in Africa.<sup>29</sup> The human right to water has also been recognised in the AU Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, and the African Union Convention on Cross-Border Cooperation.<sup>30</sup>

The different instruments and the jurisprudence of monitoring bodies have established and recognised an independent human right to water with explicit guarantees of this right for women in women's rights instruments. This has drawn global attention to the large number of people without access to water and the burden disproportionately borne by women in fetching water.<sup>31</sup> The recognition has also been accompanied by an elaboration on the content of this right by the ESCR Committee and the African Commission by providing guidelines for states to realise this right for all, especially vulnerable groups such as women.

## 2.2 Definition and content: Is there a right to water for growing food?

The first issue to be settled is whether the right to water should be defined narrowly or broadly. Where the right does appear in global human rights instruments it is generally very narrowly defined. For example, article 24 of the Convention on the Rights of the Child (CRC) only mentions the provision of 'clean drinking water'.<sup>32</sup> The human right to water is also referred to as the right to 'drinking water' by different UN bodies and resolutions. For instance, the Human Rights Council uses the phrase 'the human right to drinking water and sanitation', hence the special mechanism on issues of water was initially established as the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation.<sup>33</sup> This was changed to the Special Rapporteur on the Human Rights Obligations Related to Access to Safe

26 TS Bulto 'The human right to water in the corpus and jurisprudence of the African human rights system' (2011) 11 *African Human Rights Law Journal* 341.

27 Nairobi Guidelines (n 24).

28 Resolution on the Right to Water Obligations (n 25).

29 Resolution on the Right to Water Obligations (n 25).

30 Adopted 29 January, 2018; Adoption: 27 June, 2014.

31 This is because women typically are the water collectors and managers in the domestic sphere. See Van Houweling (n 5) 660.

32 Convention on the Rights of the Child (CRC) (adopted 20 November 1989 and entered into force 2 September 1990).

33 Human Rights Council (HRC) Resolution on human rights and safe drinking water and sanitation, 28 March 2008 A/HRC/RES/7/22 para 2.

Drinking Water and Sanitation (Special Rapporteur on Water).<sup>34</sup> Similarly, the former Special Rapporteur to the UN Economic and Social Council, El Hadji Guissé, used the term 'right to drinking water supply' before proposing the use of the term 'right to water' for the sake of consistency.<sup>35</sup>

Regardless of the terminology used, it is clear from General Comment 15 that the human right to water does not simply denote the right to drinking water but, at the very least, also includes other domestic and personal uses, such as bathing, cleaning, cooking and sanitation.<sup>36</sup> General Comment 15 defines the substantive content of the human right to water as follows:<sup>37</sup>

The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for *personal and domestic uses*. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.

General Comment 15 defines personal and domestic use to mean drinking, personal sanitation, the washing of clothes, food preparation, and personal and household hygiene.<sup>38</sup> It goes further to elaborate on these uses by stating that drinking entails water for consumption; sanitation is the disposal of human excreta (water is only necessary where water-based means are adopted); food preparation includes water for cooking or food hygiene; and hygiene means cleanliness.<sup>39</sup>

This definition of what constitutes personal and domestic uses is still narrow, as it seems to exclude water for other uses, although these uses are often acknowledged as part of the human right to water.<sup>40</sup> However,

34 HRC *The human right to safe drinking water and sanitation*, 8 April 2011, A/HRC/RES/16/2.

35 UN Economic and Social Council (ECOSOC) *Realisation of the right to drinking water and sanitation. Report of the Special Rapporteur*, El Hadji Guissi, UN Doc E/CN.4/Sub.2/2005/25, 11 July 2005, Annex - Draft guidelines for the realisation of the right to drinking water and sanitation para 1.1. (Sub-Commission Guidelines) See also United Nations Sub-Commission on the Promotion and Protection of Human Rights Promotion of the Realisation of the Right to Drinking Water and Sanitation; Res 2006/10 (2006) Adopting the Draft Guidelines for the Realisation of the Right to Drinking Water and Sanitation (2005) UN Doc.E/CN.4/Sub.2/2005/25 (United Nations Sub-Commission on the Promotion and Protection of Human Rights, Res 2006/10, Promotion of the Realisation of the Right to Drinking Water and Sanitation 24 August 2006, UN Doc A/HRC/Sub.1/58/L11, adopting the Draft Guidelines for the Realisation of the Right to Drinking Water and Sanitation (2005), UN Doc E/CN.4/Sub.2/2005/25).

36 General Comment 15 (n 16) para 2.

37 As above.

38 General Comment 15 para 12.

39 General Comment 15 fn 13.

40 See eg General Comment 15 para 15 recognising that people may not be deprived of their means of subsistence.

General Comment 15 also includes the following:<sup>41</sup>

Water is required for a range of different purposes, *besides personal and domestic uses*, to realise many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.

General Comment 15 thus seems to include both a narrow and a broad definition of the human right to water. The narrow definition is limited to water for personal and domestic use; the broad definition includes water for food production, environmental protection, generating a livelihood, and performing cultural practices.

Although many agree that water for personal and domestic use is essential, stopping at the narrow definition of the right has been criticised by Van Koppen and others.<sup>42</sup> It is argued that this domestic approach overlooks the benefit of productive use of water that is essential for poor households.<sup>43</sup> This is also known as the ‘domestic-plus’ approach or ‘multiple uses’ approach to the human right to water. For instance, it is pointed out that the productive use of water at household level that comprises small-scale economic activities, including small home gardens for growing vegetables and fruit, rearing livestock, brewing beer and brick making, contributes to the household income and livelihood for many poor people.<sup>44</sup> Women, in particular, rely on home gardens as a source of nourishment and through the sale of the produce as a supplement to sources of income.<sup>45</sup> Empirical evidence shows that in practice, even when water facilities are designed for a single use, rural communities use their facilities for productive activities that contribute to food security and/or income.<sup>46</sup> Van Koppen and others argue for the ‘domestic-plus’ approach whereby designs of water delivery systems are made to enhance water

41 General Comment 15 (n 16) para 6. See also para 7 providing that a people may not be deprived of its means of subsistence in line with art 1 paragraph 2 of ICESCR. It also makes reference to the United Nations Convention on the Law of Non-Navigational Uses of Watercourses (adopted on 21 May 1997 and entered into force 17 August 2014), which declares that, in determining vital human needs in the event of conflicts over the use of water courses, special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation. Women farmers must be guaranteed access to water for food production.

42 See generally Hall (n 10).

43 See Thompson et al (n 1) 31, RP Hall et al ‘(n 1) 480 492, see also van Koppen (n 4) 9 11.

44 See Van Houweling et al (n 5) 658.

45 As above; Van Koppen (n 4) 9-10.

46 See Hall (n 10) generally; Van Koppen (n 4) 2, stating that the single-use approach is based on the assumption that other sectors will take care of the other needs or uses of water. See also K Mokgope & JA Butterworth ‘Rural water supply and productive uses: A rapid survey in the Sand River catchment’ (2001) WHIRL Project Working Paper 1-21.

quantities while maintaining water quality for humans.<sup>47</sup> An expanded understanding of what ‘domestic’ use entails will ensure that the human right to water not only ‘keeps the heads of the people above the water’ but also guarantees adequate supplies of water that support livelihoods for the poor.<sup>48</sup> This, according to Hellum, would ‘capture the integrated way in which water is used for a multiplicity of livelihood purposes’ from a rural or semi-urban household perspective.<sup>49</sup>

General Comment 15 recognises that people should not be deprived of their subsistence and even calls on states to ensure that water for subsistence farming, for instance, should be guaranteed especially for women.<sup>50</sup> The ESCR Committee also makes reference to the UN Convention on the Law of Non-Navigational Uses of Water Courses, which declares that in determining vital human needs in the event of conflicts over the use of water courses, special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation. Furthermore, the ESCR Committee specifies that water both for domestic purposes and for the prevention of starvation and disease must be prioritised.<sup>51</sup> This would suggest that General Comment 15 supports the ‘domestic-plus’ approach and particularly home gardening which is a means of subsistence requiring access to water. However, it does require that ‘priority in the allocation of water must be given to the right to water for personal and domestic uses’.

The human right to water is much broader than water for personal and domestic use which has to be prioritised. According to Winkler, this is partly because drinking, cooking, washing and personal hygiene cannot be substituted, and require direct access to water by each person. The other uses such as for food or livelihood needs can be met through a variety of means, other than subsistence farming, and do not require everyone to have direct access to water.<sup>52</sup> Winkler concludes that priority must be given to needs that exclusively rely on water.<sup>53</sup> Another factor is that non-domestic uses require higher quantities of water than personal

47 Van Koppen (n 4) 7.

48 Mokgope & Butterworth (n 46 above) 2. See also B van Koppen & B Schreiner ‘Priority general authorisation in rights-based water use authorisation in South Africa (2014) *Water Policy* 1-19, arguing that most statutory water laws in sub-Saharan Africa through the licence (or permit) system deny and discriminate against poor people in relation to access to water for small-scale gardens. This is because licensing disregards customary water laws, results in administrative discrimination due to a lack of government capacity to process their applications and relegates them to second-class entitlement with no access to water for basic livelihood under the right to water, food and adequate standard of living.

49 A Hellum ‘Engendering the right to water and sanitation: Taking the lived realities of women and girls as starting point’ in A Russel & M Landgford (eds) *The right to water: Theory, prospects and practice* (2017).

50 General Comment 15 (n 16) para 7.

51

52 Winkler (n 50) 3-4; Winkler (n 15) 130 158-167, arguing that the state has a variety of policy options regarding how to realise the right to foods other than to provide direct access to water.

53 Winkler (n 50) 3-4; see also Winkler (n 15 above) 129-131.

and domestic uses.<sup>54</sup> For instance, whereas the World Health Organisation (WHO) has established that between 50 and 100 litres per capita per day are sufficient for domestic purposes, at least 2 000 litres per capita per day are required for producing food.<sup>55</sup> It therefore is argued that including a human right to water for growing food would be guaranteeing claims to large quantities of water.<sup>56</sup> Winkler argues against the ‘domestic-plus’ approach of Van Koppen and others. She is of the view that if water for producing food for basic consumption were taken to be guaranteed by the right to water, there would be no reason from a normative perspective to stop only at that and to not include water for agriculture on a larger scale and all other uses to realise any human right.<sup>57</sup> Her argument is that there is a danger of guaranteeing water for all human rights under the human right to water as this would make the right less tangible and focused.

Bulto, who also argues for a narrow definition, posits that states cannot deliver water for all conceivable uses.<sup>58</sup> According to Bulto this narrow definition serves the purpose only of identifying the ‘amount of a non-derogable bare minimum amounts of water per se and the related implementation duties of states’.<sup>59</sup> He also acknowledges that General Comment 15 prioritises water for personal and domestic use, but does not preclude the possibility of claiming water for the other recognised uses, such as for food production, culture and livelihood.<sup>60</sup>

Although the concerns of large quantities of water creating a huge burden are valid, there is no justification for apprehension as the human right to water as elaborated in General Comment 15 clearly already identifies the hierarchy for realising this right considering both the narrow definition and the broader aspect of the right to water guaranteed.<sup>61</sup> It should be accepted that all the water uses included under the broad definition are part of what the human right to water entails, that is, the human right to water guarantees even the large amounts of water needed for food production and generating a livelihood (excluding commercial and industrial uses). However, priority should rightly be given to personal and domestic uses.<sup>62</sup> The personal and domestic uses are prioritised to prevent disease and the narrow definition is best understood as forming the minimum core content of the human right to water, as will be elaborated further below. Non-domestic uses are guaranteed under the human right to water, to be realised progressively after meeting the domestic water

54 Eg, whereas the WHO has established that 100 litres per capita per day is sufficient for domestic purposes, at least 2 000 litres per capita per day are required for producing food. See Winkler (n 15) 3-4.

55 G Howard & J Bartram *Domestic water quantity, service level and health* (2003) 22. See also World Water Assessment Programme (WWAP) *Water, a shared responsibility* (2006) 247.

56 Winkler (n 50) 3-4.

57 Winkler (n 15) 130.

58 Winkler 56.

59 Winkler 60 61-62. He argues further that prioritising water for personal and domestic has been part of ‘long-standing state practice’.

60 As above.

61 See General Comment 15 (n 16) para 6. See also page 9 for a discussion of this.

62 See General Comment 15 para 37.

requirements. After domestic use, the next priority are situations of disaster relief, where water for the prevention of starvation and disease must be provided.<sup>63</sup> This priority guarantees both water for personal and domestic use and water for food production.<sup>64</sup> Water required to meet the core obligations of each of the Covenant rights is next in priority. Of particular interest for purposes of this chapter is the right to food which ordinarily would be closely related to the right to water for food production. According to the former UN Special Rapporteur on the Right to Food, Olivier de Schutter, the right to food 'protects the right of all human beings to feed themselves in dignity, either by producing their food or by purchasing it'.<sup>65</sup> This right has a clearly-stated core obligation, namely, to mitigate and alleviate hunger.<sup>66</sup> To ensure that everyone is free from hunger, states must adopt national strategies to ensure food and nutrition security for all.<sup>67</sup> Water is indispensable to realising food and nutrition security as it contributes to growing food, processing for transformation and preparation. The right to food is dependent on access to water as no food can be produced without it. Further, the largest use of water is for growing food: Agriculture accounts for 70 per cent of all water use. It therefore would be important to recognise a human right to water for food production, to prevent starvation and for a healthy life.<sup>68</sup> This point was raised by the UN Special Rapporteur on the Right to Food, J Ziegler, when commenting on an initial draft of General Comment 15. He stated that water should be viewed as a source of food security and included in the content of the right to water besides domestic uses.<sup>69</sup> Thus, a human right to water for food production would also fall under this priority to meet core obligations for other rights.<sup>70</sup>

The human right to food and, more specifically, the right to be free from hunger is recognised as part of an adequate standard of living in ICESCR and other human rights instruments.<sup>71</sup> This right may also form

63 General Comment 15.

64 United Nations Conventions on the Law of Non-Navigational Uses of Watercourses; see also M Windfuhr *Water for food: A human rights obligation how states can manage conflicts between the human right to water and the human right to adequate food* 19, available at [https://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/Study\\_Water\\_for\\_Food\\_a\\_Human\\_Rights\\_Obligation.pdf](https://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Study_Water_for_Food_a_Human_Rights_Obligation.pdf) (accessed 20 May 2019)

65 O de Schutter 'The right to food', <http://www.srfood.org/en/right-to-food> (accessed 8 March 2014).

66 General Comment 12 The Right to Adequate Food (Art 11) Adopted at the Twentieth Session of the Committee on Economic, Social and Cultural Rights, on 12 May 1999 ] para 6.

67 General Comment 12 para 21.

68 BD Brooks 'Human right to water in Northern Africa and the Middle East: What is new and what is not; what is important and what is not' (2007) 23 *Water Resources Development* 227 233.

69 A Cahill 'The human right to water – a right of unique status': the legal status and normative content of the right to water' (2005)9: 3 *The International Journal of Human Rights* 396

70 General Comment 12 paras 12 & 21. See also Water for Food Security and Nutrition: A Report by the High-Level Panel of Experts on Food Security and Nutrition, May 2015. Water for realising the human right to food goes beyond production, to also contribute to livelihoods and income necessary for economic access to food. However, this is beyond the scope of this chapter.

71 Art 11.

the basis for deriving the human right to water for food production as it is impossible to realise this right without water, as alluded to above. For purposes of this chapter, I maintain that the right to water is the basis for the human right to water for food production.

The last priority in General Comment 15 identified by Windhurf is water for agriculture with a focus on groups that need it for their subsistence.<sup>72</sup> General Comment 15 in paragraph 7 recognises the indispensability of water for agriculture to realise the right to adequate food. It then provides that water for agriculture should be provided to women farmers, indigenous peoples and other farmers to ensure subsistence farming and to secure livelihoods.<sup>73</sup> The General Comment notes that the provision of water for food production can be achieved through different water management systems and techniques such as water harvesting and irrigation technologies. Herein is another guarantee for women's rights to water for growing food contained within the human right to water.

The African Commission's Nairobi Guidelines, as General Comment 15, recognises the right to water for food production under the human right to water. It provides that 'the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal, domestic, and agricultural uses'.<sup>74</sup> Similar to General Comment 15, water for domestic and personal use is the minimum core obligation but the Guidelines also recognise the broader content of the right.<sup>75</sup> Women farmers and other disadvantaged and marginalised farmers together with indigenous peoples are also the focus for ensuring access to water for agriculture.<sup>76</sup> In the Nairobi Guidelines it is not clear whether water for agriculture is to be restricted to subsistence farming and securing livelihoods as this is only mentioned with regard to indigenous people. However, the Draft Guidelines on the Right to Water in Africa (Draft Guidelines) being developed clarify this.<sup>77</sup> In these Draft Guidelines the human right to water is recognised to include both the narrow and broad definitions as the right extends beyond domestic and personal use to water for agriculture.<sup>78</sup> This definition is later qualified and further extended by requiring that states must as a priority make available water to meet human needs which includes water for domestic and personal use, sanitation, subsistence agriculture and other means of subsistence.<sup>79</sup> The document contains no terminology of minimum core obligations, but under the heading of 'minimum amount of water' states are enjoined to ensure access to minimum quantities of water for personal and domestic use, for subsistence farming and for securing the livelihoods of peoples,

72 Windfuhr (n 64) 20.

73 General Comment 15 para 7.

74 Nairobi Guidelines para 88.

75 Nairobi Guidelines para 92(a).

76 Nairobi Guidelines paras 92 (t) & (d).

77 African Commission Draft Guidelines on the Right to Water in Africa.

78 Draft Guidelines para 11.1.

79 Draft Guidelines para 12.1.



particularly for indigenous communities.<sup>80</sup> This again points to a human right to water for growing food within the right to water. Women farmers are particularly mentioned to ensure that they have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology.<sup>81</sup>

I have thus far argued that a human right to water encompasses both a narrow and broad definition and forms the basis for a human right to water for growing food. This right requires larger quantities of water than that required for domestic and personal use. However, states are still under an obligation to realise this right for all people with a particular focus on women and other disadvantaged and vulnerable groups. Basically, where resources permit, states must move beyond the narrow domestic approach to the broader domestic-plus or productive use approach which goes beyond simply providing water for consumption and cooking. This is the progressive realisation of the right envisaged for all socio-economic rights, as will be discussed in the next part as I seek to clarify the normative content of and states' obligations under the human right to water for growing food.

### **2.3 Normative content of the human right to water for growing food**

General Comment 15 and the Nairobi Guidelines provide authoritative interpretation guides for the human right to water and, thus, also the human right to water for growing food. Both provide for the substantive and procedural content of this right. The substantive content entitles every person, especially women, to available, accessible, acceptable and an adequate quality of water on a non-discriminatory basis to enable one to produce food for subsistence and securing an adequate standard of living. The procedural content requires participation in water governance. This right to water for growing food must be implemented progressively having regard to available resources. I will discuss further the substantive and procedural content of the human right to water, then states' obligations, but I start with a discussion of the concept of progressive realisation.

In order to implement this human right to water for growing food, standards or entitlements that can be enforced or claimed must be identified. The concept of progressive realisation encapsulates the fact that all economic, social and cultural rights generally will not be able to be achieved in a short period. This is because economic, social and cultural rights are resource-intensive and there is recognition that states may not always have the required resources. Although the realisation of these rights may be attained gradually over a long period of time, states are under an obligation to move as expeditiously as possible towards their full

80 Draft Guidelines para 12.2.

81 Draft Guidelines para 18.2.

realisation.<sup>82</sup> Progressive realisation has two policy implications.<sup>83</sup> First, it allows for a delay in the strategy for human rights fulfilment.<sup>84</sup> For instance, the quality of the services and goods implied by the full realisation of the right will be attained over a period of time.<sup>85</sup> Second, it allows for setting priorities among different rights and considering trade-offs among them as resources may not permit pursuing all of them simultaneously or with equal vigour.<sup>86</sup> State parties have a clear obligation within this flexible device to take steps within the maximum available resources and move as expeditiously and effectively as possible towards the full realisation of rights.<sup>87</sup> This obligation requires states to immediately start to carry out the implementation of the right.<sup>88</sup> Hence, as discussed above, regarding water uses it may not be possible to ensure that both domestic and productive uses are equally realized. Where there are resource constraints states are permitted to prioritise domestic use while moving as expeditiously and effectively as possible towards guaranteeing water for other uses, including for food production.<sup>89</sup>

Hall, Van Koppen and Van Houweling posit that although this has thus far been the case, there has been no movement to operationalise

- 82 See ESCR Committee General Comment 3: The Nature of States Parties' Obligations (art 2(1) of the Covenant) 1990 UN Doc E/1991/23 para 9; UN Commission on Human Rights Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights UN Doc E/CN.4/1987/1 Principle 21. See also International Commission of Jurists (ICJ) Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 26 January 1997 Guideline 8, <http://www.eschnet> (accessed 12 February 2011). The Maastricht Guidelines state that progressive realisation does not alter the nature of the legal obligation of states which requires that certain steps be taken as soon as possible.
- 83 RE Robertson 'Measuring state compliance with the obligations to devote the maximum available resources to realising economic, social and cultural rights' (1994) 16 *Human Rights Quarterly* 703. See also UN Office of the High Commissioner for Human Rights (OHCHR) *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* 2006 HR/PUB/06/12 para 49, <http://www.unhcr.org/refworld/docid/46ceaf92.html> (accessed 22 February 2012). See also C de Albuquerque & V Roaf *On the right track: Good practices in realising the rights to water and sanitation* (2012) 32 stating that progressive realisation is to ensure that states do not attempt to meet their international obligations with empty promises and half-measures.
- 84 OHCHR (n 63) para 49.
- 85 As above; ESCR Committee General Comment 3 (n 82) para 9; Craven (n 14) 133. This applies to both developed and developing states. A Chapman & S Russell *Core obligations: Developing a framework for economic, social and cultural rights* (2002) 4, stating that progressive realisation does not mean the gradual increase in the number of people who enjoy the right but rather the gradual improvement of the level of enjoyment of the right for all. See D Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 198.
- 86 Chapman & Russell (n 65) 4.
- 87 General Comment 3 (n 82) para 9.
- 88 The obligation to take steps and several specific rights in ICESCR are not subject to progressive realisation. The rights that have been worded similar to ICCPR requiring states to 'ensure' and 'guarantee' entails an immediate obligation on states to implement the rights, including art 3 on the right to equality; art 7(a)(i) on the right to equal remuneration for work of equal value; art 8 on the rights to form and join trade unions and to strike; art 13(3) on liberty of parents to choose their children's school; art 15(3) on freedom for scientific research and creative activity. See arts 10(3), 13(2)(a), 13(4) also with immediate obligations. MM Sepulveda & MMS Carmona *The nature of the obligations under the International Covenant on Economic, Social, and Cultural Rights* (2003) 175.
- 89 General Comment 3 (n 82) para 9.

the provision of water beyond the basic domestic requirement.<sup>90</sup> This is unfortunate, as progressive realisation does not allow states to drag their feet or to indefinitely defer their obligations.<sup>91</sup> Progressive realisation must be understood within the overall objective and purpose of ICESCR, which is to establish clear obligations for state parties to realise the full extent of the rights.<sup>92</sup> State parties have a clear obligation within this flexible device to maximise available resources, to take steps that are immediate and tangible towards the realisation of rights, and to ensure there are no retrogressive steps and non-discrimination in the measures adopted.<sup>93</sup>

Generally, the recognition of progressive realisation poses great difficulties in developing the normative content and enforcement of economic, social and cultural rights. On the one hand there are those that advocate a contextual approach to defining the normative content and enforcing economic, social and cultural rights grounded in a particular institutional, doctrinal and cultural context.<sup>94</sup> On the other hand, there is the universalist approach which advances transcendental components of economic, social and cultural rights developed from a comparative analysis of rights in different jurisdictions that is deemed applicable generally. Both approaches, however, are weak in ensuring the enjoyment of the human right to water for growing food.

This is provided in the substantive content of the right. First there is the entitlement or obligation to ensure the availability of water. As alluded to above, the right guarantees equitable access to water primarily for subsistence farming or securing a livelihood to ensure an adequate standard of living, particularly for disadvantaged and vulnerable people. The availability to women would thus refer to an adequate quantity of water to meet the needs for subsistence farming and for securing their livelihoods.<sup>95</sup> The water supply must be continuous or regular. The actual quantity needed for this will vary depending on specific conditions and context where the right is being realised. Water is rapidly decreasing into a scarce commodity due to overexploitation, climate change and natural and man-made disasters, among other factors.<sup>96</sup> Agriculture is a main consumer of water, taking up to 70 per cent of all water withdrawals globally and this has potential to undermine the sustainability of the resource if not carefully managed.<sup>97</sup> States are thus called upon to ensure water management systems and strategies technologies for rain water harvesting, use and reuse that enhance water efficiency and productivity

90 Hall (n 11) 857.

91 Robertson (n 62) 703. See also De Albuquerque (n 62) 32.

92 General Comment 3 (n 82) para 9.

93 As above.

94 M Tushnet *Weak courts, strong rights: Judicial review and social welfare rights in comparative constitutional law* (2009) 10.

95 General Comment 15 para 7; Draft Guidelines para 12.

96 General Comment 15 para 1 states that this is exacerbating existing poverty.

97 Water for food security and nutrition (n 72) 9

in agriculture<sup>98</sup>

Accessibility has been divided into four categories, namely, physical, economic, non-discrimination and information accessibility. Physical accessibility entails access to water within a reasonable distance that also guarantees security should be available to everyone including members of vulnerable and disadvantaged groups, for whom special measures may be necessary.<sup>99</sup> Economic accessibility or affordability is a requirement to ensure that the cost of acquiring water for growing food should not exclude people by threatening or compromising their enjoyment of other rights. Thus, the Nairobi Guidelines require states to ensure equitable access to water and water management systems for women and other disadvantaged farmers.<sup>100</sup>

Acceptability and adequate quality calls for the protection of water resources and the prevention of disease and other threats to health from the use of unsafe and toxic water.<sup>101</sup> This is particularly important where water for non-domestic use is concerned. Water must be fit for use without compromising the health of the user. Water quality for agriculture is different from that of domestic and personal use, as the latter may involve direct consumption by humans, whereas the former is intended for, for instance, fisheries, crops and livestock. The principle requiring cultural and quality as standards is also applicable to water for growing food, but this has not been specifically elaborated.

The human right to water guarantees procedural rights to access information and participation in decisions regarding water that also extend to the right to water for growing food. Access to information is an integral part of procedural rights that act to safeguard equity and accountability in realising the human right to water. Everyone is guaranteed the right to seek, receive and impart information concerning water issues. The participatory right to water for growing food requires that the process within which the state crafts strategies, policies and laws to ensure the right standards and norms to meet the goal of universal access must be undertaken in collaboration with people. It particularly requires that poor, disadvantaged and marginalised groups be given an equal opportunity to take part in and influence such processes. General Comment 15 specifically advances a participatory right to water in line with the primacy of equity in the struggle to secure access to water. Participation thus is regarded as an empowerment right to challenge inequality.

Further, although the human right to water for growing food is acknowledged in General Comment 15, this is vague and unclear. The ESCR Committee should thus clearly define this right through further

98 General Comment 15 para 7; Nairobi Guidelines Cfs Water for food security and nutrition (n72)13. Resolution 300 calls on states to ensure protection of resources from abusive use and pollution.

99 Nairobi Guidelines para 3(a).

100 Nairobi Guidelines para 92(t).

101 General Comment 15 para 8.

elaboration and in its role as the monitoring body should encourage states to move beyond the provision of water for domestic use to 'domestic-plus'. This will go a long way towards ensuring that the human right to water for growing food does not remain in the shadows but that it the right attracts the necessary global attention and effort to realise it.

### **3 Conclusion**

The chapter has argued that the human right to water includes a right to water for growing food, which is especially important for the poverty alleviation of poor women. Access to water for such productive uses would contribute to their household nutrition, food security and income by maintaining, for instance, a small vegetable garden. This will require guaranteeing women large quantities of water beyond the ordinary quantities to meet domestic use by operationalising the progressive realisation of the human right to water. States must be encouraged to move from the domestic approach tied to public health concerns to the 'domestic-plus' approach that ensures that people also have a livelihood and thus enjoy an adequate standard of living. This is a challenge as states usually are content with meeting the bare minimum requirements of their obligations. It thus is important that the clear recognition of the human right to water for growing food be established in international law. Furthermore, the ESCR Committee should establish this right among the criteria to monitor progress on realising the human right to water. Through advocacy and further research on the link between poverty and water, states will be compelled to move beyond meeting basic human needs for water to productive uses such as for growing food to ensure poverty alleviation, particularly of women who bear the burden of the scourge.

## References

- Alston P 'Out of the abyss: The challenges confronting the new United Nations Committee on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 352
- Brooks BD 'Human right to water in Northern Africa and the Middle East: What is new and what is not; what is important and what is not' (2007) 23 *Water Resources Development* 227
- Bulto TS *The extraterritorial application of the human right to water in Africa* (Cambridge University Press 2014)
- Bulto TS 'The human right to water in the corpus and jurisprudence of the African human rights system' (2011) 11 *African Human Rights Law Journal* 341
- Chapman A & Russell S *Core obligations: Developing a framework for economic, social and cultural rights* (Intersentia 2002)
- Copra S 'The right to food and water: Dependencies and dilemmas (2010) Paper prepared for the Institute for Human Rights and Business. [http://www.ihrb.org/pdf/Right\\_to\\_Food\\_and\\_Water\\_Dependencies\\_and\\_Dilemmas.pdf](http://www.ihrb.org/pdf/Right_to_Food_and_Water_Dependencies_and_Dilemmas.pdf) (accessed 14 July 2012)
- Craven M *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (Oxford University Press 1995)
- D Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (Oxford University Press 2007)
- De Albuquerque C & Roaf V *On the right track: Good practices in realising the rights to water and sanitation* (OHCHR 2012)
- Hall RP, Vance EA & Van Houweling E 'The productive use of rural piped water in Senegal' (2014) 7 *Water Alternatives* 480
- Hall RP, Van Koppen B & Van Houweling E 'The human right to water: The importance of domestic and productive water rights' (2014) 20 *Science and Engineering Ethics* 849
- Hellum A 'Engendering the right to water and sanitation: Taking the lived realities of women and girls as starting point' in Langford M & Russel A (eds) *The right to water: Theory, prospects and practice* (Cambridge University Press 2017)
- Howard G & Bartram J *Domestic water quantity, service level and health* (WHO 2003)
- Kent R 'The challenge of crafting remedies for violation of social economic rights' in Langford M (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (Cambridge University Press 2008)
- Liebenberg S 'Socio-economic rights: Revisiting the reasonableness review/minimum core debate' in Woolman S & Bishop M *Constitutional conversations* (Pretoria University Law Press 2008)
- Mokgope K & Butterworth JA 'Rural water supply and productive uses: A rapid survey in the Sand River catchment' (2001) WHIRL Project Working Paper 4
- Pruitt LR 'Deconstructing CEDAW's article 14: Naming and explaining rural difference (2010-2011) 17 *William and Mary Journal of Women and the Law* 347
- Quinot G & Liebenberg S 'Naming the band: Reasonableness review in administrative justice and social economic rights jurisprudence in SA' in Liebenberg S & Quinot G *Law and poverty: Perspectives from SA and beyond* (Juta & Company Ltd 2012)
- Robertson RE 'Measuring state compliance with the obligations to devote the maximum available resources to realising economic, social and cultural rights' (1994) 16 *Human Rights Quarterly* 693
- Sepulveda MM & Carmona MMS *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003)
- Thompson J, Porras IT, Tumwine JK, Mujwahuzi MR, Katui-Katua M, Johnstone N & Wood L *Drawers of water II: 30 years of change in domestic water use and environmental health in east Africa* (IIED 2001)
- Tushnet M *Weak courts, strong rights: Judicial review and social welfare rights in*

- comparative constitutional law* (Princeton University Press 2009)
- Van Bueren G 'Alleviating poverty through the Constitutional Court' (1999) 15 *South African Journal Human on Rights* 57
- Van Houweling E, Hall RP, Diop AS, Davis J & Seiss M 'The role of productive water use in women's livelihoods: evidence from rural Senegal' (2012) 5 *Water Alternatives* 658
- Van Koppen B, Derman B, Schreiner B, Durojaye E & Mweso N 'Fixing the leaks in women's human rights to water: Lessons from South Africa' in Hellum A, Kameri-Mbote P & Van Koppen B (eds) *Water is life: Women's human rights in national and local water governance in Southern Africa* (Weaver Press 2015) 457
- Van Koppen B & Schreiner B 'Priority general authorisation in rights-based water use authorisation in South Africa (2014) *Water Policy* 1
- Van Koppen B 'Multiple-use water services to advance the Millennium Development Goals' (2006) Research Report 98
- Viljoen F 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Law Journal of Civil Rights and Social Justice* 11
- Wesson M 'Grootboom and beyond: Reassessing the social economic rights jurisprudence of South Africa' (2004) 20 *South African Journal on Human Rights* 284
- Winkler IT 'A human right to water for food production?' Paper presented to the 13th IWRA World Water Congress, Montpellier, France from 1-4 September 2008
- Winkler IT *The human right to water: Significance, legal status and implications for water allocation* (Hart Publishing 2012)
- Woodhouse M 'Threshold, reporting, and accountability for a right to water under international law' (2004-2005) 8 *University of Denver Water Law Review* 171





# CHAPTER 6

## THE LINK BETWEEN ENVIRONMENTAL POLLUTION AND POVERTY IN AFRICA

*Olubayo Oluduro*

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### **Abstract**

*This chapter examines the meaning of environmental pollution, the causal relationship between poverty and environmental degradation and the ways in which environmental pollution exacerbates poverty. The chapter also discusses some of the laws in place in Africa for the protection of the environment and environmental pollution in Africa using some specific case studies. It further addresses some of the challenges of addressing environmental pollution in Africa and proffers solutions to the problems. The chapter concludes by calling on African governments to take collective action to protect the environment in order to reduce the poverty that continues to damage the environment and puts the people at risk.*

### **1 Introduction**

One of the most pressing challenges in Africa is the extreme high levels of poverty and deprivation caused by environmental events. This poverty is largely caused by the interaction between humans and the environment in order to satisfy their daily needs. These human-environment relations result in damage to the environment, thereby diminishing the potential for sustainable development. It is important to note that the environment plays a crucial role in people's physical, mental and social well-being.<sup>1</sup> People's personal well-being is strongly related to the environment, particularly as it concerns their health, earning capacity, security, physical ambiance and decent housing. The food the African people eat, the air they breathe, and the water they use depends on how the environment is managed and the resources therein are exploited. A situation where multinational corporations and poor communities pollute and damage the natural resources in the world, coupled with the absence of equitable and balanced stewardship of the environment governed by ecological norms, makes the elimination of poverty a pipe dream.<sup>2</sup> Over the past

1 European Environment Agency ch 5 'Environment, health and quality of life' <http://www.eea.europa.eu/soer/synthesis/synthesis/chapter5.xhtml> (accessed 7 March 2016).

2 K Mwambazambi 'The complexity of environmental protection in sub-Saharan Africa and reduction of poverty' (2011) 4 *Ethiopian Journal of Environmental Studies and Management* 17 18.

30 years the African environment has continued to deteriorate.<sup>3</sup> While thousands of African people have already died from starvation caused by environmental degradation, millions more people currently are 'faced with imminent disaster because their water sources have run dry, their land has become so denuded they cannot rear livestock, and the soil so poor they cannot cultivate it'.<sup>4</sup>

The African continent is rich in natural resources. According to the *International Energy Agency (IEA)* report of 2007, 12,7 per cent of the total world crude oil production emanated from Africa – much of it in Nigeria in West Africa as well as Libya and Algeria in North Africa, with the region producing 6,8 per cent of the total world gas output.<sup>5</sup> Also, nearly 5 per cent of the world's total coal production occurs in Africa, largely South Africa, with the entire region having 9 per cent of total world uranium deposits.<sup>6</sup> Unfortunately, these resources have not translated to wealth in Africa, but rather to what may be regarded as a resource curse.<sup>7</sup> The richness of its biological and mineral resources notwithstanding, the region remains poor. Food insecurity threatens millions each year as environmental degradation threatens agricultural and pastoral lands, watersheds, surface and groundwater sources, and the rich forests and savannahs of Africa.<sup>8</sup>

The emphasis on pollution control was seen as incompatible with the broader goals of economic development and poverty alleviation. This dilemma was eloquently expressed by Indira Gandhi, then Prime Minister of India, during the Stockholm Conference on Environment and Development in 1972, when she asked:<sup>9</sup>

Are not poverty and need the greatest polluters? How can we speak to those who live in villages and in slums about keeping the oceans, the rivers and the air clean when their own lives are contaminated at source? The environment cannot be improved in conditions of poverty. Nor can poverty be eradicated without the use of science and technology.

Notwithstanding this general perception, pollution cannot be ignored, particularly in developing countries.

In this chapter I examine the causal relationship between poverty

3 Conserve Africa 'Environment and poverty', <http://www.conserveafrica.org.uk/sustainable-development-and-local-communities-in-africa/environment-and-poverty-in-africa/> (accessed 7 March 2016).

4 As above.

5 Venro Project 'Rethinking biomass energy in sub-Saharan Africa' *Prospects for Africa – Europe's Policies* (2009) 5.

6 As above.

7 See generally T Lawson-Remer & J Greenstein 'Beating the resource curse in Africa: A global effort' (2012) 3 *Africa in Fact – The Journal of Good Governance Africa* 21-24; S Jones 'Sub-Saharan Africa and the "resource curse": Limitations of the conventional wisdom' 2008 Danish Institute for International Studies (DIIS) Working Paper 2008/14, Copenhagen, Denmark.

8 UNEP *Africa environment tracking: Issues and developments* (2006) 1.

9 Quoted in A Hayes & MV Nadkarni (eds) *Poverty, environment and development: Studies of four countries in the Asia Pacific region* (2001) 46 (as reproduced in A Rosencranz et al *Environmental law and policy in India: Cases, materials and studies* (1991)) 39.

and environmental degradation and the ways in which environmental pollution exacerbates poverty. The chapter also discusses the legal framework in place in Africa for the protection of the environment and environmental pollution in Africa using some specific case studies. It further considers some of the challenges of addressing environmental pollution in Africa and suggests solutions to the problems. The chapter concludes by calling on African governments to take collective action to protect the environment in order to reduce the poverty that continues to damage the environment and puts the people at risk.

## 2 Legal framework for the protection of the environment in Africa

The African Convention on the Conservation of Nature and Natural Resources was adopted by the defunct Organization of African Unity (OAU) on 15 September 1968 in Algiers, Algeria. The Convention declares that the

Enforcement of these legal instruments is vital to the protection of the environment in Africa, which in turn, could give zest to the quest to achieve poverty reduction initiatives ... in the region. This enquiry starts with a discussion of the regional attempts to address environmental concerns in Africa.<sup>10</sup>

The request to revise and update the 1968 Algiers Convention was made by two governments, those of Nigeria and Cameroon. The request was aimed at addressing the weaknesses of the original Algiers Convention, among which are 'its failure to provide the administrative, legal, institutional and financial foundations for its implementation and the pragmatic means to honor the international law principle of *pacta sunt servanda*'.<sup>11</sup> The Revised African Convention on the Conservation of Nature and Natural Resources was finally adopted by the second ordinary session of the Assembly of the African Union (AU) in Maputo, Mozambique, on 11 July 2003. The Convention places an obligation on African countries to recognise and enforce the conservation of the environment as a common goal<sup>12</sup> and to 'prevent damage that could affect human health or natural resource in another state by the discharge of pollutants'.<sup>13</sup> Article VI(3)(c) enjoins member states to ensure that 'mining and the disposal of wastes do not result in erosion, pollution, or any other form of land degradation'. To this end, the Convention requires measures to be taken to control pollution and

10 Quoted in Mwambazambi (n 2) 18.

11 Report of the Study on the Development of Strategy to Guide the Promotion of the Ratification of the Revised African Convention on the Conservation of Nature and Natural Resources (Maputo Convention) AMCEN/14/REF/8-E 2012. *Pacta sunt servanda* is a Latin term meaning 'agreements must be kept'. It is a principle of international law which is to the effect that international treaties should be upheld by all the signatories.

12 See FJ Terblanche 'A legal framework for the transboundary movement of hazardous waste in South Africa and Lesotho' LLM dissertation, North-West University, 2007.

13 Art VII(1)(b).

water-borne diseases and to ensure that people have access to a sufficient and continuous supply of water.

Also important is the African Charter on Human and Peoples' Rights (African Charter). This was the first binding regional instrument to expressly provide for a substantive environmental right as evident in the provisions of article 24 of the Charter which provide that 'all people shall have the right to a general satisfactory environment favourable to their development'. In other words, the Charter stressed the need to promote a quality environment for African people. As noted by Amechi, the inclusion of this right in the Charter 'constitutes an acknowledgment by its framers of the importance of a healthy environment to Africa's socio-economic development as well as the realisation of other human rights in Africa'.<sup>14</sup>

Improperly-handled environmental pollution poses significant risks to the environment on which the present and future generations rely for the resources needed for survival. The cost of restoring the environment impacted by pollution can be very high, and the process can take many years to complete; and where the community's water supply and soils that are used for agriculture or pasture are impacted, it diminishes the economic benefits derived from such land.<sup>15</sup>

The United Nations (UN) Committee on Economic, Social and Cultural Rights (ESCR Committee) has also explained that the right to health contained in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) extends to the underlying determinants of health, including 'a healthy environment'.<sup>16</sup> The ESCR Committee has noted that the obligation of states under article 12(2)(b) extends to 'the prevention and reduction of the population's exposure to harmful substances such as ... harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health'.<sup>17</sup> Thus, the failure by governments to take necessary measures to prevent third parties from polluting or contaminating food, water supplies and air, and/or a failure to enact or enforce laws may constitute violations of the rights to health,<sup>18</sup> water and adequate food<sup>19</sup> contained in ICESCR.<sup>20</sup> Many African countries are parties to the Covenant.

There are also several declarations, resolutions and policy documents that the AU has adopted in an effort to protect and conserve the

14 EP Amechi 'Enhancing environmental protection and socio-economic development in Africa: A fresh look at the right to a general satisfactory environment under the African Charter on Human and Peoples' Rights' (2009) 5 *Law, Environment and Development Journal* 62.

15 UNEP (Basel Convention) *Our sustainable future: The role of the Basel Convention* UNEP Geneva, Switzerland.

16 ESCR Committee General Comment 14: The Right to the Highest Attainable Standard of Health (art 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc E/C.12/2000/4 11 August 2000 para 4.

17 General Comment 14 (n 16) para 15.

18 Art 12.

19 Art 11.

20 Amnesty International *Petroleum, pollution and poverty in the Niger Delta* (2009) 12.

environment in Africa. One of these is the New Partnership for Africa's Development (NEPAD) and its environmental action plan (NEPAD-EAP) which identified rising poverty levels and deepening environmental degradation as the two major inter-related factors that presently stand as barriers to the achievement of sustainable development in Africa.<sup>21</sup> The overall objective of the Action Plan adopted by the AU in 2003 was to complement the relevant African processes with a view to addressing environmental challenges in Africa, in order to contribute to the achievement of economic growth and poverty eradication.<sup>22</sup>

Other important declarations that are relevant to African nations for the protection of the environment from pollution include the Stockholm Declaration. Principle 1 of the Declaration provides that '[m]an has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations'.<sup>23</sup> Principles 2, 3, 4 and 5 all refer to our responsibility to ensure that environmental resources and biodiversity are maintained for present and future generations. Principle 6 makes direct reference to the need to control the discharge of toxic substances and other substances as well as the release of heat, in quantities or concentrations that will exceed the capacity of the environment to absorb; while Principle 7 stresses the need for governments to 'take all possible steps' to prevent pollution of the seas by substances hazardous to the marine environment or human health. It requires states to prevent or abate transboundary pollution that could cause substantial harm.

Also worthy of mention is the 1992 UN Conference on Environment and Development (Rio Conference) which recognises both the relationship between poverty and environmental degradation in underdeveloped countries. Principle 1 provides that '[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'.<sup>24</sup> More importantly, Principle 14 stresses that '[s]tates should effectively cooperate to discourage or prevent the relocation and transfer to other states of any activities and substances that cause severe environmental degradation or are found to be harmful to human health'.

At the regional level, the African Ministerial Conference was established on the Environment in December 1985 to ensure the promotion of regional cooperation towards addressing environmental concerns.

21 New Partnership for Africa's Development (NEPAD) *Action Plan of the Environment Initiative of the New Partnership for Africa's Development* (2003) paras 1 & 3.

22 Paras 138 & 142 NEPAD.

23 United Nations Conference on the Human Environment, Stockholm, Sweden 5-16 June 1972, Report of the United Nations Conference on the Human Environment (Stockholm Declaration) UN Doc A/CONF.48/14/REV.1 (1973).

24 United Nations Conference on Environment and Development, Rio de Janeiro, South America, 3-14 June 1992, Rio Declaration on Environment and Development, UN Doc A/CONF.151/26/REV.1, Annex I (12 August 1992).

The Conference, which is an inter-governmental body on environment and development, presently serves as the main policy-making forum that addresses and discusses Africa's environmental problems.<sup>25</sup> It has adopted several declarations relating to the promotion of environmental protection and sustainable development in Africa in order to further its objectives.<sup>26</sup> Unfortunately, in practice many African political leaders fail to respect these decisions and resolutions, and pay little attention to issues of environmental protection.

It is important to note that because most African nations are parties to the above-mentioned treaties and declarations, the government of each country is required to ensure that the environment is not polluted or degraded in such a way that it poses a threat to human rights, including the right to health and life of communities who may be exposed to it, thereby exacerbating the poverty situation of the people. Notwithstanding the adoption of these international instruments, some African countries continue to experience pollution in various forms caused by the people themselves and the multi-national corporations (MNCs) operating in most of these countries, thereby deepening the poverty situation of the host communities.<sup>27</sup>

### 3 Nature of environmental pollution in Africa

Over 70 per cent of Africa's population is rural and depends heavily on the land and the natural environment for their livelihood and well-being. Therefore, the way in which environmental goods and services are used will have serious consequences for alleviating poverty, improving human well-being, and ensuring sustained economic development.<sup>28</sup> The exploitation of environmental resources in an unsustainable manner can result in environmental degradation which in turn impoverishes the people. Conversely, the clamour for the conservation of the environment without providing for alternative means of livelihood for the vulnerable groups that solely depend on exploiting the environment will result in further impoverishment.<sup>29</sup> As a result of serious commitment to and attention given by industrialised nations to environmental pollution, industrial pollution now is of little concern to developed nations. The industrialised nations can afford to enforce high standards of environmental protection. This is not the case in developing countries, including African countries, as pollution continues to be a major source of illness, poverty and, ultimately, death. Indeed, across the developing nations pollution indiscriminately

25 Mwambazambi (n 2) 21.

26 K Mbaki *Afrique Centrale et la question environnementale* (2008).

27 See *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

28 Kulindwa K; Kameri-Mbote P, Mohamed-Katerere J & Chenje M 'The human dimension' in *Africa Environment Outlook 2: Our Environment, Our Wealth* chapter 1 2.

29 EN Nwagbara et al 'Poverty, environmental degradation and sustainable development: A discourse' (2012) 12 *Global Journal of Human Social Science Sociology, Economics and Political Science* 1.

kills thousands of people, shortens lives, destroys children's growth and development, and results in chronic illnesses that impair the economic development of the country.<sup>30</sup>

### 3.1 Environmental pollution in Africa: Case studies of some countries

Environmental degradation has plagued Africa since the colonial era and is being worsened by the 'new globalisation'. The colonialists paid no attention to the ecological damage their policies and activities caused the continent. Following their total control over the various colonies, the imperialists had unreserved power to plunder and despoil Africa's vast economic resources for the benefit of their respective home countries, without showing any concern for sustainability.<sup>31</sup> Unfortunately, globalisation, which was supposed to bring about local development and improve the quality of life of the people, has brought pain, agony, misery and poverty to affected communities. Largely, in virtually all African countries MNCs are routinely granted licences to explore for natural resources without adequate consultation with the local people who own the land where these natural resources are located. This is premised on the ground that these resources belong to the nation as a whole and that the central government is acting as the national custodian to efficiently manage the revenue derived from exploitation for the benefit of the whole country.<sup>32</sup> Sadly, as events in the Nigerian Niger Delta and the Anglophone region of Cameroon have illustrated, the royalties from oil rarely are used to develop the affected communities. Rather, the communities are left to bear the pangs arising from environmental pollution.

#### 3.1.1 South Africa

Nearly two decades after the apartheid era, South Africa has made significant progress in developing the legal framework required to prevent environmental pollution, and to act against polluters. Section 24 of the South African Constitution provides that everyone has a right to an environment that is not harmful to their health and well-being; and to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation, and secure ecologically-sustainable development and use of natural resources while promoting justifiable economic and social development. In addition, South Africa has promulgated legislation to protect or enhance

30 Blacksmith Institute *The world's worst polluted places: The top ten* (2006) 3.

31 JM Mbaku 'The environment and the new globalisation in Africa' in GK Kieh (ed) *Africa and the new globalisation* (2008) 181-182.

32 Mbaku (n 31) 141.

environmental quality, such as the National Environmental Management and Air Quality Acts. The country also is a signatory to a wide range of international agreements and protocols, including the United Nations Framework Convention on Climate Change, the Montreal Protocol (ozone depletion), and the Basel Convention dealing with the control of trans-boundary movement of hazardous waste.<sup>33</sup>

Notwithstanding the above, many communities in South Africa continue to face exposure to environmental pollution such as polluted air or land in the form of poor air quality or contaminated land, for example, from industrial and other sources.<sup>34</sup> The country has the world's fifth largest mining sector, and this sector contributed 8 per cent of its gross domestic product (GDP) in 2017.<sup>35</sup> South Africa's mining sector significantly impacts on the environmental conditions. Pollution from mining activities perhaps is the most direct cause of ground water pollution in South Africa and, further, small waste coal dumps cause both pollution and safety problems as waste coal may spontaneously ignite.<sup>36</sup> In 2015 per capita emissions in South Africa stood at 9,5 tonnes of CO<sub>2</sub> equivalent (tCO<sub>2</sub>e), around half of US per capita emissions but well over the world average of 6.8tCO<sub>2</sub>e.<sup>37</sup> This makes it the biggest source of emissions in Africa, and the world's fourteenth largest emitter of greenhouse gases (GHGs) due to its heavy reliance on coal.<sup>38</sup> Air pollution in South Africa is matched by ground and water pollution. The mining companies have devised ways of circumventing resistance by the community. More often than not, mining companies are situated close to poor communities<sup>39</sup> and often are granted licences to operate by these communities due to false promises of employment and bursaries for tertiary education. These communities hardly see these benefits. Unfortunately, these communities have continued to bear the consequences of these mining activities. One of these consequences is the contamination of ground water and rivers with negative effects on livestock, the ecosystem and people's access to water. This was the situation for residents of Krugersdorp in Gauteng Province, where ground water accessed via boreholes was polluted in 2005,

33 A Mathee 'Environment and health in South Africa: Gains, losses, and opportunities' (2011) 32 *Journal of Public Health Policy* S37-S43 S41.

34 Mathee (n 33) S41.

35 R McSweeney & J Timperley 'The Carbon Brief profile: South Africa' *Carbon Brief* 15 October 2018, <https://www.carbonbrief.org/the-carbon-brief-profile-south-africa> (accessed 7 July 2019).

36 Energy Information Administration, South Africa: Environmental Issues, [http://schoolnet.org.za/CoL/ACE/course/ukzncore2a/documents/core2a.south\\_africa.htm](http://schoolnet.org.za/CoL/ACE/course/ukzncore2a/documents/core2a.south_africa.htm) (accessed 7 March 2016).

