

**The Promotion and Protection of Socio-Economic Rights under the African  
Charter on Human and Peoples' Rights: Prospects and Challenges in South  
Africa and Nigeria**

**By**

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## **ABBREVIATIONS**

A.G	Attorney-General
ACHPR	African Charter on Human and Peoples' Rights
ACHR	African Court of Human Rights
ANC	African National Congress
APRM	African Peer Review Mechanism
AU	African Union
CAMA	Companies and Allied Matters Act 1990
CAT	Convention against Torture
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
ICERD	International Convention on the Elimination of all forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural rights
CSOs	Civil Society Organisation
ECOWAS	Economic Community of West African States
EITI	Extractive Industries Transparency Initiative
GDP	Gross Domestic Product
HIPC	Heavily Indebted Poor Countries
HIV/AIDS	Human Immunodeficiency Virus /Acquired Immunodeficiency Syndrome
HSIC	Heads of State Implementation Committee
I.M.F	International Monetary Fund
ICCPRs	International Covenant on Civil and Political Rights
ICESCRs	International Covenant on Economic, Social and Cultural Rights
INGOs	International non-governmental Organisations
MDGs	Millennium Development Goals
MOSOP	Movement for the Survival of Ogoni People
NAP	National Action Plan
NDA	National Development Agency
NEPAD	New Partnership for African Development
NGOs	Non-governmental organisations
NPO)	Non-Profit Organisation
NSWG	National Stake Holders' Working Group
OAU	Organisation of African Unity

OHCHR	Office of the High Commissioner for Human Rights
POA	Programme of Action
PRC	Permanent Representative Committee
PRS	Poverty Reduction Strategy
PRSP	Poverty Reduction Strategy Papers
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SAN	Senior Advocate of Nigeria
SAPs	Structural adjustment programme
SERAC	Social and Economic Rights Action Centre
SPDC	Shell Petroleum Development Company
TAC	Treatment Action Campaign
TNCs	Trans-National Corporations
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
W.B	World Bank
WHO	World Health Organisation
WTO	World Trade Organisation

## **ABSTRACT**

This thesis argues that the nature of socio-economic rights makes their violation central to key poverty and developmental issues in Africa. The thesis further argues that an effective socio-economic rights' legal and institutional framework will aid the realisation of socio-economic rights as well as poverty reduction and development. In this context, the thesis examines the arrangements made for the promotion and protection of socio-economic rights under the African Charter. It also critically examines challenges to the realisation of socio-economic rights under the Charter.

Using South Africa and Nigeria as case studies in the implementation of socio-economic rights in Africa, the thesis examines how both countries have incorporated the African Charter and the influence if any; the Charter may have on the interpretation of socio-economic rights in both jurisdictions. The thesis also examines constitutional protection of socio-economic rights as well as other domestic arrangements for the realisation of socio-economic rights in both countries.

As an original contribution to the study of socio-economic rights, the thesis compares how domestic courts in South Africa, a country with constitutionally recognised justiciable socio-economic rights and Nigeria, a country with constitutionally recognised non-justiciable directive principles of state policies, have interpreted and applied socio-economic rights provisions. Justiciable and non-justiciable socio-economic rights provisions both guide and shape legislative action, policy formulation and executive/administrative decision making. Against a backdrop of the above, the increasing role of civil society organisations in the realisation of socio-economic rights is also examined.

The thesis hypothesised that the Constitutional Court of South Africa will not provide a fundamental right to individuals to claim positive judicially enforceable action and services from the state. As an original contribution to the study of socio-economic rights, this hypothesis is tested by conducting qualitative analyses of socio-economic rights cases where litigants invoked the socio-economic rights provisions of the South African Constitution.

# **The Promotion and Protection of Socio-Economic Rights under the African Charter on Human and Peoples' Rights: Prospects and Challenges in South Africa and Nigeria.**

## **1. Introduction:**

### **Statement of Problem**

The African Charter makes express provision for several socio-economic rights<sup>1</sup> and all 53 member states of the African Union have ratified the Charter.<sup>2</sup> Socio-economic rights are rights that create entitlements to material conditions for human welfare; socio-economic rights are therefore rights such as the rights to food, water, health care services and shelter.<sup>3</sup> However, the realisation of socio-economic rights under the African Charter, presents a number of challenges such as justiciability, enforceability and limited resources.

In the context of human rights, poverty may be described as the denial of a person's right to a range of basic capabilities.<sup>4</sup> These include capabilities such as the capability to be in good health and to be adequately nourished.<sup>5</sup> Therefore, non-realization of socio-economic rights sustains poverty. Similarly, non- incorporation of human rights based principles into policies, social norms, legislation and judicial decisions perpetuates poverty.<sup>6</sup> Speaking on non-realization of socio-economic rights and poverty, Justice P.N Bhagwati of the Indian Supreme Court, in the case of *Minerva Mills v Union of India*,<sup>7</sup> stated that:

“To a large majority of people, who are living in almost subhuman existence in conditions of abject poverty and for whom life is one long unbroken story of want and destitution, notions of individual freedom and liberation, though representing some of the most cherished values of a free society, would sound as empty words bandied about in the drawing rooms of the rich and well-to-do, and the only solution for making the rights meaningful to them was to re-make the material conditions and usher in a new social order, where socio-economic justice will inform all institutions of public life so that the preconditions of fundamental liberties for all be secured.”

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<sup>1</sup> For the purpose of this study socio-economic rights refer to economic, social and cultural rights

<sup>2</sup> C Odinkalu, 'The role of case and complaints procedures in the reform of the African regional human rights system,' *African Human Rights law Journal*, Volume 1, No 2, October 2001, Page 244

<sup>3</sup> D Brand and C Heyns, *Socio-economic Rights in South Africa*, Pretoria University Law Press, Pretoria, 2005, Page3

<sup>4</sup> Office of the United Nations High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, Geneva, Switzerland, 2006, Page 2

<sup>5</sup> Ibid

<sup>6</sup> Food and Agricultural Organisation of the United Nations , *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, Paragraph 3, 2002, retrieved 20th March 2010  
[http://www.fao.org/righttofood/KC/downloads/vl/docs/Human%20rights%20approach%20to%20poverty%20reduction%20strategies\\_draft%20guidelines.pdf](http://www.fao.org/righttofood/KC/downloads/vl/docs/Human%20rights%20approach%20to%20poverty%20reduction%20strategies_draft%20guidelines.pdf)

<sup>7</sup> AIR 1980 SC 1789 at 1846

## 2. Relevance of Socio-economic Rights to Poverty Reduction:

Socio-economic rights are perceived as having both instrumental and intrinsic value to poverty reduction. The intrinsic value of socio-economic rights to poverty reduction focuses on the relevance of socio-economic rights to the characterisation of poverty, while the instrumental value focuses on the realisation of socio-economic rights as a means to poverty reduction.<sup>8</sup> Socio-economic rights obligations, unlike other poverty reduction strategies such as the Millennium Development Goals (MDGs) create legal obligations.<sup>9</sup> Most poverty reduction initiatives are more or less political commitments by governments which may not be legally binding on subsequent governments within a state.<sup>10</sup>

Socio-economic rights can play a role in enabling vulnerable and disadvantaged groups in Africa to challenge poverty and socio-economic inequality. Socio-economic rights empower the poor by giving them entitlements that give rise to legal obligations on others.<sup>11</sup> However, socio-economic rights cannot prescribe the method for reducing poverty; what it does is to lay the normative framework for international, national and community action aimed