37 McSweeney & Timperley (n 35).

38 As above. Indeed, South Africa is the world's seventh largest producer of coal.

39 Eskom's coal-fired power plant fleet is located in the vicinity of the highly-populated region of Gauteng, with several plants located within 100km of the region. See L Myllyvirta 'Air quality and health impacts of Eskom's planned non-compliance with South African Minimum Emission Standards' *Greenpeace* 19 March 2019, <https://storage.googleapis.com/planet4-africa-stateless/2019/03/8a84b69a-air-quality-and-health-impacts-of-eskoms-non-compliance.pdf> (accessed 7 July 2019).



including by sulphurous compounds and uranium.<sup>40</sup> There are reports of skin problems resulting from bathing or washing clothes in acidic water by borehole users, with a loss of biodiversity in the affected communities.<sup>41</sup> The Witbank area has seen more than a century of sustained coal mining with many consequences. As a result of pollution from mining operations, the water quality in the Middelburg dam is said to no longer be fit for human consumption for 40 per cent of the time. This will continue to deteriorate for the foreseeable future, and the Witbank dam is likely to experience a similar fate.<sup>42</sup> The future is bleak for Witbank coal fields once the coal reserves have been fully exploited and mining has ceased. It is predicted that, perhaps, in a century from now

all of the mines will be flooded and leaking acid water. In their upper reaches, the rivers will run red, and both river and ground water will be undrinkable. Aquatic animal life will be minimal, and only very hardy aquatic vegetation will survive. The rivers will also be choked with sediment. Extensive areas of the region will have become devoid of vegetation due to acidification of the soil, setting in motion severe erosion which will strip the soil cover and eat into the backfill of the old opencast workings. The eroded sediment will choke the rivers and all dams will be filled with sediment. In short, the region could become a total wasteland.<sup>43</sup>

After mining, the surface of the mined area generally is rehabilitated and, in principle, can be used for agriculture. However, the ground water aquifers would have been disturbed, and the ground water severely polluted, so that it will no longer be possible to obtain potable water from boreholes. Drinking water for livestock and humans in such areas therefore will have to be brought in from elsewhere. Streams draining these rehabilitated areas will also be unusable due to seepage of polluted ground water.<sup>44</sup>

Air quality legislation, called Minimum Emission Standards (MES) which came into effect in terms of section 21 of the National Environment Management: Air Quality Act<sup>45</sup> on 1 April 2010 was put in place in South Africa to protect people's lives as, among others, it mandates the Minister for Environmental Affairs or the member of the executive council (MEC) by notice in the Gazette to publish a list of activities that result in atmospheric emissions and which the Minister or the MEC of a province responsible for air quality management in the province reasonably believes have or may have a significant detrimental effect on the environment, including health, social conditions, and so forth. The MES were subsequently amended and the amendments were promulgated on

40 Africa Groundwater Atlas 'Case study: Acid mine drainage in South Africa' *British Geological Survey* 2019, [http://earthwise.bgs.ac.uk/index.php/Case\\_Study\\_Acid\\_Mine\\_Drainage\\_South\\_Africa](http://earthwise.bgs.ac.uk/index.php/Case_Study_Acid_Mine_Drainage_South_Africa) (accessed 7 July 2019).

41 As above.

42 TS McCarthy & K Pretorius 'Coal mining on the Highveld and its implications for future water quality in the Vaal River system' International Mine Water Conference Proceedings held in Pretoria, South Africa 19-23 October 2009 64, [http://www.imwa.info/\\_imwa\\_2009/IMWA2009\\_McCarthy.pdf](http://www.imwa.info/_imwa_2009/IMWA2009_McCarthy.pdf) (accessed 7 March 2016).

43 As above.

44 As above.

45 Act 39 of 2004.

22 November 2013,<sup>46</sup> replacing the 2010 regulations. These standards which were expected to come into effect in 1 April 2015 and for 'new plant' by 1 April 2020 attempt to enforce the maximum levels of emission standards that industry can release. However, South Africa's air quality legislation aimed at reducing pollution and the attendant health consequences has been under serious assault from the major polluters. Eskom has made an application for the postponements and suspensions of the company from complying with air quality legislation for 16 of its plants. It argued that the costs of complying with the law outweigh the benefits,<sup>47</sup> as it was estimated that it would cost the company R200 billion to ensure compliance at all its plants, which Eskom it said cannot afford. Eskom has also asked that Medupi, which is one of the world's largest coal power stations and its newest mega-plant, be given until 2027 to comply. It said in its application that '[i]t is not practically feasible or beneficial to South Africa to fully comply with the minimal emission standards'.<sup>48</sup> Eskom's failure to comply with the emission standards has serious air quality and health implications. Explaining the avoidable health impacts if Eskom's requests for non-compliance with the MES are fully granted, Greenpeace estimated that 16 000 premature deaths (5 600 premature deaths due to the increased risk of lower respiratory infections, including in young children; 1 500 premature deaths due to the increased risk of stroke; 1 500 premature deaths due to the increased risk of death from diabetes; 2 300 premature deaths due to the increased risk of chronic obstructive pulmonary disease; 3 000 premature deaths due to the increased risk of ischaemic heart disease; and 1 900 premature deaths due to the increased risk of lung cancer associated with chronic PM2.5 exposure; as well as 500 premature deaths due to the increased risk of death associated with acute NO<sub>2</sub> exposure) could be avoided by requiring full compliance by Eskom with the MES, representing a 40 per cent reduction in the health impact of air pollution from Eskom's power stations.<sup>49</sup> Eskom estimated that emissions from its coal-fired power stations caused 333 deaths per year.<sup>50</sup> However, data from Greenpeace International estimated that Eskom's fleet of coal stations caused the deaths of between 2 200 and 2 700 people per year because of the gases released, such as mercury and sulphur dioxide.<sup>51</sup> Notwithstanding the conflicting figures, it is clear that

46 *Government Gazette* 37054; L Burger et al 'Atmospheric impact report: Sasol Infracem, a division of Sasol Chemical Industries Limited' Report 13STL01SB September 2014 i.

47 M Steele 'Africa: South Africa's pollution laws under full assault' *AllAfrica* 7 October 2014, <http://allafrica.com/stories/201410071922.html?viewall=1> (accessed 7 March 2016).

48 *Mail & Guardian* 'Air pollution kills millions annually, says WHO' 25 March 2014, <http://mg.co.za/article/2014-03-25-7-million-killed-by-air-pollution-annually> (accessed 7 March 2016).

49 Myllyvirta (n 39).

50 M Gosling 'Eskom estimates 333 people likely to die every year from coal power station emissions' *fin24*, <https://www.fin24.com/Economy/Eskom/eskom-estimates-333-people-likely-to-die-every-year-from-coal-power-station-emissions-20181122> (accessed 7 July 2019).

51 *Mail & Guardian* 'Eskom spurns air quality controls' 14 March 2014, <http://mg.co.za/article/2014-03-13-eskom-spurns-air-quality-controls> (accessed 7 March 2016).

the emissions from Eskom unarguably have serious implications for the health of the people and lead to premature deaths.

In South Africa polluting factories and toxic waste sites are located mostly in poor neighbourhoods, with the result that the poor are made to bear the environmental costs. In a study at the lead mining town of Aggeneys in the Northern Cape province, it was shown that lead poisoning in children was more widespread in the town than in a nearby non-mining town.<sup>52</sup> More polluting is Sasol's coal-to-liquids process. It has been said that those born in Sasolburg's Zamdela township, located immediately downwind of the plant,

are less likely to get work at the plant than newcomers because, having grown up in the bad air of the Vaal Triangle, locals tend to fail the medical test. So it seems that Sasol and its big corporate neighbours rely on the fresh blood of people they have not yet contaminated.<sup>53</sup>

Another area that suffered from the polluting activities of companies in South Africa is the Mpumalanga Highveld with Sasol's second and third plants at Secunda and most of Eskom's power stations. Sasol and Eskom emit approximately two million tonnes of sulphur dioxide and one million tonnes of nitrogen oxides together with a cocktail of volatile organic compounds.<sup>54</sup> Life expectancy in Mpumalanga, South Africa, is 50,3 years for males and 51,6 years for females, as against the national life expectancy of 53,3 for males and 55,2 for females.<sup>55</sup>

Furthermore, South Africa's oil sector negatively impacts on humans and the environment. For instance, the health of the people of the south of Durban in South Africa is negatively impacted since they live in the neighbourhood of Sapref and Engen – two of South Africa's largest oil refineries. Several families live just about 20 metres from the oil refineries. A major health study in the south of Durban found high levels of respiratory ailments compared to other sites and it conservatively estimated the risk of cancer at 250 times the accepted norm,<sup>56</sup> thereby confirming the systemic violation of people's constitutional right 'to an environment that is not harmful to their health or well-being', for economic reasons.

Indoor air pollution is also prevalent in rural areas in South Africa as a result of poverty. The lack of electricity in many homes makes most rural communities of South Africa, approximately three million households, burn fuel wood and coal so as to meet their energy needs. The gathering of fuel wood not only proves unsustainable and contributes to deforestation, but the fuel wood that is frequently burned in enclosed spaces without adequate ventilation can result in harmful levels of pollutants in rural

52 YER von Schirnding et al 'A study of pediatric blood lead levels in a lead mining area in South Africa' (2003) 93 *Environmental Research* 259, cited in Mathee (n 34) S40.

53 D Hallows *Unpacking climate change: Background notes to the catastrophe groundwork* (2013) 69.

54 As above.

55 L McDaid *The health impact of coal groundwork* (2014).

56 Hallows (n 53).

homes, leading to respiratory health problems and other ailments.<sup>57</sup> In Soweto there is excessive smoke pollution owing to the burning of coal and, according to ESKOM, pollution levels in Soweto are 2,5 times higher than anywhere else in South Africa. Medical studies reveal that Soweto's children suffer from asthma and chest colds and take longer to recover from respiratory diseases than do youngsters elsewhere in the country.<sup>58</sup>

In addition, children and women in these communities have to spend several hours a day, which they could have spent on other profitable ventures, collecting wood for cooking, thus further deepening poverty. The daily burden of firewood collection contributes to gender inequality, as it prevents women and girls from spending time at school or being engaged in productive economic activities while at the same time exposing them to a higher risk of sexual violence.<sup>59</sup>

### 3.1.2 Nigeria

Unlike the Constitution of South Africa, the Constitution of the Federal Republic of Nigeria does not have any direct provision for environmental protection or sustainability. Section 20 of the Constitution of the Federal Republic of Nigeria, 1999 provides that '[t]he State shall protect and improve the environment and safeguard the water, air, and land, forest and wildlife of Nigeria'. While this section refers to an environmental objective for the Nigerian state, the fact that it is under the notorious section 6 on fundamental objectives and directive principles of state policy under chapter II of the Constitution subjects the provision to the lame-duck status of non-justiciable.<sup>60</sup> In addition, there are different legislations and policies in place in Nigeria to deal with environmental pollution.

The Niger Delta in Nigeria, which is home to some 31 million people, is one of the 10 most important wetland and coastal marine ecosystems in the world. Yet, the majority of the population in the oil-rich region lives in poverty. This region has been described by the United Nations Development Programme (UNDP) as suffering from 'administrative neglect, crumbling social infrastructure and services, high unemployment, social deprivation, abject poverty, filth and squalor, and endemic conflict'.<sup>61</sup> The entire lives of the people in the region depend upon land and the resources therein. Their subsistence economy is based on land and water resources since

57 Energy Information Administration, South Africa: Environmental Issues, [http://schoolnet.org.za/CoL/ACE/course/ukzncore2a/documents/core2a.south\\_africa.htm](http://schoolnet.org.za/CoL/ACE/course/ukzncore2a/documents/core2a.south_africa.htm) (accessed 7 March 2016).

58 Quoted in M Kidd *Environmental law* (2011) 299.

59 World Bank 'On thin ice: How cutting pollution can slow warming and save lives' Joint Report of the World Bank and the International Cryosphere Climate Initiative, Washington DC, October 2013 55.

60 O Oke-Samuel & O Oluduro 'Re-inventing environmental governance towards effective emission control in South Africa and Nigeria' (2012) 14 *Journal of Sustainable Development in Africa* 194.

61 UNDP *Niger Delta Human Development Report* (2006).

they are predominantly fishers and farmers. Therefore, any adverse impact of pollution on land is bound to affect the social, economic, cultural and spiritual well-being of the people. The entire stage of oil exploration in Nigeria is characterised by pollution, that is, from the point of seismic and exploration activities, through production, to transportation. It 'makes water unsuitable for fishing and render many hectares of land unusable. Brine from oil field contaminates water formations and streams, making them unfit as sources of drinking water.'<sup>62</sup>

Water has been polluted leading to poor access to drinkable water. For instance, the Niger Delta Environmental Survey (NDES) Report (2000) which covered the states of the Niger Delta region, except Cross River State, found that most communities rely on untreated surface water and wells, leading to health problems from waterborne diseases.<sup>63</sup> Many of the cases of illnesses in developing countries are linked to environmental conditions that lead to water contamination. Water pollution leads to reduced water usability and increased water-borne diseases. The increased cost of obtaining clean water, increased water treatment costs, reduced farm production due to decreasing water usability, increased medical costs, thus resulting in decreased incomes.<sup>64</sup> Issues on environmental management therefore are germane to development and to any poverty reduction strategy for the Niger Delta region, where nearly 60 per cent of the population depends on the natural environment for their livelihood.<sup>65</sup>

It is estimated by the World Bank (2005) that Nigeria flares approximately 75 per cent of the gas it produces owing to the lack of a local market and infrastructure. The method of gas flaring by the oil companies operating in the Niger Delta area is the 'open-pipe flare' which has no provision for pollution abatement and is very damaging to the environment.<sup>66</sup> Thus, the flames generate serious environmental problems, including the formation of acid rain, visibility impairment, a negative impact on agriculture and animal life, air quality impairment, and other health challenges. While the exploration and mining activities continue to generate wealth for the nation and the MNCs, it has continued to aggravate the poverty of many. In his study on the impact of gas flaring on the environment, Ibaba disclosed that 'there is about 100 per cent loss in yield of all crops cultivated about 200 metres away from Izombe station (a flare site), 45 per cent loss for about 600 metres away and about 10 per cent loss in yield of crops about one kilometer away from the flare'.<sup>67</sup> The

62 O Ibeanu 'Affluence and affliction: The Niger Delta as a critique of political science in Nigeria' inaugural lecture, University of Nigeria, Nsukka, 20 February 2008 182.

63 Quoted in *Niger Delta Human Development Report* (n 61) 28.

64 D Smith 'Poverty and environmental links: Examples from Africa' UNDP-UNEP Poverty Initiative, Nairobi, Kenya.

65 Smith (n 64) 74.

66 JC Ebegbulem et al 'Oil exploration and poverty in the Niger Delta region of Nigeria: A critical analysis' (2013) 4 *International Journal of Business and Social Science* 279 287 282.

67 S Ibaba *Understanding the Niger Delta crisis* (2001) 28, quoted in Ebegbulem et al (n 66) 282.

flared gas caused the withering away of economic trees such as oil palm trees, cotton trees, and so forth.

Instances of pollution in the Niger Delta region of Nigeria were mentioned by Imobighe: In 1979, a storage facility at the West Niger Delta, Shell-operated Forcados terminal collapsed, and spilled an estimated 560 000 barrels into surrounding land, mangrove swamps and the Atlantic; another major blowout occurred in 1980 which spewed out some 200 000 barrels of crude oil into the Atlantic ocean and destroyed nearly over 840 acres of Niger Delta mangrove; in 1998, a 24-inch crude oil pipeline linking the Idoho offshore platform with the Mobil-operated Qua Ibeo terminal ruptured and spilled an estimated 40 000 barrels of crude into Atlantic ocean, polluting the coastline from Eket to Lagos and beyond the Nigerian Western border to Ghanaian shores, over 960 kilometres away Eromosele (1998); and in 1998 there was the Jesse fire incidence where more than 1 500 lives were lost and several hectares of farmland and plantations were razed by fire.<sup>68</sup> In the Niger Delta, the once fertile ecosystem has become messy as a result of pollution. The environmental pollution arising from the oil exploration activities in the region has destroyed farmlands and fishing grounds, and this seriously affected the traditional occupations of the people such as fishing, farming, lumbering, and so forth. The polluted environment seriously impairs the ability of the people to produce enough to meet their basic needs. If the degradation of cultivated land by environmental pollution continues at the present rate in the Niger Delta, it will seriously reduce the soil fertility and reduce crop yields, thereby negatively impacting on the food security in the country and exacerbating poverty. As observed by Naanen:<sup>69</sup>

To appreciate the social effect on the area of this environmental degradation and land alienation one has to have some idea of the demography and economy of Ogoniland. With a mainly rural population of 500 000 concentrated within 404 square miles of territory, Ogoni's population density is exceptional. The population is densest in the Gokana area, precisely the area where oil exploitation has had the most damaging impact. *The population is historically depended on a peasant farming and fishing economy. The destruction of the aquatic culture and much of the limited farmland through oil spillage has caused grave economic distress. The most conspicuous aspects of life in contemporary Ogoni are poverty, malnutrition and disease. The death rate is high even by the Third World standards.*

As is evident from above, the long-term effects of oil spills on soil will undoubtedly undermine the livelihood of the people and will lead to poverty for rural farmers who rely on the proceeds from sales as income for survival. Unfortunately, despite the several billions of dollars generated from oil exploration by the Nigerian government, the Niger Delta, which

68 MD Imobighe 'Paradox of oil wealth in the Niger-Delta region of Nigeria: How sustainable is it for national development?' (2011) 4 *Journal of Sustainable Development* 160 168 162.

69 B Naanen 'Oil-producing minorities and the restructuring of Nigerian federalism: The case of the ogoni people' (1995) 33 *Journal of Commonwealth and Comparative Politics* 66 (my emphasis).

is the oil and gas-rich wetland and which firmly established Nigeria 'as a major world producer of oil', has encountered mainly the negative effects of this oil exploitation.<sup>70</sup> This has continued to create political tension between the people in the region and the government with regard to the money received not being used to uplift these communities who are in a worse off position because of the source of the money – the oil.

#### 4 Nexus between pollution and poverty

Since the 1970s it has universally been agreed that there is an inextricable link between poverty and environmental degradation. This nexus appears to be a two-way relationship – poverty causes environmental degradation and, in turn, the degradations in environment exacerbate poverty.<sup>71</sup> As noted by Jehan and Umama, environment affects poverty situations in three different ways: 'by providing sources of *livelihoods* to poor people, by affecting their health and by influencing their vulnerability'.<sup>72</sup> Poverty, on the other hand, also affects the environment in several ways: 'by forcing poor people to degrade environment, by encouraging countries to promote economic growth at the expense of environment, and by inducing societies to downgrade environmental concerns, including failing to channel resources to address such concerns'.<sup>73</sup> Similarly, it was observed by the World Commission on Environment and Development<sup>74</sup> that '[p]overty is a major cause and effect of global environmental problems. It is therefore futile to attempt to deal with environmental problems without a broader perspective that encompasses the factors underlying world poverty and international inequality.' The Commission further noted that '[m]any parts of the world are caught in a vicious downwards spiral: Poor people are forced to overuse environmental resources to survive from day to day, and their impoverishment of their environment further impoverishes them, making their survival ever more difficult and uncertain.'<sup>75</sup> Fabra further is of the view that 'poverty and environmental degradation are often bound together in a mutually reinforcing vicious cycle, and thus human rights abuses related to poverty can be both the cause and effects of environmental problems'.<sup>76</sup>

Conversely, the protection of the environment also helps to achieve

70 See O Oluduro *Oil exploitation and human rights violations in Nigeria's oil producing communities* (2014) 3.

71 A Rahman 'Environment-poverty nexus: A global overview' in A Chakraborty (ed) *Poverty and environment: An introduction* (2006) 40.

72 S Jehan & A Umama 'The environment-poverty nexus' (2003) *Development Policy Journal* 53.

73 Jehan & Umama (n 72).

74 Brundtland Commission 1987.

75 Quoted in T Forsyth & M Leach *Poverty and environment: Priorities for research and policy* (1998) 5.

76 A Fabra 'The intersection of human rights and environmental issues: A review of institutional development at international level' Background paper prepared for Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, Geneva, Switzerland, 14-16 January 2002, <http://www2.ohchr.org/english/issues/environment/enviro3.htm> (accessed 13 March 2016).

poverty reduction in Africa. This is because the poor in Africa, particularly those living in rural areas, largely depend on the natural resources from their immediate environment for sustenance, the protection of which will help guarantee their means of livelihood. For example, oil pollution remains one of the biggest challenges to the economic survival of the people. It affects their key occupation – fishing and farming – and renders such useless. It contributes to poverty through worsened health and by reducing and/or hindering the productivity of those resources upon which the poor rely, and poverty restricts the poor to acting in ways that are destructive to the environment.<sup>77</sup>

In several ways the poor are more exposed to environmental pollution. They are more vulnerable to pollution in the sense that their locations are often environmentally degraded and also their poverty hinders them from avoiding the impacts of environmental pollution. It was observed by actionAid that villages situated on gold deposits within the Obuasi concession area in Ghana experienced biting poverty – a lack of permanent health facilities and poor social amenities.<sup>78</sup>

The nexus between environmental pollution and poverty is evident from how environmental pollution contributes to poverty and *vice versa*.

#### 4.1 Environmental pollution leads to diversion of labour

Environmental pollution can reduce the labour productivity of the people, notwithstanding that they are healthy. For example, where there is water pollution, this may cause the local inhabitants to spend increasing time finding water from distant neighbouring communities. The time spent looking for water at the expense of other income-generating activities, such as agriculture or socially-beneficial activities, household and child-rearing responsibilities, the pursuit of education or physical rest to preserve the health of women, can result in lower incomes. Environmental degradation in the form of pollution can impact the access to education of children, especially the girl child, who is made to spend more time collecting firewood and fetching water instead of attending school. For example, in Malawi, where more than 90 per cent of households use firewood as their main source of energy, children in communities with a scarcity of fuel wood are 10 to 15 per cent less likely to attend secondary school.<sup>79</sup> Besides, the long distances travelled by women carrying a load of approximately 20 kilograms pose serious long-term health risks for them, including spine and pelvic deformities that can lead to complications during childbirth.<sup>80</sup>

77 SD Mink *Poverty, population and the environment* (1994) 1.

78 ActionAid *Gold rush: The impact of gold mining on poor people in Obuasi in Ghana* (actionAid: Johannesburg, South Africa, 2006) 23.

79 K Kulindwa et al 'The human development' in *Africa Environment Outlook 2: Our environment, our wealth ch 1* 12.

80 WaterAid 'Women's issues' Issue Sheet, November 2009, cited in S Karekzi et al 'Energy, poverty, and development' UNEP 181.



All these factors have serious implications for the well-being of the local inhabitants.

## 4.2 Increased burden of disease in poor countries

Environmental degradation in the form of pollution has serious health implications. Up to one-fifth of the total burden of disease in the developing world – and up to 30 per cent in sub-Saharan Africa – may be associated with environmental risk factors.<sup>81</sup> Studies carried out by UNDP and the Department for International Development (DFID) of the United Kingdom and Northern Ireland showed that about 30 per cent of all African countries' disability-adjusted life year losses are caused by environmental problems,<sup>82</sup> such as land, air and water pollution. It was also estimated that while Africa suffers 84 million disability-adjusted life years as a result of environment-related health problems, including waterborne diseases and indoor air pollution, indoor air pollution is estimated to cause 18 million disability-adjusted life years annually in sub-Saharan Africa or 44 per cent of the global total of indoor air-pollution disability-adjusted life years.<sup>83</sup> A 2012 Global Burden of Disease study found that indoor air pollution kills between 3,5 million and a follow-up study by the World Health Organisation in 2014 increased each year, which is more deaths than those caused by HIV/AIDS (around 1,6 million per year) and malaria (around 627 000), combined.<sup>84</sup> It is the poor, particularly women and children that is mostly affected by environmental health problems caused by a lack of safe water and sanitation, indoor air pollution, among others, all of which affect their ability to rise above poverty. It is the poor that more often fall sick as they live in neighbourhoods where the land, air and water are polluted, that regularly go to hospital for treatment. This not only drives up the health care costs and medication for the nation but further exacerbates poverty among the locals as they have to use their few resources to take care of their health.

## 4.3 Problem of food security

The right to food is closely linked to the dignity of human beings and

81 The International Bank for Reconstruction and Development/The World Bank *Linking poverty reduction and environmental management: Policy challenges and opportunities* (2002) 15.

82 African Ministerial Conference on the Environment 'Managing Africa's natural capital for sustainable development and poverty reduction' 15th session, Hurghada, Egypt, 8-12 September 2014, AMCEN/15/3 para 23.

83 African Ministerial Conference on the Environment (n 76); United Nations Environment Programme (UNEP) 5th Global Environment Outlook Report, Nairobi, Kenya, UNEP (2012).

84 B Plumer 'The deadliest environmental problem today is indoor air pollution: Killing 4 million a year' *Vox* 15 September 2014, <http://www.vox.com/2014/9/15/6150713/the-deadliest-environmental-problem-today-is-indoor-air-pollution> (accessed 13 March 2016).

is imperative for the enjoyment of other rights such as health, work and even life. The right to food is firmly entrenched in international and regional instruments. The Universal Declaration of Human Rights (Universal Declaration) provides that everyone has the right to a standard of living adequate for his or her health and well-being and his or her family, including food.<sup>85</sup> Also, ICESCR recognises that every person has a right to be free from hunger.<sup>86</sup> Similarly, the Universal Declaration on the Eradication of Hunger and Malnutrition is another important step taken by the international community for the protection of the right to food.<sup>87</sup> The African Commission has further stated that the right to food is implicit in the African Charter, in such provisions as the right to life,<sup>88</sup> the right to health<sup>89</sup> and the right to economic, social and cultural development.<sup>90</sup> The ESCR Committee in its General Comment 12 has explained the meaning of the right to food as stated in ICESCR.<sup>91</sup> The right to adequate food is realised when every man, woman and child alone or in community with others has physical and economic access at all times to adequate food or the means for its procurement.<sup>92</sup> States have a core obligation to respect and protect this right and to fulfil and facilitate its enjoyment by ensuring adequate conditions for that purpose. As part of their obligations to protect people's resource base for food, the ESCR Committee has stated that state parties 'should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food'.<sup>93</sup> The minimum core of the right to food requires that African governments should not destroy or contaminate food sources and should not allow private parties to destroy or contaminate food sources, thereby preventing people's efforts at feeding themselves.<sup>94</sup> However, the fulfilment of this right in several African countries has been jeopardised by the activities of oil companies and the government due to the negative impacts resulting in environmental pollution. For example, it was reported that large areas of land in Obuasi previously used for cultivation are believed to have been contaminated through gold mining activities and toxic water pollution by Anglo-American's subsidiary, AngloGold Ashanti (AGA) and its predecessor, Ashanti Goldfields Corporation (AGC), thereby undermining poor people's food security and right to food.<sup>95</sup> When oil

85 Art 25 Universal Declaration.

86 Art 11 ICESCR.

87 Adopted on 16 November 1974 by the World Food Conference convened under General Assembly Resolution 3180 (XXVIII) of 17 December 1973; and endorsed by General Assembly Resolution 3348 (XXIX) of 17 December 1974; see KP Poudyal 'The protection of socio-economic rights with special reference to the right to food, right to education and the right to health', [http://www.interights.org/doc/WS2\\_Poudyal\\_final.doc](http://www.interights.org/doc/WS2_Poudyal_final.doc) (accessed 7 March 2016).

88 Art 4 African Charter.

89 Art 16 African Charter.

90 Art 22 African Charter. See *SERAC* (n 27) para 64.

91 ESCR Committee General Comment 12 (1999), art 11 of the International Covenant on Economic, Social and Cultural Rights, E/C.12/1999/5.

92 General Comment 12 (n 91) para 6.

93 General Comment 12 (n 91) para 27.

94 See *SERAC* (n 27) para 65.

95 *actionAid* (n 78) 18.

spills occur on agricultural farmlands, the crops in the ground do not survive as any crop that comes into contact with the oil is destroyed. The oil on the soil results in water-logging, which decreases soil aeration, and decimates soil organisms such as the worms that are necessary for soil fertility and nutrient-rich topsoil formation.<sup>96</sup>

#### 4.4 Right to safe drinking water

Water is important in ensuring the continuance of life, and is closely linked to other fundamental rights. Water is essential for securing livelihoods (the right to gain a living by work); for enjoying certain cultural practices (the right to take part in cultural life); ensuring environmental hygiene (the right to health); to sustain life (the right to life); to produce food (the right to adequate food), and so forth. A failure to fulfil the right to water, in terms of ensuring that there is access to sufficient quantity of safe and clean water may jeopardise the fulfilment of other rights. The ESCR Committee declared that 'the human right to water entitles everyone to sufficient, affordable, physically accessible, safe and acceptable water for personal and domestic uses'.<sup>97</sup> When oil pollution occurs, it leaches into the soil and groundwater in the affected area, which may have a negative impact on the right to safe drinking water, as witnessed in the Niger Delta communities in Nigeria. A spill can cause severe harm to the population dependent on these streams and creeks as a source of their water. It was reported that following the major Texaco spill of 1980 in Nigeria, 180 people died in one community as a result of the pollution.<sup>98</sup> Litigation against the oil companies for compensation in the event of environmental harm includes claims for the deaths of children caused by drinking polluted water.<sup>99</sup>

It is worth noting that African countries face several challenges in addressing environmental pollution. Some of these include a lack of access to justice by the poor because of the costs of appointing a lawyer, procuring expert witnesses and scientific evidence, travel, court fees; a lack of knowledge at the local level regarding the impacts of pollution on human health and the environment; fragmented approach to environmental legislation and/or policies; a lack of adequate policies; a weak institutional framework for environmental protection; and a lack of effective sanctions for pollution and environmental damage.

96 JE Okeagu et al 'The environmental and social impact of petroleum and natural gas exploitation in Nigeria' (2006) 23 *Journal of Third World Studies* 199.

97 ESCR Committee General Comment 15 (2002) The right to water (arts 11 & 12 of ICESCR) 29th session, Geneva, Switzerland, 11-29 November 2002 E/C. 12/2002/11.

98 F Fekumo 'Civil liability for damage caused by oil Pollution' 268, quoted in Human Rights Watch *The price of oil: Corporate responsibility and human rights violations in Nigeria's oil producing communities* (1999) 61.

99 Eg, *SPDC v Chief Caiphas Enoch & 2 Others* (1992) 8 NWLR (Pt 259) 335, in which five children were alleged to have died as a result of drinking oil-contaminated water. See Human Rights Watch (n 98).

## 5 Protecting the environment to fight poverty and achieve the Sustainable Development Goals

The United Nations (UN) General Assembly, all 191 UN member states, in September 2000 developed a Millennium Declaration pledging a ‘new global partnership to reduce extreme poverty’.<sup>100</sup> This Declaration contains eight development goals to be achieved by 2015: goals one (eradicating extreme poverty and hunger); two (achieving universal primary education); three (promoting gender equality and empowering women); four (reducing child mortality); five (improving maternal health); six (combating HIV/AIDS, malaria and other diseases); seven (ensuring environmental sustainability); and eight (developing a global partnership for development).

The Millennium Development Goals (MDGs) expired in 2015. To accelerate progress beyond the MDGs, the Sustainable Development Goals (SDGs) laid the foundations for supporting sustainable global development through 2030 and beyond. Thus, the international community adopted a post-2015 development agenda and came up with a new set of SDGs to replace the expiring MDGs at a UN Summit in September 2015<sup>101</sup> by 193 member states. The overarching goal of the SDGs, as in the case of its predecessor, is to end poverty. The SDGs aimed to build on the foundation laid by the MDGs, desire to complete the unfinished business of the MDGs, and respond to new challenges. In a bid to increase the chances of success of the main goal of SDGs, there are 17 SDGs<sup>102</sup> (with 169 targets) compared to eight MDGs. As part of the measures to end poverty and build global prosperity and sustainability, the SDGs incorporated issues not addressed in the MDGs such as dealing with natural disasters, connecting people to a market economy through better access to infrastructure, reducing the impact of climate change, among

100 Office of the United Nations High Commissioner for Human Rights United Nations Millennium Declaration 8 September 2000, <http://www.ohchr.org/english/law/millennium.htm> (accessed 17 March 2016).

101 International Monetary Fund Factsheet *The IMF and the Millennium Development Goals* 15 April 2015, <https://www.imf.org/external/np/exr/facts/mdg.htm> (accessed 17 March 2016).

102 Goal 1 (End poverty in all its forms everywhere); Goal 2 (End hunger, achieve food security and improved nutrition and promote sustainable agriculture); Goal 3 (Ensure healthy lives and promote well-being for all at all ages); Goal 6 (Ensure availability and sustainable management of water and sanitation for all) including to improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater, and increasing recycling and safe reuse globally; Goal 7 (Ensure access to affordable, reliable, sustainable, and modern energy for all); Goal 11 (Make cities and human settlements inclusive, safe, resilient and sustainable); Goal 12 (Ensure sustainable consumption and production patterns); Goal 13 (Take urgent action to combat climate change and its impacts); Goal 14 (Conserve and sustainably use the oceans, seas and marine resources for sustainable development); Goal 15 (Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss).

others, because an integrated agenda is so critical to end poverty.<sup>103</sup>

Land, water and air pollution and proximity to mining, toxic waste sites, among others, affect poor people more in terms of access to natural resources and livelihoods, leading to their further impoverishment and vulnerability. These factors, in particular, adversely affect the achievement of the goal of halving extreme poverty by 2015 which represents the heart of the MDGs.<sup>104</sup> A failure to address pollution in all its ramifications will further exacerbate poverty, which inevitably will slow down the process of achieving the SDGs. If Africa is to achieve the growth rates and a more sustainable future as being proposed by the SDGs, there is a need for policy interventions to tackle the problems of environmental degradation associated with environmental pollution.

## 6 Recommendations

There undoubtedly is an inextricable link between poverty and environmental pollution. As discussed, environmental pollution is both a contributory factor to poverty and the result of poverty. We now discuss some steps African governments can take towards protecting the environment, including reducing poverty-related activities that continue to damage the environment.

### 6.1 Political commitment

In most African countries much progress has been made in building the legal and institutional framework needed to prevent environmental pollution, and to deal with polluters. African leaders must move beyond the mere crafting of environmental laws. Several communities, for example, in South Africa, continue to experience hazards such as polluted air, lead and mercury from industrial and other sources.<sup>105</sup> These exposures could have been avoided if there is a strong political will and institutional capacity on the part of the government to enforce the extant laws and policies aimed at preventing environmental pollution and ensuring a quality environment. African governments must ensure the full implementation of such laws with clear monitoring, reporting and verifiable mechanisms if the continent is to address environmental pollution and other environmental challenges facing the region.<sup>106</sup> For example, Zimbabwe is reported to have comprehensive environmental legislation that covers all the most

103 A Bhattacharya & H Kharas 'Worthy of support, our piece on the Sustainable Development Goals' *The Economist* 8 April 2015, <http://www.economist.com/blogs/freexchange/2015/04/our-piece-sustainable-development-goals> (accessed 17 March 2016).

104 Rahman (n 71).

105 Mathee (n 33) S41.

106 See S Ogalla, quoted in I Banda 'Legislation alone will not address Africa's climate challenges' *Global Issues* 2 June 2014, <http://www.globalissues.org/news/2014/06/02/18768> (accessed 17 March 2017).

important areas relating to environment. Zimbabwe has nearly 20 Acts and almost 40 statutory laws<sup>107</sup> on environmental issues, yet faces serious problem of implementation to meeting its REDD+ commitments, among others.

## 6.2 Promotion of education and information sharing

Given that the lack of education has been linked to environmental damage, the provision of information about the environmental and economic costs of pollution may contribute to attitudinal change. Environmental education about the negative environmental externalities through changes in school curricula, and the use of local media should be part of any long-term strategy towards addressing poverty as a major cause and consequence of environmental degradation. Educational programmes may help increase appreciation for and, indeed, the value attributed to the environment and natural resources which in turn may encourage more environmentally-friendly behaviour.<sup>108</sup> Research done in China and Indonesia suggests that education reduces pollution damage because when a community is better educated, they will be more willing and able to organise the control of polluters.<sup>109</sup> 'Naming and shaming' corporations that generate the most pollution by establishing a website where their names are regularly published will also force the actors to change their behaviour by adopting environmentally-friendly technologies rather than having their image destroyed.

## 6.3 Eliminating poverty

If a population lives in dire poverty, they care less about environmental concerns and do not concern themselves with environmental sustainability. Poverty condemns half of humanity to dependence on polluting household energy practices such as the inefficient burning of solid fuels on an open fire or traditional stoves indoors, creating a dangerous cocktail of hundreds of pollutants.<sup>110</sup> It is estimated that worldwide more than 1,2 billion people still lack access to electricity. This includes approximately 550 million people in Africa, and the number of people without access to energy in sub-Saharan Africa is projected to rise to 90 to 100 million

107 UNFCCC 'Environmental legislation in Zimbabwe', <http://unfccc.int/resource/ccsites/zimbab/legislat/legislat.htm> (accessed 17 March 2016).

108 United Nations Environment Programme (UNEP) *Africa environment outlook. Policy analysis guidelines for integrated environmental assessment and reporting (UNEP: Nairobi, Kenya)* 27.

109 S Dasgupta et al 'Where is the poverty-environment nexus? Evidence from Cambodia, Lao PDR, and Vietnam' (2005) 33 *World Development* 617.

110 World Health Organisation *Fuel for life: Household energy and health* (2006) 8.

individuals in 2030.<sup>111</sup> A lack of access to energy services will result in the poor being deprived of the most basic of human rights and economic opportunities to improve their standard of living; will inhibit people from accessing modern hospital services; food cannot be refrigerated; and businesses cannot function.<sup>112</sup> Therefore, all efforts must be put in place by African countries towards addressing poverty. In China, decreasing poverty has allowed several of Chinese population to avoid indoor air pollution. In 1990 it was estimated that almost 2,6 million people died from air pollution in China, but the number declined to 2,3 million people in 2010 despite an 18 per cent increase in the population.<sup>113</sup> There is a drastic reduction in indoor air pollution because an increasing number of people having overcome poverty can now afford to cook by using modern energy (improved access to cheap electricity) rather than burning charcoal, twigs and dung inside their homes.<sup>114</sup> Once a country continues to develop economically, it can start to channel resources into environmental protection and pollution reduction as has been done in China. An estimated 80 per cent of China's coal-fired power plants now are equipped with pollution-reducing scrubber technology, and the nation's sulphur emission rates have also since 2006 been steadily reducing.<sup>115</sup> Also, cheap wood-burning stoves in East Africa and *plancha* stoves in Latin America reduce pollution levels by as much as 50 and 90 per cent respectively.<sup>116</sup> Thus, making cleaner fuels and improved stoves available to millions of poor people in developing countries will go a long way towards reducing child mortality, improve women's health; and can help raise families out of poverty and accelerate development progress.<sup>117</sup>

Other recommendations include improved public transport; the inclusion of the right to a clean and decent environment as a justiciable right in the constitutions of African states; the empowerment of civil society organisations; ensuring that African nations take full advantage of accessing international funding assistance through the Clean Development Mechanism (CDM) to promote the development of environmentally-sustainable economic projects and reduce poverty; strengthening of the public health programmes; strengthening the environmental institutions at the national level for effective delivery; and the implementation of international treaties on environmental protection and making the MNCs accountable for environmental pollution.

111 E Wadongo 'A personal approach to tackling energy poverty in Africa', <http://www.one.org/us/2013/06/10/a-personal-approach-to-tackling-energy-poverty-in-africa/> (accessed 6 March 2016).

112 As above.

113 B Lomborg 'Fight poverty to reduce pollution' *China Daily*, [http://africa.chinadaily.com.cn/weekly/2014-08/08/content\\_18272044.htm](http://africa.chinadaily.com.cn/weekly/2014-08/08/content_18272044.htm) (accessed 17 March 2017).

114 As above.

115 'Pollution solutions: Understanding the link between poverty and pollution' 17 October 2014, [http://www.pollutionsolutions-online.com/news/air-clean-up/16/breaking\\_news/understanding\\_the\\_link\\_between\\_poverty\\_and\\_pollution/32158/](http://www.pollutionsolutions-online.com/news/air-clean-up/16/breaking_news/understanding_the_link_between_poverty_and_pollution/32158/) (accessed 17 March 2016).

116 World Health Organisation (n 110) 28.

117 L Jong-wook 'Foreword' in WHO (n 110) 4.

## 7 Conclusion

Environmental threats in the form of climate change, deforestation, air and water pollution are among the major barrier towards lifting human development. The 2013 Human Development Report warned that the number of people living in extreme poverty could increase by up to 3 billion by 2050 unless urgent action is taken to tackle environmental challenges. The longer action is delayed, the higher the cost will be.<sup>118</sup> I have in this chapter considered the various links between environmental pollution and poverty and have been able to show that environmental pollution is both a contributing factor to poverty and the result of poverty. Indeed, the environmentally-unsustainable use of natural resources reduces incomes, increases costs and worsens poverty,<sup>119</sup> while environmentally-sustainable use of resources can help to promote a healthy environment, decrease costs and reduce poverty. The failure by African governments to prevent widespread pollution arising from human and industrial activities has in no small measure affected the living conditions of the affected communities. With the wealth of natural resources, including minerals, biodiversity, wildlife, forests, fisheries and water with which that Africa is endowed, the continent has the potential for social and economic growth provided it is able to address the problem of environmental pollution, population growth and rising levels of poverty besetting it.

118 'Environmental threats could push billions into extreme poverty, warns UN' *The Guardian* 14 March 2013, <http://www.theguardian.com/global-development/2013/mar/14/environmental-threats-extreme-poverty-un> (accessed 17 March 2017).

119 D Smith 'Poverty and environment links: Examples from Africa' UNDP-UNEP Initiative, Nairobi, Kenya, <http://www.wilsoncenter.org/sites/default/files/Smith1.pdf> (accessed 14 March 2017).



## References

- actionAid Gold rush: The impact of gold mining on poor people in Obuasi in Ghana (actionAid 2006)
- Africa Groundwater Atlas 'Case study: Acid mine drainage in South Africa' British Geological Survey 2019, [http://earthwise.bgs.ac.uk/index.php/Case\\_Study\\_Acid\\_Mine\\_Drainage\\_South\\_Africa](http://earthwise.bgs.ac.uk/index.php/Case_Study_Acid_Mine_Drainage_South_Africa) (accessed 7 July 2019)
- African Ministerial Conference on the Environment Managing Africa's natural capital for sustainable development and poverty reduction Fifteenth session Hurghada, Egypt, 8-12 September 2014, AMCEN/15/3
- Amechi EP 'Enhancing environmental protection and socio-economic development in Africa: A fresh look at the right to a general satisfactory environment under the African Charter on Human and Peoples' Rights' (2009) 5 *Law, Environment and Development Journal* 58
- Amnesty International Petroleum, pollution and poverty in the Niger Delta (Amnesty International Publications 2009)
- Banda I 'Legislation alone will not address Africa's climate challenges' *Global Issues* 2 June 2014, <http://www.globalissues.org/news/2014/06/02/18768> (accessed 17 March 2016)
- Bhattacharya A & Kharas H 'Worthy of support, our piece on the "Sustainable Development Goals"' *The Economist* 8 April 2015, <http://www.economist.com/blogs/freexchange/2015/04/our-piece-sustainable-development-goals> (accessed 17 March 2016)
- Blacksmith Institute *The world's worst polluted places: The top ten* (The Blacksmith Institute 2006) 3
- Burger L et al 'Atmospheric impact report: Sasol Infrachem, a division of Sasol Chemical Industries Limited, Report 13STL01SB', September 2014
- Conserve Africa 'Environment and poverty', <http://www.conserveafrica.org.uk/sustainable-development-and-local-communities-in-africa/environment-and-poverty-in-africa/> (accessed 7 March 2016)
- Dasgupta S, Deichmann U, Meisner C & Wheeler D 'Where is the poverty-environment nexus? Evidence from Cambodia, Lao PDR, and Vietnam' (2005) 33 *World Development* 617
- Ebegbulem JC, Ekpe, D & Adejumo, TO 'Oil exploration and poverty in the Niger Delta region of Nigeria: A critical analysis' (2013) 4 *International Journal of Business and Social Science* 279
- Energy Information Administration, South Africa 'Environmental issues', [http://schoolnet.org.za/CoL/ACE/course/ukzncore2a/documents/core2a.south\\_africa.htm](http://schoolnet.org.za/CoL/ACE/course/ukzncore2a/documents/core2a.south_africa.htm) (accessed 7 March 2016)
- European Environment Agency 'Chapter 5: Environment, health and quality of life', <http://www.eea.europa.eu/soer/synthesis/synthesis/chapter5.xhtml> (accessed 7 March 2016)
- Fabra A 'The intersection of human rights and environmental issues: A review of institutional development at international level' Background Paper prepared for Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, Geneva, Switzerland, 14-16 January 2002, <http://www2.ohchr.org/english/issues/environment/enviro/bp3.htm> (accessed 13 March 2016)
- Fekumo F 'Civil liability for damage caused by oil pollution' in Omotola JA (ed) *Environmental laws in Nigeria including compensation* (University of Lagos Press 1990) 268
- Forsyth T & Leach M 'Poverty and environment: Priorities for research and policy' United Nations Development Programme and European Commission, 1998
- Gosling M 'Eskom estimates 333 people likely to die every year from coal power station emissions' *fin24*, <https://www.fin24.com/Economy/Eskom/eskom-estimates-333-people-likely-to-die-every-year-from-coal-power-station-emissions-20181122> (accessed 7 July 2019)

- groundWork *Slow poison: Air pollution, public health and failing governance* (groundWork 2014)
- Hallowes D *Unpacking climate change: Background notes to the catastrophe* (groundWork 2013)
- Hayes A & Nadkarni MV (eds) *Poverty, environment and development: Studies of four countries in the Asia Pacific region* (UNESCO PROAP 2001)
- Human Rights Watch *The price of oil: Corporate responsibility and human rights violations in Nigeria's oil producing communities* (Human Rights Watch 1999)
- Ibaba S *Understanding the Niger Delta crisis* (Jiral Publication Company 2001)
- Ibeanu O 'Affluence and affliction: The Niger Delta as a critique of political science in Nigeria' inaugural lecture, University of Nigeria, Nsukka, delivered on 20 February 2008
- Imobighe MD 'Paradox of oil wealth in the Niger-Delta region of Nigeria: How sustainable is it for national development?' (2011) 4 *Journal of Sustainable Development* 160
- International Bank for Reconstruction and Development/The World Bank *Linking poverty reduction and environmental management: Policy challenges and opportunities* (Washington DC 2002)
- International Monetary Fund *Factsheet The IMF and the Millennium Development Goals* 15 April 2015, <https://www.imf.org/external/np/exr/facts/mdg.htm> (accessed 17 March 2016)
- Jehan S & Umana A 'The environment-poverty nexus' (2003) 3 *Development Policy Journal* 53
- Jones S 'Sub-Saharan Africa and the "Resource curse": Limitations of the conventional wisdom' 2008 Danish Institute for International Studies (DIIS) Working Paper 2008/14, Copenhagen, Denmark
- Jong-wook L *Forward: Fuel for life: Household energy and health* (WHO 2006)
- Kelly TJ & wa Githtnji M *Environmental degradation and poverty in less industrialised nations* (Frontera Norte Num Especial: Pobreza 1994)
- Kidd M *Environmental law* (Juta & Co Ltd 2011) 299
- Kulindwa K; Kameri-Mbote P, Mohamed-Katerere J & Chenje M 'The human dimension' in *Africa Environment Outlook 2: Our Environment, Our Wealth* chapter 1
- Lawson-Remer T & Greenstein J 'Beating the resource curse in Africa: A global effort' (2012) 3 *Africa in Fact – The Journal of Good Governance Africa* 21
- Lomborg B 'Fight poverty to reduce pollution' China Daily, [http://africa.chinadaily.com.cn/weekly/2014-08/08/content\\_18272044.htm](http://africa.chinadaily.com.cn/weekly/2014-08/08/content_18272044.htm) (accessed 17 March 2016)
- Mail & Guardian* 'Air pollution kills millions annually, says WHO' 25 March 2014, <http://mg.co.za/article/2014-03-25-7-million-killed-by-air-pollution-annually> (accessed 7 March 2016)
- Mail & Guardian* 'Eskom spurns air quality controls' 14 March 2014, <http://mg.co.za/article/2014-03-13-eskom-spurns-air-quality-controls> (accessed 7 March 2016)
- Mathee A 'Environment and health in South Africa: Gains, losses, and opportunities' (2011) 32 *Journal of Public Health Policy* S37
- Mbaki K *Afrique Centrale et la question environnementale* (Kinshasa: MED 2008)
- Mbaku JM 'The environment and the new globalisation in Africa' in Kieh GJ (ed) *Africa and the new globalisation* (Ashgate Publishing Limited 2008)
- McCarthy TS & Pretorius K 'Coal mining on the Highveld and its implications for future water quality in the Vaal River system' *International Mine Water Conference Proceedings* held in Pretoria, South Africa, 19-23 October 2009 64, [http://www.imwa.info/~imwa\\_2009/IMWA2009\\_McCarthy.pdf](http://www.imwa.info/~imwa_2009/IMWA2009_McCarthy.pdf) (accessed 7 March 2016)
- McCarthy TS & Pretorius JP 'Coal mining on the Highveld and its implications for future water quality in the Vaal River system', file:///C:/Users/MY%20PC/Downloads/Coal%20mining%20on%20the%20Highveld%20and%20its%20implications%20for%20future%20water%20quality%20in%20the%20Vaal%20

- river%20system%20(2).pdf (accessed 7 July 2019)
- McDaid L *The health impact of coal* (groundWork 2014)
- McSweeney R & Timperley J 'The Carbon Brief Profile: South Africa' *Carbon Brief* 15 October 2018, <https://www.carbonbrief.org/the-carbon-brief-profile-south-africa> (accessed 7 July 2019)
- Myllyvirta L 'Air quality and health impacts of ESKOM's planned non-compliance with South African Minimum Emission Standards' *Greenpeace* 19 March 2019, <https://storage.googleapis.com/planet4-africa-stateless/2019/03/8a84b69a-air-quality-and-health-impacts-of-eskoms-non-compliance.pdf> (accessed 7 July 2019).
- Mink SD *Poverty, population and the environment* (The World Bank 1994)
- Mwambazambi K 'The complexity of environmental protection in sub-Saharan Africa and reduction of poverty' (2011) 4 *Ethiopian Journal of Environmental Studies and Management* 17
- Naanen B 'Oil-producing minorities and the restructuring of Nigerian federalism: The case of the Ogoni people' (1995) 33 *Journal of Commonwealth and Comparative Politics* 46
- New Partnership for Africa's Development (NEPAD) *Action Plan of the Environment Initiative of the New Partnership for Africa's Development*, 2003
- Nwagbara EN, Abia, RP, Uyang FA & Ejeje JA 'Poverty, environmental degradation and sustainable development: A discourse' (2012) 12 *Global Journal of Human Social Science Sociology, Economics and Political Science* 1
- Office of the United Nations High Commissioner for Human Rights. United Nations Millennium Declaration 8 September 2000, <http://www.ohchr.org/english/law/millennium.htm> (accessed 17 March 2016)
- Okeagu JE, Okeagu, JC, Adegoke, AO & Onuoha, CN 'The environmental and social impact of petroleum and natural gas exploitation in Nigeria' (2006) 23 *Journal of Third World Studies* 199
- Oke-Samuel O & Oluduro O 'Re-inventing environmental governance towards effective emission control in South Africa and Nigeria' (2012) 14 *Journal of Sustainable Development in Africa* 194
- Oluduro O *Oil exploitation and human rights violations in Nigeria's oil producing communities* (Intersentia Publishers 2014) 3
- Plumer B 'The deadliest environmental problem today is indoor air pollution – Killing 4 million a year' *Vox* 15 September 2014, <http://www.vox.com/2014/9/15/6150713/the-deadliest-environmental-problem-today-is-indoor-air-pollution> (accessed 13 March 2016)
- Pollution Solutions 'Understanding the link between poverty and pollution' 17 October 2014, [http://www.pollutionsolutions-online.com/news/air-clean-up/16/breaking\\_news/understanding\\_the\\_link\\_between\\_poverty\\_and\\_pollution/32158/](http://www.pollutionsolutions-online.com/news/air-clean-up/16/breaking_news/understanding_the_link_between_poverty_and_pollution/32158/) (accessed 17 March 2016)
- Poudyal KP 'The protection of socio-economic rights with special reference to the right to food, right to education and the right to health', [http://www.interights.org/doc/WS2\\_Poudyal\\_final.doc](http://www.interights.org/doc/WS2_Poudyal_final.doc) (accessed 7 March 2016)
- Rahman A 'Environment-poverty nexus: A global overview' in A Chakraborty (ed) *Poverty and environment: An introduction* (Icfai University Press 2006)
- Report of the Study on the Development of Strategy to Guide the Promotion of the Ratification of the Revised African Convention on the Conservation of Nature and Natural Resources (the Maputo Convention) AMCEN/14/REF/8-E, 2012
- Rosencranz A et al *Environmental law and policy in India: Cases, materials and studies* (Tripathi 1991)
- Smith D 'Poverty and environment links: Examples from Africa' *UNDP-UNEP Initiative*, Nairobi, Kenya, <http://www.wilsoncenter.org/sites/default/files/Smith1.pdf> (accessed 14 March 2016)
- Steele M 'Africa: South Africa's pollution laws under full assault' *Allafrica* 7 October 2014, <http://allafrica.com/stories/201410071922.html?viewall=1>

- (accessed 7 March 2016)
- Terblanche FJ 'A legal framework for the transboundary movement of hazardous waste in South Africa and Lesotho' LLM dissertation, North-West University, 2007
- The Guardian* 'Environmental threats could push billions into extreme poverty, warns UN' 14 March 2013, <http://www.theguardian.com/global-development/2013/mar/14/environmental-threats-extreme-poverty-un> (accessed 17 March 2016)
- UNDP Niger Delta Human Development Report 2006
- UNEP 'Africa environment tracking: Issues and developments' 2006
- UNEP (Basel Convention) Our sustainable future: The role of the Basel Convention UNEP Geneva, Switzerland
- United Nations Environment Programme (UNEP) Africa environment outlook. Policy Analysis Guidelines for Integrated Environmental Assessment and Reporting (UNEP) 27
- United Nations Environment Programme (UNEP) Fifth Global Environment Outlook report, Nairobi, UNEP (2012)
- UNFCCC 'Environmental legislation in Zimbabwe', <http://unfccc.int/resource/ccsites/zimbab/legislat/legislat.htm> (accessed 17 March 2016)
- Venro Project 'Rethinking biomass energy in sub-Sahara Africa' Prospects for Africa – Europe's Policies 2009 5
- Von Schirnding YER, Mathee, A, Kibel M, Robertson P, Strauss N & Blignaut R 'A study of pediatric blood lead levels in a lead mining area in South Africa' (2003) 93 *Environmental Research* 259
- Wadongo E 'A personal approach to tackling energy poverty in Africa', <http://www.one.org/us/2013/06/10/a-personal-approach-to-tackling-energy-poverty-in-africa/> (accessed 6 March 2016)
- WaterAid Women's issues, Issue Sheet, November 2009, cited in Karekzi S et al 'Energy, poverty, and development' (Cambridge University Press 2012)
- World Bank 'On thin ice: How cutting pollution can slow warming and save lives' Joint Report of the World Bank and the International Cryosphere Climate Initiative, Washington DC, October 2013
- World Health Organisation *Fuel for life: Household energy and health* (WHO 2006)

# CHAPTER 7

## ALLEVIATING POVERTY THROUGH RETIREMENT REFORMS

*Kitty Malherbe\**

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### Abstract

*Older persons in South Africa may be described as a sizeable but vulnerable group requiring specific protection. One of the ways in which the country can provide for the socio-economic needs of its older population is through social security benefits. This chapter provides an overview of the current deficits in the provision of social security to older persons. The aims of this chapter are to explain why reforms of the current retirement income system are necessary and to illustrate how retirement reforms may be utilised to address poverty not only of older persons, but other members of their households as well. The argument is made that this goal can only be achieved if retirement reforms form part of comprehensive social security reforms that are based on the realisation of the right of access to social security.*

### 1 Introduction

With the current emphasis on the protection and development of the youth,<sup>1</sup> the reader may be forgiven for questioning the need to focus on older persons, and retirement reforms in particular, in a publication dealing with ways of addressing the widespread poverty in South Africa. The aims of this chapter are to explain why reforms of the current retirement income system are necessary and to illustrate how retirement reforms may be utilised to address poverty not only of older persons, but other members of their households as well. The argument is made that this goal can only be achieved if retirement reforms form part of comprehensive social security reforms that are based on the realisation of the right of access to social security.

### 2 Poverty among older persons

The age at which a person becomes an 'older person' in South Africa is not entirely clarified by legislation. Before 2008 both the Social Assistance

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1 One of the priorities for national development listed in the National Development Plan is 'building a future for South Africa's youth'. National Planning Commission *National Development Plan 2030 Executive Summary* (2011) 20.

Act<sup>2</sup> and Older Persons Act<sup>3</sup> used to define older persons as women aged 60 years or older and men aged 65 or older. In 2008 Parliament, under pressure from litigation by a group of men claiming that the statutory pensionable age set in the Social Assistance Act unfairly discriminated against men who would have to wait until the age of 65 to access the older person's grant,<sup>4</sup> amended the qualifying age for the older person's grant to 60 years for both men and women.<sup>5</sup> However, steps to amend the Older Persons Act in the same manner were not initiated until recently,<sup>6</sup> with the result that at the time of writing men only obtained the protection provided to older persons in terms of the Act at age 65.

The South African population is gradually ageing,<sup>7</sup> even though the projected growth rate of the older population in South Africa is lower than in most other countries, which is attributed to the high mortality rate due to the HIV pandemic.<sup>8</sup> The number of older persons in South Africa has increased from 2,8 million in 1996 to 4,6 million in 2017.<sup>9</sup> It is estimated that the number of older persons will increase to 6,7 million by 2030, and to 8 million by 2065.<sup>10</sup>

The proportion of older persons living in poverty in South Africa declined from 55 per cent of older persons in 1996, to 36,2 per cent in 2011,<sup>11</sup> but showed a marginal increase again between 2011 and 2015.<sup>12</sup> Together with women, children, the youth, persons with disabilities and families living with HIV, older persons are regarded as one of the groups worst affected by poverty.<sup>13</sup>

The reasons for so many older persons living in poverty have been summarised as follows:<sup>14</sup>

2 Act 13 of 2004, sec 10.

3 Act 13 of 2006, sec 1.

4 *Christian Roberts v Minister of Social Development* Unreported Case 32838/05 (2010) TPD.

5 Sec 10 was amended by the Social Assistance Amendment Act 6 of 2008, sec 1.

6 Sec 1 of the Older Persons Amendment Bill, GN 426 in GG 40883 of 2 June 2017 equalises the age at which a person becomes an 'older person' at 60 years of age or older for men and women.

7 National Planning Commission *National Development Plan – Vision for 2030* (2011) 78; M Olivier 'Old age and retirement' in M Olivier et al (eds) *Introduction to social security* (2004) 270.

8 UN Economic Commission for Africa, African Centre for Gender and Social Development *The state of older people in Africa – 2007: Regional review and appraisal of the Madrid International Plan of Action on Ageing* (2007) 24.

9 Statistics South Africa *Mid-year population estimates, 2017* (2017) 1. Older persons as a proportion of the population increased from 7,1% in 1996 to 8,1% in 2017.

10 Statistics South Africa *Census 2011: Profile of older persons in South Africa* (2014); Inter-Departmental Task Team on Social Security and Retirement Reforms (IDTT) 'Comprehensive social security in South Africa: Discussion Document' (2012) 12.

11 Statistics South Africa *Poverty trends in South Africa: An analysis of absolute poverty between 2006 and 2011* (2014) 29.

12 Statistics South Africa *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2015* (2017) 60.

13 'Understanding poverty and development' <http://www.etu.org.za/toolbox/docs/development/poverty.html> (accessed 2 September 2017).

14 As above.

Older people are usually not working anymore and have to be taken care of by the rest of society. In South Africa most poor older people survive on the monthly pensions paid by the state ... Because of high unemployment many families share the pensions meant for the elderly and it ends up being insufficient for their needs. Older people also often look after grandchildren and continue to perform unpaid domestic work for their families. This especially applies to older women.

Poverty among older persons, therefore, seems to be linked to a loss of income as a result of retirement and the socio-economic situation of the rest of their households, which in many cases may translate into limited financial support for older persons by family members.<sup>15</sup>

Older persons in South Africa, therefore, may be described as a sizeable but vulnerable group requiring specific protection.<sup>16</sup> One of the ways in which a country can provide for the socio-economic needs of its older population is through social security benefits. In terms of section 27(1)(c) of the South African Constitution,<sup>17</sup> '[e]veryone has the right of access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'. Section 27(2) of the Constitution obliges the state to take reasonable legislative and other measures within available resources to progressively realise the right of access to social security. The next part of this chapter briefly outlines the current social security benefits available to older persons in order to determine whether there is a need for reform of social security for older persons in South Africa.

### 3 Current social security provision for older persons

The majority of older persons in South Africa rely on non-contributory social grants from the state for income.<sup>18</sup> The older person's grant is a means-tested, flat rate,<sup>19</sup> monthly grant payable in terms of section 10 of the Social Assistance Act.<sup>20</sup> The scale of the older person's grant is unique in the developing world<sup>21</sup> and has been credited with the reduction of

15 Statistics South Africa *Vulnerable Groups Series II: The Social Profile of Older Persons, 2011-2015* (2017) 58.

16 Statistics South Africa *Social profile of vulnerable groups in South Africa 2002-2010* (2011) 92; Statistics South Africa *Vulnerable Groups Indicator Report 2016* (2017).

17 The Constitution of the Republic of South Africa, 1996.

18 According to Statistics South Africa (n 15) 57, 69,8% of South African older persons were accessing grants in 2015.

19 The grant amount in 2017 is R1 600 per month. The grant amount for a given year is usually declared by the Minister of Finance in the annual budget speech.

20 The requirements to qualify for an older person's grant are found in secs 5 and 10 of the Social Assistance Act, as well as the regulations in GN R898 in GG 30356 of 22 August 2008.

21 MP Olivier & E Kalula 'Scope of coverage' in MP Olivier et al (eds) *Social security: A legal analysis* (2003) 127.

poverty among older persons in South Africa.<sup>22</sup>

In addition to the older person's grant, an additional amount, the grant-in aid, is payable to recipients of the older person's grant who are so severely physically or mentally disabled that they need care at home.<sup>23</sup> The role of social assistance in addressing poverty in old age is twofold: First, it raises the income of persons who had no or a very low income before retirement age; and, second, it addresses the fall in income of those who had pre-retirement income, but no or little retirement savings. The aim of social assistance for older persons, therefore, is to ensure that individuals 'do not fall below a certain basic minimum level of existence'.<sup>24</sup>

South Africa is in the unique position that it has no compulsory national retirement fund system similar to those found in other countries with advanced social security systems. Instead, social insurance for retirement is provided by just over 5 000 privately administered funds and the retirement funds for employees of the state and state-owned enterprises.<sup>25</sup> The occupational retirement funding system is voluntary, as no employer is compelled by legislation to join or create a fund on behalf of its employees.<sup>26</sup> As a result, many formally-employed employees are not members of retirement funds and have to rely on the older person's grant for retirement income; the same is true for informally-employed workers.

Finally, self-employed persons and employees who wish to top up the retirement savings provided by occupational retirement funds can voluntarily make use of private retirement savings vehicles, for example, retirement annuity funds.<sup>27</sup>

#### 4 Arguments for the reform of the current retirement income system

A closer examination of specific components of the social security system leads one to the conclusion that it needs an urgent overhaul. Unless this is done, poverty will remain intractable and many will continue to have no access to socio-economic rights in South Africa.<sup>28</sup>

22 *Black Sash Trust v Minister of Social Development & Others* [2017] ZACC 8 para 1; Statistics South Africa (n 12) 9; The World Bank *Fiscal policy and redistribution in an unequal society* (2014) 35.

23 Sec 12 Social Assistance Act.

24 N Smit & LG Mpedi 'Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy?' (2010) 14 *Law, Democracy and Development* 3.

25 Financial Services Board *Annual Report 2016* (2016) 27. These funds are regulated by a variety of legislations, including the Pension Funds Act 24 of 1956, the Income Tax Act 58 of 1952 and the Acts creating each of the funds for employees of the state or state-owned enterprises.

26 National Treasury *Retirement fund reform* (2004) 18.

27 Retirement annuity funds are also regulated in terms of the legislation cited in n 25, including the Pension Funds Act 24 of 1956.

28 LG Mpedi *Pertinent social security issues in South Africa* (2008) 37.



The Constitution is the supreme law of South Africa. As a result, the yardstick to measure whether the current retirement income system is in need of reform is compliance with the Constitution and, specifically, the extent to which it affords everyone the right of access to social security in terms of section 27 of the Constitution.<sup>29</sup>

As shown above, there is no comprehensive social security or coordinated retirement income system in South Africa.<sup>30</sup> The completely fragmented nature of social security for older persons means that access to retirement income through social security (if any) is limited to only one of the forms of social security to the exclusion of access to the other.<sup>31</sup> For example, the means test for social assistance either disqualifies persons with some retirement savings entirely from receiving a grant or reduces the amount payable.<sup>32</sup> Hence, the means test for the older person's grant acts as a disincentive for low-income earners to save for retirement, as accumulating any personal wealth could lead to a loss of the right to an older person's grant or a reduction in the grant amount.<sup>33</sup> In addition, the means test is difficult to efficiently administer.<sup>34</sup> Therefore, one of the most urgent reforms of the retirement funding system required is to create a universal (and thus non-means-tested) non-contributory grant for citizens and permanent residents aged 60 years and older.<sup>35</sup>

Apart from the state's constitutional duty to provide access to social assistance, currently in the form of grants paid to the majority of older persons who did not have the means to save for their old age, it also has the duty to create an environment that enables individuals to save for their retirement. As was stated above, participation in the current occupational retirement funding system is voluntary, and the state's only role is to regulate the industry and to provide a dispute resolution mechanism. As a result of the voluntary nature of the occupational retirement funding system, many employees, whether through their own myopic views on saving for retirement or their employers' reluctance to participate in a fund, are excluded from the scope of social insurance in the form of

29 Although the human rights approach to social security would require the current social security system to be measured against all constitutional values and rights (Mpedi (n 28) 10-11), this chapter focuses only on the extent to which the right of access to social security is currently realised.

30 Mpedi (n 28) 14; IDTT (n 10) 4.

31 With the exception of the limited number of employees belonging to an occupational retirement fund and who also are able to make use of the private retirement savings vehicles.

32 The formula for the means test for the older persons' grant is found in Annexure A to GN R898 in GG 30356 of 22 August 2008, as amended in 2011 and 2014. In terms of this formula, post-retirement income reduces the maximum grant payable, and assets worth 55 times the maximum grant payable disqualify applicants from receiving the grant at all.

33 IDTT (n 10) 13.

34 A Asher & MP Olivier 'Retirement and old age' in MP Olivier MP et al (eds) *Social security: A legal analysis* (2003) 249; Mpedi (n 28) 24.

35 Department of Social Development *Reform of retirement provisions* (2007) 12; National Treasury *2013 Retirement reform proposals for further consultation* (2013) 8; IDTT (n 10) 4.

retirement benefits.<sup>36</sup>

The absence of legislation mandating retirement fund membership effectively denies those workers who prefer to take extra cash home, instead of contributing to a pension or provident fund, access to a social insurance-type of funding for retirement.<sup>37</sup> As early as 2002, the Committee of Inquiry into a comprehensive system of social security for South Africa (Taylor Committee) recognised the pitfalls of the current voluntary retirement system and recommended minimum mandatory contributions to retirement savings by all persons employed in the formal sector.<sup>38</sup>

Not only do only about half of the formal labour force have access to membership of occupational retirement funds, but the nature of the current retirement funding system also means that informal workers are denied access to membership of these funds and thus to social insurance-type benefits upon retirement. The National Treasury has acknowledged that extending the scope of coverage of the retirement funding system will depend on reaching workers with 'a tenuous connection to the formal labour force', and that providing them with access to social insurance-type retirement benefits should be addressed in broader social security reforms.<sup>39</sup>

The third available option for retirement income, private retirement savings, is too costly for most South African workers, as no matching employer contribution is involved.<sup>40</sup>

It therefore may be argued that the current fragmented system of social security aimed at the provision of income in old age relies too heavily on the older person's grant with limited access to occupational retirement funds.

The state's duty to take reasonable measures to realise the right of access to social security upon retirement is not limited to the scope of coverage of the retirement funding system, but extends also to ensure access to adequate benefits upon retirement. A number of issues affect the adequacy of benefits from occupational retirement funds, but the two issues that recently have received the attention of the National Treasury are the lack of preservation of benefits acquired before retirement and a preference for lump sum retirement benefits with a resultant lack of

36 According to the National Treasury, only around half of formally-employed workers are members of employer-sponsored retirement funds. National Treasury (n 35) 12.

37 Conditions of service often make retirement fund membership compulsory, but this is not necessarily the case.

38 Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the present – Protecting the future* (2002) 94.

39 National Treasury (n 35) 12.

40 It can even be questioned whether private retirement savings constitute social security at all, as there is no solidarity or pooling of risks involved. Taylor Committee Report 3 'Constitutional framework of social security in South Africa' (2002) 45 <http://www.sarpn.org/CountryPovertyPapers/SouthAfrica/taylor/report3.php> (accessed 2 September 2017).

preservation of post-retirement benefits.<sup>41</sup>

Both these problems are a result, once again, of the voluntary nature of the system. Just as there is no statutory compulsion to become a member of a fund, there are no statutory measures to compel occupational fund members to preserve savings for retirement upon withdrawal from a fund, which may lead to a lack of adequate accumulated savings at retirement.<sup>42</sup> These difficulties particularly arise when individuals change jobs or are dismissed and they take their retirement benefits in cash in order to fund periods of unemployment. Their retirement benefits are consequently neither transferred to another fund, nor reinvested in any other retirement savings vehicle.

The issue of the post-retirement preservation of benefits arises because of the preference of many employees for membership of provident funds due to the lump sum payments upon retirement that these funds provide. The perceived advantages of a lump sum payout, such as having the freedom to decide where to invest the amount or being able to settle debts, unfortunately, may in some instances lead to its main disadvantage, which is a less than adequate monthly income during retirement.<sup>43</sup>

Section 27 of the Constitution requires the state to take reasonable measures within its available resources to realise the right of access to social security. Much emphasis has been placed on the track record of social assistance in reducing poverty.<sup>44</sup> The relatively generous level<sup>45</sup> of the older person's grant means that the financial burden on the state to provide grants for older persons is enormous. Concerns have been raised over the government's available resources to expand the grant system.<sup>46</sup> The limited resources available for the expansion of the older person's grant have necessitated reforms that integrate the public grants system and the occupational retirement funding system. An integrated retirement funding system will enable the state to continue paying grants to those older persons who cannot provide for their own retirement, as the responsibility for the provision of retirement benefits for those individuals who can afford to contribute to saving for their own retirement would be shifted to other parts of the system.

41 See below part 5.2.

42 According to the National Treasury *Social security and retirement reform: Second discussion paper* (2007) 5, less than 10% of people leaving retirement funds preserve their benefits.

43 IDTT (n 10) 19. See also National Treasury (n 26, n 35 & n 42).

44 World Bank (n 22) 2. According to Statistics South Africa (n 16) 9, '[a]lthough initially seen as a short-term measure to address poverty, social grants have increasingly become a source of livelihood in South Africa and have played an instrumental role in reducing poverty levels'.

45 N Natrass 'Disability and welfare in South Africa's era of unemployment and AIDS' CSSR Working Paper 147 (2006) 7; J Seekings & E Moore 'Kin, market and state in the provision of care in South Africa' CSSR Working Paper 327 (2013) 12.

46 In his 2014 Budget Speech, the then Minister of Finance, Pravin Gordhan, acknowledged that in a period of weak economic growth, the sustainability of government spending on the social wage 'is inevitably tested'. See also World Bank (n 22) 46-47; Mpedi (n 28) 26.

## 5 Proposed retirement reforms

There currently are two retirement reform processes in South Africa: the complete overhaul of the current retirement funding and social security system, and the interim reforms of retirement fund legislation to deal with the lack of preservation of benefits.

### 5.1 Comprehensive social security and retirement reform process

The complete overhaul of the current retirement funding and social security system was announced by President Mbeki in 2007. The initial aims with the reform process were to –

- encourage higher levels of retirement savings, including measures to assist lower-income employees to save for their retirement;
- create a single national retirement fund to ‘take advantage of economies of scale’ and reduce costs;
- support current fund members’ efforts to save for their retirement;
- build on current retirement legislation;<sup>47</sup> and
- create a sustainable pension structure.<sup>48</sup>

Although the Discussion Document on ‘Comprehensive social security in South Africa’, prepared by the Inter-Departmental Task Team on Social Security and Retirement Reforms (IDTT), was compiled in 2012,<sup>49</sup> it was only made publicly available at the end of 2016. The discussion paper is (at the time of writing) under discussion by the social partners (government, business, community and labour) at the National Economic Development and Labour Council (NEDLAC) and the outcome of the discussions on the proposed model of the reformed social security system is not yet known.

However, based on the various discussion documents that have been published to facilitate the reform process, which give some indication of the form the reformed system will take,<sup>50</sup> the reformed system will most likely be made up of a number of ‘pillars’, more or less based on

47 Joint press statement on Retirement Reform by Government, COSATU, FEDUSA and NACTU issued on 27 June 2008.

48 ‘SA’s new retirement structure takes shape’ *Personal Finance* 20 January 2008, <http://www.persfin.co.za> (accessed 7 September 2017).

49 IDTT (n 10).

50 The discussion documents that have been made available to date include the Taylor Committee Report (2002); National Treasury *Retirement reform: A discussion paper* (2004); National Treasury *Social security and retirement reform: Second discussion paper* (2007); National Treasury *2013 Retirement reform proposals for further consultation* (2013); Department of Social Development *Reform of retirement provisions* (2007); Department of Social Development *Creating our future: Strategic considerations for a comprehensive system of social security* (2008); IDTT (n 10).

the multi-pillar models of the World Bank<sup>51</sup> and the International Labour Organisation (ILO).<sup>52</sup> Central to the proposed reforms is the creation of a National Social Security Fund (NSSF).<sup>53</sup>

The first pillar of the reformed social security system is planned to consist of a non-means-tested grant for older persons.<sup>54</sup> It is envisaged that the role of the second pillar, the retirement funding pillar, will be fulfilled by the NSSF in the form of a mandatory contributory pension scheme offering defined benefits for all workers,<sup>55</sup> with government meeting part of the contribution costs of lower-income employees.<sup>56</sup> A simplified contribution arrangement for informal workers and self-employed persons is also proposed.<sup>57</sup>

Much of the uncertainty surrounding the final form of the reformed social security system centres on the role of existing occupational retirement funds in the proposed supplementary retirement saving schemes intended to boost retirement income received from the NSSF.<sup>58</sup> To ensure adequate income during retirement, workers who earn above the ‘contribution ceiling’ for the NSSF will be encouraged to make supplementary contributions to those of the current retirement funds that are approved in terms of the proposed ‘approved funds framework’. The IDTT proposes a system of automatic enrolment which will oblige employers to enroll employees in one of the approved funds in addition to their mandatory contributions to the NSSF.<sup>59</sup> Tax incentives for voluntary contributions to occupational retirement funds or private retirement vehicles on top of mandatory participation in the NSSF are also being considered.<sup>60</sup>

The most important aspect of the latest discussion document on the proposed reforms<sup>61</sup> is its focus on a comprehensive social security system and not only on retirement reforms. A close interaction between the NSSF and social assistance is envisaged, with social assistance serving as ‘the foundation of an integrated social security system rather than as

51 For more on the World Bank model, see R Holzmann & J Stiglitz (eds) *New ideas about old age security* (2001); R Holzmann & R Hinz *Old-age income support in the 21st century: An international perspective on pension systems and reform* (2005).

52 For a description of the ILO’s multi-pillar retirement income model, see C Gillion *The development and reform of social security pensions: The approach of the International Labour Office* (2000) 53 *International Social Security Review* 35.

53 IDTT (n 10) 5.

54 IDTT (n 10) 25.

55 The IDTT discussion document proposes that workers earning below an agreed amount (the contribution floor) be exempted from contributing to the NSSF and that those earning in excess of a threshold amount (the contribution ceiling) will be required to contribute to supplementary retirement savings. IDTT (n 10) 5-6.

56 IDTT (n 10) 21; National Planning Commission (n 1) 43.

57 IDTT (n 10) 5.

58 The IDTT (n 10) 19 acknowledges that there are ‘considerable strengths’ in the current retirement saving system.

59 IDTT (n 10) 28.

60 IDTT (n 10) 28; National Treasury (n 42) 18.

61 Although the IDTT discussion paper (n 10) was compiled in 2012, it served in its original form at NEDLAC in November 2016. It therefore is the most recent discussion document related to comprehensive social security and retirement reforms.

a last resort for those on the margins of the productive economy'.<sup>62</sup> The retirement reforms are also not occurring in isolation – the other social insurance schemes are also being overhauled and the IDTT envisages a single department responsible for overseeing social security in order to unify policy making on social security.<sup>63</sup> Greater coherence between social security arrangements and labour-market policies, as well as between social security arrangements and the proposed National Health Insurance (NHI) system, is also proposed.<sup>64</sup>

## 5.2 Reforms proposed by National Treasury

Precisely because the complete overhaul of the social security system has taken far longer than originally estimated, the National Treasury has introduced some interim reforms of the occupational retirement fund system to address the lack of preservation measures in the current system.

The obvious solution to the problem of lack of preservation of benefits, and consequent poverty during retirement, is the creation of a single national fund with compulsory membership where the issue of transferring accrued benefits from one fund to the other will not arise, as has been proposed in the discussion documents on the social security and retirement reforms. In the interim, the National Treasury has proposed amending existing retirement fund legislation to incorporate elements of compulsory preservation of benefits.

It is proposed that, from a date specified in the amending legislation, members of retirement funds will not be entitled to cash withdrawal benefits and their withdrawal benefits will have to be paid into a preservation fund.<sup>65</sup> Depending on the extent to which employees who become unemployed and struggle to find new employment will be allowed to withdraw benefits from the preservation funds, compulsory pre-retirement preservation of benefits will go a long way towards ensuring that employees receive adequate benefits upon retirement.

To deal with the issue of the lack of preservation of post-retirement benefits, the National Treasury proposed legislative amendments to harmonise the annuitisation requirement of pension and provident funds, that is, to incorporate some measure of periodical payments during retirement for provident fund members, similar to those received by pension fund members.<sup>66</sup> The aim was that these amendments, as introduced by the Taxation Laws Amendment Act 25 of 2015, would be implemented

62 IDTT (n 10) 25.

63 IDTT (n 10) 34.

64 IDTT (n 10) 18.

65 National Treasury (n 35) 5. See also National Treasury *Preservation, portability and governance for retirement funds* (2012).

66 National Treasury (n 35) 7-9.

as from 1 March 2016.<sup>67</sup> However, fierce opposition to the amendments by organised labour has led to the postponement of the implementation of the provisions relating to the annuitisation requirements to 1 March 2019.<sup>68</sup>

## 6 Constitutional principles guiding reforms

In the context of determining whether measures are taken to realise the right of access to housing, the Constitutional Court found that '[a] court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.'<sup>69</sup> Therefore, the aim of this part of the chapter is not to analyse the details of the proposed reforms and whether they offer the most 'desirable or favourable measures',<sup>70</sup> but rather to argue that the reforms, as measures to progressively realise the right of access to social security, must result in a reasonable framework for the social security system.

South Africa is in a unique position with regard to retirement reforms. Not only is the social security system unlike those found in other countries, but the constitutional framework is also unique. Any reforms of the social security system in South Africa occur within the context of section 27 of the Constitution and the duty of the state to take reasonable measures to realise the right of access to social security it creates. Whenever retirement reforms are considered and implemented in other countries, no guidelines similar to those found in section 27 and the jurisprudence on its interpretation are available, apart from the provisions of international law.

Therefore, the outcomes of any South African retirement reforms will have to be tested against section 27 and applicable international law and the extent to which the reforms increase access to social security. Issues such as political and economic expediency that in many instances are the bases of reforms in other countries should, therefore, be shifted into the background. Therefore, even though the reforms in the comparator countries mentioned in some of the discussion documents are definitely worth studying as examples of models to be adopted,<sup>71</sup> comparisons have to be approached with caution, as similar constitutional requirements do

67 Taxation Laws Amendment Act 25 of 2015, sec 3(p).

68 Fin 24 'Treasury seeks further delay in provident fund tax change' 15 August 2017, <http://www.fin24.com/Money/Retirement/treasury-seeks-further-delay-in-provident-fund-tax-change-20170815> (accessed 3 September 2017).

69 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC) para 41.

70 For a more detailed analysis of the reforms proposed in the discussion documents prior to the IDTT discussion paper, see ED Malherbe 'Intergenerational solidarity and the provision of support and care to older persons' unpublished LLD thesis, University of the Western Cape, 2010.

71 The discussion documents outlined the retirement income systems and legislation and retirement reforms of a number of countries, including Chile, Sweden, the United Kingdom and the United States of America.

not apply in those countries.

The Constitution requires any court, tribunal or forum to consider international law when interpreting the Bill of Rights.<sup>72</sup> When courts are interpreting any other legislation, a reasonable interpretation that is in line with international law must receive preference over alternative interpretations that are inconsistent with international law.<sup>73</sup>

South Africa ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in January 2015 and, therefore, has direct international law obligations to give effect to the right to social security in terms of ICESCR. Article 9 of ICESCR provides for ‘the right of everyone to social security, including social insurance’. In addition to the right to social security, article 11 also provides for ‘the right of everyone to an adequate standard of living for himself and his family, including adequate food clothing and housing, and to the continuous improvement of living conditions’.

The United Nations (UN) Committee on Economic, Social and Cultural Rights (ESCR Committee) has produced General Comments that have become authoritative guidelines on the scope and content of the socio-economic rights included in ICESCR.

The following list of principles to guide reforms in South Africa is based on section 27 of the Constitution and the interpretation thereof by the courts,<sup>74</sup> as well as on the clarification of the content of social security rights and older persons’ rights as found in the relevant General Comments of the ESCR Committee.

## 6.1 Coordinated approach

General Comment 19<sup>75</sup> defines the right to social security in terms of article 9 as

the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependants.<sup>76</sup>

72 Sec 39(1)(b).

73 Sec 233.

74 Although it is recognised that the rights contained in the Bill of Rights are ‘inter-related and mutually supporting’ (*Grootboom* (n 69) para 23), the focus in this part of the chapter is on the guidelines provided in sec 27(2), as interpreted by the courts. For a discussion of the broader constitutional principles to be considered when redesigning the South African social security system, see Taylor Committee (n 40) 38-40.

75 General Comment 19 ‘The right to social security’ (2008) para 2.

76 For the purposes of General Comment 19, social security programmes include social insurance and social assistance schemes.



State parties are obliged to adopt legislative measures, national strategies and plans of action to realise the right to social security.<sup>77</sup> It does not matter whether state parties have single social security systems or a variety of systems to provide for various contingencies, as long as public authorities ‘take responsibility for the effective administration or supervision of the system’.<sup>78</sup>

One of the main obstacles to accessing adequate retirement income in South Africa identified above is the lack of coherence between the older person’s grant and the occupational retirement funding framework. Poverty during retirement is a single contingency and there currently is no public authority taking responsibility for the effective administration and supervision of all retirement income measures (social assistance and social insurance) as required by General Comment 19. One of the main goals of reforms should be to create one national retirement income system, as part of a comprehensive social security framework, to deal with the problems associated with the fragmented nature of the current system.<sup>79</sup>

Most of the reform proposals make provision for a continued role for occupational retirement funds in providing supplementary benefits to those employees who can afford additional contributions, as ‘public social security arrangements cannot provide full income protection for every worker’.<sup>80</sup> It is important that this future role envisaged for retirement funds does not once again result in a fragmented retirement income framework and, therefore, one of the main reform challenges is ‘to find an optimal mix of statutory, pooled and standardised social security mechanisms, alongside supplementary voluntary and occupational arrangements’.<sup>81</sup>

## 6.2 Inclusivity

Section 27(1)(c) of the Constitution guarantees ‘everyone’ access to social security. Retirement reforms, therefore, should aim for inclusivity,<sup>82</sup> by providing for mandatory participation in the retirement savings pillar(s), at least for all formally-employed workers. Article 9 of ICESCR has been interpreted as requiring state parties to ‘take appropriate measures to establish general regimes of *compulsory* old-age insurance’.<sup>83</sup> The voluntary nature of the current South African retirement funding system raises serious concerns regarding the enjoyment of article 9 rights. However, the proposals for the reform of the social security system make provision for a

77 Paras 67 & 68.

78 Paras 11 & 46.

79 In *Grootboom* (n 69) para 78, it was held that sec 27 requires the state to provide access to social security ‘on a programmatic and coordinated basis, subject to available resources’.

80 IDTT (n 10) 19.

81 IDTT (n 10) 19-20.

82 Taylor Committee Report (n 40) 35.

83 General Comment 6 ‘The economic, social and cultural rights of older persons’ (1995) para 27.

compulsory retirement insurance pillar, thereby showing intent to dispose of this obstacle to complying with article 9.

### 6.3 Progressive realisation

In terms of section 27(2) the state is required to progressively realise the right of access to social security. The reform process will not necessarily be flawed if the reformed system, as a transitional measure, initially focuses on access to retirement income for all employees in the formal economy, as long as the design of the reformed system and the founding legislation make provision for the extension of protection to informal workers and self-employed persons at a later stage.<sup>84</sup>

To ensure the progressive realisation of the right of access to retirement income, the reformed system will also have to be based on the principle of solidarity or pooling of risks to facilitate the participation of low-income and informal workers.<sup>85</sup> Therefore, the principles of inclusivity and progressive realisation must be read together.

### 6.4 Governance and accountability

Section 27(2) requires the state to take reasonable legislative *and other* measures to ensure the progressive realisation of the right of access to social security. It was held in *Grootboom* that the reasonableness of measures to progressively realise socio-economic rights is not assessed merely on the conception of the measures, but also on the implementation thereof.<sup>86</sup>

Issues such as governance and accountability, as well as the institutional capacity to implement the reformed system, therefore, have to be taken into account to ensure that the reformed retirement and social security system will be in line with constitutional requirements.<sup>87</sup>

### 6.5 Availability of resources

The state's responsibility in terms of section 27 is limited to what it can

84 The requirement of progressive realisation means that 'accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time'; *Grootboom* (n 69) para 45.

85 Taylor Committee (n 40) 45; National Treasury (n 42) 6; Social Development (n 35) 101.

86 *Grootboom* (n 69) para 42.

87 Taylor Committee (n 40) 39; IDTT (n 10) 34. The importance of governance and accountability to ensure the realisation of social security rights was recently emphasised by the Constitutional Court in reaction to the 'extraordinary conduct' of the Minister of Social Development and of the South African Social Security Agency that placed the continued payment of social assistance after 31 March 2017 in jeopardy. See *Black Sash Trust* (n 22).

achieve within its 'available resources'. The slow-down in economic growth and rise in levels of unemployment have increased the burden on the working population, and less money is available to pension schemes. Even worse consequences of the low economic growth are decreases in tax revenue and increases in unemployment compensation.

With unemployment figures at their current high (and growing) level,<sup>88</sup> South Africa's ability to manage an old-age income security system relying mainly on public funds and, therefore, tax revenue, is severely curtailed. The government's inability to collect taxes from the large number of South Africans working in the informal economy worsens the burden on the already-limited state funds that have to be applied to competing interests.<sup>89</sup> As was held in *Khosa & others v Minister of Social Development & Others*, 'limiting the cost of social welfare is a legitimate government concern'.<sup>90</sup>

According to the ESCR Committee, older persons 'feature prominently among the most vulnerable, marginal and unprotected groups. In times of recession and of restructuring the economy, older persons are particularly at risk.'<sup>91</sup> Paragraph 12 of General Comment 3 obliges state parties to protect vulnerable members of society even when facing resource constraints.<sup>92</sup> Read together, these provisions indicate that older persons are entitled to protection by the state even when resources are limited. The availability of resources, therefore, should not be the overriding principle driving the reforms to the detriment of universal access to social security.<sup>93</sup>

As was stated above, an integrated retirement income and social

88 In terms of the Quarterly Labour Force Survey (QLFS), the official unemployment rate in the second quarter of 2017 (April-June 2017) was 27,7%, <http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2017.pdf> (accessed 7 September 2017). Note that the expanded definition of unemployment, which includes the so-called 'discouraged jobseekers', may far exceed the unemployment rate quoted above (according to the QLFS, there were just under 2,3 million discouraged jobseekers in the second quarter of 2017).

89 The state's constitutional obligation in terms of sec 27 requires at the minimum provision of basic levels of social security to the most vulnerable groups in South Africa, which include not only older persons, but also persons with disabilities and HIV/AIDS, caregivers of poor children and people who are destitute and cannot support themselves and their dependants. S Liebenberg 'The right to social security: Response' in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 158. See Malherbe (n 70) 438-444 for a critical analysis of the concept of 'intergenerational equity' which criticises spending on older persons under circumstances where children remain impoverished.

90 2004 6 BCLR 569 (CC) para 64.

91 General Comment 6 (n 83) para 17. In the 'Initial Report by South Africa on the Measures Adopted and Progress Made relating to the International Covenant on Economic, Social and Cultural Rights (ICESCR)' (2017) para 81, the South African government highlighted the vulnerability that comes with old age and highlighted the current reform process as part of the measures taken to realise art 9 rights.

92 General Comment 3 'The nature of states parties' obligations' (1990) para 12.

93 In the context of the right of access to housing, Yacoob J stated in *Grootboom* (n 69) para 94: 'I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. I stress, however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them.'

security system as envisaged in the discussion documents will enable the government to continue paying grants to older persons, as the responsibility for the provision of retirement income would be shared with the other proposed 'pillars' of the integrated national social security system.

## 6.6 'Lifespan' view to addressing poverty

Finally, although one of the main goals of the retirement and social security reforms is to ensure access to retirement income, a 'lifespan' view must be taken. Hence proposed reforms, such as the compulsory preservation of retirement savings, should not serve to impoverish workers that face pre-retirement financial crises and prolonged periods of unemployment.

Unforeseen pre-retirement contingencies constitute one of the main reasons why the entire social security system should be reformed and not only the retirement income part, so that measures such as improved unemployment protection and death and disability cover can be included in the reformed system.<sup>94</sup> Ultimately, 'addressing poverty should be adopted as one of the key goals of a comprehensive social security system',<sup>95</sup> and reform proposals should be evaluated on the basis of the extent to which they make provision for the alleviation of poverty.

## 7 Potential impact of social security and retirement income reforms

In the initial stages of the retirement reform process detractors noted that there are more pressing social protection issues than retirement reforms, such as social security for informal workers, job creation and unemployment insurance. Olivier stated:<sup>96</sup>

Concentrating attention on reforming that part of the social security system which covers only a small part of the labour force at the expense of the informal sector and those who are unemployed is inherently unequal, as it directs the attention of government and other stakeholders away from a huge segment of the population with no or little social security coverage.

However, it may be argued that it does not necessarily follow that retirement reforms are not urgently required. It only means that retirement reforms cannot occur in isolation from comprehensive social security reforms that include measures to extend social protection to informal workers and

94 National Treasury (n 42) 10; IDTT (n 10) 19 & 21-26.

95 Taylor Committee (n 40) 43.

96 M Olivier *Regional overview of social protection for non-citizens in the Southern African Development Community* (2009) 42.

reforms of other social insurance schemes.<sup>97</sup>

The reform process, and particularly the introduction of the proposed NSSF, will inevitably have a significant impact on the current occupational retirement funds, 'especially those catering for lower-income workers who will struggle to make contributions over and above their NSSF obligations'.<sup>98</sup> Although the retirement funding industry has seen a decrease in the number of active funds due to a shift from stand-alone to umbrella funds,<sup>99</sup> concerns have been raised over the far-reaching impact that the proposed reforms will have on the industry and the national economy as a whole.<sup>100</sup>

The abovementioned concerns regarding the effect of the reforms on the economy have to be weighed against the positive impact that the reforms can have on existing levels of poverty and inequality. Reforms resulting in access to social insurance-type benefits in addition to non-means-tested social grants for low-income workers who reach retirement will result in increased old age income. The inclusion of low-income workers in the NSSF will serve the Constitution's transformative agenda, as they will become 'members' of a national scheme, rather than mere 'beneficiaries' of social assistance.<sup>101</sup> Making participation in the NSSF compulsory will also ensure that employees who currently are not members of funds due to their own myopic choices or their employers' reluctance to contribute will no longer have to rely solely on the older person's grant and will receive increased social security benefits upon retirement.

One of the best arguments in favour of reforms aiming to increase retirement income is the intergenerational effect of reducing poverty among older persons.<sup>102</sup> It is estimated that 6 per cent of South African households are 'skip-generation', where a grandparent lives with his or her grandchildren in the absence of their parents.<sup>103</sup> Increasing the income of older persons heading skip-generation households is likely to improve the standard of living of the children in those households. Based on the role that the older person's grant already plays in providing a source of income and alleviating poverty in many households where older persons live

97 National Planning Commission (n 1) 343; IDTT (n 10). Organised labour has been vehemently opposed to reforms of the current retirement funding system before the comprehensive social security reform process has run its course. 'Cosatu pension battle rages on' *Business Day* 25 July 2017, <https://www.businesslive.co.za/bd/national/labour/2017-07-25-cosatu-pension-battle-rages-on/> (accessed 7 September 2017).

98 IDTT (n 10) 33.

99 Financial Services Board *2015 Annual report of the Registrar of Pension Funds* (2016) 10.

100 K Hanekom 'Discussion paper on comprehensive social security in South Africa', <http://www.simekaconsult.co.za/comprehensive-social-security/> (accessed 7 September 2017). The IDTT (n 10) 22 aims to preserve the best attributes of the existing retirement funding system in the design of the new social security framework.

101 See K Malherbe 'Implementing domestic workers' social security rights within transformative constitutionalism' in D du Toit (ed) *Exploited, undervalued – and essential: Domestic workers and the realisation of their rights* (2013) 152.

102 IDTT (n 10) 13.

103 Statistics South Africa *Social profile of vulnerable groups in South Africa 2002-2012* (2013) 75. Almost 10% of all female-headed households are skip-generation.

with unemployed family and children,<sup>104</sup> the intergenerational effect of increasing the income of older persons through the proposed reforms will also be experienced by households where older persons live with multiple other generations.

In summary, retirement reforms based on the guiding principles identified above can result in increased access to social security for older persons. The available discussion documents indicate that the reform processes are aiming for inclusivity for groups that are currently excluded from retirement funding schemes, such as low-income workers, informal workers and the self-employed. In addition, low-income workers who currently are discouraged from saving for their retirement due to the means test for the older person's grant will be able to participate in the NSSF and accumulate additional retirement savings, without forfeiting the grant. The reforms will also address the reduction of retirement income due to pre- and post-retirement preservation of contributory benefits. The effect that the retirement reforms will have on older persons and their households can best be summarised as follows:<sup>105</sup>

These are reforms that will take several phases to be fully implemented. Their contribution to poverty reduction and income security will take time, their impact reinforced and magnified from one generation to the next. These are investments in social cohesion that will be felt long into the future.

104 Statistics South Africa (n 15) 58.

105 National Treasury (n 42) 39.

## References

- Asher, A & Olivier, MP 'Retirement and old age' in Olivier, MP et al (eds) *Social security: A legal analysis* (LexisNexis Butterworths 2003)
- Department of Social Development *Creating our future: Strategic considerations for a comprehensive system of social security* (2008)
- Department of Social Development *Reform of retirement provisions* (2007)
- Financial Services Board *2015 Annual report of the Registrar of Pension Funds* (2016)
- Gillion, C *The development and reform of social security pensions: The approach of the International Labour Office* (2000) 53 *International Social Security Review* 35
- Holzmann, R & Stiglitz, J (eds) *New ideas about old age security: Towards sustainable pension systems in the 21st century* (World Bank 2001)
- Holzmann, R & Hinz, R *Old-age income support in the 21st century: An international perspective on pension systems and reform* (World Bank 2005)
- Inter-Departmental Task Team on Social Security and Retirement Reforms 'Comprehensive social security in South Africa: Discussion Document' (2012)
- Liebenberg, S 'The right to social security: Response' in Brand, D & Russell, S (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (Protea Book House 2002)
- Malherbe, ED 'Intergenerational solidarity and the provision of support and care to older persons' unpublished LLD thesis, University of the Western Cape, 2010
- Malherbe, K 'Implementing domestic workers' social security rights within transformative constitutionalism' in Du Toit, D (ed) *Exploited, undervalued – and essential: Domestic workers and the realisation of their rights* (Pretoria University Law Press 2013)
- Mpedi, LG *Pertinent social security issues in South Africa* (Community Law Centre, University of the Western Cape 2008)
- National Planning Commission *National Development Plan 2030 Executive Summary* (2011)
- National Treasury *2013 Retirement reform proposals for further consultation* (2013)
- National Treasury *Preservation, portability and governance for retirement funds* (2012)
- National Treasury *Retirement fund reform: A discussion paper* (2004)
- National Treasury *Social security and retirement reform: Second discussion paper* (2007)
- Natras N 'Disability and welfare in South Africa's era of unemployment and AIDS' CSSR Working Paper 147 (2006)
- Olivier, M 'Old age and retirement' in Olivier, M et al (eds) *Introduction to social security* (Lexis Nexis Butterworths 2004)
- Olivier, M 'Regional overview of social protection for non-citizens in the Southern African Development Community (SADC)' The World Bank SP Discussion Paper 0908 (2009)
- Olivier, MP & Kalula, E 'Scope of coverage' in Olivier, MP et al (eds) *Social security: A legal analysis* (LexisNexis Butterworths 2003)
- Seekings, J & Moore, E 'Kin, market and state in the provision of care in South Africa' CSSR Working Paper 327 (2013)
- Smit, N & Mpedi, LG 'Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy?' (2010) 14 *Law, Democracy and Development* 1
- Statistics South Africa *Census 2011: Profile of older persons in South Africa* (2014)
- Statistics South Africa *Mid-year population estimates, 2017* (2017)
- Statistics South Africa *Poverty trends in South Africa: An analysis of absolute poverty between 2006 and 2011* (2014)
- Statistics South Africa *Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2015* (2017)
- Statistics South Africa *Social profile of vulnerable groups in South Africa 2002-2010* (2011)

Statistics South Africa *Social profile of vulnerable groups in South Africa 2002-2012* (2013)

Statistics South Africa *Vulnerable Groups Indicator Report, 2016* (2017)

Statistics South Africa *Vulnerable Groups Series II: The Social Profile of Older Persons, 2011-2015* (2017)

The World Bank *Fiscal policy and redistribution in an unequal society* (2014)

UN Economic Commission for Africa, African Centre for Gender and Social Development (2007) *The state of older people in Africa – 2007: Regional review and appraisal of the Madrid International Plan of Action on Ageing*



# CHAPTER 8

## DISABILITY, POVERTY AND HUMAN RIGHTS IN AFRICA: OPPORTUNITIES FOR POVERTY REDUCTION FROM THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

*Enoch M Chilemba\**

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### Abstract

*Many persons with disabilities in the world, including in Africa and in developing countries at large, live in situations of higher poverty levels than those of people without disabilities. Persons with disabilities also face discrimination and various obstacles to accessing crucial basic services such as education and employment – a situation that perpetuates their poverty. Thus, the obstacles that hinder persons with disabilities from enjoying and exercising rights such as equality and non-discrimination, employment, social protection and education play a significant role in perpetuating or causing this situation of poverty. Many African countries are state parties to the Convention on the Rights of Persons with Disabilities. Several of these countries have enacted disability-specific legislation. This chapter explores the opportunities for poverty eradication that the CRPD provides to African state parties through its human rights guarantees, especially socio-economic rights. It analyses the legal interventions that exist in selected African disability statutes for implementing the rights of equality, employment, education and social protection. The chapter also assesses the extent to which the provisions in such statutes conform to the principal standards set by the CRPD. The chapter finds that several gaps weaken the potential of disability statutes to utilise the opportunities that the CRPD provides for eradicating poverty among persons with disabilities in Africa.*

### 1 Introduction

Persons with disabilities live in situations of higher poverty levels than those of people without disabilities. This trend prevails in developing countries, including on the African continent. It has been established that there is a link between poverty and disability,<sup>1</sup> whereby disability and poverty reinforce each other. This explains the fact that many persons with disabilities are found in developing countries, while at the same time high poverty levels are found in such developing countries. Many factors account for the high poverty levels among persons with disabilities.

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1 See generally ST Tesema 'Economic discourse of disability in Africa: An overview of lay and legislative narratives' (2014) *African Disability Rights Yearbook* 122.

It has been documented that persons with disabilities in Africa and in developing countries broadly face discrimination and encounter various obstacles to access crucial services such as education and employment.<sup>2</sup> These obstacles in turn perpetuate the poverty situation. It is worth noting that the rights to freedom from discrimination, education and employment are recognised as substantive rights under several human rights treaties, including the Convention on the Rights of Persons with Disabilities (CRPD).<sup>3</sup> It follows that the failure by persons with disabilities to exercise these and other rights contributes significantly to this poverty situation. Thus, there is a link between poverty and disability, on the one hand; and the enjoyment of human rights, on the other.

Many African countries have ratified CRPD and other applicable treaties. A number of such countries, which include Malawi,<sup>4</sup> Zambia,<sup>5</sup> Uganda,<sup>6</sup> Kenya,<sup>7</sup> Tanzania<sup>8</sup> and Ghana,<sup>9</sup> have disability-specific laws.<sup>10</sup> (This chapter focuses on the disability statutes of Malawi, Zambia and Tanzania as these were enacted after the entry into force of CRPD and after the states had ratified the Convention. For this reason, these three states were expected to adhere to or, at the very least, to have in mind the standards set by CRPD when enacting the disability-specific legislation). The disability laws serve as crucial legislative tools for implementing the rights of persons with disabilities. This chapter explores the opportunities for poverty eradication that CRPD provides to African state parties through its human rights guarantees for persons with disabilities. The chapter argues that the appropriate implementation of the rights, especially the socio-economic rights, guaranteed under the CRPD would play a significant role in eradicating poverty among persons with disabilities in Africa.

African state parties to CRPD can only find themselves in a 'better' position to achieve the implementation of the Convention if the domestic disability-specific laws or statutes, in addition to other implementation tools,<sup>11</sup> that they put in place conform to CRPD's standards for

- 2 See eg Tesema (n 1) 122, where it is noted that '[d]isability often leaves people without education and employment'.
- 3 Convention on the Rights of Persons with Disabilities, UN Doc/ A/RES/61/106 (2006), adopted 13 December 2006, entered into force 3 May 2008. The applicable treaties are discussed below. This chapter focuses on CRPD.
- 4 Malawi signed CRPD on 27 September 2007 and ratified it on 27 August 2009.
- 5 Signed on 9 May 2008 and ratified on 1 February 2010.
- 6 Signed on 30 March 2007 and ratified on 25 September 2008.
- 7 Signed on 30 March 2007 and ratified on 19 May 2008.
- 8 Signed on 30 March 2007 and ratified on 10 Nov 2009.
- 9 Signed on 30 March 2007 and ratified on 31 July 2012.
- 10 See eg Malawi's Disability Act 8 of 2012; Zambia's Persons with Disabilities Act 6 of 2012; Kenya's Persons with Disabilities Act, Ch 133; Uganda's Persons with Disabilities Act 20 of 2006; Tanzania's Persons with Disabilities Act 9 of 2010; and Ghana's Persons with Disabilities Act 715 of 2006.
- 11 The national implementation measures could include other statutes that are not disability specific, policies, programmes, action plans, budgetary allocation, appropriate institutional or administrative mechanism, and others. See art 4 of CRPD. However, the chapter focuses on disability-specific legislation as one of the legislative tools for implementing the rights of persons with disabilities at the domestic level.

implementing the rights. In addition, it is only when states ensure the actual implementation of such disability-specific statutes and other implementation measures (in practice) that they will be able to fully utilise the opportunities for poverty eradication that CRPD provides. Accordingly, the chapter proceeds on the premise that, as a first step, African state parties to CRPD must ensure that the disability-specific legislation that they enact (in addition to other implementation measures that they take) must conform to CRPD's standards in order to be in 'a feasible' position to make use of the opportunities for poverty eradication provided by CRPD. The second and equally crucial step requires states to actually implement in practice the disability-specific statutes and any other measures taken that conform to CRPD standards. However, in accordance with its aims and scope, the chapter deals only with assessing the extent to which the three African states that the chapter has selected (Malawi, Zambia and Tanzania) can be said to have taken this first step, namely, enacting disability-specific statutes that conform to the CRPD's standards for implementing the selected socio-economic rights.

In setting out to achieve its objectives, the chapter briefly explains the link between poverty and disability, on the one hand, and the enjoyment of human rights, on the other. It thereafter analyses the opportunities that CRPD's substantive socio-economic rights of equality and non-discrimination (which is both a civil and political right and a socio-economic right), education, employment and social protection provide for eradicating poverty among persons with disabilities.<sup>12</sup> In this regard the chapter outlines some of the principal standards that CRPD sets for implementing these rights. It further discusses the obstacles that persons with disabilities face in exercising these rights and analyses the legal interventions that exist in selected African disability-specific statutes for implementing these socio-economic rights. The chapter also makes an assessment of the extent to which the provisions in such statutes conform to the pertinent principal standards under CRPD. It concludes with the pertinent findings and proposed recommendations.

## **2 Poverty, disability and human rights link in Africa**

### **2.1 Persons with disabilities in Africa: Among the poorest of the poor**

The Committee on the Rights of Persons with Disabilities (CRPD Committee), which monitors the implementation of CRPD, on various occasions has bemoaned the fact that persons with disabilities throughout

12 The choice of this set of rights is explained in 2.2 below.

the world live in conditions of abject poverty.<sup>13</sup> The Committee has highlighted this, among others, through the various Concluding Observations it has issued following the examination of state party reports submitted to it. For example, the Committee has raised the following concerns, following observations, regarding the poverty situation in a number of countries:

- Over 80 per cent of persons with disabilities live in poverty or extreme poverty and very few receive the solidarity allowance according to the Observations on Bolivia.<sup>14</sup>
- Almost 15 per cent of persons with disabilities in Canada live in poverty or extreme poverty.<sup>15</sup>
- The rate of employment of persons with disabilities in Ethiopia is very low, which increases the risk of poverty and segregation.<sup>16</sup>
- In Ethiopia 95 per cent of persons with disabilities live in poverty, and there are only a few programmes that specifically target persons with disabilities and cover disability-related expenses.<sup>17</sup>
- A high number of persons with disabilities live in poverty, especially women, children, Afro-Hondurans and indigenous people in Honduras.<sup>18</sup>
- The situation of poverty is deplorable in households with persons with disabilities both in rural and urban areas and in particular among persons with disabilities in ethnic minority groups in Kenya.<sup>19</sup>
- The majority of persons with disabilities live in poverty, especially in rural and remote areas in the Republic of Moldova, and the available social allowances are insufficient to cover the minimum necessary for an adequate standard of living.<sup>20</sup>
- There is a lack of support services of any kind for persons with disabilities in Portugal who, as a result of the implementation of austerity measures, are forced to live in poverty or extreme poverty in the absence of family support or assistance networks.<sup>21</sup>
- Large numbers of persons with disabilities live below the poverty line in Slovakia, including Roma and ethnic minority families who have a family member with a disability.<sup>22</sup>
- Large numbers of persons with disabilities live in situations of poverty in Thailand, particularly those belonging to ethnic minority groups, those in single parent-headed households and in families where parents on a full-

13 See eg CRPD Committee 'Concluding Observations on the Initial Report of Ethiopia' (UN Doc CRPD/C/ETH/CO/1 (4 November 2016) para 61.

14 CRPD Committee 'Concluding Observations on the Initial Report of Plurinational State Bolivia' UN Doc CRPD/C/BOL/CO/1 (4 November 2016) para 63.

15 CRPD Committee 'Concluding Observations on the Initial Report of Canada' UN Doc CRPD/C/CAN/CO/1 (8 May 2017) para 49.

16 CRPD Committee 'Concluding Observations on Ethiopia' (n 13) para 59.

17 CRPD Committee 'Concluding Observations on Ethiopia' (n 13) para 61.

18 CRPD Committee 'Concluding Observations on the Initial Report of Honduras' UN Doc CRPD/C/HND/CO/1 (4 May 2017) para 59.

19 CRPD Committee 'Concluding Observations on the Initial Report of Kenya' UN Doc CRPD/C/KEN/CO/1 (30 September 2015) para 49.

20 CRPD Committee 'Concluding Observations on the Initial Report of the Republic of Moldova' UN Doc CRPD/C/MDA/CO/1 (18 May 2017) para 50.

21 CRPD Committee 'Concluding Observations on the Initial Report of Portugal' UN Doc CRPD/C/PRT/CO/1 (20 May 2016) (2017) para 53.

22 CRPD Committee 'Concluding Observations on the Initial Report of Slovakia' UN Doc CRPD/C/SVK/CO/1 (17 May 2016) para 75.

time basis care for a child with disabilities.<sup>23</sup>

It thus is evident that the problem of poverty affects persons with disabilities across the globe – it is a universal problem, a situation that is of great concern to the CRPD Committee, as explained above. The situation is worse when it comes to persons with disabilities in Africa, a position highlighted by the CRPD Committee<sup>24</sup> where, for example, 95 per cent of persons with disabilities in Ethiopia live in poverty, as observed above.<sup>25</sup> Indeed, various studies have found that poverty is prevalent among persons with disabilities in Africa, as it is in developing countries at large.<sup>26</sup> A research study conducted in nine Southern African countries, namely, Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Zambia and Zimbabwe, revealed that in these countries ‘poverty is the frame within which the entire discussion of disability and disability rights must be set’ since most persons with disabilities ‘fall into the category of the poorest of the poor’.<sup>27</sup>

Generally, studies have confirmed that ‘[i]n low-income countries, persons with disabilities belong to the poorest of the poor’.<sup>28</sup> The Committee on the Rights of the Child (CRC Committee) has noted that over 80 per cent of persons with disabilities in the world live in developing countries with little or no access to services.<sup>29</sup> The United Nations Children’s Fund (UNICEF) (originally known as the United Nations International Children’s Emergency Fund) also reported that ‘[a] disproportionate number of all persons living in poverty in developing countries are persons with disabilities’.<sup>30</sup> Finally, the World Bank through its studies reported that half a billion persons with disabilities are ‘indisputably amongst the poorest of the poor and are estimated to comprise 15-20% of the poorest in developing countries’.<sup>31</sup> Various explanations have been given

23 CRPD Committee ‘Concluding Observations on the Initial Report of Thailand’ UN Doc CRPD/C/THA/CO/1 (12 May 2016) (2016) para 55.

24 The CRPD Committee has also decried this poverty situation in its Concluding Observations issued after examining states party reports submitted by a number of African countries. See eg ‘Concluding Observations on the Initial Report of Ethiopia’ (n 13) para 61; ‘Concluding Observations on the Initial Report of Kenya’ (n 19) para 49; CRPD Committee ‘Concluding Observations on the Initial Report of Uganda’ UN Doc CRPD/C/UGA/CO/1 (12 May 2016) para 24.

25 ‘Concluding Observations on the Initial Report of Ethiopia’ (n 13) para 61.

26 See Infocus Programme on Skills, Knowledge and Employability/Disability Programme and International Labour Office ‘Disability and poverty reduction strategies: How to ensure that access of persons with disabilities to decent and productive work is part of the PRSP Process’ (2002) 168 *Gladnet Collection Paper 4*, <http://digitalcommons.ilr.cornell.edu/gladnetcollect/168> (accessed 27 April 2014); S Mitra et al *Disability and poverty in developing countries: A snapshot from the World Health Survey* (2011) iv; S Mitra et al ‘Disability and poverty in developing countries: A multidimensional study’ (2013) 41 *World Development* 2 11.

27 H Kotzé (Commissioned by OSISA) *Status of disability rights in Southern Africa* (2012) 5 6.

28 Infocus Programme (n 26) 1.

29 CRC Committee General Comment 9 ‘The rights of children with disabilities’ UN Doc CRC/C/GC/9 (7 February 2007) para 1.

30 UNICEF *Children and young people with disabilities: Fact Sheet* (2013) 16.

31 See SJ Peters ‘Review of marginalisation of people with disabilities in Lebanon, Syria

for this poverty situation, including the fact that as a category of people persons with disabilities experience multiple deprivations at higher rates and severity than persons without disabilities.<sup>32</sup> This explanation points towards a link between disability and poverty. For its part, the CRPD Committee in its Statement on the UN Sustainable Development Goals (SDGs) highlighted that '[t]here is ample evidence that persons with disabilities are more likely than persons without disabilities to experience poverty as well as disadvantage, exclusion and discrimination, in all spheres of life'.<sup>33</sup> Furthermore, in its General Comment 5, on independent and community living, the Committee acknowledged that CRPD in its Preamble recognises that many persons with disabilities live in poverty. The Committee highlighted the need to address the impact of poverty on persons with disabilities.<sup>34</sup> This link between poverty and disability is worth further exploration.

## 2.2 Poverty, disability and human rights linkage

Disability and poverty constitute a vicious cycle as there are instances where disability leads to poverty and poverty also leads to disability.<sup>35</sup> Poverty might lead to factors that cause 'preventable' impairments such as diseases, including maternal and prenatal diseases, malnutrition, injuries and a failure to afford quality healthcare services.<sup>36</sup> In addition, persons with disabilities face obstacles that lead to or perpetuate poverty such as discrimination and marginalisation in society, and a lack of access to crucial services such as education, employment and healthcare facilities.<sup>37</sup> In this regard, UNICEF has observed that 'poverty and disability reinforce each other, contributing to increased vulnerability and exclusion'.<sup>38</sup> With regard to children, UNICEF has found that poor children 'are more likely to become disabled through poor healthcare, malnutrition, lack of

and Jordan. Background paper prepared for the Education for All Global Monitoring Report' (2010) 6, <http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Beirut/pdf/Background%20paper%20EFA%202010-Marginalization%20in%20Jordan%20Syria%20and%20Lebanon.pdf> (accessed 27 April 2015).

32 Mitra et al (n 26) 11.

33 CRPD Committee 'Statement on Sustainable Development Goals, Addressed to the Eighth Session of the Open Working Group on Sustainable Development Goals by the Committee on the Rights of Persons with Disabilities' (2014), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=14211&LangID=E> (accessed 9 August 2019).

34 See CRPD Committee General Comment 5: 'Living independently and being included in the community' UN Doc CRPD/C/GC/5 (27 October 2017) para 5, where the Committee highlights that '[s]tates parties recognise that many persons with disabilities live in poverty and stress the need to address the impact of poverty'.

35 See General Comment 9 (n 29) para 3; UNICEF (n 30) 6 16; Tesema (n 1) 122-123; S Mitra (Disability World) 'Disability: The hidden side of African poverty', [http://www.disabilityworld.org/01-03\\_04/news/africa.shtml](http://www.disabilityworld.org/01-03_04/news/africa.shtml) (accessed 27 April 2015).

36 See UNICEF (n 30) 6 16; Mitra et al (n 26) 10; N Groce et al *Poverty and disability: A critical review of the literature in low and middle-income countries* (2011) 4; Mitra (n 35).

37 See UNICEF (n 30) 6 & 16; Tesema 'Economic discourse of disability in Africa: An overview of lay and legislative narratives' (2014) *African Disability Rights Yearbook* (n 1 above) 122.

38 See UNICEF (n 30) 6.

access to clean water and basic sanitation, dangerous living and working conditions' and that, after acquiring the disabilities, 'they are more likely to be denied basic resources that would mitigate or prevent deepening poverty'.<sup>39</sup> Accordingly, poverty is both a major cause and consequence of disability.<sup>40</sup> As a result, where there are higher poverty levels, there will also be higher disability rates and *vice versa*.

The foregoing discussion further shows that the failure by persons with disabilities to access basic services such as education and employment and social protection amenities, coupled with discrimination against them exacerbates the poverty situation. Education, employment; social protection and equality (non-discrimination) are recognised as substantive rights of persons with disabilities under CRPD, as is discussed in part 3 below. Therefore, the failure to exercise these rights by persons with disabilities contributes to this poverty situation. Indeed, CRPD Committee expressed concern over the very low rate of employment of persons with disabilities in Ethiopia, a development which according to the Committee 'increases the risk of poverty and segregation'.<sup>41</sup>

For its part, the recently-adopted Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) in its Preamble expressly states that the Protocol was also adopted on 'noting that persons with disabilities experience extreme levels of poverty'.<sup>42</sup> The African Disability Protocol further in its Preamble states that African Union (AU) member states were '[c]oncerned at the multiple forms of discrimination, high levels of poverty and the great risk of violence, exploitation, neglect and abuse that women and girls with disabilities face'.<sup>43</sup> It is thus acknowledged that AU member states by adopting the African Disability Protocol had realised the link between poverty, disability and human rights. They thus sought to utilise the realisation of the human rights of persons with disabilities in Africa in order to address the poverty situation facing persons with disabilities in Africa. Indeed, the Disability Protocol also contains rights such as equality and non-discrimination,<sup>44</sup> inclusive quality education,<sup>45</sup> work<sup>46</sup> and social protection.<sup>47</sup> Consequently, it will be appreciated that there is a strong link between poverty, disability and the enjoyment of human rights by persons with disabilities.

It is crucial that African countries such as Malawi, Zambia and Tanzania

39 As above.

40 See General Comment 9 (n 29) para 3; KJ Alam 'Impact of the global economic crisis and disability and poverty in developing countries', [www.un.org/disabilities/documents/COP/alam.doc](http://www.un.org/disabilities/documents/COP/alam.doc) (accessed 27 April 2015).

41 'Concluding Observations on the Initial Report of Ethiopia' (n 13) para 59.

42 See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, adopted on 29 January 2018, Preamble para 15.

43 African Disability Protocol (n 42) Preamble para 16.

44 Non-discrimination (art 5); equality (art 6); equal recognition before the law (art 7).

45 Art 16(3).

46 Art 19.

47 Arts 20(1) & (2)(b).

that are party to CRPD must ensure the appropriate implementation of the rights of persons with disabilities that are contained in CRPD. The implementation must be done in the way required by CRPD. This would increase the likelihood of having poverty reduced. Indeed, as will be demonstrated below,<sup>48</sup> CRPD provides opportunities for eradicating poverty among persons with disabilities through its rights guarantees. These three African states that are parties to CRPD can achieve this by, among others, using their disability-specific legislation to implement the human rights guarantees under CRPD, in particular the four socio-economic rights identified in this chapter. It is thus relevant to explore the extent to which the provisions in selected African disability statutes reflect the principal standards that CRPD sets for these rights in order to utilise these opportunities.

### **3 Utilising the opportunities from CRPD in countering obstacles relating to disability and poverty in Africa**

A number of African countries, including the three states mentioned above, have ratified CRPD.<sup>49</sup> As explained above, these three African states also have disability-specific legislation. The three countries enacted their disability-specific legislation after 2008 when the CRPD entered into force. The focus of the chapter is on such disability-specific statutes, enacted post-2008 after the adoption of CRPD. The chapter therefore examines disability-specific legislation in Malawi (the Disability Act of 2012);<sup>50</sup> Zambia (the Persons with Disabilities Act of 2012); and the Tanzanian Persons with Disability Act of 2010.<sup>51</sup> It is expected that the legislation must conform to CRPD's standards for implementing equality and non-discrimination, education, employment and social protection.<sup>52</sup> This is the case since, as explained above, and as will be highlighted below, the appropriate implementation of these rights could play a crucial role in addressing the poverty debacle in Africa, including in the three

48 The explanation is contained in 3 below.

49 See the countries listed in Part 1 above.

50 Malawi is in the process of enacting new consolidated disability legislation that will replace the Disability Act of 2012 and the handicapped Persons Act of 1971. The Disability Bill 2018 has been drafted for this purpose. See Malawi government's Ministry of Gender, Children, Disability and Social Welfare, Persons with Disabilities Bill, 2019, version of 8 November 2018. When enacted into law, the Bill will address most of the shortfalls explained below.

51 It is worth noting that of these three countries, only Malawi has submitted its initial state party report to CRPD Committee. The initial report was combined with the second state report. See CRPD Committee 'Combined initial and second periodic reports submitted by Malawi under article 35 of the Convention, due in 2016' UN Doc CRPD/C/MWI/1-2 (18 March 2019). The report, among others, lists national policies such as the Vision 2020, the Malawi Poverty Reduction Strategy Paper (MPRSP) and the Malawi Growth and Development Strategy (MGDS), which aim at reducing poverty. See para 10 of the state report. The Committee was yet to adopt the Concluding Observations on the report as of March 2020.

52 CRPD also recognises the right to an adequate standard of living alongside the right to social protection.



countries mentioned. The appropriate rights implementation could also address the obstacles faced by persons with disabilities with regard to non-discrimination, employment, education and earning a livelihood.<sup>53</sup> These obstacles exacerbate the poverty conundrum.

### 3.1 Fostering equality and non-discrimination to reduce poverty

#### 3.1.1 Equality standards under CRPD

CRPD guarantees the right to equality and non-discrimination in article 5 where it sets out four obligations. First, it obliges state parties to ensure equality under the law and equality as a social goal.<sup>54</sup> Second, it obliges states to, among others, provide legal protection against discrimination in legislation.<sup>55</sup> Third, it requires the provision of reasonable accommodation to achieve substantive equality for persons with disabilities.<sup>56</sup> It is worth noting that the CRPD Committee, through its Concluding Observations, emphasises that state parties must explicitly recognise the failure to provide reasonable accommodation as constituting disability-based discrimination in their national laws.<sup>57</sup> In its General Comment 6, which

53 The explanation with respect to each of these four substantive rights is respectively contained in 3.1, 3.2, 3.3 & 3.4 below.

54 Art 5(1); M Schulze *Understanding the UN Convention on the Rights of Persons with Disabilities* (2010) 61.

55 Art 5(2). See eg CRPD Committee 'Concluding Observations on the Initial Report of Armenia' UN Doc CRPD/C/ARM/CO/1 (8 May 2017) para 8; CRPD Committee 'Concluding Observations on the Initial Report of Thailand' (n 23) para 14; CRPD Committee 'Concluding Observations on the Initial Report of Australia' UN Doc CRPD/C/AUS/CO/1 (21 October 2013) para 15.

56 Art 5(3); CRPD Committee Communication 3/2011, *HM v Sweden* (2011); R Kayess & P French 'Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 19.

57 See eg CRPD Committee 'Concluding Observations on the Initial Report of Italy' UN Doc CRPD/C/ITA/CO/1 (6 October 2016) para 10; 'Concluding Observations on the Initial Report of Armenia' (n 55) para 8; 'Concluding Observations on the Initial Report of Honduras' (n 18) para 14; CRPD Committee 'Concluding Observations on the Initial Report of Bosnia and Herzegovina' UN Doc CRPD/C/BIH/CO/1 (2 May 2017) para 11(c); CRPD Committee 'Concluding Observations on the Initial Report of Colombia' UN Doc CRPD/C/COL/CO/1 (30 September 2016) para 15(a); 'Concluding Observations on the Initial Report of Ethiopia' (n 13) para 10; CRPD Committee 'Concluding Observations on the Initial Report of Jordan' UN Doc CRPD/C/JOR/CO/1 (15 May 2017) para 1a; 'Concluding Observations on the Initial Report of Kenya' (n 19) para 10(b); CRPD Committee 'Concluding Observations on the Initial Report of Mauritius' UN Doc CRPD/C/MUS/CO/1 (30 September 2015) para 10; 'Concluding Observations on the Initial Report of Portugal' (n 21) para 14; 'Concluding Observations on the Initial Report of Slovakia' (n 22) para 18; 'Concluding Observations on the Initial Report of Thailand' (n 23) para 14; 'Concluding Observations on the Initial Report of Uganda' (n 24) para 9(c); CRPD Committee 'Concluding Observations on the Initial Report of United Arab Emirates' UN Doc CRPD/C/ARE/CO/1 (3 October 2016) para 12(a); CRPD Committee 'Concluding Observations on the Initial Report of Argentina' UN Doc CRPD/C/ARG/CO/1 (8 October 2012) para 12; CRPD Committee 'Concluding Observations on the Initial Report of El Salvador' UN Doc CRPD/C/SLV/CO/1 (8 October

relates to equality and non-discrimination, the Committee also highlights the significance of the duty to provide reasonable accommodation.<sup>58</sup> Lastly, it (CRPD) expects states to take specific measures, which include ‘temporary (affirmative action) special measures’, to foster *de facto* equality.<sup>59</sup> Thus, CRPD in article 5 emphasises substantive equality.<sup>60</sup> In terms of the benchmark to be complied with by African state parties in taking poverty reduction measures, the chapter focuses on the prohibition of all forms of disability-based discrimination, the requirement to provide reasonable accommodation and the obligation to take temporary specific measures, including affirmative action, as CRPD’s crucial standard(s) relating to substantive equality.

It must be highlighted that the CRPD Committee has explained the significance of ensuring equality and non-discrimination in the quest to reduce poverty among persons with disabilities within the framework of the SDGs.<sup>61</sup> The Committee’s statement requests the Open Working Group on Sustainable Development Goals to ‘stress that equality and non-discrimination are reflected as cross-cutting issues in the post-2015 development framework’.<sup>62</sup> In its General Comment 3, relating to women and girls with disabilities, the Committee highlighted that ‘poverty is both a compounding factor and the result of multiple discrimination’.<sup>63</sup> Hence, ensuring equality and non-discrimination would play a crucial role in addressing poverty. Indeed, the CRPD Committee has highlighted the role played by equality in the realisation of Goal 10 of the Sustainable Developmental Goals (reducing inequality within and among countries).<sup>64</sup>

2013) para 14; CRPD Committee, ‘Concluding Observations on the Initial Report of Azerbaijan’ UN Doc CRPD/C/AZE/CO/1 (12 May 2014) para 14.

58 See eg CRPD Committee General Comment 6: ‘Equality and non-discrimination’ UN Doc CRPD/C/GC/6 (26 April 2018) para 26, where the Committee states in (e) that ‘[e]nsuring that the reasonable accommodation is suitable to achieve the essential objective of the promotion of equality and the elimination of discrimination against persons with disabilities’.

59 Art 5(4). Schulze (n 54) 63; CRPD Committee ‘Concluding Observations on the Initial Report of El Salvador’ (n 57) paras 15 & 16.

60 See generally L Waddington ‘Breaking new ground: The implication of ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community’ in OM Arnardóttir & G Quinn (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (2009) 116.

61 See eg CRPD Committee Statement on the UN SDGs (n 33).

62 As above.

63 CRPD Committee General Comment 3: ‘Women and girls with disabilities’ UN Doc CRPD/C/GC/3 (25 November 2016) para 59.

64 See eg CRPD Committee, ‘Concluding Observations on the Initial Report of Plurinational State Bolivia’ (n 14) para 14 ‘Concluding Observations on the Initial Report of Colombia’ (n 57) para 15(d); CRPD Committee ‘Concluding Observations on the Initial Report of Cyprus’ UN Doc CRPD/C/CYP/CO/1 (8 May 2017) para 14; ‘Concluding Observations on the Initial Report of Ethiopia’ (n 13) para 12; CRPD Committee ‘Concluding Observations on the Initial Report of Guatemala’ UN Doc CRPD//C/GTM/CO/1 (30 September 2016) para 18; ‘Concluding Observations on the Initial Report of Italy’ (n 57) para 12; ‘Concluding Observations on the Initial Report of United Arab Emirates’ (n 57) para 12(d).

### 3.1.2 *Domestic obstacles and interventions regarding non-discrimination in Africa*

A study by Kotzé on countries in Southern Africa has summarised the obstacle(s) relating to discrimination by observing that persons with disabilities in many societies 'suffer neglect and discriminatory attitudes and practices, and frequently find themselves on the very lowest rung of the societal ladder'.<sup>65</sup> Similarly, it has been observed that in South Africa persons with disabilities continue to experience discrimination and are 'pushed to the margins of society'.<sup>66</sup> The Committee on Economic, Social and Cultural Rights (ESCR Committee) in its General Comment 5, relating to persons with disabilities, has observed that disability-based discrimination largely prevails in many crucial sectors, particularly 'in the fields of education, employment, housing, transport, cultural life, and access to public places and services'.<sup>67</sup> Discrimination contributes to a gap in employment between persons with and without disabilities.<sup>68</sup> There is also discrimination in relation to social protection measures. UNICEF has noted in its 2013 fact sheet on children and young people with disabilities that '[m]any health insurance schemes discriminate against persons with disabilities, on grounds of the cost of their health care'.<sup>69</sup>

Discrimination against children with disabilities is also prevalent in many African countries. For example, children with disabilities in Malawi experience discrimination from birth on the grounds of their disability.<sup>70</sup> Similarly, children with disabilities in South Africa constitute one of the specific categories (of persons with disabilities) that are victims of past and existing inequalities due to discrimination on the grounds of disability.<sup>71</sup> Above all, in many jurisdictions in Africa the perception on the basis of culture and religion is also reflected in the attitude towards persons with disabilities and prevalent in legislation, resulting in discrimination against persons or children with disabilities.<sup>72</sup> Accordingly, discrimination against persons/children with disabilities also accounts for the conditions of abject poverty in which they often live. Indeed, a report by Human Rights Watch has highlighted that '[d]iscrimination can both cause poverty and

65 Kotzé (n 27) 14.

66 'Disabled living in poverty – Study' News24 14 May 2010, <http://www.news24.com/SouthAfrica/News/Disabled-living-in-poverty-study-20100514> (accessed 2 April 2015).

67 See ESCR Committee General Comment 5 'Persons with disabilities' UN Doc/E/1995/22 (9 December 1994) para 15.

68 S Mizunoya & S Mitra 'Is there a disability gap in employment rates in developing countries?' (2013) 42 *World Development* 29.

69 UNICEF (n 30) 16.

70 See Malawi government National Policy on the Equalisation of Opportunities for Persons with Disabilities (Equalisation Policy) (2005) 4.

71 See eg Government of the Republic of South Africa Integrated National Disability Strategy (INDS) (1997) 12.

72 See eg I Grobbelaar-Du Plessis & T van Reenen 'Introduction to aspects of disability law in Africa' in I Grobbelaar-Du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) xvi; M Jones & LA Marks 'Law and the social construction of disability' in M Jones & AB Marks (eds) *Disability, diversity and legal change* (1999) 3.

be a hurdle in alleviating poverty'.<sup>73</sup>

A glance at the legal interventions contained in the selected domestic disability legislation presents a 'mixed bag' of hope and gloom. First, the Malawi Disability Act prohibits discrimination in the enjoyment of certain specified substantive rights,<sup>74</sup> while not doing the same with regard to other substantive rights.<sup>75</sup> Furthermore, the Act does not impose the obligation to provide reasonable accommodation in ensuring equality and non-discrimination, but only with respect to facilitating 'access for persons with disabilities to the premises or service or amenity' pursuant to a court order.<sup>76</sup> The Act also does not require the taking of specific measures such as affirmative action to achieve substantive equality for persons with disabilities. This contradicts CRPD's standards discussed above. Nonetheless, Malawi has drafted the Persons with Disabilities Bill that seeks to enact consolidated disability legislation.<sup>77</sup> The definition of discrimination in section 2 of the Bill recognises the denial of reasonable accommodation as constituting discrimination. Section 19 provides an umbrella prohibition of discrimination and also imposes the obligation to provide reasonable accommodation. Therefore, the Bill will address some of the drawbacks in the Disability Act 2012 when enacted into law in terms of the standards relating to equality and non-discrimination.

For its part, Zambia's Persons with Disabilities Act 2012 provides for non-discrimination in section 6 of the Act which states that '[a] person shall not discriminate against a person with disability on the basis of disability'.<sup>78</sup> It also recognises non-discrimination as one of the general principles contained in section 4.<sup>79</sup> The Act expressly recognises the denial of reasonable accommodation as constituting disability-based discrimination,<sup>80</sup> thereby complying with the equality standard under CRPD. However, the anti-discrimination provision in section 6 makes no

73 HumanRightsWatch *Discrimination, inequality, and poverty: A human rights perspective* (2013), <http://www.hrw.org/news/2013/01/11/discrimination-inequality-and-poverty-human-rights-perspective> (accessed 27 April 2015).

74 See sec 7 (prohibition of discrimination in healthcare services); sec 9 (accessibility without discrimination); sec 11 (education without discrimination); sec 13 (employment without discrimination); sec 15 (prohibition of discrimination in social support services); sec 18 (prohibition of discrimination in political or public life); sec 20 (prohibition of discrimination in sporting or cultural activities or recreational services); sec 22 (prohibition of discrimination in housing and land issues).

75 See eg sec 16 (right of association and representation); sec 25 (right to information and communication technologies); sec 11 (education without discrimination); sec 13 (employment without discrimination); sec 15 (prohibition of discrimination in social support services); sec 18 (prohibition of discrimination in political or public life); sec 20 (prohibition of discrimination in sporting or cultural activities or recreational services); sec 22 (prohibition of discrimination in housing and land issues).

76 See Malawi Disability Act (n 10) sec 9(3). See generally EM Chilemba 'The right to primary education of children with disabilities in Malawi: A diagnosis of the conceptual approach and implementation' (2013) *African Disability Rights Yearbook* 21-22; EM Chilemba 'Malawi' (2014) *African Disability Rights Yearbook* 223-226.

77 Malawi government's Ministry of Gender, Children, Disability and Social Welfare, Persons with Disabilities Bill, 2019, version of 8 November 2018.

78 See Persons with Disabilities Act 6 of 2012, sec 6(1).

79 See sec 4(b).

80 See sec 2.

reference to the concept of temporary specific measures such as affirmative action for fostering *de facto* equality.<sup>81</sup>

Finally, the Persons with Disabilities Act of Tanzania in section 6 prohibits all forms of discrimination on the basis of disability.<sup>82</sup> It further requires the provision of reasonable accommodation, to which it refers as reasonable changes,<sup>83</sup> for purposes of promoting equality and eliminating discrimination.<sup>84</sup> It also defines discrimination as including the denial of reasonable accommodation.<sup>85</sup> This complies with the pertinent CRPD standards.<sup>86</sup> Furthermore, the Act defines the term '[to] discriminate' as including the 'failure to effect affirmative action' in section 3(d),<sup>87</sup> thereby recognising the duty to take affirmative action measures to achieve equality. The Act thus complies with all the equality and non-discrimination standards under CRPD. Consequently, the disability laws of Zambia and Tanzania contain a number of positive aspects, while the Malawian Act falls below CRPD's standards relating to equality and non-discrimination.

## 3.2 Fostering inclusive education to eradicate poverty

### 3.2.1 *Inclusive education standards under CRPD*

CRPD in article 24 makes provision for the socio-economic right to education for persons with disabilities and sets out the pertinent standards. Significantly, the standards emphasise the principle of inclusion through what could be described as the 'inclusive schools approach' to the conceptualisation of inclusive education for persons with disabilities.<sup>88</sup> This is because CRPD expects measures to be taken which ensure that, as a priority, persons with disabilities should attain an education in the general/mainstream education system together with other persons.<sup>89</sup>

81 The provision on employment (discussed in 3.3 below) recognises the role of affirmative action.

82 Sec 6(b). See also sec 5(1)(d).

83 The Act defines reasonable changes as opposed to reasonable accommodation in sec 3 in the manner as the definition of reasonable accommodation in art 2 of CRPD.

84 Sec 6(c).

85 Sec 3.

86 These are briefly explained in the first part of 3.1 above.

87 Sec 3(d).

88 See the text of the opening para of art 24(1).

89 See CRPD art 24(2)(a); Schulze (n 54) 135; CRPD Committee 'Concluding Observations on the Initial Report of Sweden' UN Doc CRPD/C/SWE/CO/1 (12 May 7 2014) para 48; 'Concluding Observations on the Initial Report of Azerbaijan' (n 57) para 40; 'Concluding Observations on the Initial Report of Australia' (n 55) para 45; CRPD Committee 'Concluding Observations on the Initial Report of Austria' UN Doc CRPD/C/AUT/CO/1 (30 September 2013) para 40. The inclusive schools approach is the direct opposite of the special schools approach, which broadly advocates the provision of education to persons with disabilities in separate/segregated settings. For further discussion of inclusive education and other approaches to education of learners with disabilities, see WHO & World Bank World report on disability (2011) 210 211; Chilemba (n 76) 8-11; B Byrne 'Hidden contradictions and conditionality: Conceptualisations of inclusive education in international human rights law' (2013)

Thus, a number of the core elements of the right to inclusive education under CRPD's article 24 and, in particular, the elements listed in article 24(2),<sup>90</sup> reinforce the need for persons with disabilities to attend mainstream schools in the communities in which they live together with other persons.<sup>91</sup> The CRPD Committee has emphasised this in its General Comment 4,<sup>92</sup> relating to the right to inclusive education.<sup>93</sup> Consequently, the CRPD Committee has persistently and expressly recommended that state parties should move away from the special schools and integrated education and embrace inclusive schools.<sup>94</sup> In terms of the benchmark to be complied with by African state parties in taking poverty reduction measures, the chapter focuses on the recognition of inclusive education as envisaged under CRPD as a significant standard.

The CRPD Committee has emphasised the relevance of inclusive education guaranteed in article 24 to the issue of poverty among persons with disabilities in General Comment 4. Amongst others, the Committee pointed out that '[i]nclusive education is to be understood as ... a means of realising other human rights. It is the primary means by which persons with disabilities can lift themselves out of poverty.'<sup>95</sup>

Indeed, the CRPD Committee emphasises that inclusive education would foster the implementation of Goal 4 of the Sustainable Development Goals.<sup>96</sup> This goal, relating to quality education, actually makes reference to inclusive education. The goal seeks to ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.

28 *Disability and Society* 232.

90 See CRPD, art 24(2)(a)-(e).

91 See eg art 24(2)(a). See also CRPD Committee 'Concluding Observations on the Initial Report of Thailand' (n 23) para 46.

92 CRPD Committee General Comment 4: 'The right to inclusive education', UN Doc CRPD/C/GC/4 (25 November 2016).

93 See General Comment 4 (92) para 8, where the Committee states: 'In accordance with article 24(1), states parties must ensure the realization of the right of persons with disabilities to education through an inclusive education system at all levels.' See also para 11, where it cautions: 'Placing students with disabilities within mainstream classes without accompanying structural changes to, for example, organization, curriculum and teaching and learning strategies, does not constitute inclusion.'

94 See eg CRPD Committee 'Concluding Observations on the Initial Report of Kenya' (n 19) para 44(a); 'Concluding Observations on the Initial Report of Mauritius' (n 57) para 43; 'Concluding Observations on the Initial Report of Slovakia' (n 22) paras 68(b) & (e); 'Concluding Observations on the Initial Report of Uganda' (n 24) para 49(a); 'Concluding Observations on the Initial Report of United Arab Emirates' (n 57) para 44; 'Concluding Observations on the Initial Report of Argentina' (n 57) paras 37 & 38; CRPD Committee 'Concluding Observations on the Initial Report of China' UN Doc CRPD/C/CHN/CO/1 (15 October 2012) paras 35 & 36. There are a number of obligations listed under art 24 for implementing inclusive education. These include the provision of reasonable accommodation and individualised support. However, a discussion of these obligations does not fall within the scope of this chapter.

95 General Comment 4 (n 92) para 10.

96 See eg CRPD Committee 'Concluding Observations on the Initial Report of Guatemala' (n 64) para 60(d); 'Concluding Observations on the Initial Report of Italy' (n 57) para 56; 'Concluding Observations on the Initial Report of Portugal' (n 21) para 46; CRPD Committee 'Concluding Observations on the Initial Report of Serbia' UN Doc CRPD/C/SRB/CO/1 (23 May 2016) para 50; 'Concluding Observations on the Initial Report of Slovakia' (n 22) para 68.

### 3.2.2 *Domestic obstacles and interventions regarding (inclusive) education in Africa*

Persons with disabilities in Africa face many obstacles that prevent them from accessing and attaining an education on an equal basis with others. A study in Southern Africa has revealed that children with disabilities often do not attend school, or they are prevented from doing so due to stigma, discriminatory attitudes and practices.<sup>97</sup> In the same vein it has been found that the majority of children with disabilities in Zimbabwe do not access education.<sup>98</sup> Similarly, it has been documented by the Malawian government that almost 98 per cent of children with disabilities in Malawi do not obtain an education.<sup>99</sup> For its part, the CRC Committee has noted that '[t]he majority of children with disabilities in developing countries remain out of school and are completely illiterate'.<sup>100</sup> The dynamics contributing to this include the fact that 'some countries still have legislation declaring certain categories of children to be "uneducable"'.<sup>101</sup> In addition, UNICEF has observed that '[m]ost schools throughout the world are physically inaccessible ... including inaccessible hygiene and sanitation facilities, systems for enhancing communication, appropriate equipment and materials, and transportation'.<sup>102</sup>

A report by UNICEF on Malawi has observed that the challenges related to access to education for persons/children with disabilities include a failure to send children with disabilities to school for various reasons such as a lack of proper care at school and education being deemed irrelevant to children with disabilities; unfriendly education systems; a lack of specialist teachers and inclusive education-oriented teachers, specific teaching and learning materials; unfair examination systems; unfriendly school environment – inaccessible classrooms, playgrounds and toilets; a lack of assistive devices, guides or assistants; voluntary withdrawal due to, among others, inadequate care in the case of certain disabilities; and a lack of accommodation in 'special needs education' institutions.<sup>103</sup> These obstacles may be attributed to the failure to implement 'inclusive education', discussed above. Indeed, various obstacles, including legal and cultural challenges, impede access to education by children with disabilities in Cameroon – a situation which is compounded by the lack of facilities that could ensure inclusive primary education.<sup>104</sup>

97 Kotzé (n 27) 14.

98 See eg E Mandipa 'A critical analysis of the legal and institutional frameworks for the realisation of the rights of persons with disabilities in Zimbabwe' (2013) *African Disability Rights Yearbook* 73 75; R Lang & G Charowa *DFID scoping study: Disability issues in Zimbabwe* (2007) 6.

99 See Malawi government *Equalisation Policy* (n 70) 5.

100 See General Comment 9 (n 29) para 1.

101 See UNICEF (n 30) 21.

102 As above.

103 UNICEF & Malawi government *From exclusion to inclusion: Promoting the rights of children with disabilities in Malawi* (2012) 33.

104 See eg SAD Kanga 'Forgotten or included? Disabled children's access to primary education in Cameroon' (2013) *African Disability Rights Yearbook* 45-47.

The matter of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa & Another*<sup>105</sup> highlights the impact of the failure to implement inclusive education. The matter arose out of a provincial education policy and practice which differentiated between children with ‘severe or profound’ intellectual disabilities and other children, including children with other types of disabilities. The other children with disabilities attended the few available special schools and mainstream schools that had considerable state funding directly provided by the Department of Education. For their part, the children with profound ‘intellectual disabilities’ would receive an education in certain ‘special care centres’, which were receiving very low funding channelled through the Department of Health. As a result, many children with profound intellectual disabilities failed to access education. Both the policy and practice were based on the misconception that the affected children (with severe or profound intellectual disabilities) in some cases were ‘uneducable’. The Court found that every child with a disability is capable of learning and that the state should provide funding for their education. It thus is not surprising that it has been reported that household surveys in 13 developing countries in Africa, Latin America and Southeast Asia found that children with disabilities between six and 17 years of age were less likely to enrol in schools.<sup>106</sup> Furthermore, a study by the UN has observed that 98 per cent of children with disabilities in developing countries do not attend school.<sup>107</sup>

In light of the foregoing discussion, it may be concluded that there is a link between disability and the lack of access to education; which leads to or proliferates poverty. Indeed, a UNESCO study has observed that ‘there is a circular relation between poverty, disability and education’.<sup>108</sup> In this regard it has been highlighted that ‘[a]n adequate education improves the chances of acquiring gainful employment for a disabled person, which in turn opens up a range of possibilities, the most important of which is the chance to escape from poverty and dependency’.<sup>109</sup> Furthermore, the CRPD Committee has observed, as highlighted above, that ‘[i]nclusive education is ... the primary means by which persons with disabilities can lift themselves out of poverty’.<sup>110</sup>

A glance at the legal interventions set out in the selected domestic disability legislation would suggest whether any hope is in sight. First, section 10 of the Disability Act 2012 of Malawi provides for the right to education on the basis of equal opportunity;<sup>111</sup> the obligation to ensure an inclusive education system and lifelong learning; and the obligation

105 2011 (5) SA 87 (WCC); 2011 JDR 0375 (WCC).

106 Mitra et al (n 26) 36.

107 United Nations *From exclusion to equality: Realising the rights of persons with disabilities: A handbook for parliamentarians on the Convention on the Rights of Persons with Disabilities* (2007) 1.

108 Peters (n 31).

109 Kotzé (n 27) 25.

110 General Comment 4 (n 92) para 10.

111 Malawi Disability Act (n 10) sec 10.



to ensure access to quality primary education.<sup>112</sup> Section 10 further emphasises the inclusive schools approach as it guarantees the right of persons with disabilities not to be excluded from the general education system.<sup>113</sup> The emphasis on mainstream education system for persons with disabilities means that the Act is consistent with CRPD's conceptualisation of inclusive education.<sup>114</sup>

For its part, the Persons with Disabilities Act of Zambia requires the minister (responsible for persons with disabilities) to ensure that the education system is inclusive at all levels in collaboration with the minister responsible for education.<sup>115</sup> The minister is also required, after consultation with the minister responsible for education, to ensure, among others,<sup>116</sup> the non-exclusion of persons with disabilities from the general education system on the basis of disability;<sup>117</sup> and access by persons with disabilities to an inclusive, quality and free primary education, secondary education and higher education on an equal basis with others in the communities in which they live.<sup>118</sup> These obligations are consistent with CRPD's standards relating to inclusive education set out in its article 24, as highlighted above.<sup>119</sup> These standards determine that the education must be conceptualised in terms of inclusive education at all levels by emphasising the non-exclusion of persons with disabilities from the general education system. However, the Act also obliges the government to establish special schools for persons with disabilities who 'cannot be enrolled' in inclusive educational institutions 'by reason of their disability'.<sup>120</sup> This position allows for the retention of special schools,<sup>121</sup> contrary to the recommendations and 'standards' advanced by the CRPD Committee discussed above.<sup>122</sup>

Finally, the Persons with Disabilities Act of Tanzania, which is the country's disability-specific legislation, recognises that persons with

112 As above.

113 See sec 10(a), which obliges government to ensure an inclusive education system by '(a) ensuring that persons with disabilities are not excluded from the general education system at all levels ...'

114 The text of the legislative provision (sec 10(a)) is similar to the CRPD provision'.

115 See Zambia's Persons with Disabilities Act (n 10) sec 22(1).

116 The duties are listed in sec 22(2)(a)-(j).

117 Sec 22(2)(a).

118 See sec 22(2)(b).

119 The brief discussion of these standards is contained in the first part of 3.2 above.

120 See sec 23(2). The Act also suggests that learners with intellectual disabilities should only access vocational training as opposed to other forms of education. See sec 22(2)(f).

121 See also sec 25, which allows for the refusal of access to 'inclusive schools' by persons whose disability is assessed as requiring special schools.

122 See the discussion in the first part of 3.2 above. See also General Comment 4 (n 92) paras 8 & 11; CRPD Committee 'Concluding Observations on the Initial Report of Kenya' (n 19) para 44(a); C 'Concluding Observations on the Initial Report of Mauritius' (n 57) para 43; 'Concluding Observations on the Initial Report of Slovakia' (n 22) paras 68(b) & (e); 'Concluding Observations on the Initial Report of Uganda' (n 24) para 49(a); 'Concluding Observations on the Initial Report of United Arab Emirates' (n 57) para 44; 'Concluding Observations on the Initial Report of Argentina' (n 57) paras 37 & 38; 'Concluding Observations on the Initial Report of China' (n 94) paras 35 & 36.

disabilities ‘have same rights to education, training in inclusive settings’.<sup>123</sup> It therefore requires persons with disabilities to attain an education within the mainstream/general education system. This obligation is consistent with the understanding of inclusive education under CRPD, as discussed above.<sup>124</sup> However, the Act recognises that children with disabilities should attend an ordinary public or private school ‘except where a need for special communication is required’.<sup>125</sup> This implies that the Act leaves room for special schools for certain categories of children with disabilities. Indeed, the Act permits the existence or establishment of special schools for persons with disabilities.<sup>126</sup> Nonetheless, it provides that ‘special schools should only be “for [a] transitional period towards inclusive schools”’.<sup>127</sup> To this extent, the Act merely demonstrates partial compliance with the standards for inclusive education under CRPD. Therefore, it is only the Disability Act of Malawi that contains the positive aspect for requiring a single track inclusive education system for persons with disabilities as required by CRPD; whereas the Acts of Malawi and Tanzania contain aspects that conceptualise inclusive education in a way that falls below and/or contradicts the CRPD’s standard.

### 3.3 Enhancing employment in the open labour market to eradicate poverty

#### 3.3.1 Open labour market employment standard under CRPD

CRPD guarantees the socio-economic right to employment in article 27 by emphasising the right of persons with disabilities to work in an open labour market that is inclusive and accessible.<sup>128</sup> Thus, CRPD conceptualises the right to employment in terms of the open labour market model. This model stands parallel to the sheltered or ‘reserved’ employment model, which entails emphasising vocational and/or technical training for persons with disabilities and their employment in factories/industries where they discharge routine or manual jobs.<sup>129</sup> In terms of this model, persons with

123 See Tanzania’s Persons with Disabilities Act (n 10) sec 27(1).

124 See discussion in the first part of 3.2 above.

125 Sec 27(3).

126 Sec 29(2).

127 Sec 29(3).

128 See introductory para of CRPD art 27(1), which provides: ‘States parties recognize the right of persons with disabilities to work, on an equal basis with others ... to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities ...’

129 See eg the Landmark Americans with Disabilities Act Settlement Agreement between the US Department of Justice and Rhode Island involving approximately 3 250 Rhode Islanders with intellectual and developmental disabilities whereby the Islanders agreed to close all sheltered workshops. Justice News Department of Justice Reaches Landmark Americans with Disabilities Act Settlement Agreement with Rhode Island’ 8 April 2014, <http://www.justice.gov/opa/pr/department-justice-reaches-landmark-americans-disabilities-act-settlement-agreement-rhode> (accessed 10 August 2019).

disabilities do not have the freedom to make their own choices regarding employment. On the other hand, the open labour market employment model recognises that persons with disabilities have the right to choose their type, nature, place and manner of work (and to compete for jobs) on an equal basis with others. The CRPD Committee has confirmed that state parties must subscribe to the open labour market employment model and has discouraged sheltered employment.<sup>130</sup>

According to the standards under CRPD, the measures that should be incorporated in disability legislation and other mechanism for implementing the right to employment include adhering to the open labour market employment model,<sup>131</sup> prohibiting discrimination,<sup>132</sup> promoting the employment of persons with disabilities, especially in the private sector, through appropriate policies and measures such as affirmative action programmes and incentives;<sup>133</sup> and ensuring the provision of reasonable accommodation in the workplace,<sup>134</sup> among others.<sup>135</sup> In terms of the benchmark to be complied with by African state parties in taking poverty reduction measures, the chapter focuses on ensuring open labour market employment as set out under CRPD. In the same vein the CRPD Committee emphasises the fact that open labour market employment is crucial in the implementation of Goal 8 of the Sustainable Development Goals (to promote sustained, inclusive and sustainable economic growth,

130 See generally CRPD Committee ‘Concluding Observations on the Initial Report of Armenia’ (n 55) para 48; ‘Concluding Observations on the Initial Report of Bosnia and Herzegovina’ (n 57) para 49; ‘Concluding Observations on the Initial Report of Plurinational State Bolivia’ (n 14) para 62; CRPD Committee ‘Concluding Observations on the Initial Report of Brazil’ UN Doc CRPD/C/BRA/CO/1 (29 September 2015) para 49; ‘Concluding Observations on the Initial Report of Canada’ (n 15) para 48(a); ‘Concluding Observations on the Initial Report of Colombia’ (n 57) para 61(a); ‘Concluding Observations on the Initial Report of Cyprus’ (n 64) para 54; ‘Concluding Observations on the Initial Report of Ethiopia’ (n 13) para 60 (a); ‘Concluding Observations on the Initial Report of Kenya’ (n 19) para 48; ‘Concluding Observations on the Initial Report of Mauritius’ (n 57) para 38; ‘Concluding Observations on the Initial Report of the Republic of Moldova’ (n 20) para 49; ‘Concluding Observations on the Initial Report of Serbia’ (n 96) para 56; ‘Concluding Observations on the Initial Report of Slovakia’ (n 22) para 74; ‘Concluding Observations on the Initial Report of Thailand’ (n 23) para 54(a); ‘Concluding Observations on the Initial Report of Uganda’ (n 24) para 53(b); ‘Concluding Observations on the Initial Report of United Arab Emirates’ (n 57) para 50(a); ‘Concluding Observations on the Initial Report of Austria’ (n 89) paras 44 & 47; CRPD Committee ‘Concluding Observations on the Initial Report of Hungary’ UN Doc CRPD/C/HUN/CO/1 (22 October 2012) para 44; ‘Concluding Observations on the Initial Report of El Salvador’ (n 57) para 56; ‘Concluding Observations on the Initial Report of China’ (n 94) paras 41 & 42. A discussion of all the obligations to be discharged in implementing the right to employment does not fall within the scope of this chapter.

131 CRPD art 27(1).

132 CRPD art 27(1)(a).

133 CRPD art 27(1)(h).

134 CRPD art 27(1)(i).

135 See generally CRPD Committee ‘Concluding Observations on the Initial Report of Argentina’ (n 57) para 44; CRPD Committee ‘Concluding Observations on the Initial Report of Paraguay’ UN Doc CRPD/C/PRY/CO/1 (15 May 2013) para 64; ‘Concluding Observations on the Initial Report of Hungary’ (n 130) para 44; ‘Concluding Observations on the Initial Report of El Salvador’ (n 57) para 56. A discussion of all the obligations to be discharged in implementing the right to employment does not fall within the scope of this commentary as it focuses on the requirement to ensure the open labour market employment model.

full and productive employment and decent work for all).<sup>136</sup>

### 3.3.2 *Domestic obstacles and interventions regarding open labour market employment*

It has been observed that ‘persons with disabilities are less likely to be employed’.<sup>137</sup> The causes of the limited opportunities to access employment include: the failure to provide job accommodation; inaccessible work environments; and discrimination.<sup>138</sup> For example, organisations for persons with disabilities (DPOs) in Mozambique have identified as a major hindrance the lack of job opportunities for persons with disabilities.<sup>139</sup> In the case of South Africa, it was reported that ‘[l]imited work opportunities and discrimination in the labour market are other factors that hampered their access to employment’.<sup>140</sup> Furthermore, it has been observed that in Zambia the ‘professional jobs for blind people are only begging and teaching’ due to their failure to attain an education, hence they are forced to ‘go straight to the streets’.<sup>141</sup>

In Southern Africa, broadly, it has been reported that employers do not ordinarily choose to employ persons with disabilities unless they ‘are forced to give preference’ to persons with disabilities by affirmative action policies, quotas, the receipt of tax rebates or other economic incentives.<sup>142</sup> This is partly due to the fact that employers are ‘likely to be deterred by the idea of spending more on appropriate accommodation’ for employees with disabilities.<sup>143</sup>

It thus may be observed that persons with disabilities in Africa do not generally have equal opportunities to access employment in the ‘conventional’ or open labour market. The major cause of this is the failure to implement ‘open labour market employment’ for persons with

136 See eg CRPD Committee ‘Concluding Observations on the Initial Report of Plurinational State Bolivia’ (n 14) para 62; ‘Concluding Observations on the Initial Report of Canada’ (n 15) para 48(d); CRPD Committee ‘Concluding Observations on the Initial Report of Chile’ UN Doc CRPD//C/CHL/CO/1 (13 April 2016) para 58; ‘Concluding Observations on the Initial Report of Colombia’ (n 57) para 61(c); ‘Concluding Observations on the Initial Report of Cyprus’ (n 64) para 54; ‘Concluding Observations on the Initial Report of Ethiopia’ (n 13) para 60(c); ‘Concluding Observations on the Initial Report of Guatemala’ (n 64) para 64; ‘Concluding Observations on the Initial Report of Honduras’ (n 18) para 58; ‘Concluding Observations on the Initial Report of Italy’ (n 57) para 70; ‘Concluding Observations on the Initial Report of the Republic of Moldova’ (n 20) para 49(b); ‘Concluding Observations on the Initial Report of Portugal’ (n 21) para 52; ‘Concluding Observations on the Initial Report of Serbia’ (n 96) para 54; ‘Concluding Observations on the Initial Report of Slovakia’ (n 22) para 74; ‘Concluding Observations on the Initial Report of Uganda’ (n 24) para 53(c); ‘Concluding Observations on the Initial Report of United Arab Emirates’ (n 57) para 50(e).

137 Mitra et al (n 26) 36. See also Tesema (n 1) 125.

138 See Mizunoya & Mitra (n 68) 29.

139 Kotzé (n 27) 29.

140 ‘Disabled living in poverty – Study’ (n 66).

141 Kotzé (n 27) 29.

142 As above.

143 As above.

disabilities (explained above). Ultimately, the high unemployment levels among persons with disabilities will lead to increased poverty levels among them. Indeed, it has been acknowledged that the obvious consequence of the failure by persons with disabilities to find jobs 'is a perpetuation of poverty'.<sup>144</sup>

A glance at the existing interventions in the selected disability legislation appears to provide no immediate solution to the conundrum since most of these statutes do not require adherence to the open labour market employment model alone. First, section 12 of the Malawian Disability Act recognises the right of persons with disabilities to earn/gain a living through work that is freely chosen or accepted in a labour market, and to work or obtain employment in an open, inclusive and accessible working environment.<sup>145</sup> The Act thus subscribes to the open labour market employment model.<sup>146</sup> It is worth noting that the Act recognises only the open labour market employment model and does not mention sheltered employment. To this extent it complies with the open labour market employment standard under CRPD.<sup>147</sup>

Second, the Persons with Disabilities Act of Zambia requires the government to, among others, create a labour market and work environment that is open, inclusive and accessible to persons with disabilities.<sup>148</sup> This shows that the Act recognises the open labour market employment model.<sup>149</sup> However, the Act mandates government (through the national disability body) to operate schemes and projects for self-employment or regular or sheltered employment for persons with disabilities.<sup>150</sup> The obligation to promote sheltered employment contradicts the open labour market employment standard under CRPD.

For its part, the Tanzanian Persons with Disabilities Act makes no reference to the open labour market employment model.<sup>151</sup> (It also does not mention the concept of sheltered/reserved employment.) To the extent that the Act does not recognise or advocate open labour market employment for person with disabilities, it does not comply with the employment standard under CRPD.<sup>152</sup> Therefore, it is only the disability-

144 As above.

145 See Malawi Disability Act (n 10) secs 12(1)(a) & (b).

146 See also sec 14(2)(c).

147 In addition, the Act obliges government to promote the employment of qualified persons with disabilities in the public and private sector, through appropriate policies and measures, which should include affirmative action programmes and incentives. See sec 12(3)(f).

148 See Zambia's Persons with Disabilities Act (n 10) sec 35(3)(a).

149 Sec 35(3)(h). In addition, the Act requires government to take measures that include creating and promoting the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures; and the provision of reasonable accommodation to persons with disabilities in the workplace. See sec 35(3)(h) & (i).

150 See sec 14(1) (d).

151 Tanzania's Persons with Disabilities Act (n 10).

152 Nonetheless, the Act imposes a number of obligations, which include the provision of 'job accommodation' in the work place; the promotion of employment for persons with disabilities by applying affirmative action treatment; and the provision of reasonable

specific legislation of Malawi (the Malawian Disability Act) that adheres to the crucial standard of recognising the open labour market employment model alone in conceptualising the right to employment for persons with disabilities; while the Zambian and Tanzanian Acts contain aspects that fall below and contradict the standard of CRPD.

### 3.4 Ensuring social protection to reduce poverty

#### 3.4.1 Social protection standards under CRPD

Article 28 of CRPD guarantees the socio-economic rights to an adequate standard of living and social protection for persons with disabilities. The right to an adequate standard of living should be enjoyed by persons with disabilities themselves and their families.<sup>153</sup> The right to an adequate standard of living and social protection is crucial as it requires state parties to take measures to ensure the provision of or access to clean water services,<sup>154</sup> adequate housing,<sup>155</sup> adequate food,<sup>156</sup> adequate clothing,<sup>157</sup> assistance with disability-related needs and expenses<sup>158</sup> and retirement benefits and programmes.<sup>159</sup> The right to social protection requires states to ensure the availability of the social security mechanisms or system(s) to provide sustainable income security; adequacy of social security in terms of the amount and duration, guided by the principle of dignity; accessibility in terms of environment, coverage and economic accessibility or affordability, and accessibility to the information provided relating to social protection programmes.<sup>160</sup> The forms of social protection measures recommended by the CRPD Committee include non-contributory pensions; poverty reduction strategies; disability pensions; health care; rehabilitation services; public housing; disability and social allowances; social and health insurance schemes; and subsidies and benefits.<sup>161</sup>

changes (or reasonable accommodation) in the workplace. See secs 34(1)(b); 34(2)(a) & 34(2)(c).

153 CRPD art 28(1); CRPD Committee 'Concluding Observations on the Initial Report of Paraguay' (n 135) paras 67 & 68;

154 CRPD art 28(2)(a).

155 CRPD art 28(1).

156 As above.

157 As above.

158 CRPD art 28(2)(c).

159 CRPD art 28(2)(e).

160 See generally C Parker & L Clements 'The UN Convention on the Rights of Persons with Disabilities: A new right to independent living?' (2008) 4 *European Human Rights Law Review* 508.

161 See eg CRPD Committee 'Concluding Observations on the Initial Report of Armenia' (n 55) para 50; 'Concluding Observations on the Initial Report of Bosnia and Herzegovina' (n 57) para 51; 'Concluding Observations on the Initial Report of Plurinational State Bolivia' (n 14) para 64; 'Concluding Observations on the Initial Report of Ethiopia' (n 13) para 62; 'Concluding Observations on the Initial Report of the Republic of Moldova' (n 20) para 51; 'Concluding Observations on the Initial Report of Uganda' (n 24) para 55(b); 'Concluding Observations on the Initial Report of United Arab Emirates' (n 57) para 52(a); 'Concluding Observations on the Initial

CRPD and its monitoring committee explicitly appreciate the role that the right to social protection could play in reducing poverty by requiring state parties to take measures that target persons with disabilities and their families living in situations of poverty. In this regard, CRPD obliges states to ensure access to state assistance ‘with disability-related expenses, including adequate training, counselling, financial assistance and respite care’,<sup>162</sup> while the Committee expects the taking of adequate measures ‘to compensate persons with disabilities and their families, whose income is reduced because of their disability’.<sup>163</sup> In terms of the benchmark to be complied with by African state parties in making poverty reduction measures, the chapter focuses on the recognition of the right to social protection as a crucial standard.<sup>164</sup>

It is worth noting that the CRPD Committee in its General Comment 6 has highlighted the fact that article 28 of the CRPD (on adequate standards of living and social protection) is important, especially for persons with disabilities, including women, living in extreme poverty.<sup>165</sup> With regard to social protection the Committee in fact highlighted that ‘[s]tate parties are further required to implement a basic protection floor’.<sup>166</sup> The Committee made reference to poverty four times in paragraph 68 of the General Comment. It is worth noting that despite relating to equality and non-discrimination, the General Comment dedicates paragraph 68 to article 28 of CRPD.

Similarly, in General Comment 3, relating to women and girls with disabilities, the Committee only mentions the term ‘poverty’ in paragraph 59, which it dedicates to social protection recognised in article 28 of CRPD. This also demonstrates the strong link between ensuring social protection for person with disabilities and eradicating poverty and reducing inequalities among these persons. Above all, the CRPD Committee emphasises the significance of ensuring social protection in the implementation of Goal 10 of the Sustainable Development Goals (reducing inequality within and among countries).<sup>167</sup>

Report of El Salvador’ (n 57) para 58; ‘Concluding Observations on the Initial Report of Argentina’ (n 57) para 45; ‘Concluding Observations on the Initial Report of China’ (n 94) paras 43 & 44; ‘Concluding Observations on the Initial Report of Paraguay’ (n 135) para 67.

162 See CRPD art 28(2)(c).

163 CRPD Committee ‘Concluding Observations on the Initial Report of Paraguay’ (n 135) para 67.

164 Nonetheless, the chapter also appreciates the significance of the right to an adequate standard of living in poverty eradication.

165 General Comment 6 (n 58) para 68.

166 As above.

167 See eg CRPD Committee ‘Concluding Observations on the Initial Report of Armenia’ (n 55) para 50; ‘Concluding Observations on the Initial Report of Plurinational State Bolivia’ (n 14) para 64; ‘Concluding Observations on the Initial Report of Colombia’ (n 57) para 63(d); ‘Concluding Observations on the Initial Report of Cyprus’ (n 64) para 56; ‘Concluding Observations on the Initial Report of Ethiopia’ (n 13) para 62; ‘Concluding Observations on the Initial Report of Guatemala’ (n 64) para 66(d); ‘Concluding Observations on the Initial Report of Italy’ (n 57) para 72; ‘Concluding Observations on the Initial Report of Jordan’ (n 57) para 52; ‘Concluding Observations on the Initial Report of Portugal’ (n 21) para 54(d); ‘Concluding Observations on

### 3.4.2 Domestic obstacles and interventions regarding livelihood

It has been noted that the 'socio-cultural barriers that resulted in chronic poverty and economic deprivation of persons with disabilities have left many of them with no economic options other than begging'.<sup>168</sup> Thus persons with disabilities often find themselves with limited livelihood opportunities. In this regard, a study by Kotzé which focused on Southern African countries has found that situations arise where a parent would stay at home to look after a child with a disability, thereby not earning a living.<sup>169</sup> In addition, where persons with disabilities do not engage in economic activities, they might also not access social protection schemes, thereby having no means to earn a livelihood.<sup>170</sup> For example, studies have found that the majority of persons with disabilities in South Africa could not access disability grants and many of them did not know how to apply for the same or that the grant existed.<sup>171</sup> In any case, UNICEF has observed that social protection mechanisms often do not address the plight of persons with disabilities by, among others, failing to take account of the additional costs associated with disability, 'resulting in families being driven into poverty'.<sup>172</sup>

The link between disability and livelihood stems from society's negative perceptions about the ability of a person with a disability to interact in educational, economic, or social spheres, as the Southern African study has found.<sup>173</sup> As a result, many persons with disabilities in several African countries have limited livelihood opportunities. For example, a survey conducted by the National Association of Societies for the Care of the Handicapped (NASCOH) in Zimbabwe has found that 'close to 42%' of persons with disabilities in Zimbabwe have no income at all.<sup>174</sup> In Malawi the main activities of persons with disabilities aged five years and above are farming/fishing (38,8 per cent); household duties/heading livestock (26 per cent); brewing beer (2 per cent); and other businesses and pottery/handicraft (1 per cent); with the rest 'not doing anything at all'.<sup>175</sup> In addition, more households with one or more members with disabilities might have no one employed as compared to households without a person

the Initial Report of Serbia' (n 96) para 57; 'Concluding Observations on the Initial Report of Slovakia' (n 22) para 76; 'Concluding Observations on the Initial Report of Thailand' (n 23) para 56; 'Concluding Observations on the Initial Report of Uganda' (n 24) para 55(c); 'Concluding Observations on the Initial Report of United Arab Emirates' (n 57) para 52(b).

168 Tesema (n 1) 124.

169 Kotzé (n 27) 26.

170 See eg 'Disabled living in poverty' (n 66), where it was stated that '[f]or those not employed, they expressed great frustration with their lack of capability to secure a livelihood'.

171 'Disabled living in poverty' (n 66).

172 UNICEF (n 30) 16.

173 Kotzé (n 27) 12.

174 Kotzé (n 27) 21.

175 C Munthali & Centre for Social Research *Situational analysis of persons with disabilities in Malawi* (2011) 19.



with a disability.<sup>176</sup>

The obstacles to finding employment or to earning a livelihood by persons with disabilities in Malawi include a lack of skills training that could empower persons with disabilities; a lack of jobs; mobility challenges; a lack of access to credit for small-scale businesses; and a lack of awareness among employers about disability rights.<sup>177</sup> Therefore, there is a link between disability and the limited opportunities for earning a livelihood, which causes or propagates poverty among persons with disabilities in Africa. Accordingly, social protection mechanisms could economically empower persons with disabilities who do not have opportunities for earning a livelihood.

On a brighter note, a quick glance at the social protection provisions in the selected disability legislation appears to bring forth considerable hope for persons with disabilities. First, the Disability Act of Malawi provides for the right to adequate standards of living (guaranteed to persons with disabilities themselves, and their families)<sup>178</sup> and social protection.<sup>179</sup> It further obliges the government to ensure, among others, access to adequate food, clothing and housing, and a continuous improvement in living conditions in realising the right to adequate standards of living.<sup>180</sup> With regard to social protection, it requires the government to ensure equal access to appropriate and affordable social services, to ensure access to social support programmes, and to develop national guidelines to enable persons with disabilities that are receiving social benefits to move into self or open labour market employment.<sup>181</sup> Therefore, the Act conforms to CRPD's standards requiring guarantees of or right to social protection for persons with disabilities. It is worth noting that the Malawi Disability Act in section 23 also sets out the right of persons with disabilities to economic empowerment, which requires government, among others, to ensure that persons with disabilities are able to access loans and credit facilities for purposes of carrying out income-generating activities.<sup>182</sup> The implementation of these rights would similarly induce poverty reduction.

The Persons with Disabilities Act of Zambia guarantees to persons with disabilities the right to adequate standards of living, a continuous improvement in living conditions and social protection.<sup>183</sup> The section requires the responsible minister, in consultation with the minister responsible for labour, to take measures that ensure that persons with disabilities have equal access to appropriate and affordable services,

176 As above.

177 Munthali & Centre for Social Research (n 175) 20.

178 Malawi Disability Act (n 10) sec 14(1).

179 See sec 14 (2)(b), which obliges the government to ensure access by persons with disabilities to social support programmes.

180 Sec 14(1)(a).

181 Secs 14(2)(a), (b) & (c).

182 Malawi Disability Act (n 10) sec 23.

183 See Zambia's Persons with Disabilities Act (n 10) sec 36. (The Act/section does not provide that the right is guaranteed to the families of persons with disabilities as well). This is at variance with the CRPD provision as explained above.

devices and other assistance for disability-related needs; access, especially by women and girls with disabilities, to social protection programmes and poverty reduction programmes; access to public housing programmes; and access to retirement benefits and programmes.<sup>184</sup> The Act thus goes a long way towards incorporating the right to adequate standards of living and social protection contained in article 28 of CRPD, thereby expanding the potential of the Act to play a role in reducing poverty among persons with disabilities in Zambia.

The Persons with Disabilities Act of Tanzania recognises the rights of persons with disabilities to social protection.<sup>185</sup> In realising the right, the Act requires the responsible minister, after consultation with the minister responsible for labour, employment and finance, to take appropriate measures to ensure access to the following: social security; appropriate and affordable services, devices and other assistance for disability-related needs; social protection programmes and poverty reduction strategies (in particular by the aged and women); and available grants and credit services for income-generating activities and public housing programmes, if resources allow.<sup>186</sup> However, the Act does not indicate that the right is also granted to the families of persons with disabilities. In addition, it does not mention the right to adequate standards of living. Nonetheless, to the extent that it provides for social protection, it could serve as a significant poverty eradication tool in favour of persons with disabilities in Tanzania.<sup>187</sup> Therefore, the selected disability statutes demonstrate greater levels of adherence to the social protection standards under CRPD and thus would serve as potential tools for poverty reduction.

## 4 Conclusion

The chapter has elucidated that there are several factors that contribute to the high levels of poverty among persons with disabilities in the world, and in Africa in particular, after noting and explaining the link between poverty and disability. As highlighted above, certain factors contributing to the poverty situation involve the obstacles faced by persons with disabilities in accessing education and employment, among others. Indeed, education and employment are recognised as socio-economic rights under CRPD and other relevant treaties. Accordingly, some of the contributing factors are based on or connected with the enjoyment of human rights. Hence, the extent of human rights enjoyment impacts on poverty among persons with disabilities in Africa.

The chapter has examined challenges that prevail with respect to four areas, namely, education, employment, livelihood and equality

184 See secs 36(a), (b), (c) & (d).

185 Sec 54.

186 Secs 54(2)(a), (b) & (c).

187 The chapter regards the recognition of the right to social protection as crucial, as discussed in 3 above.

and non-discrimination. In addition, it has argued that the appropriate implementation of these rights that are contained in CRPD would significantly contribute to alleviating poverty among persons with disabilities in Africa. Although several human rights treaties guarantee rights applicable in these contexts, CRPD is the contemporary human rights treaty that specifically makes provision for the rights of persons with disabilities. Of course, the AU has also adopted the African Disability Protocol as far as the African regional human rights system is concerned.<sup>188</sup> However, the Protocol was yet to enter into force at the time of writing (March 2020).<sup>189</sup> Until such time as it does, CRPD remains the only operational disability rights-specific treaty applicable in the African region.

CRPD was also adopted while bearing in mind that it should be both a human rights and a developmental tool capable of triggering a change that would push for poverty reduction among persons with disabilities in the world. For example, its Preamble expressly makes reference to the situations of poverty in which persons with disabilities often live.<sup>190</sup> It highlights that ‘the majority of persons with disabilities live in conditions of poverty’ and, hence, recognises that there is a ‘critical need to address the negative impact of poverty on persons with disabilities’.<sup>191</sup> Above all, the Preamble recognises that ‘the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms ... will result in significant advances in the human, social and economic development of society and the eradication of poverty’.<sup>192</sup> Accordingly, CRPD acknowledges that the enjoyment of human rights by persons with disabilities would facilitate the reduction of or, indeed, eradicate poverty. It is worth noting that ending poverty is in line with Goal 1 of the Sustainable Development Goals (to end poverty in all its forms everywhere).

In addition, CRPD contains a number of rights, including socio-economic rights, and provisions that if implemented appropriately would go a long way towards alleviating poverty among persons with disabilities in Africa. These rights/provisions include those that set out socio-economic rights such as equality and non-discrimination (which is both a socio-economic and a civil and political right); education; employment; health; accessibility; adequate standards of living and social protection; independent and community living; and habilitation and rehabilitation. The chapter has focused on obstacles or factors that cause (or lead to) poverty that are related to education, employment, general livelihood and discrimination. Thus, it has highlighted that CRPD, through the standards it sets, provides opportunities for addressing the poverty situation among

188 African Disability Protocol (n 42).

189 The Protocol requires ratifications for it to enter into force. See African Disability Protocol (n 42) art 38(1). As of July 2019, only six out of the 55 AU member states had signed the Protocol; while no state had deposited its ratification.

190 See eg Preamble paras (e) & (m).

191 See Preamble para (e).

192 See Preamble para (m).

persons with disabilities through the socio-economic rights it guarantees that are applicable in these four areas. These socio-economic rights include equality and non-discrimination, inclusive education, open labour market employment and social protection.

Furthermore, the chapter has analysed the obstacles faced by persons with disabilities in the four areas explained above. It has also examined the extent to which the disability-specific legislation in three selected African countries (Malawi, Zambia and Tanzania) incorporates the broad standards set by CRPD for implementing the pertinent four socio-economic rights mentioned in order to facilitate poverty reduction among persons with disabilities in the African region. It must be acknowledged that socio-economic rights generally are subject to progressive realisation.<sup>193</sup> However, in light of the fact that persons with disabilities constitute a vulnerable and marginalised group, state parties to ICESCR have the immediate (core) obligation to prioritise such group when implementing the four socio-economic rights.<sup>194</sup> In addition, obligations such as to ensure non-discrimination in the enjoyment of socio-economic rights are also more immediately applicable.<sup>195</sup> Accordingly, African states are expected to pay particular attention to their obligations relating to the socio-economic rights of persons with disabilities, with a view to addressing the poverty situation.

The following four statements can generally be made in relation to the analysis. First, certain disability-specific statutes analysed for purposes of this chapter still fall short of conforming to the equality and non-discrimination standards under CRPD by not recognising the obligation to provide reasonable accommodation in ensuring equality and non-discrimination. Second, most of these disability-specific statutes do not conform to the inclusive education standards under CRPD principally because the statutes continue to recognise the dual track system of providing the education of person with disabilities in special schools and in mainstream inclusive schools. Third, certain disability-specific statutes do not conform to the open labour market employment standard under CRPD. This is so because most of the disability statutes do not expressly recognise the open labour market employment model alone, with certain statutes still advocating [for] sheltered employment. Fourth, the disability-specific statutes appear to be on track with regard to respecting the obligation to ensure social protection measures for persons with disabilities.

Therefore, it may generally be concluded from the chapter's analysis that African countries need to modify their disability-specific statutes

193 See International Covenant on Economic Social and Cultural Rights (ICESCR), adopted on 16 December 1966, entered into force on 3 January 1976 (UN Treaty Series Vol 993 3) art 2(1). See also ESCR Committee General Comment 3: 'The nature of states parties obligations' UN Doc E/1991/23 (14 December 1990) para 1.

194 See General Comment 3 (n 193) para 12.

195 General Comment 3 para 1.

(and similar implementation measures) to conform to CRPD's provisions and/or standards in order to utilise the opportunities that CRPD provides through its rights provisions to eradicate poverty among persons with disabilities in their jurisdictions. This will also contribute to furthering the realisation of Sustainable Development Goal 1. The modification of the disability-specific statutes is especially necessary regarding the aspects of ensuring equality and non-discrimination, inclusive education and employment in the open labour market. It can unequivocally be stated that only after this has been done will the pertinent disability-specific statutes serve as tools capable of igniting the hope of ushering persons with disabilities in Africa out of the situations of poverty which they currently face.

## References

- Alam, KJ 'Impact of the global economic crisis and disability and poverty in developing countries' [www.un.org/disabilities/documents/COP/alam.doc](http://www.un.org/disabilities/documents/COP/alam.doc) (accessed 27 April 2015)
- Chilemba, EM 'Disability rights and emerging disability legislation in selected African jurisdictions: A diagnostic commentary' (2015) 3 *African Disability Rights Yearbook* 291
- Chilemba, EM 'Malawi' (2014) *African Disability Rights Yearbook* 207
- Chilemba, EM 'The right to primary education for children with disabilities in Malawi: A diagnosis of the conceptual approach and implementation' (2013) *African Disability Rights Yearbook* 3
- De Beco, G 'Study on the implementation of article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe' Study commissioned by the Office of the UN High Commissioner for Human Rights (OHCHR) Regional Office for Europe (2011)
- 'Disabled living in poverty – Study' *News24*: 14 May 2010 <http://www.news24.com/SouthAfrica/News/Disabled-living-in-poverty-study-20100514> (accessed 2 April 2015)
- Filmer, D 'Disability, poverty, and schooling in developing countries: Results from 14 household surveys' (2008) 22 *World Bank World Economic Review* 141
- Grobbelaar-du Plessis, I & Van Reenen, T 'Introduction to aspects of disability law in Africa' in Grobbelaar-du Plessis, I & Van Reenen, T (eds) *Aspects of disability law in Africa* (Pretoria University Law Press 2011)
- Groce, N et al 'Poverty and disability: A critical review of the literature in low and middle-income countries' (2011) University College London: Leonard Cheshire Disability and Inclusive Development Centre
- Human Rights Watch *Discrimination, inequality, and poverty: A human rights perspective* (2013) <http://www.hrw.org/news/2013/01/11/discrimination-inequality-and-poverty-human-rights-perspective> (accessed 27 April 2015)
- Infocus Programme on Skills, Knowledge and Employability/Disability Programme and International Labour Office 'Disability and poverty reduction strategies: How to ensure that access of persons with disabilities to decent and productive work is part of the PRSP Process (2002) 168 Gladnet Collection Paper <http://digitalcommons.ilr.cornell.edu/gladnetcollect/168> (accessed 27 April 2014)
- Jones, M & Marks, LA 'Law and the social construction of disability' in Jones, M & Marks, AB (eds) *Disability, diversity and legal change* (The Hague: Martinus Nijhoff 1999)
- Kamga, SAD 'Forgotten or included? Disabled children's access to primary education in Cameroon' (2013) *African Disability Rights Yearbook* 27
- Kayess, R & French, P 'Out of darkness into light: Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1
- Kotzé, H *Status of disability rights in Southern Africa* (2012) OSISA/OSF
- Lang, R & Charowa, D *DFID scoping study: Disability issues in Zimbabwe* (2007) Harare: Department for International Development (DFID)
- Mandipa, E 'A critical analysis of the legal and institutional frameworks for the realisation of the rights of persons with disabilities in Zimbabwe' (2013) *African Disability Rights Yearbook* 73
- Mitra, S, Posarac, A & Vick, B 'Disability and poverty in developing countries: A multidimensional study' (2013) 41 *World Development* 1
- Mitra, S (Disability World) 'Disability: The hidden side of African poverty' [http://www.disabilityworld.org/01-03\\_04/news/africa.shtml](http://www.disabilityworld.org/01-03_04/news/africa.shtml) (accessed 27 April 2015)
- Mitra, S, Posarac, A & Vick, B *Disability and poverty in developing countries: A snapshot from the world healthy survey* (2011) World Bank
- Mizunoya, S & Mitra, S 'Is there a disability gap in employment rates in developing

- countries?' (2013) 42 *World Development* 28
- Munthali, C and Centre for Social Research *Situational analysis of persons with disabilities in Malawi* (2011) Zomba: Centre for Social Research
- Parker, C & Clements, L 'The UN Convention on the Rights of Persons with Disabilities: A new right to independent living?' (2008) 4 *European Human Rights Law Review* 508
- Peters, SJ 'Review of marginalisation of people with disabilities in Lebanon, Syria and Jordan: Background paper prepared for the Education for All Global Monitoring Report' (2010) UNESCO
- Schulze, M *Understanding the UN Convention on the Rights of Persons with Disabilities* (Handicap International 2010)
- Steiner, H, Alston, P & Goodman, R *International human rights in context: Law, politics, morals* (Oxford University Press 2007)
- Tesema, ST 'Economic discourse of disability in Africa: An overview of lay and legislative narratives' (2014) *African Disability Rights Yearbook* 121
- UNICEF *Children and young people with disabilities: Fact Sheet* (2013)
- UNICEF & Malawi government *From exclusion to inclusion: Promoting the rights of children with disabilities in Malawi* (2012)
- United Nations *From exclusion to equality: Realising the rights of persons with disabilities: A handbook for parliamentarians on the Convention on the Rights of persons with disabilities* (2007) Geneva: Office of the High Commissioner for Human Rights
- United Nations *Monitoring the Convention on the Rights of Persons with Disabilities: Guidance for human rights monitors* (2010) Geneva/New York: Office of the High Commissioner for Human Rights
- Waddington, L 'Breaking new ground: The implication of ratification of the UN Convention on the Rights of Persons with Disabilities for the European community' in Arnardóttir, OM & Quinn, G (eds) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian perspectives* (Martinus Nijhoff Publishers 2009)
- World Health Organisation and World Bank (2011) *World report on disability* World Health Organisation & World Bank: Geneva





# CHAPTER 9

## THE CO-EXISTENCE OF GENDER INEQUALITY AND POVERTY IN SOUTHERN AFRICA

Nomthandazo Ntlama\*

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### Abstract

*The Southern African Development Community region is characterised by high levels of gender inequality and poverty. This state of affairs may be attributed to many factors, such as the high level of unemployment, which has a negative impact on the equal enjoyment of rights by women. The region has been progressive and has designed legal reforms that are aimed at the promotion of gender equality and the elimination of poverty. Notwithstanding the progress made, inequalities and an increase in poverty persist, which thwart the strides that have since been made. This persistence is more extreme in the case of women as a vulnerable group as it entrenches the co-existence of poverty and inequality, considering the economic power imbalances between men and women. This chapter provides an overview of the SADC's aspirations on the elimination of gender inequalities and the reduction of poverty as envisaged in the Protocol on Gender and Development. The chapter adopts a human rights-oriented approach to emphasise the importance of legal reform as a foundation for the advancement of gender equality and the elimination of poverty as envisaged in the Protocol. It starts by identifying factors that are a hindrance to the achievement of equality and also attempts to define the concepts of gender equality and poverty, followed by a discussion of the importance of the adoption of the Protocol on Gender and Development. This is not a comparative study on gender equality and the elimination of poverty but a focus on the envisaged aims of the Protocol.*

### 1 Introduction

The Southern African region<sup>1</sup> is one of the five regions in Africa.<sup>2</sup> The Southern African Development Community (SADC) is characterised by

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1 The Treaty of the Southern African Development Community, 1992 established the Southern African Development Community (SADC), with its seat in Gaborone, Botswana, as entrenched in art 2. The SADC region is comprised of the following member states: Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Eswatini, Tanzania, Zambia and Zimbabwe.

2 These regions are Southern, Central, East, North and West Africa.

the co-existence of gender inequality and poverty.<sup>3</sup> This form of socio-legal contrast is driven by economic power imbalances between men and women.<sup>4</sup> The imbalances characterise the quality of life of people in levels of inequality, which entail the ‘humiliating legal and socio-political effect of repressive conceptions’<sup>5</sup> of equality and non-discrimination. These imbalances are ‘highly unacceptable and are on the increase even in resource-rich countries like, for example, Angola, Namibia and South Africa’.<sup>6</sup> The imbalances limit the region’s potential as the benefits of legal reform do not appear to translate to the substantive conception of equality and the eradication of poverty. The imbalances restrict the capacity of member states to develop socio-legal, political and cultural measures which are essential for the ‘functioning of a good democratic state’<sup>7</sup> in the elimination of all inequalities and reduction of poverty. The situation is exacerbated by high levels of unemployment, which impact negatively on the human rights of women to the achievement of the right to substantive equality. The centrality of the right to equality is a yardstick against which to also eradicate poverty. There is an intersection of gender inequality and poverty, which is extremely severe in the case of women because of their limited access to life-changing resources such as education.

However, the region is engaged in finding concrete ways and solutions to ensure the achievement of gender equality and the reduction of poverty. This is part of its obligation as envisaged in various treaties and conventions that it signed and ratified as a member of the community of nations to ‘champion the process of empowering [men and women] in a concerted manner through addressing gender and development challenges’<sup>8</sup> that are not unique to it. The adoption of the SADC Protocol on Gender and Development (SADC Protocol)<sup>9</sup> is a direct response to challenges that are not unique to it but of global concern.<sup>10</sup> The undertaking is an indication of

- 3 V Gumede ‘Poverty and inequality in Africa: Towards the post-2015 development agenda for sub-Saharan Africa’ University of South Africa, <https://www.vusigumede.com/content/2016/academic%20paper/Poverty%20and%20Inequality%20in%20Africa.pdf> (accessed 10 June 2019).
- 4 O’Regan J in *Brink v Kitshoff* 1996 (6) BCLR 752. The judge pointed out that ‘the co-existence of poverty and gender inequality resulted in deep patterns of disadvantage which are particularly acute against [rural and black women]’; para 44.
- 5 Sachs J in *Fourie v Minister of Home Affairs* 2005 (3) BCLR 241 (CC) para 9.
- 6 ‘Inequality in Southern Africa: Options for redress’ Policy Brief 1-6, <http://www.ioi.org/wcsmp5/groups/public/---ed> (accessed 12 January 2015).
- 7 Moseneke DCJ in *South African Police Service v Solidarity obo Barnard* (CCT01/14) [2014] ZACC 23 (2 September 2014) para 33.
- 8 EB Mwale ‘Presentation on gender equality in Zambia during the civil society/patriotic front dialogue’ 12-13 April 2012, Cresta Golf View Hotel, Lusaka, Zambia, 1, <http://www.fes-zambia.org/media/documents/GEN> (accessed 13 November 2014).
- 9 SADC Protocol, signed on 17 August 2008, Johannesburg, South Africa. As of 2013 13 member states had signed the Protocol (except for Botswana and Mauritius), while the Democratic Republic of the Congo and Madagascar have not yet ratified the Protocol, <http://sadc.int/documents/publications/show> (accessed 25 January 2015).
- 10 The objectives of the Protocol are among others to provide for the empowerment of women, to eliminate discrimination and to achieve gender equality and equity through the development and implementation of gender-responsive legislation, policies, programmes and projects. The Protocol also seeks to harmonise the various international, continental and regional gender equality instruments to which SADC member states have subscribed, such as the Convention on the Elimination of All

the political will to bridge the gap between men and women in advancing the democratic principles – which would otherwise be incomplete without the economic empowerment of women. The region has demonstrated this commitment by adopting various measures that are designed to include a human rights approach, which encapsulates the ‘logic and language of rights’<sup>11</sup> in fighting poverty and gender inequality.<sup>12</sup> A human rights approach acknowledges that poverty and gender inequality are an inter-related African problem and no region can be complacent about these socio-legal and political ills.<sup>13</sup>

The human rights approach is similarly expressed by Lopi who contends that ‘[SADC], like all other sub-regions [in Africa], is characterised with gender disparities in all areas including in the social, economic, political and cultural spheres’.<sup>14</sup> It is in this context that the SADC recognises its fundamental role by developing legal reforms that seek to remove all barriers facing women, such as domestic violence, the lack of representation in the political arena and all other related factors, to ensure equal access to opportunities, in order to ‘build a critical mass of people in facilitating progressive changes in societies’.<sup>15</sup> For example, countries such as South Africa, despite the newcomer status in the elimination of inequalities because of the pre-democratic dispensation, has made progress in the area of legal reform in addressing the issues of inequality and poverty.<sup>16</sup> However, with the challenges that continue to manifest themselves in ensuring that there is equal enjoyment of the rights between men and women, poverty and inequality continue to bedevil the progress made since the attainment of democracy in 1994. During the election parade in May 2019 in South Africa by all the political parties that were vying for the votes of the general populace, their commitments were designed along the lines of striving towards the elimination of gender inequalities and the elimination of poverty in order to free the potential of each person in the advancement of the democratic ideals on the new

Forms of Discrimination Against Women (CEDAW); the Beijing Declaration and its Platform of Action; the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (African Women’s Protocol); and the Millennium Development goals (MDGs). Therefore, the SADC Protocol consolidates and creates synergies between various commitments on gender equality and women’s empowerment into one comprehensive regional instrument that effectively enhances the capacity to plan, implement and monitor the SADC gender agenda, <https://www.sadc.int/issues/gender/> (accessed 10 June 2019).

- 11 P de Vos & W Freedman (eds) *South African constitutional law in context* (2014) 348.
- 12 These measures include, but are not limited to, the SADC Declaration on Gender and Development 1997; the Regional Indicative Strategic Development Plan (RISDP) (2005-2020); the SADC Gender Policy 2007; and other related instruments.
- 13 Preface in F Leach & C Mitchell (eds) *Combating gender violence in and around schools* (2006).
- 14 B Lopi ‘Gender and poverty in the context of human development, health, education and the MDGs’ presentation at the Commission for Africa-Southern Africa Consultation, Lusaka, Zambia, 13-14 December 2004 3; Mwale (n 8).
- 15 Mwale (n 8).
- 16 See, eg, the adoption of the Promotion of Equality and Prevention of Unfair Discrimination Act 2 of 2000 (Equality Act) and the extension of social security to people of foreign origin, who are permanent residents as envisaged in the *Khosa v Minister of Social Development* 2004 (6) BCLR 569 (CC) judgment.

dispensation. This was indicative and an acknowledgment of the existing disparities between men and women, which compromise the desired goals of achieving substantive gender equality and the elimination of poverty.

Against this background, this chapter provides an overview of the SADC's aspirations on the elimination of gender inequality and reduction of poverty as envisaged in the Protocol on Gender and Development.<sup>17</sup> The chapter adopts a human rights-oriented approach to emphasise the importance of legal reform as a foundation in the advancement of the right to gender equality and elimination of poverty as envisaged in the Protocol. It starts by identifying factors that are a hindrance to the achievement of equality by also attempting to define 'gender equality' and 'poverty', followed by a discussion of the importance of the adoption of the SADC Protocol. This is not a comparative study but a focus on the envisaged aspirations in the Protocol, which are meant to promote gender equality and the elimination of poverty.

## **2 SADC's transformative vision in eliminating gender inequalities and poverty**

### **2.1 Reducing poverty and eliminating gender inequality: A mammoth task**

This part highlights the factors that inhibit the facilitation of the achievement of substantive gender equality and the eradication of poverty. In this way, it sets the tone for the definition of gender inequality and poverty and a reflection on these factors as a hindrance to the transformative vision of the region. By transformation is meant the envisaged change that is needed to correct the manifestation of inequalities that results in poverty, especially in the case of women. In a nutshell, the intention is to show that the identified factors in this part encapsulate the intersection of gender inequality and poverty, which impact negatively on the human rights of women in the SADC region.

Gender equality and the reduction of poverty are fundamental goals of the SADC's aspirations as envisaged in the Protocol that are meant to ensure the empowerment of both men and women.<sup>18</sup> Considering the manifestation of inequalities, it is acknowledged that the goals envisaged in the Protocol endorse the transformative vision that is designed to 'create opportunities for women, disadvantaged and marginalised people and communities so they can participate in, and benefit from, the develop-

17 SADC Protocol (n 9).

18 See art 3(a) of the SADC Protocol which seeks to empower women, eliminate discrimination and achieve gender equality and equity through the development and implementation of gender-responsive legislation, policies, programmes and projects.

ment of their communities and nations'.<sup>19</sup> The transformative vision is linked to the creation of decent jobs, access to resources, the enhancement of the quality of social services, and other related factors. The undertaking to advance a transformed region is borne out by the fact that the region is suffering from great disparities in wealth, which mostly affect the more vulnerable women and children. These groups are affected to a greater extent by poverty and inequality than the rest of the general populace.

The United Nations (UN) Economic Commission for Africa has observed that 'the persistence of poverty, mainly due to lack of economic opportunities, is the root cause of all problems placing women in a vicious circle deepening the already critical areas of access to health, education and political participation'.<sup>20</sup> The progress in advancing women is further derailed by the historic inequalities that subordinate women. The impact of this history makes it difficult to achieve progressive legal reforms that may be designed to be sensitive to women's issues, which, in turn, may permeate and be used as instruments of societal change.<sup>21</sup>

The inequalities compromise and hinder the institutional and social foundations for the right and respect of women's human rights that are essential to facilitate changes in a more meaningful way. They limit the development process – the provision of adequate resources, proper flow of national information and the advancement of freedom – which are needed to undertake the obligations effectively.<sup>22</sup>

Gender inequality is defined as the 'difference between men and women which systematically empower one group to the detriment of the other and impact negatively on the [opportunities that may be available to either of them]'.<sup>23</sup> Patriarchy can be understood as a 'social structure that men and women are highly invested in and reproduce in their everyday interaction and prohibition of certain behaviours for men and women and also structures of access to resources, typically [where] men benefit compared to women, but not all women benefit to the same degree and

19 Foreword by G Fraser-Moleketi 'Investing in gender equality for Africa's transformation' in African Development Bank Group *Investing in gender equality for Africa's transformation*, <http://www.afdb.org/fileadmin/uploads/afdb//Doc> (accessed 13 November 2014).

20 United Nations Economic Commission for Africa Sub-Regional Office for West Africa 'Tracking progress in the implementation of regional and international agendas, including NEPAD and other special initiatives in the sub-region' ECA-WA/ICE.15/2012/05 13.

21 J Kabwila-Kapasula 'Patriarchy and oppression of women in 21st century Africa: A conversation with Adichie and Dangarembga' UNISA public lecture, 12 August 2009; F Cooper 'Conflict and connection: Rethinking colonial African history' (1994) 99 *The American Historical Review* 1516.

22 C Himonga 'Law and gender in Southern Africa: Human rights and family law' in W York, S Bradshaw & SN Ngedwa (eds) *The uncertain promise of Southern Africa* (2000) 275.

23 World Health Organization 'Why gender and health?' <http://www.who.int/gender/genderandhealth/en/index.html>, quoted in M Cornell 'Gender inequality: Bad for men's health' (2013) 14 *Southern African Journal of HIV Medicine*, <http://sajhivmed.org.za/index.php/hivmed/rt/printerfriendly/95/151> (accessed 29 January 2019).

some women may also gain from these relationships'.<sup>24</sup>

Inequality between men and women is of particular concern to the SADC, because of the escalation in and manifestation of

violence against women in different forms, in particular, domestic violence and murder-suicides that have become an urgent priority requiring specific legislation, policy and programme development by the member states. Violence against women which is caused by, among other things, economic inequality between men and women, the acceptance of physical violence to resolve conflicts, lack of independence and control in decision-making not only in household affairs but generally, make women more vulnerable to social stigmatization and rejection because of the lack of education and high levels of poverty.<sup>25</sup>

Other areas of concern include the 'feminisation of poverty and the gendered nature of HIV infections and AIDS-related deaths'.<sup>26</sup> These issues are:<sup>27</sup>

- gender norms relating to masculinity which endorse power imbalances between men and women;
- increased vulnerability of women as a result of restrictive laws and policies as well as adverse cultural norms which perpetuate gender stereotypes; and
- violence against women, which fuels and contributes to the limitation of the law in addressing the socio-political imbalances.

These challenges continue to undermine the progress made by the region in terms of the promotion of gender equality in seeking to eliminate the inequalities and the feminisation of poverty. The transformative ideals of the region are unlikely to be achieved in the near future because of the perpetuation of violence and other forms of abuse and discrimination that subordinate women to the non-fulfilment of their rights.

The perpetuation of gender inequality has a direct link to poverty, which is most extreme in the case of women. Poverty is not an easily-

- 24 A Gibbs, S Willan, A Misselhorn & J Mangoma 'Combined structural interventions for gender equality and livelihood security: A critical review of the evidence from Southern and Eastern Africa and the implications for young people' (2012) 15 *Journal of the International AIDS Society* 2.
- 25 K Njogu & E Orcharson-Mazrui 'Gender inequality and women's rights in the Great Lakes: Can culture contribute to women's empowerment?' [www.unesco.org/new/fileadmin/.../Culture-Womens-Empowerment.pdf](http://www.unesco.org/new/fileadmin/.../Culture-Womens-Empowerment.pdf) (accessed 29 September 2015).
- 26 TA Salomao 'Tracking progress on implementation of the SADC Protocol on Gender and Development with special focus on Part Three Governance Articles 12 and 13 Women in Politics and Decision-Making Positions' (2013) *SADC Gender Monitor* 5; MB Kaundjua 'Gender dimensions of poverty and the Millennium Development Goals (MDGs) in Namibia' University of Namibia. He points out that there is a tendency to 'feminise poverty without reflecting on the role of the institutions and ideologies that create and perpetuate inequality, and consequently subject people to poverty' (5).
- 27 M Geldenhuys, C Kaufulu-Kumwenda, S Nabaneh& and K Stefiszyn 'The African Women's Protocol and HIV: Delineating the African Commission's General Comment on articles 14(1)(d) and (e) of the Protocol' (2014) 14 *African Human Rights Law Journal* 685. C Rakodi 'Evaluation of the strategy for women and gender equality in development cooperation (1997-2005): Country case study: Zambia' (2005) School of Public Policy, University of Birmingham; Mwale (n 8).

defined concept but is determined by

- extreme poverty which implies that the households are unable to meet the basic needs required for survival;
- moderate poverty, which refers to conditions of life in which the basic needs are met, but just barely; and
- relative poverty, which is generally perceived to be a household income level below a given proportion of average national income.<sup>28</sup>

These factors are indicative of the fact that people do not have ‘access to physical, social and economic [means] to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life which entails stability, availability, accessibility and consumption and use of food’.<sup>29</sup> These factors endorse the link of poverty to the insufficiency in resources, which are required to maintain an acceptable standard of life.<sup>30</sup>

Rapoo contends that poverty is exacerbated by:<sup>31</sup>

- external dependency, which maintains the enclave economy of the unjustified differentiation between men and women;
- distributive inefficiencies resulting in the informal sectors having unequal access to productive assets and markets;
- allocative inefficiencies, which make the formal sector unnecessarily capital and technology intensive, while the non-formal sectors tend to be without capital and technology – thus making productivity increases

- 28 JD Triegaardt ‘Poverty and inequality in South Africa: Policy considerations in an emerging democracy’ (2006) ADRU 2, <http://www.dbsa.org/Research/Documents/Poverty%20and%20inequality%20in%20South%20Africa%20Policy%20considerations%20in%20an%20emerging%20democracy.pdf> (accessed 3 October 2014); O Shisana, K Rice, N Zungu & K Zuma ‘Gender and poverty in South Africa in the era of HIV/AIDS: A quantitative study’ (2010) 19 *Journal of Women’s Health* 39. UN-OHRLLS Report entitled ‘State of the least developed countries 2014: Follow-up on the implementation of the Istanbul Programme of Action for the least developed countries’. The report also defines poverty as the inability to meet basic needs, including food, water, safe drinking water, sanitation facilities, shelter, health, education and information; v (executive summary).
- 29 Millennium Developmental Goals Report ‘Assessing progress in Africa towards the Millennium Development Goals: Food security in Africa: Issues, challenges and lessons’ (2013) 21, <http://www.afdb.org/fileadmin/uploads/afdb/DOC> (accessed 13 November 2014).
- 30 K Osei-Hwedie ‘Poverty eradication in Botswana: Towards the realisation of vision 2016’ (2004) 18 *Botswana Journal of African Studies* 7.
- 31 T Rapoo ‘Gender and the “New Africa Agenda”’ (2007) Centre for Policy Studies Brief 49 1-8; N Mbano-Mweso ‘Poverty, women and the human right to water to grow food’ (2014) 15 *ESR Review* 3-6 (she also contends that the ‘co-existence of poverty and gender inequality undermines economic growth and productivity, reinforces the deep inequalities that characterise the current patterns of globalisation and trap vulnerable households in cycles of poverty’ (3)). The Human Development Index Report 2013 entitled ‘The rise of the south: Human progress in a diverse world: Explanatory note on 2013 HDR composite indices’ highlights that the Gender Inequality Index (GII) is reflected in three dimensions, which are reproductive health, measured by maternal mortality and adolescent fertility rates; empowerment, measured by the share of parliamentary seats held by each gender and attainment at secondary and higher education by each gender; and economic activity, measured by the labour market participation rate for each gender (4), <http://hdr.undp.org/sites/default/files/reports/14> (accessed 11 January 2015).

- almost impossible.;
- technical inefficiencies resulting in low technological capabilities, thus limiting the adaptations that can be made to production techniques and the nature of products and services produced [which] in turn, prevent the establishment of value chains [where] levels of productivity of labour, capital and land tend to be low compared to optimal methods of production; and
- extractive industries have further deepened enclave development as the extractive zones became the centre of government and private sector attention and not the basis of diversification [resulting] in the increase in unemployment, deepening of poverty and inequality between and within countries is widening.

With these factors in mind, it is worth emphasising that in the SADC the critical institutional driver of poverty is gender inequality.<sup>32</sup> The tracing of poverty to the foundations of gender inequalities, such as economic imbalances, domestic violence and other related factors, as mentioned above, creates a form of inequality that subjects women to more vulnerability. As expressed by Njogu et al, the foundations of the inequalities are strengthened by the exclusion of women from political and economic decision-making and the aggression of men towards women.<sup>33</sup>

The aggression is also characterised by the 'expectation that men should be tough, brave and aggressive, frequent fighting or wife beating, institutionalisation and regular occurrence of various crimes against women'.<sup>34</sup> This means that the link between gender inequality and poverty is shaped by a multiplicity of factors, which include, but are not limited to, engagement with power and politics, harmonious rather than conflictual household relationships, and the failure to engage with broader questions of globalisation and economic change.<sup>35</sup>

Generally, it is clear that there is a co-existence of gender inequality and poverty, which is a reflection on the existing inequalities in the entire society. The co-existence of gender inequality and poverty is a form of exclusion of women in the enjoyment of their rights. The interrelationship that exists between gender inequality and poverty highlights the core content of discrimination which is defined in the SADC Protocol as 'any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise, by any person of human rights, and fundamental freedoms in the political,

32 O Chabaya, S Rembe & N Wadesango 'The persistence of gender inequality in Zimbabwe: Factors that impede the advancement of women into leadership positions in primary schools' (2009) 29 *South African Journal of Education* 235. See also A Porter 'Extreme poverty set to arise across Southern Africa' 5 April 2017, Institute of Security Studies, <https://issafrica.org/iss-today/extreme-poverty-set-to-rise-across-southern-africa> (accessed 9 June 2019). Porter points out that by 2040 more than 40 million people are expected to live in extreme poverty because of the pervasive inequality.

33 Njogu (n 24).

34 Njogu (n 24) 8.

35 Gibbs (n 23).



economic, social, cultural, civil or any other field'.<sup>36</sup> Haina is of the view that the definition enables the determination of

- differential treatment, which can be demonstrated as exclusion or favour of a certain sex;
- the rationality that is made for gender preferences; and
- treatment that has a harmful or hurtful purpose or effect.<sup>37</sup>

These factors signify the impact of discrimination on women and its direct link to the continuity of related gender inequalities that usually emanate from traditional prejudices against women, which, for example, relegates their role to that of childbearing.<sup>38</sup> The demotion of women to child bearers was evidenced by the South African Constitutional Court in *Hugo v President of the Republic of South Africa*.<sup>39</sup> Without undertaking an analysis of this judgment, although at face value it appeared to promote the rights of women to equal protection and benefit of the law because of South Africa's historic legacy of inequalities, which were particularly acute against women, the Court indirectly compromised the substantive conception of the rights of women and reduced them to child bearers. The judgment encouraged the conformity of women to behave in a manner that limits their advancement as it perpetuated their socio-political, legal and cultural subordination, which shapes the attitudes and the beliefs about gender roles. The Court advanced the gendered nature of inequalities and poverty. As expressed by Zou, the intersection of inequalities and poverty is demonstrated in 'social institutions and structures, including cultural, legal, social and economic factors, which shape women's ability to socio-economic and political empowerment'.<sup>40</sup>

In essence, the judgment missed an opportunity to equalise men and women in the translation of their equal right to co-responsibility in the upbringing of children. It also focused on the criminal conduct of men instead of the underlying values of equality, which are foundational to South Africa's new constitutional dispensation. The Court entrenched the inequality status between men and women, which is a direct link to the 'co-existence of poverty and gender inequality which compromise the advancement of the democratic participation and changes in socio-economic structures in order to ensure access for all to resources and opportunities'.<sup>41</sup> South Africa's 2013 Country Report on the Millennium Development Goals (MDGs) attributed the co-existence of poverty and gender inequality to the high unemployment rate and low labour force

36 The definition is similarly captured in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

37 L Haina 'The principle of gender equality manifested in China's social security system and relevant problems' in China Society for Human Rights Studies (ed) *Constructing an environment for sustainable human rights development* (2014) 304.

38 Haina (n 37).

39 1997 (6) BCLR 708 (CC).

40 M Zou "'Women hold up half the sky": Engendering the right to development' (2015) *Beijing Forum on Human Rights* 440.

41 Kaundjua (n 25) 12.

participation, where the ratio of population-to-employment remains below the target set, resulting in the 'disturbing trends in terms of the differentiation of poverty outcomes according to generation and gender in particular youth and women who remain disproportionately vulnerable to all forms of poverty defined under MDG 1'.<sup>42</sup>

Notwithstanding the co-existence of poverty and gender inequality and their impact on the elimination of gender inequalities and reduction of poverty, the SADC is determined to become part of the community of nations and to ensure that states take responsibility in terms of implementing gender-sensitive legal reforms.<sup>43</sup>

## 2.2 Towards a transformative region: Advancing the principles of the community of nations

This part emphasises the importance of the adoption of the Protocol as a legal reform that lays the foundation for the facilitation of the elimination of inequalities and the reduction of poverty. It provides an overview of the broad framework without an analysis of the specific provisions of the SADC Protocol.

The quest for the redress of inequalities and the reduction of poverty is widespread recognition by the region of the development of a normative and consensual framework that prohibits gender-based inequalities.<sup>44</sup> As correctly captured by the South African Constitutional Court:<sup>45</sup>

[Gender in]equality and [poverty] cannot be separated, because they are both violated simultaneously by [various socio-political factors]. [Those factors] deny equal respect for [human rights], which lie at the heart of equality, and become the basis for [discrimination]. At the same time, the negation by the state [to eliminate the co-existence of gender inequality and poverty] becomes the foundation for the repudiation of equality. Human rights are better approached and defended in an integrated rather than a disparate fashion. The rights must fit the people, not the people the rights. This requires looking at rights and their violations from a person's-centred rather than a formula-based position, and analysing them contextually rather than abstractly.

42 Statistics South Africa 'Millennium Development Goals Country Report 2013' (2013) 5.

43 Eg, South Africa's National Development Plan 2030 envisions the 'elimination of poverty and reduce inequality ... [wherein] all citizens have the capabilities to grasp the ever-broadening opportunities available [that are designed] to change the life chances of millions of our people, especially the youth; life chances that remain stunted by our apartheid history' (5).

44 R Semafumu 'Report on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women: Harnessing a potential for positive changes' Oxfam GB Southern African Region Study, [https://www.google.com/search?rlz=1C1GGRV\\_enZA783ZA783&ei=fRYCXeKtNvKc1fAPz\\_aOmAw&q=Prohibiting+gender+inequality+in+the+SADC+region&oq=Pr](https://www.google.com/search?rlz=1C1GGRV_enZA783ZA783&ei=fRYCXeKtNvKc1fAPz_aOmAw&q=Prohibiting+gender+inequality+in+the+SADC+region&oq=Pr) (accessed 12 June 2019).

45 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 para 112.

Drawing from the judgment, states are obligated to design and develop effective measures that will address the challenges faced by the region. The responsibility is encapsulated in the SADC Protocol.<sup>46</sup> The Protocol is a benchmark against which the region must ensure the achievement of its intended goals in terms of the elimination of gender inequalities and poverty.

The Protocol seeks to give effect to the long-identified thematic areas, to address the challenges faced by the region.<sup>47</sup> These areas include the

use of gender mainstreaming as an important strategy towards gender equality, engendering all macro-economic policies and procedures, consolidating and creating a synergy between various commitments on gender equality at international and continental levels into a comprehensive regional instrument, developing information and education strategies to widen awareness of the international, regional and national policy frameworks on gender equality among the general populace in SADC, promoting dialogue and discussion on women's human rights and gender equality, strengthening a monitoring mechanism for advancing gender equality, and raising awareness of the gender dimensions of the HIV/AIDS pandemic and violence against women and girls, so that both are viewed as emergencies, requiring appropriate actions to be taken at the national and regional levels.<sup>48</sup>

As Munalula contends, the SADC Protocol is therefore designed as a legal reform that 'should result in increased accountability on the part of the member states on issues of gender equality ... by creating common normative standards ... [that] should empower policymakers, service delivery institutions, human rights activists and beneficiaries of the stated rights with the legal tools to demand and claim gender equality'.<sup>49</sup> The Protocol was adopted against the background of the already-existing legal reforms, which have not achieved and addressed the challenges that continue to plague the region.<sup>50</sup> The region continues to be faced with the

lack of representation of women in parliament, inadequate legal frameworks and existence of contradictions between customary law practices and codified law that prevail and worsen violence against women in the face of emerging trends of violence, the impact of HIV/AIDS on women and the burden of care they shoulder, rising of the abject poverty situation of women which depicts a feminine face, remains of stereotypical attitudes in the society and media which make change of mindset difficult.<sup>51</sup>

Mathiba-Madibela further pointed out that the adoption of the Protocol

46 SADC Protocol (n 9).

47 Report on the SADC Consultative Conference on Gender and Development, Gaborone, Botswana, December 2005: 'Reflecting and re-strategising for gender-based regional integration', [http://www.sadc.int.index.php.download\\_file/view/2686/211](http://www.sadc.int.index.php.download_file/view/2686/211) (accessed 25 November 2015).

48 M Mathiba-Madibela 'Monitoring implementation of the Beijing commitments by SADC member states' (2006) *SADC Gender Monitor* 2.

49 MM Munalula 'SADC Protocol on Gender and Development: Roadmap to equality?' (2011) 1 *SADC Law Journal* 190.

50 See the objectives in art 3(b) of the Protocol.

51 C Lowe-Morna 'From a declaration to a protocol' in SADC Report (n 30); Mwale (n 8).

was strengthened by the

- emergence of new institutional arrangements after the restructuring process;
- limited ability to translate the policies into action – at both regional and national levels;
- lack of capacity at national level to review laws and policies pertaining to gender issues;
- inadequate resources and commitment by institutions and member states stalling the process;
- limited efforts to implement declarations and protocols as a drawback which works against successful implementation; and
- the fact that limited human resources, and a shortage of staff, particularly in the area of gender, continue to be a trend that impedes progress both at sub-regional and national levels.<sup>52</sup>

It is worth emphasising that it is the above context that prompted the adoption of the Protocol and its framing in a human-rights-based approach with its linkage to the state's responsibility to affirm the importance of constitutional and legal rights in the elimination of gender inequalities and the reduction of poverty in the region. The adoption of a human rights-oriented approach envisages the integration of human rights into law and/or policy making in the operationalisation of the regulation of the authority of member states. This is particularly important in the area of eliminating gender inequality and the reduction of poverty because the approach serves as a foundation for the empowerment of people not just to know but to also enforce their rights. On the other hand, to hold those responsible accountable not only for the promotion, protection and respect but the fulfilment of the rights. In essence, the human rights approach is two-pronged as it seeks to advance knowledge and the impact of rights on the recipients while, on the other hand, it requires the norms, standards of the laws, policies and the institutions to be based explicitly on human rights values.<sup>53</sup> The approach endorses the aspirations in the Preamble as it seeks to ensure the 'consolidation and the creation of a synergy between the various commitments on gender equality and equity made at regional, continental and international levels into one comprehensive regional instrument that enhances the capacity to report effectively and also addresses new challenges'.

52 Mathiba-Madibela (n 48). These factors are similarly expressed by Munalula (n 49) 190, by pointing out that the adoption of the Protocol was due to a lack of progress by most SADC countries in meeting targets set under non-binding agreements or pursuing substantive law reform to support gender equality; the importance of the region moving from an era of paying lip-service to regional commitments to one in which they would be compelled to act through the process of an obligatory, action-oriented framework; the clarification of normative expectations for inclusion of and the focus on region-specific manifestations of gender inequality.

53 See Office of the United Nations High Commissioner for Human Rights 'Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies' (HR/PUB/06/12) para 15, <https://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf> (accessed 12 June 2019).

The broad intention of the region is encapsulated in the objectives of the SADC Protocol, as it envisages to

- provide for the empowerment of women, to eliminate discrimination and to achieve gender equality and equity through the development and implementation of gender-responsive legislation, policies, programmes, and projects;
- harmonise the implementation of the various instruments to which the SADC member states have subscribed at the regional, continental and international levels on gender equality and equity;
- address emerging gender issues and concerns;
- set realistic, measurable targets, time frames, and indicators for achieving gender equality and equity;
- strengthen, monitor and evaluate the progress made by member states towards reaching the targets and goals set out in the Protocol; and
- deepen regional integration, attain sustainable development, and strengthen community building.<sup>54</sup>

These objectives are directly linked to the Solemn Declaration on Gender Equality in Africa, which was adopted by the Heads of State and Government of the African Union (AU).<sup>55</sup> The Declaration commits to and acknowledges the co-existence of gender inequality and poverty as it is 'deeply concerned about the status of women and the negative impacts on women of issues such as the high incidence of HIV/AIDS among girls and women, conflict, poverty, harmful traditional practices, high population of refugee women and internally displaced women, violence against women, women's exclusion from politics and decision-making, and illiteracy, limited access of girls to education'.<sup>56</sup>

This means that Africa, and not only the SADC, had long been concerned about the elimination of gender inequality and poverty as is the case with the international community,<sup>57</sup> as it had already adopted various instruments that are acknowledged in the Preamble of the Declaration as Africa reaffirms its commitment to the principle of gender equality as enshrined in article 4(l) of the Constitutive Act of the AU, as well as other existing commitments, principles, goals and actions, set out in the various regional, continental and international instruments on human and

54 Art 3 Protocol.

55 Adopted at the 3rd ordinary session of the AU Assembly in Addis Ababa, Ethiopia, 6-8 July 2004 (Declaration).

56 See Preamble to the Declaration.

57 Eg, as long ago as in September 1995 the Fourth World Conference on Women held in Beijing, China, produced the Beijing Declaration and Platform of Action which set an international agenda for the promotion of women's human rights, the empowerment of women and gender equality. The Declaration states in no uncertain terms that '[t]he advancement of women and the achievement of equality between women and men are a matter of human rights and a condition for social justice and should not be seen in isolation as a women's issue. They are the only way to build a sustainable, just and developed society. Empowerment of women and equality between women and men are prerequisites for achieving political, social, economic, cultural and environmental security among all peoples', [http://beijing20.unwomen.org/~media/headquarters/attachments/sections/csw/pfa\\_e\\_final\\_web.pdf](http://beijing20.unwomen.org/~media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf) (accessed 29 September 2015).

women's rights. These instruments include the Dakar Platform for Action (1994); the Beijing Platform for Action (1995); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979); the African Plan of Action to Accelerate the Implementation of the Dakar and Beijing Platforms for Action for the Advancement of Women (1999); the Outcome Document of the 23rd Special Session of the United Nations General Assembly on the Implementation of the Beijing Platform for Action (2000); the UN Resolution 1325 (2000) on Women, Peace and Security; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) (2003).

Drawing from the instruments mentioned above, it is thus concluded that they are given content by the adoption of the SADC Protocol to highlight the progress made by the region in ensuring the narrowing of the inequality gap and the reduction of poverty for both men and women. These instruments acknowledge that gender inequalities in the region – as is the case with the rest of the African continent – require immediate attention to ensure the substantive translation of the legal reform into reality.<sup>58</sup>

For example, article 2(1) of the SADC Protocol requires state parties to harmonise their national legislation, policies, strategies and programmes with relevant regional and international instruments related to the empowerment of women and girls for ensuring gender equality and equity. States are further required to adopt necessary policies, strategies and programmes, such as affirmative action, to facilitate the implementation of the Protocol.<sup>59</sup>

The harmonisation of the Protocol with the already-developed reforms is important for the elimination of the co-existence of gender inequalities and the reduction of poverty. Mlambo-Ngcuka contends that this should

- first, be a moral and ethical imperative which is essential for the determination of the substantive translation of the rights into reality;
- secondly, be the efforts, as evidenced by the adoption of the Protocol in order to achieve a just and sustainable future cannot ignore the rights, dignity, and capabilities of women;
- thirdly, to be effective, policy actions for eliminating inequalities must redress the disproportionate impact on women and girls of economic, social and environmental shocks and stresses;
- fourthly, the women's knowledge, agency, and collective action has a huge potential to improve resource productivity, enhance ecosystem and create more sustainable, low carbon food and energy, water and health systems.<sup>60</sup>

58 Namibia's country report on the African Union solemn Declaration on gender equality in Africa: Ministry of Gender Equality and Child Welfare (2006) 3, [www.genderismygender.com/country\\_report/...reports...namibia\\_report](http://www.genderismygender.com/country_report/...reports...namibia_report) (accessed 10 December 2014).

59 Art 2(1)(b).

60 Preface: P Mlambo-Ngcuka *World survey on the role of women in development 2014: Gender equality and sustainable development* (2014).

She consolidates her argument by affirming that the failure to capitalise on these factors would be a 'missed opportunity because women should not be viewed as victims but as central actors in moving towards the elimination of inequalities and reduction of poverty'.<sup>61</sup> It is deduced from Mlambo-Ngcuka's statement that the SADC Protocol provides for an opportunity for the design of programmes that have the potential to eliminate inequality and reduce poverty. The Protocol further enhances the linkages that correspond to the advancement of strategies that develop an inclusive human rights approach in the elimination of inequalities.<sup>62</sup> The human rights approach entails a broader reform that can have significant benefits for both men and women.<sup>63</sup> For example, Namibia adopted a Gender Policy which is designed to advance a human rights approach in the elimination of gender inequality and the reduction of poverty. This Policy:<sup>64</sup>

- endorses an important principle and a prerequisite for sustainable development and economic growth, which advances equal opportunities and participation, and equitable distribution of resources between men and women;
- encapsulates the concept of gender equality as a human right that should be incorporated in all the programmes that are designed to foster equality between men and women;
- advances gender mainstreaming for the strengthening of women's empowerment and the elimination of gender inequalities in all sectors and institutional policies, laws, and programmes in promoting gender analysis and the use of gender-disaggregated data in order to inform planning and policy development;
- ensures the allocation of resources for a meaningful implementation of gender-related programmes in all sectors through the provision of required budgetary and human resources;
- institutes affirmative measures as the necessary tools to facilitate the process of fast-tracking the achievement of equality;
- recognises customary, cultural and religious practices that guide the way of life among communities, but such practices should not compromise the interpretation, promotion, and protection of the right to gender equality;
- acknowledges the strategic role of men in mitigating gender-based violence;
- entrenches the zero-tolerance for gender-based violence at all levels; and
- establishes the collaboration between various stakeholders in the implementation and monitoring of the developed programmes, in ensuring the achievement of gender equality.

61 Mlambo-Ngcuka (n 60).

62 A Dlamini "'Threads of solidarity" revisited: Gender forums as important sites for contesting gender inequality' (2004) 55 *Transformation* 96; Report of the United Republic of Tanzania: 'Poverty and human development' (2009), Dar es Salaam, Tanzania, <http://planipolis.iiep.unesco.org/upload/Tanzania> (accessed 12 January 2015).

63 H Jansson, B Khumalo & T Shand 'Southern Africa: SADC must engage men for gender equality' 3 March 2014, <http://www.genderlinks.org>GLNEWS>Countries>Mauritius> (accessed 6 October 2014).

64 National Gender Policy (2010-2020) Ministry of Gender Equality and Child Welfare, Windhoek, Namibia 22, <http://www.africanchildforum.org/clr/policy> (accessed 18 January 2015).

Botswana followed the same path by identifying eight critical areas, which are essential for the consolidation of the strategies for the empowerment of women and the reduction of poverty. These areas include:<sup>65</sup>

- women and poverty, including economic empowerment;
- women in power decision making;
- education and training of women;
- women and health;
- violence against women, including women's human rights;
- the girl child;
- women and the media; and
- women and the environment.

South Africa also acknowledges its protracted history of inequalities and adopted the National Development Plan: Vision 2030, as it seeks to eliminate poverty and inequalities by 2030.<sup>66</sup> South Africa is also commended for having adopted and adhered to other regional and international instruments, and the establishment of the 'gender machinery' in government that is aimed at promoting and supporting gender equity, as well as a human rights-based discourse that permeates policy in government and civil society organisations.<sup>67</sup> Considering South Africa's history, the progress so far made advances an unprecedented political and constitutional commitment, which endorses the entrenchment of human rights for both men and women and especially for the prohibition of racial discrimination which characterised the pre-democratic dispensation which had a huge and negative impact, especially on black and rural women.<sup>68</sup>

The judiciary of the Republic of Uganda has adopted a policy entitled 'Gender Policy: Attaining Gender Equality in Access and Treatment by the Judiciary'. The aim of the Policy is to 'provide gender mainstreaming within the judiciary by addressing gender sensitive concerns as an institution and also addressing key gender obstacles to court users, more specifically, [on] access and delivery of justice to females and males and organisational development and management in terms of representation and how the judiciary can be more gender-responsive, gender aware and

65 Botswana country report on the implementation of the Beijing Platform for Action (Beijing Plus 20 years), Gender Affairs Department, Ministry of Labour and Home Affairs, June 2014 8, <http://www.unwomen.org/-/media/.../59/botswana-review-beijing20.ashx> (accessed 18 January 2015).

66 Adopted on 11 November 2011 5, <https://www.gov.za/documents/national-development-plan-vision-2030> (accessed 23 January 2015). H Zarenda 'South Africa's National Development Plan and its implications for regional development' (2013) Trade Law Centre Working Paper 34 D13PW01/2013, Stellenbosch 1-17.

67 R Moletsane 'Looking back, looking forward: Analysing gender equality in education 10 years after Beijing' (2005) 64 *Agenda: Empowering Women for Gender Equity*, Beyond Beijing 80-88.

68 A Westaway 'Rural poverty in South Africa: Legacy of apartheid or consequence of contemporary segregationism?' Paper presented at the conference *Inequality and Structural Poverty in South Africa: Towards Inclusive Growth and Development*, 20 September 2010, Johannesburg, South Africa.



gender-sensitive in its day to day working'.<sup>69</sup>

The strides taken by the identified countries in the region requires an oversight and evaluation of the impact of the developed measures in the elimination of gender inequalities and the reduction of poverty. The quest for the fulfilment of the latter (gender inequality and the reduction of poverty) is driven by:<sup>70</sup>

- first, social factors, which take into account the people's basic human rights and the safeguarding of the vulnerable from poverty and exploitation;
- second, there is the democratic factor, which determines the functioning of the political system in relation to decision-making and implementation, resource distribution, allocation of opportunities and the achievement of justice; and
- third, there is the impact of the global system on the implementation of decisions, not only in the region but also in Africa generally.

These factors contextualise the content of a human-rights approach and, as noted above, broadens a deeper understanding of the rights framework between the governor and the governed. In essence, the development of legal reforms seeks to minimise the long-term effects of inequalities that may not only compromise the integrity of men and women but the broader social fabric and wellbeing of society.<sup>71</sup> The approach intends to translate the formal conception of the legal reform into reality, because of the inability of the legal instruments to change the practical realities faced by the general populace on their own.<sup>72</sup> Women are subordinated because reforms remain on paper without a conception of how they are going to be implemented. The lack of urgency in crafting strategies designed to give content to the reform meant to address the disparities between men and women undermines adopted legal measures. The subordination is perpetuated by what could be referred to as a lack of commitment by member states due to a variety of reasons which they attribute to a lack of resources (both human and financial) in dealing with gender-sensitive policy or legal frameworks.

In the South African context, the inclusion of socio-economic rights in the 1996 Constitution, which rights have a direct impact on the enjoyment of equal rights and the reduction of poverty by women, are internally qualified by 'access to' and the 'progressive nature' of their realisation.<sup>73</sup> The limitation as endorsed in the Constitution has potential for a 'snail-pace approach' in the elimination of inequalities and the

69 Adopted in December 2012 7.

70 n 6.

71 Report of the Committee on African Affairs New York Bar Report entitled 'Gender-based violence laws in sub-Saharan Africa' (2007) 6, <http://www.reproductiverights.org/sites/default/files/doc> (accessed 13 January 2015).

72 C Murray et al 'Women's rights' in R Louw (ed) *South African human rights yearbook* 1996 (1998) Centre for Socio-Legal Studies, University of Natal ISBN: 1-868402754 296.

73 See secs 26 & 27 of the 1996 Constitution.

reduction of poverty. This is the case in Namibia where socio-economic rights are included as 'directives of state policy' and not entrenched in the Constitution, which carries more weight than the policy decisions taken by the state. The position adopted by the two countries constrains the economic advancement of both men and women. It also widens the bridging of the gap in accessing empowerment opportunities that are designed to ensure the balancing of the scales between men and women.

However, the adoption of the SADC Protocol is an acknowledgment of the co-existence of inequality and poverty between men and women. It gives effect to the recognition of the many facets of life that emanate from legal and socio-political factors, which reinforce the unequal power balance in societies. The adoption signifies the 'constitutive element of social relations in general which is expressed along the fabric of relations and institutions through socio-political and legal practices'.<sup>74</sup> It further reinforces the importance of the substantive conception of a designed measure as a political and legal resource that can be used to shape the translation of declarations and protocols into a practical reality.

The region's transformative vision, as endorsed in the SADC Protocol, seeks to give effect to the Millennium Development Goals<sup>75</sup> on the reduction of poverty and the elimination of gender inequalities, to:<sup>76</sup>

- include women in planning, budgeting, and policy-making processes in a meaningful way;
- promote the economic rights and opportunities of women and girls;
- address the gender dimensions of HIV and AIDS;
- strengthen the collection and analysis of gender-disaggregated data; and
- ensure that essential public services such as health and education benefit women, men, girls, and boys equitably.

These factors are essential for the entrenchment of the fundamental human rights of both men and women and not mere socio-political advancement but as an affirmation that:<sup>77</sup>

- ensures equal access to education and the participation in business and economic decision making fully;
- serves as a key driving force against poverty when they are better educated, healthier and with greater access to land, jobs and financial resources;
- increases the earning power of household incomes; and
- translates gender equality into better prospects and reduce the poverty of future generations.

74 Kandijua (n 25).

75 The eight goals adopted at the UN General Assembly 56th session on 8 September 2000 were to be implemented by 2015.

76 Available from [http://www.undp.org?gfe\\_rd=cr&ei=M2FQ](http://www.undp.org?gfe_rd=cr&ei=M2FQ) (accessed 27 October 2014).

77 MDGs (n 29). EISA Research Report 37 'Consolidating democratic governance in the SADC region: Mauritius' (2008).

The above principles seek to redirect the focus of the region on its history of failures, which led to the adoption of the SADC Protocol to the rebuilding of a better understanding of the impact of poverty and gender inequality alleviation strategies that seek to advance the quality of life for all. The adoption of the Protocol was and continues to be a necessity for SADC as a significant instrument in fighting against the inequalities and the subjection of women to poverty, which is encouraged by violations that perpetuate women's subordination.

The main target is to remove all the barriers as highlighted in part 2 of this chapter, that are expressed in unequal power imbalances between men and women that entrench the feminisation of poverty, especially in the rural areas and among the unemployed. The removal of such barriers, in turn, will affirm the legitimacy of the legal reform in the context of the human rights approach, by promoting principles and standards of gender equality.<sup>78</sup>

### 3 Conclusion

This chapter highlighted the importance of the SADC Protocol as a yardstick against which the aspirations for gender inequalities and the reduction of poverty may be eliminated in the SADC region. It defined gender inequality and poverty, which prompted the identification of several factors that continue to plague the aspirations of the region in an endeavour to eliminate these inequalities. It also acknowledged that although progress has been made in the development of legal reforms that are meant to address these challenges, it has been a mammoth task for the region to address the inequalities as evidenced by the plethora of instruments that have been adopted. This resulted in the adoption of the Protocol on Gender and Development, which consolidated the existing instruments in addressing the continued manifestation of the challenges faced by the region. The Protocol is highly regarded as a benchmark against which the performance of the region will be determined in the elimination of inequalities. Considering the factors identified in this chapter, it also remains to be seen whether the Protocol will achieve its intended objectives. This contention is driven by the plethora of other legal instruments not only of the SADC but also in Africa generally, which have not yet yielded the positive results of eliminating gender inequalities and reducing poverty as evidenced by the further adoption of the Protocol in addressing, particularly, women's challenges.

78 N Mohlakoana & J Dugard 'More work for women: A rights-based analysis of women's access to basic services in South Africa' (2009) 25 *South African Journal on Human Rights* 546.

## References

- Chabaya, O, Rembe, S & Wadesango, N 'The persistence of gender inequality in Zimbabwe: Factors that impede the advancement of women into leadership positions in primary schools' (2009) 29 *South African Journal of Education* 235
- Cooper, F 'Conflict and connection: Rethinking colonial African history' (1994) 99 *The American Historical Review* 1516
- De Vos, P & Freedman, W (eds) *South African constitutional law in context* (Oxford University Press 2014)
- Dlamini, A "'Threads of solidarity" revisited: Gender forums as important sites for contesting gender inequality' (2004) 55 *Transformation* 96
- Fraser-Moleketi, G 'Investing in gender equality for Africa's transformation' in African Development Bank Group *Investing in gender equality for Africa's transformation*, <http://www.afdb.org/fileadmin/uploads/afdb//Doc> (accessed 13 November 2014)
- Geldenhuis, M, Kaufulu-Kumwenda, C, Nabaneh, S & Stefiszyn, K 'The African Women's Protocol and HIV: Delineating the African Commission's General Comment on articles 14(1)(d) and (e) of the Protocol' (2014) 14 *African Human Rights Law Journal* 681
- Gibbs, A, Willan, S, Misselhorn, A & Mangoma, J 'Combined structural interventions for gender equality and livelihood security: A critical review of the evidence from Southern and Eastern Africa and the implications for young people' (2012) 15 *Journal of the International Aids Society* 1
- Haina, L 'The principle of gender equality manifested in China's social security system and relevant problems' in China Society for Human Rights Studies (ed) *Constructing an environment for sustainable human rights development* (China Intercontinental Press 2014)
- Himonga, C 'Law and gender in Southern Africa: Human rights and family law' in York, W, Bradshaw, S & Ngedwa, SN (eds) *The uncertain promise of Southern Africa* (Indiana University Press 2000)
- 'Inequality in Southern Africa: options for redress' Policy Brief 1-6, [http://www.ioi.org/wcsmp5/groups/public/---ed\\_](http://www.ioi.org/wcsmp5/groups/public/---ed_) (accessed 12 January 2015)
- Jansson, H, Khumalo, B & Shand, T 'Southern Africa: SADC must engage men for gender equality' 3 March 2014, <http://www.genderlinks.org/GLNEWS/Countries/Mauritius> (accessed 6 October 2014)
- Kabwila-Kapasula, J 'Patriarchy and oppression of women in 21st century Africa: A conversation with Adichie and Dangaremba' UNISA Public Lecture, 12 August 2009
- Kaundjua, MB 'Gender dimensions of poverty and the Millennium Development Goals (MDGs) in Namibia' University of Namibia
- Leach, F & Mitchell, C (eds) *Combating gender violence in and around schools* (Trentham Books 2006)
- Lowe-Morna, C 'From a declaration to a protocol' in SADC Report
- Mathiba-Madibela, M 'Monitoring implementation of the Beijing commitments by SADC member states' (2006) 3 *SADC Gender Monitor* 1
- Mbano-Mweso, N 'Poverty, women and the human right to water to grow food' (2014) 15 *ESR Review* 3
- Millennium Developmental Goals Report 'Assessing progress in Africa towards the Millennium Development Goals: Food security in Africa: Issues, challenges and lessons' (2013), <http://www.afdb.org/fileadmin/uploads/afdb/DOC> (accessed 13 November 2014)
- Mlambo-Ngcuka, P Preface 'World survey on the role of women in development 2014: Gender equality and sustainable development' (United Nations 2014)
- Mohlakoana, N & Dugard, J 'More work for women: A rights-based analysis of women's access to basic services in South Africa' (2009) 25 *South African Journal on Human Rights* 546

- Moletsane, R 'Looking back, looking forward: Analysing gender equality in education 10 years after Beijing' (2005) 64 *Agenda: Empowering Women for Gender Equity, Beyond Beijing* 80
- Munalula, MM 'SADC Protocol on Gender and Development: Roadmap to equality?' (2011) 1 *SADC Law Journal* 189
- Murray, C et al 'Women's rights' in Louw, R (ed) *South African human rights yearbook 1996* (1998) 7 Centre for Socio-Legal Studies, University of Natal ISBN: 1-868402754
- Mwale, EB 'Presentation on gender equality in Zambia during the civil society/patriotic front dialogue' 12-13 April 2012, Cresta Golf View Hotel, Lusaka, Zambia, 1, <http://www.fes-zambia.org/media/documents/GEN> (accessed 13 November 2014)
- Njogu, K & Orcharson-Mazrui, E 'Gender inequality and women's rights in the Great Lakes: Can culture contribute to women's empowerment?' [www.unesco.org/new/fileadmin/.../Culture-Womens-Empowerment.pdf](http://www.unesco.org/new/fileadmin/.../Culture-Womens-Empowerment.pdf) (accessed 29 September 2015)
- Osei-Hwedie, K 'Poverty eradication in Botswana: Towards the realisation of vision 2016' (2004) 18 *Pula: Botswana Journal of African Studies* 7
- Rakodi, C 'Evaluation of the strategy for women and gender equality in development cooperation (1997-2005): Country case study: Zambia' (2005) School of Public Policy, University of Birmingham
- Rapoo, T 'Gender and the "New Africa Agenda"' (2007) 49 *Centre for Policy Studies Brief* 1
- Salomao, TA 'Tracking progress on implementation of the SADC Protocol on Gender and Development with special focus on Part Three Governance Articles 12 and 13 Women in Politics and Decision-Making Positions' (2013) *SADC Gender Monitor* 5
- Shisana, O, Rice, K, Zungu, N & Zuma, K 'Gender and poverty in South Africa in the era of HIV/AIDS: A quantitative study' (2010) 19 *Journal of Women's Health* 39
- Triegaardt, JD 'Poverty and inequality in South Africa: Policy considerations in an emerging democracy' (2006) ADRU, <http://www.dbsa.org/Research/Documents/Poverty%20and%20inequality%20in%20South%20Africa%20Policy%20considerations%20in%20an%20emerging%20democracy.pdf> (accessed 3 October 2014)
- Westaway, A 'Rural poverty in South Africa: Legacy of apartheid or consequence of contemporary segregationism?' Paper presented at the Conference Inequality and Structural Poverty in South Africa: Towards Inclusive Growth and Development', 20 September 2010, Johannesburg, South Africa
- World Health Organization 'Why gender and health?' <http://www.who.int/gender/genderandhealth/en/index.html>, quoted in Cornell, M 'Gender inequality: Bad for men's health' (2013) 14 *Southern African Journal of HIV Medicine*, <http://sajhivmed.org.za/index.php/hivmed/rt/printfriendly/95/151> (accessed 29 January 2015)
- Zarenda, H 'South Africa's National Development Plan and its implications for regional development' (2013) Trade Law Centre Working Paper 34 D13PW01/2013, Stellenbosch, South Africa 1
- Zou, M "'Women hold up half the sky": Engendering the right to development' (2015)



# CHAPTER 10

## THE POTENTIAL OF THE AFRICAN HUMAN RIGHTS SYSTEM IN ADDRESSING POVERTY

Bright Nkrumah\*

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### Abstract

*The human rights interaction between the African human rights mechanisms continues to deepen, particularly in the area of poverty alleviation. The inclusion of core economic, social and cultural rights in some of the African Union's normative standards and the recent adoption of the Declaration on Employment and Poverty Alleviation in Africa mark a significant step in the ambitious project of making the AU the primary vehicle for addressing poverty. The legal right to basic necessities such as food, nutrition and safe drinking water represents one of the boldest expressions of supra-nationalism in the AU normative standards. The African Charter, for instance, is celebrated as the first regional instrument that not only linked socio-economic rights to civil and political rights, but also made the former justiciable. This implies that the substantive norms provide formal avenues for the quasi-judicial and judicial ambits of the regional human rights architecture to adjudicate on and enforce socio-economic rights and freedom from poverty. This chapter argues that with continuous and cumulative collaboration, and the harmonisation of the mandates of the monitoring bodies, the AU human rights architecture may be one of the continent's blueprints in reducing and addressing poverty.*

### 1 Introduction

The availability of and access to basic necessities such as food, water, housing and nutrition are of primary significance to many African people. An individual or a community is poverty-stricken where there is a lack of access to these fundamental necessities. A large number of African people live in severe poverty, although the 'severity of the problem is most pronounced in sub-Saharan Africa'.<sup>1</sup> This predicament was succinctly captured by the African Progress Panel when it observed:<sup>2</sup>

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1 A Flint Trade, *poverty and the environment: The EU, Cotonou and the African-Caribbean-Pacific Bloc* (2008) 98.

2 Africa Progress Report 'Equity in extractives', (2014) 26, [http://www.africanprogresspanel.org/wp-content/uploads/2013/08/2013\\_APR\\_Equity\\_in\\_Extractives\\_25062013\\_ENG\\_HR.pdf](http://www.africanprogresspanel.org/wp-content/uploads/2013/08/2013_APR_Equity_in_Extractives_25062013_ENG_HR.pdf) (accessed 18 August 2017)

[African] governments have failed to put in place the mechanisms needed to transform resource wealth into expanded opportunity for the poor. That failure is reflected in the scale of social disparities. The national average human development indicators highlighted ... mask extreme national inequalities in opportunity, starting with the opportunity to stay alive ... children from poor households are twice as likely to die before their fifth birthday as those from wealthy households.

Freedom from acute poverty is among the fundamental human interests grounded in the necessity for physical beings to have access to adequate food, safe water, basic medical care, shelter and clothing. This freedom is grounded in several international instruments such as the *Universal Declaration of Human Rights (Universal Declaration)*; the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*; the African Charter on Human and Peoples' Rights (African Charter) and other regional instruments. For instance, according to article 25 of the Universal Declaration each individual has 'the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care'. Further, article 11(1) of ICESCR 'recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'.<sup>3</sup>

Since socio-economic rights have been codified in some international standards, the African Union (AU) monitoring mechanisms can serve as conduits for adjudicating poverty claims. Indeed, numerous Africans lack the basic needs 'in order to live well – indeed, in order to live at all'.<sup>4</sup> These groups often comprise those directly in need of supra-national intervention, as their domestic prospects of even seeking redress for their grievances may be foreclosed.

In order to execute this task, three selected issues deserve mention here. The first is whether there are adequate instruments for tackling poverty. This will be done by examining the scope and content of the substantive norms of the treaties in relation to poverty. The second is whether the regional monitoring mechanisms adequately fit into the AU architecture relating to poverty reduction. The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and the African Court on Human and Peoples' Rights (African Court) receive

3 As at July 2017, 49 AU member states are parties to ICESCR, namely, Algeria, Angola, Benin, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, The Congo, The Democratic Republic of the Congo, Côte d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Egypt, Ethiopia, Guinea, Guinea-Bissau, Gabon, The Gambia, Ghana, Kenya, Lesotho, Liberia, Libyan Arab Jamahiriya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Namibia, The Niger, Nigeria, Rwanda, Swaziland, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, The Sudan, Tunisia, The United Republic of Tanzania, Togo, Uganda, Zambia and Zimbabwe. See M Ssenyonjo 'The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa' 64 *Netherlands International Law Review* 260.

4 T Pogge 'Severe poverty as a human rights violation' in T Pogge *Freedom from poverty as a human right: Who owes what to the very poor* (2007) 11.



comparatively more attention, as the African Commission on Human and Peoples' Rights (African Commission) will be addressed in a subsequent chapter. Finally, the chapter evaluates the lessons to be drawn from other international standards, particularly the European human rights system, in addressing the issue at hand.

## **2 Norm creation and norm enforcement: Issues and implications**

The African human rights architecture is composed of a set of substantive instruments and institutions created under the aegis of the former Organisation of African Unity (OAU) and subsequently inherited by the AU in 2002. Norms that overtly or implicitly refer to poverty are the African Charter and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) (their monitoring organ being the African Commission); the African Charter on the Rights and Welfare of the Child (African Children's Charter) (with its monitoring organ the *African Children's Committee*); and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) (the monitoring organ being the *African Court* on Human and Peoples' Rights).

In examining the effective and prospective function of the African regional human rights architecture in addressing poverty, consideration should be given to its gradual growth and strengthening. There have been major jurisprudential successes and normative progression. Apart from setting new standards, the regional architecture over the last decade has complemented and strengthened national legal systems in the advancement of recognisable rights.<sup>5</sup> However, these developments hold little significance for severe poverty as experienced by some African people. The denial of basic necessities often is linked to the general failings and limitations in the African human rights architecture, to which the chapter now turns.

### **2.1 Normative framework for addressing poverty**

From the inception, it should be noted that it is unclear whether the African Charter, the African Charter on the Rights and Welfare of the Child (African Children's Charter) and the African Women's Protocol address poverty. This notion was not clearly set out in any of these instruments. Rather, they provide for some of the fundamental socio-economic rights that are linked to poverty alleviation. This part, therefore, will provide

5 M Mayrhofer et al *Report on the mapping study on relevant actors in human rights protection* Work Package 4 – Deliverable 4.1, Large-Scale FP7 Collaborative Project GA 320000 1 May 2013-30 April 2017 (2014) 24.

a synopsis of anti-poverty provisions in instruments operating under the custody of the AU. Although the assessment focuses on the primary treaty, the African Charter, it will situate the Charter and related human rights standards as 'part of a normative network, instead of isolated loose threads'.<sup>6</sup> Again, despite significant emphasis being placed on binding normative frameworks, other soft laws such as declarations will also be appraised.

## 2.2 African Charter on Human and Peoples' Rights

The African Charter is hailed as the first international human rights norm that speaks to poverty alleviation. It sets out sufficient provisions (although implicit at best) addressing issues of sufficient access to basic necessities. The Charter provides for the right of the individual to access public property and services.<sup>7</sup> This provision by extension entrenches the right of the individual to access without discrimination, all state-owned and funded facilities, *inter alia* schools, hospitals, housing, water and related services. It is also the first international norm to provide for the right to development as justiciable guarantee.<sup>8</sup> Arguably, the right to development encompasses the totality of socio-economic rights, progressively tailored at ensuring, at the minimum, the basic needs for survival.<sup>9</sup>

Undoubtedly, the foregoing provisions paint a rosy picture. However, explicit provisions dealing with poverty in the African Charter are minimal. For instance, whereas ICESCR explicitly guarantees the 'right to adequate food, clothing and housing and to the continuous improvement of living conditions',<sup>10</sup> the African Charter sets out only the rights to education, health and work.<sup>11</sup> Moreover, as a product of competing tensions within the then OAU, these rights and other related socio-economic rights provisions are saddled with numerous claw-back clauses.<sup>12</sup> Arguably, this limitation can be traced back to the early 1980s when the framers of the treaty had the primary aim of saving the emerging states from undue burden.<sup>13</sup> In terms of operationalisation, the African Charter provides for a weak monitoring system of 11 part-time commissioners convening not

6 F Viljoen *International human rights law in Africa* (2012) 213.

7 Arts 13 & 14 African Charter. Article 14 equally addresses the right to property,

8 Eg, in *Centre for Minority Rights & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (Endorois case) the Commission emphasised not only the inextricable link between the rights to civil and political rights and socio-economic rights, but also the advantage of using the right to development as a conduit to enhance social wellbeing; paras 277-278.

9 Art 22.

10 The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for an elaborate catalogue of poverty-related rights, among others the right of everyone to equal work opportunity (art 6); just and favourable remuneration (art 7(a)); the right to form and join trade unions (art 8); social security (art 9); protection of the family (art 10); the right to adequate food, clothing and housing and to the continuous improvement of living conditions (art 11).

11 Arts 15, 16 & 17.

12 See art 14.

13 Viljoen (n 6) 24.

more than twice per year for sessions not exceeding 15 days.

Despite these deficiencies, the African Commission over the last three decades has adopted an expansive and progressive interpretation of the African Charter and for evading the limitation clauses and making vital socio-economic rights justiciable. In the *SERAC* case<sup>14</sup> the Commission implored the implied rights theory and extended the limited scope of the explicitly-guaranteed socio-economic rights to include the rights to housing and food. The Commission argues that the right to food is implicit 'in provisions such as the right to life'<sup>15</sup> and 'essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation'.<sup>16</sup> This pronouncement attests to the unconditional acknowledgment of socio-economic rights as justiciable claims.<sup>17</sup> Subsequently, in the *Darfur* case, as the right to water is not enshrined in the African Charter, the African Commission, apprehensive of the possibility of the implied rights theory weakening its institutional legitimacy, gave an expansive interpretation to the right to health to encompass the right of access to safe and potable water and an adequate supply of food, nutrition and housing.<sup>18</sup> This inference undoubtedly facilitated the ruling that the poisoning of the wells of the people of the Darfur region of Sudan by the Janjaweed amounted to a violation of the right to health.<sup>19</sup>

### 2.3 Little angels: African Charter on the Rights and Welfare of the Child

The African Children's Charter is the sole continental normative framework on the rights of the child. In establishing the basis for providing a safety net for children, its Preamble obligates state parties to provide special measures required to ensure the health and physical, mental and social development of the child.<sup>20</sup> This foundation visibly demonstrates that the treaty provides for a rights-based approach in alleviating poverty, specifically towards children in the region.

However, the treaty provides for a relatively detailed catalogue of safeguards against severe poverty. It sets out the obligation of states to provide child education, right to child-specific health services, rights against harmful child labour, *inter alia* conditions of employment, minimum wage and the regulation of working conditions and hours.<sup>21</sup> Interestingly, to address the question of hunger and stunted growth among

14 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC*).

15 *SERAC* (n 14) para 64.

16 *SERAC* para 65.

17 Viljoen (n 6) 23.

18 *Sudan Human Rights Organisation & Another Sudan* (2009) AHRLR 153 (ACHPR 2009) (*Darfur* case) paras 124, 209.

19 Para 126.

20 Art 14(1).

21 Arts 11, 12, 14 & 15.

children, it obliges states to provide adequate nutrition and safe drinking water, to combat diseases and malnutrition within the framework of the primary health care and to ensure appropriate health care for expectant and nursing mothers.<sup>22</sup>

By interpretation this is a provision on the right to food and water which by extension addresses issues of severe hunger and the mortality rate in the region. The above provisions provide a clear indication that the right to basic necessities, *inter alia* food, health care and education, is justiciable claims under the African human rights system.

## 2.4 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Although the African Women's Protocol does not explicitly seek to address poverty facing women, it sets out a legal framework within which the problem may be addressed. The Protocol stands on the fundamental principles of its mother instrument and provides for a striking array of anti-poverty rights in a comparatively comprehensive approach and even exceeds its predecessor in terms of substantive provisions. The factual provisions are unmatched by other normative frameworks in the AU system, particularly the African Charter.<sup>23</sup> The Women's Protocol has been envisaged as reinforcing the economic empowerment of women which mournfully was ignored in the African Charter.<sup>24</sup> In addition it provides a catalogue of provisions addressing the socio-economic development of women, *inter alia* guaranteeing the right of women to the free development of their personality, thereby prohibiting all forms of exploitation.<sup>25</sup> The Protocol obliges contractual states to provide basic services such as health services to women when necessary.<sup>26</sup>

The rights of women to freely attain, administer and manage their property is also entrenched while the right to an equitable share of the joint property deriving from marriage is guaranteed.<sup>27</sup> In probably a ground-breaking provision, contractual states to the treaty affirmed to cut down on their military expenditures in favour of spending on social objectives benefiting women.<sup>28</sup>

It further guarantees 'women equal opportunities in work and

22 Art 14.

23 Viljoen (n 6) 254-255.

24 The African Charter contains only two explicit references to women, in arts 2 and 18(3). See R Manjoo 'Women's human rights in Africa' in M Ssenyonjo (ed) *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (2012) 146.

25 Art 3(2).

26 Art 5(c).

27 Arts 5(j) & 6(d).

28 Art 10(3).

career advancement and other economic opportunities'.<sup>29</sup> The rights of women to food security, adequate housing, water, land, domestic fuel, sufficient food and nutrition are firmly enshrined in the African Women's Protocol.<sup>30</sup> However, although Viljoen criticises the Protocol for its failure to adequately highlight on the 'feminisation of poverty, especially in rural Africa',<sup>31</sup> it implicitly addresses this shortcoming by obligating member states to advance the (socio-economic) rights of women in accordance with international norms and standards.<sup>32</sup> Consequently, the Women's Protocols provisions in conjunction with article 56 of the African Charter may be used as a broad legal basis for addressing a denial of basic necessities.

### **3 Other instruments relating to poverty**

#### **3.1 AU Convention on Preventing and Combating Corruption (Anti-Corruption Convention)**

The link between corruption and severe poverty is direct. The adoption of this Convention by the AU marked a significant step in attempts to counteract the ills of corruption across the region. It is composed of legislative commands requiring state intervention to curtail the drivers of corruption which 'stifles entrepreneurship, constrains economic development, and ultimately becomes the yeast from which political dissent brewed'.<sup>33</sup>

The Convention aims to achieve three primary aspirations, namely, to (i) to prevent, punish and eradicate corruption as a means of strengthening social and economic development; (ii) remove the drivers of poverty; and (iii) establish mechanisms to improve transparency, accountability and justice in the management and use of public funds.<sup>34</sup> The human rights approach adopted by the Convention has two merits worth mentioning: (i) it reinforces national accountability institutions and systems designed to alleviate poverty; and (ii) it provides a legal basis for international accountability.

#### **3.2 Declaration on Employment and Poverty Alleviation in Africa**

Under this Declaration the heads of state reaffirmed their commitment

29 Art 13.

30 Arts 15 & 16.

31 Viljoen (n 6) 255.

32 See Preamble.

33 Viljoen (n 6) 273.

34 Art 2.

to enhance ‘employment, poverty eradication and inclusive development’ as a pathway to exiting poverty.<sup>35</sup> They also agreed to accelerate decent job creation for sustainable and inclusive development as a response to the pervasive unemployment rate among women and the youth as well as underemployment in the region.<sup>36</sup> Against this backdrop, two policy documents were adopted to ensure the full realisation of these objectives: (i) the Plan of Action for the Promotion of Employment and Poverty Alleviation; and (ii) the follow-up Mechanism for Implementation, Monitoring and Evaluation. Although AU member states are the principal implementers of these frameworks, the AU, regional economic communities (RECs) and other international donors are envisaged to collaborate in addressing the challenges of employment creation and poverty alleviation.

### **3.4 Comprehensive African Agriculture Development Programme**

One of the groundbreaking initiatives of the New Partnership for African Development (NEPAD) is the adoption of the Comprehensive African Agriculture Development Programme (CAADP). Under this framework, African leaders committed to raise agriculture productivity by at least 6 per cent per year and to increase public investment in this sector to a minimum of 10 per cent of national budgets yearly.<sup>37</sup> By bringing together continental, regional and national stakeholders, the initiative was designed to pay attention to disasters and emergencies that require food and agriculture safety nets or responses.

Specifically, the third pillar (Pillar III) of the framework calls on African leaders to guarantee food security by exploring options for increasing food supply, reducing hunger and malnutrition. Despite celebrating its tenth anniversary, food insecurity and poverty remain a challenge on the continent. Two factors have contributed to the failure of this initiative. The first is the declaratory and non-binding nature of this instrument. The second is the lack of a monitoring mechanism to ensure its effective operationalisation.

35 African Union ‘Employment, Poverty Eradication and Inclusive Development’ Extraordinary Summit of the African Union on Employment, Poverty Eradication and Inclusive Development 3-7 September 2014, Ouagadougou, Burkina Faso’, (3-7 September 2014) 2.

36 African Union (n 35) para 17.

37 <http://www.caadp.net/pdf/CAADP%20FAFS%20BROCHURE%20indd.pdf> (accessed 4 November 2014) 2.

## 4 Institutional frameworks for addressing poverty

### 4.1 African Commission on Human and Peoples' Rights

Inaugurated in October 1987, the African Commission over the years has attempted to address poverty through its norm expansion, standard setting and the facilitation of these standards in concrete decisions. Under this heading its promotional mandate is evidenced in the setting up of two special mechanisms significant to poverty alleviation. The first is the Working Group on Extractive Industries, and the second, the Working Group on Socio-Economic Rights. Whereas the former has the obligation of researching on and providing recommendations on measures for the prevention and reparation of violations of human rights by extractive industries,<sup>38</sup> the latter is mandated to undertake studies on specific socio-economic rights towards the improvement of the living conditions of African people.<sup>39</sup>

Moreover, the African Commission's Pretoria Declaration on Economic, Social and Cultural Rights in Africa<sup>40</sup> have contributed to the justiciability of socio-economic rights in the African Charter. Although considered soft law, this norm has extended the civil and political rights and socio-economic provisions of the African Charter by including other essential rights, such as the rights to housing, food, water and sanitation.<sup>41</sup>

The African Commission's primary mandate of assessing state report serves as the 'backbone of the mission' of addressing poverty.<sup>42</sup> In accordance with article 62 of the African Charter, all 54 AU states are required to submit a periodic report every two years stating whether and to what extent they have adhered to the provisions of the African Charter and the African Women's Protocol.<sup>43</sup> As of the end of 2018, of the 47 states that have submitted their reports,<sup>44</sup> only Algeria's report did not contain a section on the negative impact of positive on the livelihood of its citizens.<sup>45</sup> This provides an indication that the textual and legal basis of these reports 'open[s] the possibility for submission of shadow reports which can inform the Commission' about severe poverty not adequately

38 <http://www.achpr.org/mechanisms/extractive-industries/> (accessed 11 November 2014).

39 <http://www.achpr.org/mechanisms/escr/> (accessed 11 November 2014).

40 ACHPR (2004). Pretoria Declaration on Economic, Social and Cultural Rights in Africa. Available at file:///C:/Users/user/Downloads/achpr\_instr\_decla\_pretoria\_esc\_rights\_2004\_eng.pdf (accessed 03 December 2019).

41 Commission's Guidelines 45, 48 & 51.

42 Viljoen (n 6) 349.

43 Art 27.

44 M Killander & B Nkrumah 'Human rights developments in the African Union during 2012 and 2013' (2014) 14 *African Human Rights Law Journal* 278.

45 See eg Angola '2nd Periodic Report, 1999-2010' 5; Benin '2nd Periodic Report, 2000-2008' 28; Botswana '1st Periodic Report, 1986-200' para 466; Namibia '3rd Periodic Report, 2002-2009' 5; Togo '2nd Periodic Report, 1991-2001'.

covered in the report.<sup>46</sup>

Unfortunately the African Commission has not been able to adequately utilise this mandate to address the poverty situation in the region. Four factors account for this. The first is the failure of states to submit their reports; the second is the slow pace of the reporting process. Third, the Concluding Observations that could be used by non-governmental organisations (NGOs) as a follow-up tool are rarely made public. Finally, states bear the primary responsibility for the implementation of these recommendations. Primarily, these impediments limit the effective tackling of poverty by the African Commission as substantive anti-poverty provisions are implicit in the African Charter and the African Women's Protocol.

## 4.2 African Committee of Experts on the Rights and Welfare of the Child

The African Children's Committee has the primary mandate of promoting and safeguarding the rights and welfare of the African child.<sup>47</sup> Although its competence is defined by the text of the African Children's Charter, articles 32 and 46 of the Children's Charter mandates it to draw inspiration from other international human rights norms which evidently broaden its competence.

As in the case of the African Commission, the Children's Committee may receive and examine communications from individuals, groups or NGOs recognised by the contracting state, the AU or the United Nations (UN).<sup>48</sup> In the course of examining communications, the Committee is encouraged to gather reliable evidence or establish key facts based on on-the-spot investigations such as on-site visits and *ad hoc* missions. In terms of poverty applications, the former has the potential of addressing the procedural barriers to the justiciability of basic necessities, particularly in terms of the cumbersome process of gathering evidence for litigation.

More so, akin to the African Commission, the author of the application to the Children's Committee should not necessarily be the victim. However, such an author should have the consent of the child or demonstrate that he or she is acting in the best interests of the child.<sup>49</sup> In light of the fundamental interests of the child, an NGO or public interest litigant, as a result, may easily institute a poverty action on behalf of a child who could not have afforded to proceed with such a claim. This provision, by extension, also permits a conditional form of class action<sup>50</sup>

46 M Killander 'The African Commission on Human and Peoples' Rights' in Ssenyonjo (n 24) 241.

47 African Children's Charter (n 22) arts 32-33.

48 African Children's Charter art 44.

49 As above.

50 Otherwise termed *actio popularis*.



which is significant for addressing poverty, particularly in communities where citizens cannot afford a lawyer.

Such an understanding has so far been substantiated by the *Nubian* case.<sup>51</sup> In this case the African Children's Committee held that the denial of citizenship to Nubian children was the antithesis of the best interests of the child. It further established that Nubian children lacked access to education, adequate health care and lived in enclaves of poverty as a result of existing discrimination.

However, unlike the African Commission, although the Children's Charter does not mandate it to issue provisional measures based on its discretion or upon the request of a child, it may do so in accordance with its guidelines to forestall irreparable harm to a child or children. This principle evidently has a primary role in addressing severe poverty and related socio-economic needs, such as access to food, education health care and housing.

Moreover, although the Children's Committee's guidelines are silent on substantive relief, similar to the African Commission, it may be argued that the Committee has implied competence to award reparations in matters of negligence leading to severe hunger or disease as enshrined in the African Children's Charter. This was evidenced in its first ruling where it requested the state to adopt 'short-term, medium-term and long-term plans ... and other measures to ensure the fulfilment of the right to the highest attainable standard of health and of the right to education'.<sup>52</sup>

To ensure timely implementation, the African Children's Committee in accordance with its guidelines assigns/creates a Special Rapporteur of a Communication (SRC) with the mandate to follow up on compliance with its decisions. The Special Rapporteur, who is a member of the Committee, then provides frequent feedback to other members regarding compliance.<sup>53</sup> Based on the report, the Committee informs the Chairperson of the AU Commission on the status of implementation.

Against the backdrop of enhancing compliance, contractual states are under an obligation to ensure the wide publicity of the Committee's report in their respective countries, particularly after the consideration and acceptance by the AU Assembly. This publicity perhaps provides an avenue for compliance as it creates a platform for NGOs to assert pressure on the government to implement the decision. In sum, the Committee's individual communication combined with the implied power to award reliefs has the potential of serving as an effective quasi-judicial body for addressing poverty as entrenched in the African Children's Charter.

51 *Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v Kenya* (2011) (*Nubian* case).

52 *Nubian* case (n 51) para 69(4).

53 See Guidelines of the Communications ch3 art 4.

### 4.3 African Court on Human and Peoples' Rights

Operationalised in 2006, the African Court has both advisory and contentious jurisdiction. The former serves as an important avenue for addressing poverty in two spheres. First, it may be used to provide authoritative opinions on matters regarding poverty claims. Second, evidenced by the Advisory Opinion OC-18 of the Inter-American Court<sup>54</sup> the African Court may use advisory opinions to settle poverty litigation under its contentious jurisdiction. The contentious jurisdiction conversely gives the Court the competence to consider individual and inter-state applications which could be invoked as a judicial mechanism for addressing poverty.

The Protocol establishing the African Court extends the Court's jurisdiction to matters relating to the African Charter, the African Court Protocol and related human rights treaties ratified by the concerned state.<sup>55</sup> By extension, the African Women's Protocol and the African Children's Charter equally make up some of the treaties that the Court may interpret and apply.

In principle, the African Court's jurisdiction *ratione personae* (direct access) is limited to states that are parties to its Protocol and have made the declaration in accordance with article 5(3) of the Protocol accepting its competence. However, in view of the reluctance of states to entertain poverty claims coupled with the limited number of state declarations, the Court may circumvent these setbacks through prorogation of competence,<sup>56</sup> particularly by 'decisive acts or unequivocal behaviour' of the state concerned.<sup>57</sup> For instance, in the *Yogogombaye* case<sup>58</sup> the Court attempted to accept the case on the grounds that the respondent state (Senegal) did not raise any objections in relation to the competence of the Court during its initial engagement with the latter.

The consent by a state party indeed is the only precondition for the Court to exercise jurisdiction on applications submitted by individuals or NGOs. A concerned state that has not made the declaration per article 5(3) may expressly or tacitly accept the jurisdiction of the Court to entertain individual complaints through explicit acts or decisive conduct. Such acts include the state's active participation in the proceedings of the case, either by pleading on the merits or by making findings on the merits, or may include a lack of objection against any future decision on the merits of the case. Consequently, according to the African Court, on the

54 Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18, 17 September 2003, Inter-Am Ct HR (Ser A) No 18/03 (2003).

55 See ACtHPR (1998). Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, arts 3 & 7.

56 Or *forum prorogatum*.

57 *Michelot Yogogombaye v Senegal* Application 001/2008 Separate Opinion, para 32.

58 As above.

basis of the principle of *estoppel*,<sup>59</sup> such conduct, which is akin to tacit or decisive acceptance of its jurisdiction, cannot be revoked.<sup>60</sup> Accordingly, individuals and NGOs may follow the foregoing precedent in seizing the Court to address poverty claims against contractual states that have not made the declaration.

The African Court is also mandated to engage in and facilitate amicable settlements of disputes.<sup>61</sup> This may be conducted based on the initiative of the Court or the parties involved. Bearing in mind that litigation or adjudication rarely provides a preferable outcome to socio-economic verdicts, this avenue may be put to use to address poverty arbitrations.<sup>62</sup> In terms of extraterritorial obligations of states, the Court's jurisdiction *ratione loci*, as in the case of the African Commission, is extended to disputes alleging violations outside the jurisdiction of a state party to its Protocol.<sup>63</sup> In principle, the African Charter, the African Women's Protocol and the African Children's Charter, unlike *ICCPR*, do not impose a territorial limitation to give effect to rights 'within its territory'.<sup>64</sup> This by extension means that, in accordance with the relevant human rights instruments ratified by the states, extraterritorial obligations of states relating to poverty action can be justiciable before the Court. The aforesaid provides a clear indication that the Court follows a typical adversarial and judicial approach which guarantees the justiciability of poverty suits, which fall within its competence.

In addition, the African Court's provisional measures, which it prescribes in the interests of justice or at the request of the parties, also fundamentally link to poverty alleviation. For instance, in issues relating to forced eviction or retrenchment, the Court's interim measures have the potential of halting the injustice until such time as the proceeding is concluded. Combined with the overarching subject matter jurisdiction of the Court, and its power to pass binding and precise remedial orders, this guarantees a high level of justiciability of poverty cases.

Consequently, where it finds a breach or denial of basic necessities, it has the legal competence to make a ruling that encompasses orders calling for wider social transformation or restitution for victims. To be effective, remedies should be tailored to the conditions of each specific matter and the realities on the ground. Further, it is worth mentioning that in making such a determination, the Court is projected to make its ruling in light of the appropriateness of the remedies which should be sufficiently detailed

59 A legal principle that proscribes a party from denying or alleging a certain fact due to that party's previous act, allegation or denial.

60 Para 32.

61 See art 9 of the Protocol and Rules of the Court Rules 56 & 57.

62 Eg, this model could have been invoked in *Government of the Republic of South Africa & Others v Grootboom & Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) (*Grootboom* case) to achieve the immediate desired result.

63 Eg, in *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) the African Commission found an extraterritorial breach of economic and social rights. See para 98.

64 See art 2(1) of the International Covenant on Civil and Political Rights (*ICCPR*).

to ensure implementation with no additional explanation.

#### 4.4 Need for complementarity: The road not taken

Considering that only six countries have made the declaration under article 5(3) accepting the African Court's competence, the Court's competence of adjudicating on poverty claims will only be effective, in the interim, through communications from the African Commission. This means that the extent to which the Court can contribute to addressing poverty in terms of accountability and access to justice significantly depends on the level of cooperation with the African Commission. Seemingly, both institutions have initiated steps to enhance this engagement, particularly through the revision of the Rules of Procedure of the African Commission and the Rules of Procedure of the African Court.<sup>65</sup>

The African Commission therefore is mandated to seize the African Court if a contracting party to the latter's Protocol (i) is unwilling or has not complied with its decision; (ii) has not complied with provisional measures; or (iii) a situation constitutes a serious threat to and a gross violation of human rights.<sup>66</sup> According to Viljoen, the urgency of the third strand mandates the Commission to seize the Court with a case of massive violation based on its own initiative or information submitted to it by a civil society. This leeway enables the Court's competence to be triggered in cases of severe poverty and necessity whereby no formal communication has been filed by individual, group or an NGO.<sup>67</sup> Against this backdrop, instances of abject poverty that involve matters of violations of resource-dependent obligations and call for a broader social reform adequately fall under this category.

This avenue may be explored to convert quasi-judicial decisions relating to poverty into binding judgments with the possibility of being enforced and complied with. Following the channel of the African Commission's application to the African Court,<sup>68</sup> the former may submit cumbersome legal cases relating to group or individual poverty claims to the latter for higher legal orders. This approach is highly recommendable taking into account the fact that individual communications submitted by the Commission against a contracting state are not subject to the declaration under article 5(3). In principle and in practice, the claw-back clause under article 5(3) only limits direct applications by individuals and NGOs against a contracting state that has not made the declaration in accordance with article 5(3).

Here, the African Commission appears as a human rights defender and the victims or their representatives may join the Commission and

65 See ACtHPR (n 55) arts 5(1)(a), 6(1) & 8.

66 See Rule 118 of the Rules of Procedure of the African Commission of 2010.

67 Viljoen (n 6) 429.

68 *African Commission on Human and Peoples' Rights v Libya* Application 004/2011.

make submissions if need be. However, regarding petitions transferred to the Court where the state has made the declaration, the individual and the NGO will have direct access to seek anti-poverty redress.

## 5 Other related mechanisms

### 5.1 New Partnership for Africa's Development

The New Partnership for Africa's Development (NEPAD) is a programme designed by the AU for eradicating poverty. Regarded as Africa's 'economic blueprint'<sup>69</sup> or 'development blueprint',<sup>70</sup> NEPAD seeks to stimulate and accomplish regional and sub-regional development programmes. In its Programme of Action it identifies infrastructure development, investment in people and the development of agriculture as sectoral priorities to development. It has over the years evolved to become a *de facto* mechanism of the AU and its key political hierarchy, the Heads of State and Government Implementation Committee, frequently submits its reports to the AU Assembly.<sup>71</sup>

### 5.2 African Peer Review Mechanism

As of the end of 2013, 33 African states have signed up to this mechanism.<sup>72</sup> The African Peer Review Mechanism (APRM) represents an attempt by major African countries to 'lever themselves out of the cycle of poverty'.<sup>73</sup> It is a voluntary process of submission of a country's record in politics, economy and corporate governance to review by peers or fellow heads of state. This process, akin to the African Commission's state reporting procedure, has the underlying objective of ensuring a culture of states' commitment to the implementation of internationally-recognisable standards.

However, unlike state reporting which often comprises lower-ranking state officials, peer review ensures involvement at the highest governmental level, with a significant possibility of political will. Bearing in mind that 'human rights have a relatively prominent position in the APRM',<sup>74</sup> and 'has received more attention than the procedures and outcomes of other monitoring mechanisms',<sup>75</sup> the process can serve as a 'vehicle to improve

69 Viljoen (n 6) 166.

70 JO Adésinà 'NEPAD and the challenge of Africa's development: Towards the political economy of a discourse' (2001) 4 *African Journal of International Affairs* 125.

71 Viljoen (n 6) 167.

72 Killander & Nkrumah (n 44) 293.

73 J Cilliers 'NEPAD's Peer Review Mechanism' (2002) 64 *Institute for Security Studies Papers* 1.

74 M Killander 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 55.

75 Killander (n 74) 72-73.

the lives of the downtrodden and materially deprived Africans'.<sup>76</sup> Viljoen therefore argues that the 'APRM provides a useful mechanism to hold participating states accountable for their lack of achieving sustainable development and to eradicate poverty in line with the MDGs'.<sup>77</sup>

## 6 International best practice dealing with poverty

The 1948 American Declaration in seeking to address the social needs of American states provides for a full spectrum of socio-economic rights, among others the rights to housing,<sup>78</sup> health,<sup>79</sup> education,<sup>80</sup> work and fair remuneration,<sup>81</sup> social security,<sup>82</sup> property,<sup>83</sup> and special protection for mothers, children and the family.<sup>84</sup> Although the Declaration is not a treaty in itself, it is regarded as having a binding legal effect on all Organisation of American States member states.<sup>85</sup>

The American Convention, unlike the Declaration, by design is a binding treaty and sets out an expansive catalogue of socio-economic rights under a single provision. Article 26 explicitly provides for the rights to education, collective bargaining, material well-being, strike and work. The Convention serves as the principal treaty that sets out the rights that the Inter-American Commission and Court on Human Rights are competent to apply with respect to the 24 member states to the treaty. Moreover, the Commission enjoys jurisdictional competence over the Protocol of San Salvador which contains a range of anti-poverty provisions, among others the rights to food, education, trade unionisation, special protection for persons with disabilities, social security, work, just and equitable conditions of work, and health.<sup>86</sup>

Although it initially gave a brief and opaque reflection of the rights under section 26 of the Convention, the Commission for the first time in 2003 considered an article 26 claim. In *Five Pensioners v Peru*<sup>87</sup> the Court held that the arbitrary reduction of the pension fund of a group of retired citizens by the state was in violation of the rights to private property and judicial protection. Again, in *Juan Hernández v Guatemala* the Commission found a violation of the right to life and integrity after a detainee had

76 Viljoen (n 6) 460.

77 Viljoen (n 6) 203.

78 Arts IX & XI.

79 Art XI.

80 Art XII.

81 Arts XIV & XV.

82 Art XVI.

83 Art XXIII.

84 Arts VI & VII.

85 TJ Melish 'The Inter-American Commission on Human Rights: Defending social rights theory through case-based petitions' in M Langford *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 339.

86 See arts 6-18.

87 *Five Pensioners v Peru, Torres Benvenuto & Others v Peru*, Merits, reparations and costs, IACHR Series C 98, IHRL 1481 (IACHR 2003), 28 February 2003, Inter-American Court of Human Rights [IACtHR].

died of cholera, which was easily preventable.<sup>88</sup> State responsibility and negligence were further held in *Victor Rosario Congo v Ecuador* where a man suffering from psychosis who was kept in isolation died from dehydration and malnutrition.<sup>89</sup>

In the European context, the European Social Charter (ESC) (both the 1961 and the 1996 Revised Version) provides extensively for anti-poverty rights. The ESC for instance provides for the right to work (article 1); the right to just conditions of work (article 2); the right to fair remuneration (article 4); the right to social security (article 12); the right to social and medical assistance (article 13); and the right to benefit from social welfare services. Nonetheless, the domestication of the Charter into the national legal system is rather circumscribed and fragmented, more often avoided than enforced.<sup>90</sup>

It indeed is common to perceive an international instrument as significant only if its primary impact is to grant individual rights that can be claimed both at the national and supranational levels. Thus, in the European human rights system only two instruments are presently recognised as having a direct impact on individuals' rights in both the national and international legal order, namely, the Treaty of the European Union and the European Convention on Human Rights (European Convention).<sup>91</sup> Yet, with regard to enforcement, only the European Convention provides for an individual's right of appeal at the national level and the level of the European Court of Human Rights.<sup>92</sup>

However, unlike the ESC, the European Convention contains no references concerning entitlement to key socio-economic rights.<sup>93</sup> There is no explicit statement with regard to the right to work, social security or health. The Convention therefore is a classic epitome of a civil and political rights instrument. Consequently, the European Court of Human Rights has applied the negative and positive obligations of states to enforce socio-economic rights, particularly with regard to how the state is culpable. Hence, where a complaint alleges socio-economic deprivation due to state action or inaction which has posed or threatens to pose gross consequences for the victim, the Court imposes a socio-economic remedy for a gross civil and political rights violation in tandem with articles 3 and 8.<sup>94</sup>

88 *Hernández Lima v Guatemala* Case 11.297, Report 28/96, Inter-AmCHR OEA/Ser.L/V/II.95 Doc 7 rev. 406 (1997).

89 *Victor Rosario Congo v Ecuador* Case 11.427, Report 63/99, Inter-Am CHR, OEA/Ser.L/V/II.95 Doc 7 rev 475 (1998).

90 RR Churchill & U Khaliq (2004) 'The Collective Complaints System of the European Social Charter: an effective mechanism for ensuring compliance with economic and social rights?' 15(3) *European Journal of International Law* 427.

91 J Jean-Paul 'The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) 48 *Common Market Law Review* 996.

92 LR Glas 'European Convention on Human Rights' (2012) 30 *Netherlands Quarterly of Human Rights* 338.

93 L Clements & A Simmons 'European Court of Human Rights' in Langford (n 85) 411.

94 Clements & Simmons (n 93) 412.

For instance, in the *Hadareni* case,<sup>95</sup> which involved the destruction of property during a riot, the Court held that the state was directly culpable for the victims' homelessness. It imposed a positive duty/obligation on the state to provide them with accommodation. It further held in *Van Kück v Germany*<sup>96</sup> that the refusal to reimburse the complainants for gender reassignment measures was in breach of her private life and amounted to discrimination on the basis of her particular psychological disorder. Finally, in *D v United Kingdom*, where the complainant suffered from HIV/AIDS, the Court held that it would be illegal to deport the applicant to the island of Kitts, where he would die in complete destitution due to a lack of medicine, a hospital bed or any nursing care.<sup>97</sup>

## 7 Concluding reflections

The search for a remedy to improve the standard of living of downtrodden and materially-deprived African people arguably influenced the creation of the African human rights architecture. The architecture reflects a growing trend of the enforcement of anti-poverty provisions cloaked in socio-economic rights, and entrenched in the substantive instruments of the architecture. The foregoing has demonstrated that the individual communications procedure of the three monitoring organs offers an appropriate justiciability mechanism in addressing poverty. All have adjudicatory mandates. Whereas the African Commission and African Children's Committee are vested with implicit competence to pass substantive relief, the African Court is equipped to issue binding judgments.

With the recent ratification of the African Charter by South Sudan, all 54 AU member states are now parties to the Charter.<sup>98</sup> This ultimately broadens the jurisdiction of the African Commission to receive poverty claims from all state parties. After nearly two decades the African Children's Committee's has competence over only 49 or approximately 76 per cent of AU states that have ratified the Convention.<sup>99</sup> Sadly, the African Court Protocol has been ratified by only 30 states, fewer than two-thirds of AU member states.<sup>100</sup> Even worse, as of October 2014 only seven countries have made the declaration accepting the Court's jurisdiction to

95 *Maldovan & Others v Romania* Applications 41138/98 and 64320/01, judgment dated 5 July 2005.

96 Application 35968/97, judgment 12 September 2003.

97 Para 27.

98 Killander & Nkrumah (n 44) 1.

99 See GIEACPC (2018). African Charter on the Rights and Welfare of the Child (ACRWC). Available at <https://endcorporalpunishment.org/human-rights-law/regional-human-rights-instruments/acrcw/> (accessed 2 December 2019).

100 ACtHPR (2016). Chad becomes 30th AU member state to ratify the Protocol on the establishment of the African Court on Human and Peoples' Rights. Available at <http://en.african-court.org/index.php/news/press-releases/item/64-chad-becomes-30th-au-member-state-to-ratify-the-protocol-on-the-establishment-of-the-african-court-on-human-and-peoples-rights> (accessed 3 December 2019).



receive communications from individuals and NGOs.<sup>101</sup>

To effectively address the poverty situation in the region, enhanced harmonisation and engagement among the AU human rights institutions and the political organs of the AU are required. The urgency for a reflection and coordination is more critical in terms of the African Commission and the African Court. Although the vehicle for such a partnership has been set in the Rules of Procedure of both bodies, there has been less contact with and non-submission of cases from the Commission to the Court since October 2012.<sup>102</sup> According to Killander and Nkrumah the lack of collaboration 'may be linked to the perception of an overly arduous role of the Commission before the Court',<sup>103</sup> where the victim is isolated from the proceedings before the Court.

The more recent engagement was the striking out from the roll of the African Court in 2013 due to the non-receipt of information requested by the African Commission.<sup>104</sup> It is imperative to add that all the three organs (the African Commission, Children's Committee and Court) face the uncertainties of functioning from rented buildings and temporary seats. This certainly reflects negatively on their effectiveness. There is an urgency to relocate the African Children's Committee to the AU Commission to enhance its operations. Also, the host states of the African Commission and the Court need to provide the two institutions with permanent headquarters in terms of the criteria for hosting AU organs.

However, despite the importance of the judicial and quasi-judicial components, the caveat is that there are many setbacks that render the utilisation of these institutions illusive. There is the lingering legacy of the paradigm of ignorance, fiscal constraints and illiteracy which restricts individual and group action as a reactive remedial strategy towards poverty alleviation. The conundrum further lies in the lack of political will, which transcends to the low level of compliance with decisions.<sup>105</sup> Thus, to effectively bridge the gap between the justiciability of poverty claims and their impact on the ground, there is the urgent need for the mobilisation of political will and the enhancement of the poverty eradication commitments by African leaders.

Relatedly, approximately 450 NGOs currently enjoy observer status before the African Commission. They can therefore use their standing to

101 The seven states which have made the declaration are Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania. See AfricanLii (2018). African Court on Human and Peoples' Rights organises sensitisation seminars to Sierra Leone and Liberia next month. Available at <https://africanlii.org/article/20180727/african-court-human-and-peoples%E2%80%99-rights-organises-sensitisation-seminars-sierra> (Accessed 3 December 2019).

102 Killander & Nkrumah (n 44) 295.

103 Killander & Nkrumah 296.

104 As above.

105 B Nkrumah & F Viljoen 'Drawing lessons from ECOWAS in the implementation of article 4(h)' in D Kuwali & F Viljoen *Africa and the responsibly to protect: Article 4(h) of the African Union Constitutive Act* (2014) 251.

tackle poverty at the supra-national level, particularly through lobbying for normative as well as institutional reforms, and the submission of communications.

Inspiration should also be drawn from the successes and failures of supra-national litigation and adjudications such as the European system while taking note of African realities. The African Court should not be extremely hasty, but should follow a progressive procedure, moving step-by-step while establishing the confidence of the contractual states with international adjudication. This procedure will ultimately safeguard the justiciability and compliance of anti-poverty rulings in the respondent state. In summary, through the consistent and progressive improvement of their jurisprudence, and with effective coordination and harmonisation, the AU human rights architecture can serve as the panacea for eradicating poverty in Africa.

## References

- ACHPR (2004) Guidelines for submitting complaints. Available at <https://www.achpr.org/guidelinesforsubmittingcomplaints> (accessed 3 December 2019)
- ACHPR (2004) Pretoria Declaration on Economic, Social and Cultural Rights in Africa. Available at [file:///C:/Users/user/Downloads/achpr\\_instr\\_decla\\_pretoria\\_esc\\_rights\\_2004\\_eng.pdf](file:///C:/Users/user/Downloads/achpr_instr_decla_pretoria_esc_rights_2004_eng.pdf) (accessed 3 December 2019)
- ACHPR (2004) Working Group on Economic, Social and Cultural Rights. Available at <https://www.achpr.org/specialmechanisms/detail?id=8>> (accessed 3 December 2019)
- ACHPR (2004) Working Group on Extractive Industries, Environment and Human Rights Violations. Available at <https://www.achpr.org/specialmechanisms/detail?id=13> (accessed 3 December 2019)
- ACHPR (African Commission on Human and Peoples' Rights) (2010). Rules of Procedure of the African Commission on Human and Peoples' Rights. Available at [https://www.achpr.org/public/Document/file/English/Rules\\_of\\_Procedure\\_of\\_the\\_African\\_Commission\\_on\\_Human\\_and\\_PeoplesRightsof2010\\_%20Legal%20Instruments%20\\_%20ACHPR.pdf](https://www.achpr.org/public/Document/file/English/Rules_of_Procedure_of_the_African_Commission_on_Human_and_PeoplesRightsof2010_%20Legal%20Instruments%20_%20ACHPR.pdf) (accessed 3 December 2019)
- ACHPR (African Commission on Human and Peoples' Rights) (2019). State Report: Angola. Available at <https://www.achpr.org/states/statereport?id=117> (accessed 2 December 2019)
- ACHPR (African Commission on Human and Peoples' Rights) (2019). State Report: Benin. Available at <https://www.achpr.org/states/detail?id=3> (accessed 2 December 2019)
- ACHPR (African Commission on Human and Peoples' Rights) (2019). State Report: Botswana. Available at <https://www.achpr.org/states/detail?id=4> (accessed 2 December 2019)
- ACHPR (African Commission on Human and Peoples' Rights) (2019). State Report: Namibia. Available at <https://www.achpr.org/states/detail?id=35> (accessed 2 December 2019)
- ACHPR (African Commission on Human and Peoples' Rights) (2019). State Report: Togo. Available at <https://www.achpr.org/states/detail?id=50>> (accessed 2 December 2019)
- ACtHPR (African Court on Human and Peoples' Rights) (1998). Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights. Available at <http://hrlibrary.umn.edu/instreet/protocol-africancourt.pdf> (accessed 3 December 2019)
- ACtHPR (African Court on Human and Peoples' Rights) (2009). Rules of Court. Available at [http://en.african-court.org/images/Protocol-Host%20Agrtmt/Final\\_Rules\\_of\\_Court\\_for\\_Publication\\_after\\_Harmonization\\_-\\_Final\\_English\\_7\\_sept\\_1\\_.pdf](http://en.african-court.org/images/Protocol-Host%20Agrtmt/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final_English_7_sept_1_.pdf) (accessed 3 December 2019)
- ACtHPR (African Court on Human and Peoples' Rights) (2016). Chad becomes 30th AU member state to ratify the Protocol on the establishment of the African Court on Human and Peoples' Rights. Available at <http://en.african-court.org/index.php/news/press-releases/item/64-chad-becomes-30th-au-member-state-to-ratify-the-protocol-on-the-establishment-of-the-african-court-on-human-and-peoples-rights> (accessed 3 December 2019)
- Adésinà, JO (2001) 'NEPAD and the challenge of Africa's development: Towards the political economy of a discourse' 4 *African Journal of International Affairs* 125-144. <https://doi.org/10.1080/21528586.2004.10419110>
- Africa Progress Report (2014) *Equity in extractives*. Available at [http://www.africanprogresspanel.org/wp-content/uploads/2013/08/2013\\_APR\\_Equity\\_in\\_Extractives\\_25062013\\_ENG\\_HR.pdf](http://www.africanprogresspanel.org/wp-content/uploads/2013/08/2013_APR_Equity_in_Extractives_25062013_ENG_HR.pdf) (accessed 3 December 2019)
- African Commission on Human and Peoples' Rights v Libya* Application 004/2011
- African Union (2014) *Employment, Poverty Eradication and Inclusive Development*. Extraordinary Summit of the African Union on Employment, Poverty

- Eradication and Inclusive Development 3-7 September, Ouagadougou, Burkina.
- AfricanLii (2018). African Court on Human and Peoples' Rights organises sensitisation seminars to sierra leone and liberia next month. Available at <https://africanlii.org/article/20180727/african-court-human-and-peoples%E2%80%99-rights-organises-sensitisation-seminars-sierra> (accessed 3 December 2019)
- Centre for Minority Rights & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009)
- Churchill, RR & Khaliq, U (2004) 'The Collective Complaints System of the European Social Charter: an effective mechanism for ensuring compliance with economic and social rights?' 15(3) *European Journal of International Law* 417-456. <https://doi.org/10.1093/ejil/15.3.417>
- Cilliers, J (2002) 'NEPAD's Peer Review Mechanism' 2002(64) *Institute for Security Studies Papers* 1-12
- Clements, L & Simmons, A (2008) 'European Court of Human Rights' in M Langford (ed), *Social rights jurisprudence: Emerging trends in international and comparative law* (339-371) New York: Cambridge University Press 339
- Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003)
- Five Pensioners v Peru, Torres Benvenuto & Others v Peru*, Merits, reparations and costs, IACHR Series C 98, IHRL 1481 (IACHR 2003), 28 February 2003, Inter-American Court of Human Rights [IACtHR]
- Flint, A (2008) *Trade, poverty and the environment: The EU, Cotonou and the African-Caribbean-Pacific Bloc*. New York: Palgrave Macmillan
- GIEACPC (Global Initiative to End All Corporal Punishment of Children) (2018) African Charter on the Rights and Welfare of the Child (ACRWC). Available at <https://endcorporalpunishment.org/human-rights-law/regional-human-rights-instruments/acrwc/> (accessed 2 December 2019). *Government of the Republic of South Africa & Others v Grootboom & Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)
- Hernández Lima v Guatemala* Case 11.297, Report 28/96, Inter-AmCHR OEA/Ser.L/V/II.95 Doc 7 rev. 406 (1997)
- Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) v the Government of Kenya*, Decision No 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 22 March 2011
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Jean-Paul, J (2011) 'The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' 48 *Common Market Law Review* 995-1023
- Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18, 17 September 2003, Inter-Am Ct HR (Ser A) No 18/03 (2003)
- Killander, M (2008) 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' 30 *Human Rights Quarterly* 41-75
- Killander, M (2011) 'The African Commission on Human and Peoples' Rights' in M Ssenyonjo (ed) *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (pp. 235-248). Leiden: Martinus Nijhoff Publishers
- Killander, M & Nkrumah, B (2014) 'Human rights developments in the African Union during 2012 and 2013' 14 *African Human Rights Law Journal* 275-296
- Glas, LR (2012) 'European Convention on Human Rights' 30(3) *Netherlands Quarterly of Human Rights* 343-348
- M Mayrhofer et al *Report on the mapping study on relevant actors in human rights protection* Work Package 4 – Deliverable 4.1, Large-Scale FP7 Collaborative Project GA 320000 1 May 2013-30 April 2017 (2014) 24
- Moldovan & Others v Romania* Applications 41138/98 and 64320/01, judgment dated 5 July 2005

- Manjoo, R (2012) 'Women's human rights in Africa' in M Ssenyonjo (ed) *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (pp. 137-154). Leiden: Martinus Nijhoff Publishers
- Michelot Yogogombaye v Senegal* Application 001/2008 Separate Opinion, para 32.
- Nkrumah, B & Viljoen, F (2014) 'Drawing lessons from ECOWAS in the implementation of article 4(h)' in D Kuwali & F Viljoen (eds) *Africa and the responsibly to protect: Article 4(h) of the African Union Constitutive Act* (pp. 251-264). London and New York: Routledge
- Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)
- Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990)
- Pogge, T (2007) 'Severe poverty as a human rights violation' in T Pogge (ed) *Freedom from poverty as a human right: Who owes what to the very poor* (pp. 11-54). Oxford: Oxford University Press
- Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC*)
- Ssenyonjo, M 'The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa' 64 *Netherlands International Law Review* 259-289. DOI 10.1007/s40802-017-0091-4
- Sudan Human Rights Organisation & Another Sudan* (2009) AHRLR 153 (ACHPR 2009)
- Melish, TJ (2008) 'The Inter-American Commission on Human Rights: Defending social rights theory through case-based petitions' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (339-371). New York: Cambridge University Press
- UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
- Van Kück v Germany* Application 35968/97, judgment 12 September 2003
- Victor Rosario Congo v Ecuador*, Case 11.427, Report 63/99, Inter-Am CHR, OEA/Ser.L/V/II.95 Doc 7 rev 475 (1998)
- Viljoen, F (2012) *International human rights law in Africa*. Oxford: Oxford University Press



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## Abstract

*Access to justice for impoverished communities is a complicated phenomenon given that many factors come into play. A critical feature of the problem is equal access to amenities. Although constitutionally everyone has the right to equal protection of the law and other human rights, many poor people are excluded or ignorantly shy away from using state tools, including the rule of law, made available to them to their advantage. In a democratic state access to the courts and resources in poor communities is an impetus for the promotion, protection and fulfilment of the rights of the poor. There is a great need for state protection of the right of access to the judiciary, including the level of engagement with poor communities to be examined, in an effort to ameliorate problems faced by the poor living in marginalised communities in South Africa and beyond. This chapter attempts to examine this problem by critically looking at some of the experiences of people in poor rural communities, with a brief reference to the Centre for Community Justice and Development, a non-profit organisation delivering access to justice services to poor communities in the KwaZulu-Natal province in South Africa.*

## 1 Introduction

Many may ask what the correlation is between poverty and access to justice, or whether there are any implications for the poor in marginalised rural communities where access to justice is disregarded. The answer is in the positive, simply because the enforcement and enjoyment of human rights, including access to courts and resources, becomes highly remote and inaccessible for this particular group of people. According to the United Nations Development Programme (UNDP) access to justice requires that 'laws and remedies must be just, equitable, and sensitive to the needs of the poor and marginalised'. As alluded to by McQuoid-Mason, factors such as the limited number of lawyers representing the poor are problematic for this group of people and their legal interests are exposed to abuse.<sup>1</sup>

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1 D McQuoid-Mason 'Access to justice in South Africa: Are there enough lawyers?' (2013) 3 *Oñati Socio-Legal Series* 564-565. See D Dewar 'Too many attorneys? Oversubscription to the attorneys' profession (2011) 509 *De Rebus* [online] 23.

It follows, therefore, that there is a significant correlation between poverty and access to justice. Research has shown that where the incidence of poverty is high, the issue of justice and the enjoyment of the right of access to justice and other or related human rights are undermined in marginalised poor communities. Prolonged economic instability and financial crises destabilise citizens' security generally with many requiring adequate financial resources to pay for legal representation and civil court costs. Such economic hardships have created a new group of individuals that face harsher economic circumstances which have reinforced the vulnerability of many people living in poverty today. Over the years, the challenge for both the state and the courts has been to provide access to justice when citizens have inadequate financial resources.

Some of the rights affected are the right to dignity (section 10 of the 1996 Constitution); housing (section 26); education (section 29); equality (section 9); health care (section 27(1)(a)); property (section 25); and legal representation (section 35). Although the Constitution permits the progressive realisation of rights, including property rights (sections 25(2)-(9)) based on the availability of state resources, states are obliged to take legislative measures to realise these rights. Non-compliance may result in injustice and indigents' social and legal needs will remain unmet. It therefore is critical that poor communities and the challenges facing them are taken seriously, to minimise the further marginalisation of the poor in the poor areas of South Africa. Besides, according to Blair, 'legally enforceable rights and duties underpin a democratic society, and access to justice is essential in order to make these rights and duties real'.<sup>2</sup>

There are different dimensions of access to justice. In an attempt to try and understand the concept, one can look at a legal system in the context of access to justice either broadly, which involves the rule of law, law making, legal interpretation and implementation of law. It can also be conceived narrowly by looking at available facilities that are made accessible to survivors or victims, including legal services such as legal representation, the administration of justice, access to affordable medical care, counselling services and other state services aimed at promoting access to justice for the poor and the protection of their constitutional rights at large.<sup>3</sup>

The reason is that access to justice not only improves the rights of the poor and those marginalised, but grants them access to state structures and services in their interests, such as legal representation at state expense, access to courts by ensuring that an equitable and just legal and judicial outcomes in a democratic state are realised with limited or no hurdle. It is on this basis that this chapter will examine the role of access to justice in poor communities with reference to service providers serving the poor in such communities.

2 T Blair 'Foreword' in D Bean (ed) *Law reform for all* (1996) xiii.

3 Y Ghai et al 'The rule of law and access to justice' in Y Ghai & J Cottrell (eds) *Marginalised communities and access to justice* (2010) 3.



## 2 What is access to justice for the poor?

The initial Millennium Development Goal (MDG) of halving poverty by 2015 was intended to reduce the negative impact of poverty and poor socio-economic standing of the poor and poor communities at large. The problem, however, is that where poverty strives, access to justice and many justice factors remain unattainable for the majority in that group. In poor areas, despite the availability of legal access to some services, access to and the enjoyment of legal protection often are limited and the realisation of such rights remains a dream for those living within the poverty margin or below the poverty line.

Research has shown that over 10 million people around the world do not enjoy the protection of the law.<sup>4</sup> On a daily basis many face corrupt activities, including corrupt officials extorting money from the already poor, unlawful evictions, land grabbing,<sup>5</sup> an inability to access timely healthcare services when ill, restricted or overregulated access to preventive or palliative care because most services remain too expensive or unavailable to the poor as was the case in *Minister of Health & Others v Treatment Action Campaign & Others*.<sup>6</sup> Consequently, the poor remain highly marginalised and unable to access or seek justice when aggrieved.

The continuous marginalisation and a lack of access to justice or equity can result in public protest or demonstration, including xenophobic attacks. It therefore is critical to ensure that the rule of law applies equitably to all uniformly and justice institutions must function efficiently, encompassing even those with the least means and resources in our societies – the poor in poor communities. In addition to recognising government efforts in attempting and sometimes successfully ameliorating the impact of poverty on the poor and promote access to justice, one cannot underestimate the role of non-profit organisations (NPOs) or non-governmental organisations (NGOS). It therefore is crucial to recognise and appraise state efforts with cognisance, given the role played by NGOs in lobbying for the eradication of poverty and empowering the poor in South Africa.

## 3 How are non-profit organisations such as the Centre for Community Justice and Development promoting access to justice in South Africa post-1994?

As alluded to earlier, access to justice for the poor is best achieved through

4 E Rosenberg 'Poverty alleviation through sustainable development', [http://www.enviroopaedia.com/topic/default.php?topic\\_id=199](http://www.enviroopaedia.com/topic/default.php?topic_id=199) (accessed 12 January 2015).

5 Blair (n 2) 25; *Nkuzi Development Association v Government of the Republic of South Africa & Another* 2002 (2) SA 733 (LCC).

6 (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002).

a founded collaboration between the state and NGOs in a coincided effort to reduce poverty and marginalisation at all costs. This not only will strengthen and encourage citizens to aspire to but to ensure that resources, including access to the rule of law, becomes easily accessible for the poor in poor communities around the country. Although the national framework for including the poor and the ability or commitment to ameliorate the impact of poverty is the function of the state, a holistic approach to justice and its accessibility to poor and marginalised groups needs to be adopted with the help of NGOs and NPOs in South Africa, particularly those that provide services to poor communities.

Working in partnership with state stakeholders gives a profound insight into the plight of citizens falling in this category. Looking at, for instance, the work of the Centre for Community Justice and Development (CCJD) in the KwaZulu-Natal (KZN) province, a clear picture is presented of what can be achieved through NPOs, and this also demonstrates a tangible example of how access to justice and the promotion of human rights can bring about positive supportive development in poor and rural communities.

Twenty-six years ago CCJD was funded by staff of the School of Law, University of KwaZulu-Natal, particularly by Professor Matthews. It was originally aimed at promoting research and promoting and protecting human rights in the criminal justice system, and the prevention of political violence in the Pietermaritzburg area of KZN during the apartheid era. The Centre was once known as the Centre for Criminal Justice (CCJ). It is an NPO based in KZN which supports approximately 15 community-based advice offices throughout KZN. The Centre works closely with impoverished rural communities and provides various community services and assistance through local women recruited from their communities to selflessly serve the poor by enlightening them about their human rights and access to justice for the disadvantaged. Briefly, the advice offices play a crucial role in promoting human rights and maintaining a link to justice services and legal redress.

The Centre and its commitments were conceived during the democratic struggle and born with a vision to promote the broad range of rights: access to courts and legal assistance for the rural poor. Outreach and research endeavours have shown that for many South Africans access to adequate justiciable benefits remains remote and challenging, particularly for those living in very remote and poor areas, as many cannot afford adequate housing, a balanced diet and legal representation. Although evidence from the field has also shown that access to justice is not limited to access to adequate legal representation and courts but the ability to enjoy other related rights, including the right to education, development, health, life and so forth.

In addition, in order to efficiently serve the poor community, the advice offices and staff are well equipped to identify and understand some of the

challenges faced by the poor when accessing the legal system and social services, including social grants. One of the main obstacles is 'ignorance' and a loss of identity, as many in the poor communities in the province still are not fully aware of their constitutional rights and the constitutional changes brought about by the 1996 Constitution. Therefore, it is important to understand the social diversity and challenges facing the poor as they approach the outreach centres or advice offices for help.

In so doing, poor communities, including women and children, will be able to use state services and private organisations, including available funding, to gain unrestricted access to the legal system, enforce their legal rights and improve their standard of living, and also use legal instruments, including the law, to solve problems affecting them collectively or individually in their various communities.

At CCJD, the issue of access to justice is multifaceted and the problems identified and the assistance needed may present themselves in different ways, both to the communities or the marginalised seeking specific assistance in a community. For instance, many women are breadwinners and often fear to report intimate abuses, crimes and indiscriminate violations of their rights. Many complain that the police often are insensitive to their plight and therefore they are ignored when violated, which more often than not results in further victimisation and justice being denied as the legal remedies are taken further away from them. Equally, a man that is being abused or sexually violated may shy away from pursuing the violation or reporting the matter as the system is reluctant to assist and his human right is further undermined by, for example, the police.

In poor communities there are also cultural and historical constraints such as pressure to endure domestic violence, fear of the police, the cost of litigation, a lack of money or geographical/remoteness of some communities from social and legal amenities or services that continue to discourage poor people from coming forward or pursuing justice for themselves and those they love.

One of the roles of centres such as the CCJD serving the poor in poor communities is to work earnestly towards removing barriers to access to justice and bridging the gap between members of the community and their human rights, including their right to justice and the rule of law in a democratic state. In an effort to mitigate the impact of poverty and the barrier to the enjoyment of the aforementioned right, there is a need to provide legal advice in communities, mediation and negotiation services, free counselling and educational and arbitration services to the poor and on their behalf in matters warranting such intervention. Furthermore, it is essential to develop community-specific ways, including indigenous ways of sensitising the people on how to use the judicial formal systems to their own benefit and state structures to promote access to justice and solutions to some of their social problems.

Some of the issues affecting the poor that need to be addressed in order to promote justice in marginalised areas identified above include but are not limited to domestic violence; monetary claims; property grabbing after the death of a loved one; pension or grant claims; the enforcement of labour rights often encountered by miners or farm workers; unlawful dismissal or eviction; social problems; child abuse; and maintenance. Many of the people are poor and cannot afford the legal costs of realising their rights through the formal system. The situation is further compounded by the fact that many, especially women, are breadwinners and do not have the time to go to court and back, since they have to generate an income for their dependants. Also, the majority of women directly and indirectly afflicted are old and also burdened with various care-giving roles such as looking after or providing for children orphaned by HIV/AIDS and families members, including grandchildren suffering from one kind of disability or the other.

In order to ameliorate some of these hardships, the CCJD advice offices provide free legal education to those too poor to pay for such services and inform the public of their existent rights, and the benefits of the new constitutional disposition. They also provide out-of-court mediation, arbitration and negotiation services to the poor in an effort to promote alternative dispute resolution mechanisms, particularly in cases of domestic violence, small claims, eviction and maintenance. Furthermore, there is a need to promote ubuntu (the spirit of togetherness and unity) among the people, regardless of their socio-economic and financial standing. The CCJD, therefore, conducts presentations and focus groups in poor communities to educate and sensitise the marginalised about their rights and the empowerment opportunities that are available or can be made accessible to them in order to solve their problems collectively or individually. Many of these services are provided through free community development programmes and training projects specifically designed for targeted poor communities. Although funding often is a limiting factor, by working in partnership with state departments and private institutions, access to justice rights and services are gradually reaching more communities throughout KZN and South Africa at large.

It is worth noting that paralegals play a very important role in ameliorating the negative impact of poverty on poor people and the marginalisation of their communities. Paralegals participate actively in the outreach programmes and selflessly serve the poor community. Research has shown through the CCJD programmes that communities are fond of and comfortable with the paralegals serving them and that the services they provide are of high quality and standard as many are trained in the basic knowledge of the law and are trained regularly to bring them up to date on newly-enacted legislation.

In the words of Nelson Mandela:<sup>7</sup>

After 1994, although all South Africans technically had all sorts of civil rights (civil and political, as well as socio-economic), it remained difficult to actually access them, providing a new role for paralegals to attempt to translate the new Bill of Rights into reality (in no small part due to the educational work of paralegals) there has been an ever-growing need for paralegal assistance in claiming them.

Mandela's statement simply highlights the significant and crucial role played by paralegals in the realisation of access to justice rights and how they educate the public, including the poor, on their constitutional rights. It therefore follows that their role and contribution cannot be understated and that is why NPOs such as the CCJD and many more have relied on their services in poor communities to provide reliable services to the poor for many years.

The majority of poor people living in low-income communities are unrepresented in civil litigation when compared to criminal representation, for instance, divorce issues, maintenance, health and reproductive health matters, property and land rights. Due to financial, health and transport constraints many people therefore cannot afford to travel to the nearest cities to seek or access formal legal assistance established by the state. It follows, therefore, that the availability, geographical accessibility and economic affordability of the paralegals located in many of these advice centres and the different options of conflict resolution mechanisms, including free assistance provided to them, are highly rewarding and economical as no one is turned away and the rights of those accessing the free services are respected with privacy and confidentiality maintained at all times.

#### **4 Are there any barriers to access to justice and do they have any implication(s) for the poor in poor communities?**

There are several barriers preventing the poor from accessing justice and their human rights both in South Africa and beyond. Many countries are wrestling 'poverty', as Statistician-General Pali Lehohla alluded to recently when commenting on their latest report:<sup>8</sup>

30,4 million of South Africa's 55 million citizens in 2015 – three million

7 J Dugard & K Drage 'To whom do the people take their issues? The contribution of community-based paralegals to access to justice in South Africa' *The Justice and Development Working Paper Series* (2013) 9.

8 Statistics South Africa 'Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015' Statistics South Africa (2017). See also M Merten 'StatsSA Poverty Report 2017: Policies fail the people of South Africa' *Daily Maverick* 23 Aug 2017, <https://www.dailymaverick.co.za/article/2017-08-23-statssa-poverty-report-2017-policies-fail-the-people-of-south-africa/#.WaJO5YiGO00> (accessed 26 August 2017).

more than in 2011 – lived in poverty, or below the upper poverty line of R992 per person per month. One in three South Africans lived on less than R797 per month, or half of the country's 2015 mean annual household income of R19 120, with more women affected than men, and children and the elderly hardest hit.

Obviously, where poverty is rife, the cost of justice becomes far more unattainable for the poor. Historically, some of these factors were created before 1994 and, despite many attempts to transform the system, the justice margin has remained unresolved, for instance, racial profiling, an increase in the number of pupils dropping out of school for socio-economic reasons, poverty, and so forth. Over the years, many more problems are becoming more visible as the gap between the rich and the poor continues to widen and pressure on access to national resources is becoming more pronounced.

Despite the existence of the Bill of Rights in the 1996 Constitution and the positive affirmation of these rights through a committed and progressive judiciary, the social and justice gap remains and many affected by poverty remain marginalised. As indicated earlier, access to justice can either be examined broadly or narrowly. The problem, however, is that no matter which lens the examiner wears, the reality remains unchecked or unresolved, as the poor will remain the most affected as long as there remain poor communities in the country.

In South Africa, for instance, as in the case of many of its African counterparts, there are still too few service providers for a large number of indigents waiting for and hoping to access fundamental services provided by the state. Thus, it is quite challenging to provide legal aid assistance to everyone in need of such assistance or charged with crimes. Sadly, many are left out and only those fortunate enough to buy the services or those aware of where and how to access free services are assisted. Yet millions of South Africans are left out with their rights unprotected, unprompted and unfulfilled by the same state obliged to cater for the preservation and furtherance of their human rights.

Factors such as scarce resources, illiteracy, a lack of or poor information dissemination, poor state commitment, inequality, poor transparency, lack of accountability and sometimes poor funding all undermine the productivity of legal aid mechanisms and provisions such as paralegal assistance. These factors undoubtedly undermine the observer's effort to access a state's human rights structures and assess to what extent such structure(s) protects the rights of poor people living in poor communities. Geographical factors, economic factors and lost identity (including racial factors) remain profound, given that some people still are not documented even today, despite the attempts made by the state, including the Departments of Home Affairs and of Social Development.

The poor socio-economic standing of the poor also fuels poor access to justice by those in desperate need of assistance. For instance, many

poor people still struggle to pay the small fee the Home Affairs charges for obtaining an identity document (ID), sometimes as little as R300. This goes to show that the poor are highly constrained and the enjoyment of basic human rights such as the ability to afford paying for an identity card can mean a struggle where the applicant is financially and economically constrained. Furthermore, there is a significant gap in peoples' legal knowledge.

Many of the poor living in poor communities still do not understand what the Constitution involves and how to enforce their human rights. Consequently, they are unable to enforce their rights against individuals and the state when there is a violation of their rights, and only a few approach the legal aid offices for help or other advice offices where they can get free legal assistance or counselling, especially when traumatised by an unfortunate experience.

## **5 The intersection between poverty and access to justice for poor communities**

What does access to justice mean to the poor in poor communities? For many poor communities, the enjoyment of the right of access to justice is far-fetched and beyond their reach. Factors such as access to health care and services, including sexual and reproductive health services (SRH), education, access to clean water, sanitation, good roads, the use of interpreters in court, access to courts and the ability to understand the litigation process are practically non-existent. In poor communities, some remain uneducated and ignorant of their rights with little or no motivation to break through the barrier of perpetual marginalisation. When there is insufficient or inadequate protection of human rights, there hardly is any consolation or redress for the poor fleeing from gender-based violence or domestic violence. In poor communities, those facing criminal charges sometimes may remain in detention until the date of trial or even throughout the trial process as they are not familiar with the bail process and cannot afford the cost of hiring an attorney.

## **6 Access to justice, the role of legal aid offices and the commitment to serve the poor in poor communities**

In various countries, including in South Africa, organisations such as NGOs, NPOs and Community Based Organisation (CBOs) are often committed to alleviating some of the problems facing poor people and some state institutions are set up to help reduce some of the barriers to access to justice for the poor in poor communities. In South Africa, for instance, there are the Chapter 9 institutions. There is also the Legal Aid Board and more paralegals are working with NGOs to promote access to

justice for the poor. Some of these state-funded bodies are established to bring justice to the poorest of the poor in society.

In order to have a full understanding of the fundamental need for the promotion of access to justice and the impact it has on the poor in South Africa, one must examine the role of the Legal Aid Board and its offices. Many writers have written extensively on the South African legal aid services, but it is pivotal at this juncture to briefly highlight the significant contribution(s) made by this office in the furtherance of access to justice, equity and the promotion of human rights, particularly the right to a fair trial and access to legal representation guaranteed by section 35 of the 1996 South African Constitution.

Section 34 provides:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal of forum.

It follows, therefore, that the Constitution not only provides for the right of access to justice but requires the state to enforce the right and assist indigents in enjoying this right by making it accessible to the destitute. One can also submit that section 34 recognises both formal and informal means of dispute resolution mechanisms, which gives service providers such as NPO paralegals the legal backing to assist the poor even though they are still denied the right of appearance.

Legal Aid RSA is an organisation mandated by the 1996 Constitution to protect the rights of the poor and vulnerable in South Africa.<sup>9</sup> One of their roles is to minimise social exclusion and promote equitable justice.<sup>10</sup> Legal Aid is responsible for ensuring quality justice for indigents focusing on the poor and the marginalised, accessing public services including the courts. By so doing, this office is one of the few offices in the country that provide access to justice for the poor at no cost to the recipient of the service(s).

In order to deliver and promote the right of access to justice for the impoverished in South Africa, Legal Aid has implemented a mixed model of delivery system comprising of justice centres. For instance, in KZN alone there are 10 centres and 11 satellite offices. They deal with civil matters, criminal matters and general advice issues, including labour issues. Legal Aid also provides what is known as 'judicare services'.<sup>11</sup> This is achieved by working closely with accredited private lawyers and firms to provide legal services to those that do not have the means to buy it.

Furthermore, there is what are known as co-operative partners, for

9 Legal Aid Act 22 of 1969; Legal Aid South Africa Act 39, 2014.

10 H Sommerlad 'Some Reflections on the relationship between citizenship, access to justice, and the reform of legal source (2004) 31 *Journal of Law and Society* 349.

11 D McQuoid-Mason 'Challenges in increasing access to justice in the next decade' in M Carnelle & S Hoctor (eds) *Essays in honour of Tony Mathews* (2011) 170.



instance, NGOs, CBOs and campus law clinics established at university premises throughout the country to provide legal representation to the people. The law clinics use trained law graduates known as candidate attorneys to provide these services. They also use the agency agreements model; Legal Aid Advice line (call centre, easily accessible); impact litigation is another adopted model used to facilitate access to justice and deliver legal aid services but this is a standalone unit aimed at promoting litigation and, finally, the *pro bono* model, where members of the law society commit to serving the public free of charge, with no cost to the recipient of the legal services. The problem, however, is limited funding and, consequently, legal aid offices are financially constrained and often provide assistance more in criminal than in civil matters.<sup>12</sup> The negative implications of such one-sided assistance are that it forces the poor looking for free legal representation in civil matters to look elsewhere or give up once they do not pass the 'means test', or when legal Aid cannot assist them for any other reason(s), which often include financial constraints.

## 7 Equality and access to justice for the poor

Section 9 of the 1996 Constitution provides for the right to equal protection of the law. The reality, however, is that access to justice experiences depending on the person accessing or aspiring to access a given service can reflect inequality. This is because inequality that existed pre-1994 still exists in some areas but with problems, guise or name. Many inequalities affecting the poor occur outside the legal frontier and legal institutions, therefore directly or remotely promoting inequality in the system and the marginalisation of the people in poor communities when it comes to the realisation or the protection or enjoyment of the right of access to justice.

Consequently, where human rights protection is limited or non-existent, equity and equal access to the protection of this is less attainable and this can destabilise any attempt to promote equality in such a state. Although one must not discriminate against a particular group according to section 3 of the Constitution, the problem is that most states afflicted by poverty do not perceive marginalised communities and the poor as unequal to their economically-stable counterparts in the same country. This gap may fuel socio-economic inequality if left unchecked.

Although this submission is highly debatable, so is the case when looking at the resource made accessible to the elite *vis-à-vis* those available to the poorest of the poor in South Africa. The disparities can only be reduced by furtherance of access to justice and commitment on the part of the state to bridge the socio-economic gap created prior to 1994 by promoting a more justiciable access to national wealth and efficient sensitisation. Therefore, it is important for the state to accelerate programmes promoting socio-economic equality standards and uniform access to, for example, the civil

12 D Holness 'The constitutional justification for free legal services in civil matters in South Africa' (2013) 2 *Speculum Juris* 2-5.

and criminal justice system for all including the poor. For instance, the legal aid offices should be funded properly and encouraged to take up more civil matters in their commitment to promote access to justice for the poor given the fact that many poor people are not only faced with criminal issues but social and socio-economic dilemmas daily.

One of the ways to encourage equality is to ensure equal access to education and educational support. Education is bound to promote socio-economic standards and encourage investment, and this will improve the status of people living in poor communities.<sup>13</sup> South Africa is politically well placed to ensure that the needs of poor communities and the people living in these areas are adequately catered for and state officials should not disregard even the minutest public grievances as this may be regarded as the state not caring enough for the poor. State commitment goes beyond solving problems, such as during a public interest protest, but its ability to prevent such protest from happening by positively affirming the rights of every citizen and their ability to enjoy their human rights. It is submitted that the social distribution of wealth in South Africa varies and, therefore, the negative implication for poor access to resources, including state institutions, will affect various groups differently.

Consequently, some actions firmly institutionalised, such as divorce proceedings, marriage and child custody, will often need to involve the law and court processes that remain unaffordable and inaccessible to the poor. The question, however, is how many of the people needing these services in actual fact turn to law or the formal legal system for help. In such cases, very few poor people living in poor communities will adopt formal legal means, even when they are fully aware of what actions to take and knowing that the services will be free of charge.

This shows that socio-economic factors do not influence the poor, but there are sometimes also social factors, for instance, neighbours may decide to amicably resolve their differences instead of going to court and becoming enemies afterwards, and many people may find the formal system too stressful to go through (backlog, contingent fees, having to pay costs, adjournments, delays) and not being able to proceed. In order to prevent further inequality in social groups, there is a need to radically promote access to justice rights, and promote accessibility and empowerment in poor communities and mitigate constraints created by the system or the affluent in societies and organise an equitable legal environment that is class-neutral and all-encompassing.

## **8 Conclusion**

In conclusion, this chapter has explored the nexus between access to justice and the poor in poor communities, by examining the role of the formal

13 RL Sandefur 'Access to civil justice and race, class, and gender inequality' (2008) 34 *Annual Review of Sociology* 339.

legal system and society, by engaging in a discussion on the convergence between the limitations facing the poor and the same resources that are made easily accessible to their elite counterparts. It focused first on the role of access to justice and the relationship between the lack of realisation of the rights of the poor in a democratic state, as a result of some barriers and social exclusion practices facing this group of people, thereby limiting their ability to enjoy their human rights to the fullest.

The chapter highlighted the need to promote a substantive right of access to law and state structures and resources and the promotion and facilitation of the development of a rights-based form of social order, resulting in equity and uniform inclusion when it comes to service delivery and the right to access justice in poor communities. It has been maintained that the poor are confronted not only with legal obstacles when accessing formal legal means or redress, but that many social and socio-economic factors equally hinder and discourage, even the most objective ones, and participation is hampered. Lastly, the role of NPOs, legal aid offices and the use of paralegals to ensure that the barriers to access to justice and the exclusion problem are addressed and substantive equality paves the way for the poor to be included in the development of the country at large.

## References

- Blair, T 'Foreword' in Bean, D (ed) *Law reform for all* (Blackstone Press 1996)
- Dewar, D 'Too many attorneys? Oversubscription to the attorneys' profession' (2011) 509 *De Rebus* [online] 23
- Dugard, J & Drage, K 'To whom do the people take their issues? The contribution of community-based paralegals to access to justice in South Africa' The Justice and Development Working Paper Series (The World Bank 2013)
- Ghai, Y & Cottrill, J 'The rule of law and access to justice' in Ghai, Y et al (eds) *Marginalised communities and access to justice* (Taylor & Francis Group 2010)
- Holness, D 'The constitutional justification for free legal services in civil matters in South Africa' (2013) 2 *Speculum Juris* 1
- McQuoid-Mason, D 'Access to justice in South Africa: Are there enough lawyers?' (2013) 3 *Oñati Socio-Legal Series* 561
- McQuoid-Mason, D 'Challenges in increasing access to justice in the next decade' in Carnelley, M & Hoctor, S (eds) *Essays in honour of Tony Mathews* (University of KwaZulu-Natal Press 2011) 169
- Minister Health & Others v Treatment Action Campaign & Others* (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002)
- Nkuzi Development Association v Government of the Republic of South Africa & Another* 2002 (2) SA 733 (LCC)
- Sandefur, RL 'Access to civil justice and race, class, and gender inequality' (2008) 34 *Annual Review of Sociology* 339
- Rosenberg, E 'Poverty alleviation through sustainable development', [http://www.enviropaedia.com/topic/default.php?topic\\_id=199](http://www.enviropaedia.com/topic/default.php?topic_id=199) (accessed 12 January 2015)
- Sommerlad, H 'Some reflections on the relationship between citizenship, access to justice, and the reform of legal source' (2004) 31 *Journal of Law and Society* 345
- Statistics South Africa 'Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015' Statistics South Africa (2017)

# CHAPTER 12

## THE ROLE OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION IN ENSURING STATE ACCOUNTABILITY TO ADDRESS POVERTY

Rachael Adams\*

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Overcoming poverty is not a gesture of charity. It is an act of justice. It is the protection of fundamental human rights.

Nelson Rolihlahla Mandela (1918-2013)

### Abstract

*Since its inception at the dawn of South Africa's new democracy the South African Human Rights Commission has focused much of its efforts in securing the human rights of the country's poor and marginalised citizens. As part of its work, the Commission has engaged with government in order to ensure that the necessary priority is afforded to the realisation of the Constitution's Bill of Rights, and that government is held accountable to the people of South Africa for their obligations under the Constitution. As will be discussed in this chapter, it often is those most marginalised by society, such as those living in poverty, who face structural and other barriers to the realisation of their human rights and who most require a responsive government to address such issues. This chapter therefore briefly examines the relationship between human rights and poverty in South Africa, before providing an account of the Commission's work on poverty alleviation, and ensuring state accountability to the poor. While the important mandate of the SAHRC must be acknowledged, the Commission is also faced by limitations, such as the location of its offices in only the main metro cities, significantly impacting its reach and effectiveness.*

### 1 Introduction

The term 'poverty' has been used historically to refer to a lack of resources necessary for leading an adequate and comfortable life.<sup>1</sup> Therefore, it is a relative term, based upon what a particular society recognises to be the resources necessary for leading a particular kind of life. Yet, in South Africa it is well recognised that poverty persists in extreme and worrisome ways across the country. It is evident in the extreme divide between those whose rights, citizenship, homes and lives are secure, and those for whom these fundamentals are not.

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1 For a discussion on the concept and history of poverty see, eg, Studies in Poverty and Inequality Institute 'The measurement of poverty in South Africa project: Key issues' Working Paper 1, <http://www.treasury.gov.za/publications/other/povertyline/SPII%20document.pdf> (accessed 18 August 2017).

The (near) universal acceptance of international human rights has come to stand as a benchmark for what constitutes a humane and dignified life in contemporary times.<sup>2</sup> In particular, socio-economic rights – enshrined in international human rights law in the International Covenant on Economic, Social and Cultural Rights (ICESCR) – pertain to the tangible resources necessary for a decent standard of living, including water, housing and education. The universal realisation of socio-economic rights has been broadly accepted, and particularly in South Africa where these rights enjoy a justiciable status,<sup>3</sup> as constituting an integral step in overcoming poverty. However, the ways in which poverty intersects with human rights, and not only socio-economic rights, are numerous and complex.

One of these ways is in the affiliation between notions of poverty and notions of inequality, which human rights so fundamentally seek to eradicate. Indeed, by definition poverty is related to inequality insofar as it denotes a lack of wealth and points to the disparities between rich and poor, the ‘haves’ and the ‘have nots’. Moreover, the standards of poverty that have been developed globally – absolute poverty where a household income is not enough to meet basic needs, and relative poverty where a household’s income is 50 per cent below that of the country’s medium income – remain subject to critical circumstances of structural inequality.<sup>4</sup> As Liebenberg has noted:<sup>5</sup>

In the context of development policy and the realisation of socio-economic rights, a focus on capabilities highlights how unequal social structures can undermine people’s abilities to convert access to resources and services into valuable functionings even where absolute poverty has been eliminated.

To elaborate, the promotion and defence of equality and non-discrimination are central tenets of the human rights project, with article 1 of the Universal Declaration of Human Rights (Universal Declaration) firmly reiterating that ‘[a]ll human beings are born free and equal in dignity and rights’, a principle that is also echoed in article 2 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). This intersection of poverty and inequality is particularly important for examining the poverty situation in South Africa and the role of human rights in working towards its alleviation.

2 See, eg, the definition ‘human rights is those basic standards without which people cannot live in dignity’, published on the University of Minnesota’s Human Rights Resource Centre webpage, <http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-1/whatare.htm> (accessed 18 August 2017).

3 SM Kende ‘The South African Constitutional Court’s embrace of socio-economic rights: A comparative perspective’ (2003) 6 *Chapman Law Review* 137.

4 S Fredman ‘The potential and limits of an equal rights paradigm in addressing poverty’ (2011) 22 *Stellenbosch Law Review* 566; S van der Berg ‘Ensuring proportionate state resource allocation in socio-economic-rights cases’ (2017) 3 *South African Law Journal* 576 587.

5 S Liebenberg ‘Toward an equality promoting interpretation of socio-economic rights in South Africa: Insights from the egalitarian liberal tradition’ (2015) 132 *South African Law Journal* 411 423.

In South Africa poverty is marked by race, with over 93 per cent of South Africa's poor being black.<sup>6</sup> In addition, a study conducted by the South African Human Rights Commission (SAHRC) and the United Nations Children's Fund (UNICEF) revealed that children of black or African descent constituted 95 per cent of all children in South Africa living in poverty.<sup>7</sup> Under South Africa's Constitution of 1996 a formal commitment was made to 'improve the quality of life of all citizens and free the potential of each person'<sup>8</sup> through the enactment of the Bill of Rights in chapter 2. As part of the institutional mechanisms created to promote human rights, the SAHRC was founded under Chapter 9 of the Constitution. Accordingly, this chapter considers the role of the SAHRC as the national human rights institution of South Africa in poverty alleviation, and specifically the ways in which it works to promote government accountability to the poor.

Against this background this chapter contextualises poverty within the human rights discourse, before presenting an overview of the role and work of the SAHRC in ensuring state accountability to the poor. The chapter considers the relationship between poverty in South Africa and the Bill of Rights, paying specific attention to the socio-economic rights and the right to equality. Before unpacking the constitutional and legislative mandate of the SAHRC, the chapter provides an analysis of state accountability. In presenting the work of the SAHRC in relationship to poverty and the responsibilities of the state, the chapter examines the different mechanisms available to the SAHRC to hold the state to account for the realisation of human rights, and looks at two recent examples of SAHRC campaigns and projects in this regard. Finally, the chapter will draw on lessons learnt from the experience of the SAHRC in order to inform an opinion on the role of government with regard to poverty alleviation and accountability to the poor.

## 2 Poverty and human rights

### 2.1 International human rights law

Although the links between poverty and human rights are considered relatively apparent, whether or not poverty alleviation constitutes an actual human right has been a somewhat more contentious issue.<sup>9</sup> Article 25(1) of the Universal Declaration is seen to lay the foundations for a

6 Statistics SA 'Poverty trends in South Africa: An examination of absolute poverty between 2011 and 2015' 57-58, <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf> (accessed 11 June 2019).

7 South African Human Rights Commission and United Nations Children's Fund 'South Africa's children: A review of equity and child's rights' March 2011, 21, [www.sahrc.org.za](http://www.sahrc.org.za) (accessed 11 June 2019).

8 Constitution of the Republic of South Africa, 1996, Preamble.

9 See T Pogge 'Severe poverty as a human rights violation' Philosophy Seminar at All Souls College, Oxford, March 2003.

specific right to be free from poverty,<sup>10</sup> in so far as it protects the right to an adequate standard of living:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

If there is a human right to be free from poverty contained in the right to an adequate standard of living (a right that is further protected under article 11 of ICESCR<sup>11</sup> and article 27 of the Convention on the Rights of the Child (CRC)),<sup>12</sup> this also means that there is a corollary obligation upon states to realise this right. This conceptualisation of human rights as containing a relationship between rights holders (individuals)<sup>13</sup> and duty bearers (which under international human rights law primarily is the state) was put forward by, among others, Hohfeld, a legal theorist.<sup>14</sup> Hohfeld developed a typology for rights that drew out the correlation between duties and rights (or claims),<sup>15</sup> which has a direct relevance to the contemporary conceptualisation of human rights as developed in

10 SAHRC & UNICEF (n 7).

11 Art 11 ICESCR: '1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent. 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.'

12 Art 27 of the International Convention on the Rights of the Child (CRC): '1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. 3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing. 4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.'

13 Notably the African human rights system differs somewhat from this traditional concept of individuals as the rights holders as it provides for community or collective rights. See art 19-24 of the African Charter.

14 WN Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 *Yale Law Journal* 63.

15 Hohfeld's typology was somewhat more complex, relating also to privileges (or liberties), power, liability, immunity and disability. See n 12.



international law, which places an obligation upon the state to protect, respect and promote the attainment of rights.<sup>16</sup>

Thus, conceiving of a human right to be free from poverty would place an obligation upon the state to *protect* individuals against impoverishment and to *promote* access to the resources necessary to an adequate standard of living. In addition, if a state has a specific obligation to do something, it can be held accountable for this. A United Nations (UN) publication justifies human rights as a means to alleviate poverty in the form of the realisation of the Millennium Development Goals (MDGs) for this very reason by stating that ‘the *raison d’être* of the rights-based approach is [to ensure state] accountability’.<sup>17</sup>

Indeed, whether or not there is a firm right to be free from poverty, the human rights discourse – which places obligations upon the state for which the state can in turn be held accountable – provides an ideal framework for poverty alleviation, grounded in the human rights principles of equality and human dignity, principles that are of particular importance in South Africa as founding values of the Constitution.<sup>18</sup>

## 2.2 Poverty and human rights in South Africa

Poverty intersects with human rights in many direct and substantial ways. It is well recognised that those living in poverty frequently suffer from violations of their human rights, or face difficulties in accessing their rights.<sup>19</sup> These violations are caused both by structural factors and power imbalances that so often are the cause of social injustices. In addition, persons living in poverty often are without the resources or ability to seek redress or remedies where human rights violations occur.

For this reason, poverty is fundamentally connected to inequality and injustice, which, as discussed above, are central elements of the human rights endeavour. An oft-quoted maxim by Nelson Mandela lays out these fundamental links between poverty, human rights, justice and equality.<sup>20</sup>

Overcoming poverty is not a gesture of charity. It is an act of justice. It is the

16 See, eg, the United Nation’s Office of the High Commissioner for Human Rights’ website, <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx> (accessed 18 August 2017).

17 United Nations Office of the High Commissioner for Human Rights ‘Claiming the Millennium Development Goals [MDGs]: A human rights based approach’ (2008) 15, [http://www.ohchr.org/Documents/Publications/Claiming\\_MDGs\\_en.pdf](http://www.ohchr.org/Documents/Publications/Claiming_MDGs_en.pdf) (accessed 18 August 2017).

18 ‘Chapter 1 Founding Provisions Republic of South Africa The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.’

19 See T Pogge ‘Poverty and human rights’, summary document, [http://www2.ohchr.org/english/issues/poverty/expert/docs/Thomas\\_Pogge\\_Summary.pdf](http://www2.ohchr.org/english/issues/poverty/expert/docs/Thomas_Pogge_Summary.pdf) (accessed 18 August 2017).

20 Nelson Mandela, Amnesty International Conference, 2006.

protection of fundamental human rights. Everyone everywhere has the right to live with dignity, free from fear and oppression, free from hunger and thirst, and free to express themselves and associate at will.

Mandela connects poverty with the numerous specific rights enshrined in the Bill of Rights, including the right to the inherent dignity of all persons (section 10); the right to food and water (section 27); the right to freedom of expression (section 16); and the right to freedom of association (section 18). By so doing, he points to the fact that the alleviation of poverty is a constitutional imperative, and a central element of South Africa's nation-building efforts.

### 2.3 Socio-economic rights<sup>21</sup>

Socio-economic rights are important for poverty alleviation, insofar as they provide individuals and communities with claims against the state for accessing certain material and social resources necessary for achieving an adequate standard of living.<sup>22</sup> Socio-economic rights are particularly significant in South Africa. Section 27 of the Constitution enshrines the rights of access to health care, food, water and social security. Section 26 enshrines the right to adequate housing. Section 24 enshrines the right to an environment that is not harmful to one's health and well-being, and section 29 enshrines the right to education. These rights collectively constitute the body of socio-economic rights protected in the South African Constitution. These rights are further subject to progressive realisation by the state.<sup>23</sup>

The inclusion of socio-economic rights in the South African Constitution was globally considered progressive and distinctive.<sup>24</sup> When the Constitution was promulgated in 1996, socio-economic rights generally were considered within the international human rights discourse as non-justiciable given both their unspecific nature, and the fact that they are subject to progressive realisation by state parties, depending on available resources. However, the South African Constitution enshrined a significant catalogue of socio-economic rights and, in so doing, made a clear statement of intent to the people of South Africa of what they could expect from government and, therefore, for what government could be held accountable. In addition, South Africa's inclusion of these rights demonstrated that socio-economic rights were also fundamental

21 This part of the chapter examines the link between poverty and the socio-economic rights guaranteed under the South African Constitution. This is not a detailed discussion as chs 5-8 of this volume contain a more comprehensive discussion on this issue.

22 From an international perspective, socio-economic rights derive from art 25 of the Universal Declaration on an adequate standard of living.

23 The 'progressive realisation' clause of the Constitution has been deliberated by the Constitutional Court, most notably in the case of *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC).

24 See, eg, A Sachs 'The creation of the Constitution' (1996-1997) 41 *New York Law School Law Review* 669.

to rebuilding a nation and eradicating the poverty and inequality that characterised apartheid. Indeed, the SAHRC's Socio-Economic Rights Report of 1997-1998 states that 'by recognising these [socio-economic] rights, the eradication of poverty becomes not merely a policy choice for the state, but a legally-binding responsibility for which it is accountable'.<sup>25</sup>

In consideration of the positive duties upon the state to realise the socio-economic rights enshrined in the Bill of Rights, and the necessity of the implementation of these rights for the eradication of poverty across South Africa, it is important to first lay out what is meant by state accountability and, therefore, how the SAHRC can contribute to ensuring the realisation of rights by scrutinising government's policy efforts and interventions to alleviate poverty.

### 3 What do we mean by state accountability?

#### 3.1 State accountability

Poverty also is a political term that speaks to the distribution of resources across a particular society.<sup>26</sup> It is partly for this reason that assessing the role of the state in poverty alleviation and promoting state accountability on this issue is critical, in addition to the human rights typology laid out above which places an obligation upon the state to protect, respect and promote the fulfilment of rights. As highlighted above, poverty alleviation is a constitutional imperative and, as such, the state bears the primary responsibility<sup>27</sup> for allocating resources and ensuring access. The extent to which the state progressively commits policies and resources towards the realisation of socio-economic rights, in particular, constitutes an empirical demonstration of its commitment to poverty alleviation and, indeed, the Constitution. Indeed, Philip Alston as UN Special Rapporteur on Extreme Poverty and Human Rights notes that tax is a fundamental human rights issue and calls for international human rights obligations to shape the tax reforms of states.<sup>28</sup>

The World Bank provides a useful definition for understanding what is meant by state accountability, particularly with regards to the issue of poverty:<sup>29</sup>

Accountability ensures actions and decisions taken by public officials are

25 South African Human Rights Commission, Socio-Economic Rights Report 1997-1998, [www.sahrc.org.za](http://www.sahrc.org.za) (accessed 18 August 2017).

26 n 1 above.

27 Although the state bears the primary responsibility for securing access to the rights laid out in the Bill of Rights, the Constitution has horizontal application (enshrined in sec 8), which binds all persons.

28 P Alston & N Reisch (eds) *Tax, inequality and human rights* (2019).

29 World Bank 'Accountability in governance', <http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf> (accessed 18 August 2017).

subject to oversight so as to guarantee that government initiatives meet their stated objectives and respond to the needs of the community they are meant to be benefitting, thereby contributing to better governance and poverty reduction.

In short, accountability signifies a relationship between the state and its people. It demands a responsive state that is able to respond to the needs and concerns of its citizens. Further, to be an accountable state requires the necessary capacity and will to execute its mandate, obligations and functions, particularly as derived from the Constitution. Lastly, the World Bank's definition highlights the need for oversight as a form of guarantee for ensuring action by the state. Within South Africa's constitutional democracy, Parliament enacts direct oversight over government in addition to the constitutionally-established independent institutions, such as the SAHRC, which hold a specific mandate in respect of the realisation of human rights.

In addition, accountability has been closely linked to transparency<sup>30</sup> and the right of access to information.<sup>31</sup> In broad terms, this link between transparency and accountability posits that by allowing access to information regarding the decision making, policies and budget allocation of the state, its citizens can hold the state accountable for its actions (and, indeed, non-actions) as well as participate in policy and decision making. However, this requires the availability of information that is timely, accurate, relevant and accessible to citizens.<sup>32</sup>

For Yamin, who writes on the role of accountability in a human rights approach to health care, 'true accountability requires processes that empower and mobilise ordinary people to become engaged in political and social action'<sup>33</sup> and, further, that 'accountability in a human rights framework also requires effective and accessible mechanisms for redress in the event of violation'.<sup>34</sup>

Certainly, then, there are a number of factors that need to be present in order for a state to be truly accountable to its citizenry. As has been pointed out, a human rights-based approach encompasses notions of redress and remedy for victims where violations occur and, as such, is a just approach.<sup>35</sup> Yet, access to such remedies and justice notably is more

30 S van der Berg 'Strengthening access to information institutions to promote a culture of transparency' (2017) 33 *South African Journal on Human Rights* 167.

31 In South Africa the right of access to information is enshrined in sec 32 of the Constitution.

32 Issues of accessibility further include the language in which information is made available. See C Darch & PG Underwood 'Freedom of information legislation, state compliance and the discourse of knowledge: The South African experience' (2005) 37 *The International Information and Library Review* 77.

33 AE Yamin 'Beyond compassion: The central role of accountability in applying a human rights framework to health' (2008) *Health and Human Rights Journal* 2.

34 World Bank (n 29).

35 As above.

difficult for those living in poverty.<sup>36</sup>

In South Africa the right to justice (and to seek remedy and redress) is implicitly protected in sections 33 and 34 of the Constitution. Section 33 protects the right to just administrative action, placing an obligation on the state to provide written reasons for any administrative action taken against an individual. Section 34 enshrines the right of access to the courts and to a fair trial. Despite the protection of these rights in the Constitution, various barriers exist to accessing justice for many South Africans, and particularly those living in poor and marginalised communities. Such barriers include a lack of awareness of the Constitution and individual rights; a fear of stigmatisation and reprisal by community members or other social groups for taking legal action and any findings thereof; inadequate capacity of the judicial system and legal aid services to deal with matters in a timely manner; societal prejudices and stereotypes against the poor which may also influence laws, court proceedings and judicial decision making; inadequate redress and remedy mechanisms; as well as financial constraints in travelling to courts or other tribunals and paying the necessary legal fees.<sup>37</sup>

The SAHRC is one institution in South Africa where redress and remedies for violations of rights may be sought, since the Commission is constitutionally mandated to 'take steps to secure appropriate redress where human rights have been violated'.<sup>38</sup> Although the Commission annually receives an estimated 10 000 complaints,<sup>39</sup> many people living in rural parts of South Africa experience limited access to the SAHRC due to the fact that the Commission's nine provincial offices are located in urban areas. Indeed, Jacob writes that 'the SAHRC remains a limited urban-based institution; its services are largely inaccessible to an overwhelming majority of the people who live in the rural and semi-rural communities', and calls for it to 'decentralise its presence'.<sup>40</sup>

## 4 South African Human Rights Commission

### 4.1 Mandate and functions

The SAHRC is an independent institution established in terms of the Constitution. The SAHRC derives its enabling powers from the South

36 See also the Report of the Special Rapporteur on Extreme Poverty and Human Rights (2012), <http://www.ohchr.org/Documents/Issues/Poverty/A-67-278.pdf> (accessed 15 April 2015).

37 Darch & Underwood (n 32).

38 Sec 184(2) of the Constitution. See also part 5 on the SAHRC's mandate below.

39 SAHRC Annual Report 2014, [www.sahrc.org.za](http://www.sahrc.org.za) (accessed 18 August 2017).

40 BA Jacob 'The role and effectiveness of national human rights commissions in advancing domestic implementation of socio-economic rights in Commonwealth Africa' University of Pretoria (2014) 220.

African Human Rights Commission Act 40 of 2013 (SAHRC Act).<sup>41</sup>

Section 184(1) of the Constitution sets out the mandates of the Commission as follows:<sup>42</sup>

The Human Rights Commission must

- (a) promote respect for human rights and a culture of human rights;
- (b) promote the protection, development and attainment of human rights; and
- (c) monitor and assess the observance of human rights in the Republic.

The Commission's mandate is achieved through its legal, advisory, advocacy and research programmes, which derive their mandate from section 184(2) of the Constitution:

The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power –

- (a) to investigate and to report on the observance of human rights;
- (b) to take steps to secure appropriate redress where human rights have been violated;
- (c) to carry out research; and
- (d) to educate.

As a national human rights institution (NHRI) the SAHRC is additionally guided by the Principles Relating to the Status of National Institutions (Paris Principles) adopted by United Nations General Assembly Resolution 48/134 in 1993, to direct NHRIs in their duties and responsibilities. These principles include submitting reports to Parliament and to the public 'on any matters concerning the promotion and protection of human rights'; making recommendations on legislative and administrative laws and agreements; cooperating with the UN and other international and regional instruments; and assisting in the formulation and teaching of education and research programmes.<sup>43</sup> The SAHRC has been awarded 'A' status under the Paris Principles, meaning that it is granted speaking rights at the UN as it is considered sufficiently independent.

The SAHRC is further endowed with specific mandatory duties in relation to various rights and right groups in the Constitution. As well as holding responsibilities under the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),<sup>44</sup> the Commission also

41 This Act repeals the original Human Rights Act 40 of 1994.

42 Ch 9, sec 184 of the Constitution of the Republic of South Africa 1996.

43 Principles Relating to the Status of National Institutions, <http://www.jus.uio.no/smr/om/nasjonalt-institusjon/docs/paris-principles.pdf> (accessed 18 August 2017).

44 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

currently holds a mandate under the Promotion of Access to Information Act.<sup>45</sup> With respect to PEPUDA, the SAHRC is mandated to promote the right to equality and report to Parliament therein on the enjoyment of the right to equality in South Africa. Given the recent judgment at the Equality Court in the case of *Social Justice Coalition v Minister of Police*, which demonstrated that poverty was a ground of discrimination under PEPUDA, this finding will augment the responsibilities of the SAHRC under the Act.<sup>46</sup>

## 4.2 Reporting requirements

The SAHRC holds a number of mandates with respect to reporting and gathering information with respect to the status of compliance with the Constitution. Section 184(3) of the Constitution requires the Commission to gather information from government with regard to the realisation of socio-economic rights:

Each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights, concerning housing, health care, food, water, social security, education and the environment.

The SAHRC is one of the only NHRIs worldwide to hold a specific mandate to monitor the realisation of socio-economic rights,<sup>47</sup> a mandate that translates into a duty to enact oversight over the activities of the state in implementing these rights, and to hold it accountable for its responsibilities. Thus, in fulfilment of the constitutional obligation noted above, the SAHRC collects information from relevant government departments relating to specific socio-economic rights and compiles this information, which is verified against independent research and data produced by the Commission itself, into an annual section 184(3) report which is tabled at Parliament.<sup>48</sup> In recent years the SAHRC has published various research and policy briefs on the status of realisation of socio-economic rights.<sup>49</sup>

Jacob highlights how this special monitoring function of the SAHRC

is about ensuring the practical implementation of socio-economic rights for the benefit of all South Africans, particularly the poor and the vulnerable, by determining the extent to which state organs have implemented these rights;

45 Promotion of Access to Information Act 2 of 2000.

46 *Social Justice Coalition & Others v Minister of Police & Others* (EC03/2016) [2018] ZAWCHC 181 (14 December 2018).

47 A Corkey 'NHRIs as monitors of economic, social and cultural rights' Centre for Economic Social Rights, <http://www.cesr.org/downloads/NHRIs%20as%20Monitors%20of%20ESC%20Rights.pdf> (accessed 18 August 2017).

48 All the SAHRC's sec 184(3) reports are available online at [www.sahrc.org.za](http://www.sahrc.org.za) (accessed 18 August 2017).

49 See [www.sahrc.org.za](http://www.sahrc.org.za) (accessed 18 August 2017).

determining the reasonability of the measures which state departments and agencies have adopted to ensure that these rights are realised; and making relevant recommendations for the development and realisation of these rights.<sup>50</sup>

Further, in providing guidance to NHRIs the Paris Principles recommend that such institutions should regularly report on the realisation of human rights and provide recommendations therein. Moreover, the SAHRC Act requires the Commission to report on the implementation of the Bill of Rights by relevant government departments, and levels of compliance with international human rights standards and treaties.<sup>51</sup> To this end the Commission is required to make recommendations to all levels of government to strengthen the realisation of human rights, to review government policies relating to human rights, and to comment on the human rights concerns of new legislation and policy, particularly with regard to the impact on equality and the realisation of rights for marginalised groups.<sup>52</sup>

## **5 Structures of accountability**

The SAHRC works to promote state accountability to the poor on a number of levels. This part aims to provide an overview of the Commission's structures for promoting accountability and examples of its work in this regard. First, this part discusses the SAHRC's complaints-handling procedure as a tool for promoting state accountability at the micro-level. As an example, one case is discussed which sheds light upon the ways in which poverty intersects with other human rights concerns, particularly inequality and discrimination.

The second leg of this part moves on to provide an account of the SAHRC's reporting practices and the way in which this encourages state accountability to the poor on a macro-level. In this regard, this part examines two reports developed by the Commission, the first entitled 'Poverty traps and social exclusion among children in South Africa', and the second entitled 'Report on the right to access sufficient water and decent sanitation in South Africa 2010-2013'. These reports are selected as they illustrate both the overlapping concerns with respect to poverty and inequality, and the SAHRC's processes for promoting accountability.

### **5.1 Complaints**

The SAHRC has the power (under its investigative functions laid out in the Constitution and the SAHRC Act) to investigate complaints related to violations of human rights. Any group or individual can bring a human

50 Darch & Underwood (n 32) 238-239.

51 SAHRC Act 40 of 2013 sec 13.

52 Promotion of Access to Information Act 2 of 2000.



rights-related inquiry to the SAHRC, and the Commission is also able to consider matters of its own volition. The procedure for handling complaints is provided under the gazetted complaints handling procedure. Matters investigated are sometimes finalised by means of a report which may include specific findings and recommendations for the concerned parties. The Commission regularly deals with cases regarding service delivery of socio-economic rights, where the respondent is an organ of state, typically local government, and the complainant is an indigent community.<sup>53</sup> The recommendations in such matters provide specific indicators and timeframes by which the Commission can monitor their implementation and also ensure accountability.

A recent case handled by the Commission is demonstrative both of the increasing number of cases received relating to violations of socio-economic rights – particularly matters relating to health care, basic education and water and sanitation – and their link to poverty and discrimination. In 2014 the SAHRC concluded its investigation into human rights violations at the Alex Women's Hostel in the Johannesburg area.<sup>54</sup> The Commission opened this investigation when it received a wide-ranging complaint relating to the conditions and access to services at the Alex Women's Hostel, including issues with insufficient potable water, sanitation and sewage services; insufficient electricity supply; the removal of male children over seven years of age from their mothers; and general issues regarding, among others, gender discrimination in respect of access to the hostel and occupancy levels. The respondent was the City of Johannesburg Metropolitan Municipality, cited in its capacity as the local government authority that owns and manages the hostel.

In this matter the complainant alleged that these and the other issues noted in the complaint constituted violations to her protected rights to equality; dignity; the environment; access to health care, food, water and social security; housing; the welfare of her children; access to information; and just administrative action. Administering the complaint in terms of the Commission's complaints handling procedures, the SAHRC gathered information by conducting two *in loco* inspections of the hostel, holding several consultative meetings with the complainant and the respondent, and exchanging numerous correspondences with the relevant parties. The investigative team also undertook desktop research of applicable international and domestic law and standards.<sup>55</sup>

A number of the issues that the Commission catalogued during its investigation and in drafting its subsequent report related, directly or indirectly, to the yet-to-be-completed redevelopment of the hostel.

53 Details on how to lay a complaint with the SARHC as well as the reports of SAHRC complaints are available at the Commission's website [www.sahrc.org.za](http://www.sahrc.org.za) (accessed 18 August 2017). See also the SAHRC's Trends Analysis Reports which provide an overview of cases handled by the SAHRC, <https://www.sahrc.org.za/index.php/sahrc-publications/trends-analysis> (accessed 18 August 2017).

54 Alex Women's Hostel Report, [www.sahrc.org.za](http://www.sahrc.org.za) (accessed 18 August 2017).

55 n 48.

However, the Commission ultimately found that, in light of ‘the failure of ill-conceived interim and *ad hoc* measures, the reasonableness of steps already taken and still to be taken and [the] unreasonably long period of time that [had] elapsed since plans for redevelopment were first conceived’, the respondent had violated several human rights of the residents of the hostel.

The Commission specifically found violations with respect to the rights to dignity; access to health care, food, water and social security; housing; the welfare of children; the environment; and just administrative action (and, by implication, access to information).<sup>56</sup> According to the analysis in the report,

the respondent is alleged to have violated the rights mentioned above by failing to ensure that the hostel constituted adequate accommodation as per international and domestic standards. The reasonableness of steps taken by the respondent must be considered against the particular vulnerability of those affected by the conditions of the hostel, being women and children from poor economic backgrounds, often with little or no support systems.<sup>57</sup>

This analysis is derived from the oft-quoted *Grootboom* judgment which developed the reasonability test to include prioritising the provision of socio-economic rights for the most vulnerable members of society and, notably, children.<sup>58</sup> The development of this test marked a significant shift from the traditional poverty-rights discourse which centres primarily on socio-economic rights, by including equality and discrimination into its analysis.

The Commission concluded its investigative report into the Alex Women’s Hostel by issuing recommendations with respect to four key issues – consultation and information sharing, audits, violation-specific recommendations and hostel development – and emphasised ‘the need for full and meaningful consultation and active participation throughout the implementation of its recommendations by the respondent’.<sup>59</sup>

These recommendations are notable in that they all stress active involvement by both the Commission and those affected by the respondent’s actions. This underlying theme demonstrates a key capacity of the Commission to foster awareness and participation by the public and, specifically, those directly involved with a matter. Only by creating and maintaining this pressure on human rights violators can the Commission facilitate meaningful change for those affected, and thereby fulfil its constitutional mandate to ‘secure appropriate redress where human rights have been violated’, and encourage state accountability to the poor.

56 As above.

57 n 48, 51.

58 As above.

59 As above.

## 5.2 Reporting

As noted above, the SAHRC holds a number of reporting requirements. Reports consist of research undertaken by the Commission on a particular right or rights grouping, or are the culmination of evidence received from national hearings on a particular issue, and serve a number of purposes with regard to promoting state accountability. First, by reporting to Parliament, the Commission encourages Parliament to enact its oversight role over government and bring about increased government responsiveness and accountability to the poor. Second, the SAHRC's reports, which synthesise complaints, research and independent information, are publically available and are often used at international forums, including being submitted to international review mechanisms such as UN committees, to bring the attention of the international community to domestic issues, thereby placing diplomatic pressure upon the South African government to fulfil their constitutional obligations.

Third, by disseminating information on the action or non-action, as the case may be, of government with regard to human rights, the SAHRC provides information to the South African citizenry which they can use to hold government to account.

### 5.2.1 *Poverty traps and social exclusion among children in South Africa*

In 2014 the SAHRC, together with UNICEF, commissioned a study on poverty traps and social exclusion among children in South Africa. The study was aimed at examining the structural factors that cause and impact upon children living in poverty and their social exclusion. The report examined the impact of five interrelated and multidimensional categories – health, education, wealth, social networks and family and geography – on poverty and social exclusion suffered by a child. These categories were explored in relation to understanding the major poverty traps for children in South Africa, with 'poverty trap' being defined as a 'self-reinforcing mechanism which causes poverty to persist'.<sup>60</sup>

The study found that with regard to health, poverty traps included exposure to disease during childhood which impacts upon the growth and long-term well-being of the child; and nutrition deficiencies which similarly affected a child's growth and ability to perform at school. The study further noted the extent to which poverty-stricken households were more susceptible to contracting disease. With regard to education, the report demonstrated how a lack of access to education constituted a significant poverty trap for children in South Africa and had a disproportionate effect on the girl child. The report revealed that single-

60 South African Human Rights Commission and United Nations Children's Fund 'Poverty traps and social exclusion among children in South Africa', [www.sahrc.org.za](http://www.sahrc.org.za) (accessed 18 August 2017).

parent and child-headed households formed another considerable poverty trap. The report estimated that only a third of children in South Africa reside with both their biological parents, while 24 per cent of children have neither parent.<sup>61</sup> In addition, the report noted the effect upon social exclusion and poverty of children who live in rural areas in South Africa, and those whose parents migrate for work.

The report constituted a major study on the issue of child poverty in South Africa. It included an in-depth analysis of the policy choices available to government in an effort to provide recommendations to address structural issues that create and perpetuate poverty traps for children. The report was tabled at Parliament and, in addition, has been used as an advocacy tool by civil society both nationally and internationally in the fight for government accountability to the issue of child poverty in South Africa.

Although the SAHRC has developed a number of monitoring and evaluation mechanisms, it may be too soon to assess the impact of this particular report. However, it is worth noting that issues have been raised with regard to the capacity, or political will, of Parliament to adequately address SAHRC reports that are tabled, and to ensure oversight on the recommendations made in such reports to government ministers. Indeed, Jacob has specifically noted ‘the failure of Parliament to debate the report and invite relevant state departments to respond to allegations of maladministration and lack of service delivery clearly undermines the SAHRC’s influence on public accountability through the section 183(4) mechanism’.<sup>62</sup> The lack of effective engagement by Parliament on the reports tabled by the SAHRC frustrates the SAHRC’s ability to enforce high-level state accountability to the poor.

### *5.2.2 Water and sanitation: Accountability to people who are poor*

In 2010 the SAHRC received two cases concerning open toilets in the Free State and the Western Cape. Both cases were brought to the Commission by the opposing political party in the respective provinces, with the Democratic Alliance (DA) bringing the case regarding the African National Congress (ANC)-led area of Rammalutsi in the Free State, and the ANC bringing the case regarding the DA-led area of Makhaza in the Western Cape. Both cases were taken to court where the findings demonstrated that there were clear violations of the rights of the community members to inherent human dignity, as well as the rights of access to water and sanitation. The SAHRC interpreted the findings as a demonstration of the

61 South African Human Rights Commission and United Nations Children’s Fund ‘Poverty traps and social exclusion among children in South Africa: Summary report’ 15, [www.sahrc.org.za](http://www.sahrc.org.za) (accessed 18 August 2017).

62 n 36.

interdependence of all human rights.<sup>63</sup>

Recognising the widespread lack of enjoyment of the right of access to sufficient water and decent sanitation that these two cases demonstrated, the SAHRC called upon the Department of Planning, Monitoring and Evaluation (DPME) to conduct a nationwide report on the status of sanitation and to develop a plan to address the backlogs. The report was presented to the SAHRC at its national hearing on water and sanitation in March 2012. The report spoke of the considerable backlog facing government to implement sanitation services across particularly rural and remote areas of South Africa, as well as those parts that once were demarcated as homelands under the apartheid system. The report indicated that 1,4 million households had no sanitation services, and 3,8 million households had services that did not meet the required standards. The report also indicated that the provision of sanitation services in 23 municipalities was in a crisis state, with an acute risk of disease outbreak. In addition, the report demonstrated that there was an inadequate involvement of communities in the planning and implementation of service delivery projects.<sup>64</sup>

The national hearing in March 2012 where the DPME presented their report marked the beginning of a series of provincial hearings in all nine provinces. The hearings were designed to be a public platform where government officials and communities were brought together to discuss levels of access to water and sanitation. The hearings were held in rural and peri-rural areas, and the experiences of local residents were held up against the DPME's findings. At the provincial hearings community members were able to directly request information from the various government representatives and, in this way, to hold government to account for their responsibilities and commitments made. Other parties present at the hearings included local non-governmental organisations (NGOs), community-based organisations, academics and other Chapter Nine bodies, including the Public Protector and the Commission for Gender Equality.<sup>65</sup>

In March 2013 the SAHRC held its annual national human rights month event, where the draft findings and recommendations from the hearings were presented. These findings and recommendations were then sent to all relevant government departments for consideration, and responses were requested from government to provide their commitment to fulfilling the recommendations set out in the draft report. Some departments responded directly to the SAHRC and others requested further engagement on the matter. Those departments that did not respond substantively or at all were summoned to the SAHRC's public hearing.

63 South African Human Rights Commission *Report on the Right to Access Sufficient Water and Decent Sanitation*, [www.sahrc.org.za](http://www.sahrc.org.za) (accessed 18 September 2017).

64 As above.

65 As above.

For those departments that requested further engagement on the findings and recommendations, the SAHRC hosted a roundtable discussion with over ten departments at the Union Buildings, Pretoria, in July 2013. Finally, in March 2014 the Report on the Right to Access Sufficient Water and Decent Sanitation was launched. At its launch various community representatives and organisations were present, as well as relevant government departments. The report was formally presented to the government officials, including the Deputy Minister of Water Affairs, and was later tabled in Parliament. Through this course of action the final recommendations which were included in the SAHRC's report were developed through a consultative process with government departments, which encouraged their buy-in and support to the full realisation of the rights to access water and sanitation.<sup>66</sup>

In addition, a monitoring brief was published by the SAHRC on the implementation of the recommendations of the water and sanitation report in 2018. The monitoring brief, which was based on information received from key stakeholders to which recommendations had been directed, notes:<sup>67</sup>

Perhaps one of the most telling outcomes of this research process is that despite repeated requests for information from the Commission to the Department of Water and Sanitation (DWS), Department of Cooperative Governance and Traditional Affairs (COGTA) and the Department of Mineral Resources (DMR), they failed to respond. Government bears a constitutional and statutory obligation to provide information to the Commission, and non-responsiveness is thus highly concerning. Furthermore, a lack of responsiveness contradicts the foundational values of openness, responsiveness and accountability of the Constitution and state and negates the significant right to access to information. Of particular concern is the lack of response by the custodian for the fulfilment of the right to access water and sanitation, which has denied the DWS a valuable opportunity to engage on the issues which challenge delivery and could possible enhance service delivery, if addressed.

These telling remarks are critical for understanding the limitations of the SAHRC to actively hold government bodies to account for their human rights commitments.

That being said, the work of the SAHRC on water and sanitation provides an illustrative example of the mechanisms through which the SAHRC can work to promote state accountability to the poor. These mechanisms were prompted by an exercise of the right to justice through the courts when the two cases were brought before the courts in the Western Cape and Free State. The SAHRC's decision to then hold

66 As above.

67 South African Human Rights Commission Water and Sanitation Research Brief (2018) 5, <https://www.sahrc.org.za/home/21/files/The%20Right%20to%20Water%20&%20Sanitation%20-%20Monitoring%20the%20Implementation%20of%20the%20SAHRCs%202014%20Recommendations%2020117-2018.pdf> (accessed 11 June 2019).

the DPME responsible as a result of the court judgment to conduct a nationwide survey on the status of sanitation constitutes another means by which it was working to hold the state accountable. Further to this, the SAHRC set up public hearings, which facilitated direct communication between community members and government officials.

At these hearings government officials were called upon to make commitments to the various communities with regard to the realisation of the rights to water and sanitation. Such commitments were recorded by the SAHRC in order to monitor their implementation. The final report emanating out of all the SAHRC's work on water and sanitation included a series of recommendations which were developed in conjunction with the government departments to which they were directed in order to secure buy-in. In 2014 this report was tabled at Parliament, as the ultimate institution responsible for government oversight.

## 6 Inequality and intersectional discrimination

Through the execution of its mandate the SAHRC has observed a noticeable trend with regard to intersecting forms of discrimination. Women, in particular, can face multiple forms of discrimination on the basis of their gender, race, class, sexual orientation, and other categories. Such multiple and intersecting forms of discrimination render persons more vulnerable and susceptible to human rights abuse, including the impairment of access to remedy or redress when violations occur. Within the Commission's own work, it has observed how women who are black and poor tend to experience greater difficulties in accessing their rights to water and sanitation.<sup>68</sup> In addition, in the report by the SAHRC and UNICEF entitled *A Review of Equity and Child Rights (2011)* it was noted that children who face vulnerability and discrimination on multiple levels, including children with disabilities and children in conflict with the law, require special treatment and protection by the state.<sup>69</sup>

Therefore, it is of significant importance that the government takes into account the varying levels of enjoyments of rights for certain groups of people, and recognises that those people living in rural and impoverished areas of South Africa experience disproportionately less access to their constitutional rights and entitlements. In addition, the government must be aware of the gendered impact of a lack of access to rights, and of intersectional forms of discrimination. Accordingly, the government should ensure that the most vulnerable groups – such as women, children and persons with disabilities – are afforded priority for the implementation of their rights, as discussed above with regard to the Alex Women's Hostel report.

68 n 62.

69 [https://www.unicef.org/southafrica/SAF\\_resources\\_factschildrens11.pdf](https://www.unicef.org/southafrica/SAF_resources_factschildrens11.pdf) (accessed 18 September 2017).

## 6.1 Interdependence of rights and the role of government

In addition to emphasising the need to centre policy choices around the needs of society's most vulnerable, the SAHRC has sought to promote the indivisibility and interdependence of all human rights. With regard to the work of the SAHRC on water and sanitation, one of the key findings was that limited access to these rights caused the potential for other human rights violations to occur. For example, children who were not afforded water and sanitation provisions at their schools often were doubly denied their right to education – more so for girl children who tended to drop out of school once they hit puberty.<sup>70</sup>

As a result the SAHRC has called for the holistic realisation of the Bill of Rights by government across its work. Further, the SAHRC encourages that government take a human rights-based approach to policy design and implementation, and are cognisant of the gendered and discriminatory impact of rights. A paper developed by the Centre for Economic and Social Rights provides an illustrative description of the importance of a human rights-based approach to poverty alleviation:<sup>71</sup>

Poverty is not simply inevitable, nor can it only be blamed on the poor ... poverty is created by human actions or policy choices, rather than by nameless economic forces. A human rights approach views poverty not as a question of fate, but rather as an issue of justice. It demands that we reject the view that poverty is inevitable, but rather look at why poverty persists. With a human rights approach, we must investigate, and demand accountability for, the actions (or failures to act) that produce, perpetuate and exacerbate poverty.

A human rights approach to poverty therefore calls for a paradigm shift in how poverty is understood and addressed. Human rights provide a powerful discourse and mechanism through which to address the issue of poverty and to work towards a better life for all.

## 7 Conclusion: The role of the South African Human Rights Commission

The SAHRC is an independent and constitutionally-established institution of the state, designed to promote South Africa's constitutional democracy through monitoring the implementation of the Bill of Rights. Therefore, holding government accountable for their constitutional obligations is at the core of the design of the SAHRC. More recently, the scope of the SAHRC's mandate as a Chapter 9 institution has been brought to the fore in the recent *Nkandla* judgment.<sup>72</sup> While the judgment highlighted

<sup>70</sup> n 57.

<sup>71</sup> Centre for Economic and Social Rights Briefing – Human Rights and Poverty, (<http://www.cesr.org/downloads/CESR%20Briefing%20-%20Human%20Rights%20and%20Poverty%20-%20Draft%20December%202009.pdf>) (accessed 18 August 2017).

<sup>72</sup> *Economic Freedom Fighters v Speaker of the National Assembly & Others; Democratic Alliance v Speaker of the National Assembly & Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016).



the critical value of Chapter 9 institutions in promoting South Africa's constitutional democracy, it also spoke of the importance of taking seriously the mandate and powers of these institutions. To this end, while the judgment specifically related to the Public Protector, it has implications for all Chapter 9 institutions. Thus, where the judgment found that the recommendations of the Public Protector are binding, the SAHRC has similarly interpreted this to mean that the SAHRC's recommendations are also binding, as an institution with a comparable – if not broader – mandate to that of the Public Protector.<sup>73</sup> Accordingly, this chapter has sought to demonstrate the inextricable link between poverty and human rights and the role of the SAHRC as a national human rights institution in the fight against poverty.

Although the SAHRC plays a key role in seeking to understand the nature and causes of poverty, as well as assisting persons to access remedies and redress where violations of their rights occur, one of the key functions of the SAHRC overall is to bring these issues to the attention of both government and Parliament in order to promote state accountability in this regard. Further, the SAHRC's collaboration with civil society and community-based organisations is critical to ensuring that the Commission plays its role as an intermediary between the government and society, and such relationships will continue to inform and strengthen the work of the SAHRC going forward. However, in order to strengthen the reach and effectiveness of the SAHRC it would be hugely beneficial for the Commission to have a permanent presence in the rural and semi-urban areas where many of those living in poverty reside. In addition, the SAHRC is consistently under-resourced and under-staffed. Without adequate capacity, the SAHRC is critically limited in what it can achieve in respect of its mandate. Ensuring that the SAHRC is provided with a sufficient budget by Parliament is a key first step towards the realisation of human rights in South Africa, and extending the SAHRC's reach beyond urban centres. This is consistent with the *Nkandla* judgment which noted that if the constitutional institutions, including the SAHRC, were not given the powers to promote constitutional democracy, the constitutional safeguards would be meaningless.<sup>74</sup>

73 As above.

74 Para 49.

## References

### *Journal articles and book chapters*

- Budlender, G '20 years of democracy: The state of human rights in South Africa' Annual Human Rights Lecture, Faculty of Law, University of Stellenbosch 2 October 2014, <http://blogs.sun.ac.za/law/files/2014/10/Annual-Human-Rights-Lecture-2014-Adv-G-Budlender-SC.pdf> (accessed 16 January 2015)
- Corkey, A 'NHRIs as monitors of economic, social and cultural rights' Centre for Economic Social Rights, <http://www.cesr.org/downloads/NHRIs%20as%20Monitors%20of%20ESC%20Rights.pdf> (accessed 20 April 2015)
- Darch, C & Underwood, PG 'Freedom of information legislation, state compliance and the discourse of knowledge: The South African experience' (2005) 37 *The International Information and Library Review* 77
- Hohfeld, WN 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 *Yale Law Journal* 63
- Jacob, BA 'The role and effectiveness of national human rights commissions in advancing domestic implementation of socio-economic rights in Commonwealth Africa' PhD thesis, University of Pretoria, 2014
- Pogge, T (ed) *Freedom from poverty as a human right: Who owes what to the very poor?* (Oxford University Press 2007)
- Pogge, T 'Poverty and human rights' summary document, [http://www2.ohchr.org/english/issues/poverty/expert/docs/Thomas\\_Pogge\\_Summary.pdf](http://www2.ohchr.org/english/issues/poverty/expert/docs/Thomas_Pogge_Summary.pdf) (accessed 8 April 2015)
- Pogge, T 'Severe poverty as a human rights violation' UNESCO Poverty Project, 'Ethical and human rights dimensions of poverty: Towards a new paradigm in the fight against poverty' Philosophy Seminar at All Souls College, Oxford, March 2003
- Sachs, A 'The creation of the Constitution' (1996-1997) 41 *New York Law School Law Review* 669
- Yamin, AE, 'Beyond compassion: The central role of accountability in applying a human rights framework to health' (2008) *Health and Human Rights Journal* 2

### *Human Rights Reports*

- Centre for Economic and Social Rights Briefing – Human Rights and Poverty, <http://www.cesr.org/downloads/CESR%20Briefing%20-%20Human%20Rights%20and%20Poverty%20-%20Draft%20December%202009.pdf> (accessed 3 February 2015)
- Statistics SA 'Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2011', <http://beta2.statssa.gov.za/publications/Report-03-10-06/Report-03-10-06March2014.pdf> (accessed 1 February 2015)
- Studies in Poverty and Inequality Institute The Measurement of Poverty in South Africa project: Key issues' Working Paper 1, <http://spii.org.za/wp-content/uploads/2013/11/working-paper-no-1-the-measurement-of-poverty-in-south-africa-project-key-issue.pdf> (accessed 1 February 2015)
- The Borgen Project website, <http://borgenproject.org/10-quick-facts-about-poverty-in-africa/> (accessed 1 February 2015)
- United Nations, Office of the High Commissioner for Human Rights, 'Claiming the Millennium Development Goals [MDGs]: A human rights based approach' 2008 [http://www.ohchr.org/Documents/Publications/Claiming\\_MDGs\\_en.pdf](http://www.ohchr.org/Documents/Publications/Claiming_MDGs_en.pdf) (last accessed 5 April 2015)
- United Nations Report of the Special Rapporteur on Extreme Poverty and Human

Rights (2012), <http://www.ohchr.org/Documents/Issues/Poverty/A-67-278.pdf> (accessed 15 April 2015)

World Bank 'Accountability in governance', <http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf> (accessed 15 January 2015)

### ***SAHRC Reports***

South African Human Rights Commission and United Nations Children's Fund, 'Poverty traps and social exclusion among children in South Africa', [www.sahrc.org.za](http://www.sahrc.org.za) (accessed 15 January 2015)

South African Human Rights Commission and United Nations Children's Fund, 'Poverty Traps and Social Exclusion among Children in South Africa: Summary Report', [www.sahrc.org.za](http://www.sahrc.org.za) (accessed 15 January 2015)

South African Human Rights Commission, Alex Women's Hostel Report, [www.sahrc.org.za](http://www.sahrc.org.za) (accessed 16 April 2015)

South African Human Rights Commission, Report on the Right to Access Sufficient Water and Decent Sanitation, [www.sahrc.org.za](http://www.sahrc.org.za) (accessed 15 January 2015)

South African Human Rights Commission, Socio-Economic Rights Report 1997-1998, [www.sahrc.org.za](http://www.sahrc.org.za) (accessed 15 January 2015)

South African Human Rights Commission, Water and Sanitation Research Brief (2018), <https://www.sahrc.org.za/home/21/files/The%20Right%20to%20Water%20&%20Sanitation%20-%20Monitoring%20the%20Implementation%20of%20the%20SAHRCs%202014%20Recommendations%202011-2018.pdf> (accessed 11 June 2019)

### ***Law and Case Law***

African Union, African Charter on Human and Peoples' Rights, 1981

Constitution of the Republic of South Africa Act 108 of 1996

*Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)

*Grootboom v the Government of the Republic of South Africa* [2000] ZACC 19

Human Rights Commission Act 40 of 2013

Principles Relating to the Status of National Institutions, <http://www.jus.uio.no/smr/om/nasjonalt-institusjon/docs/paris-principles.pdf> (accessed 15 January 2015)

Promotion of Access to Information Act 2 of 2000

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

*Social Justice Coalition and Others v Minister of Police and Others* (EC03/2016) [2018] ZAWCHC 181 (14 December 2018)

United Nations, Convention on the Rights of the Child, 1989

United Nations, International Covenant on Civil and Political Rights, 1966

United Nations, International Covenant on Economic, Social and Cultural Rights, 1966

United Nations, Universal Declaration of Human Rights, (1948)

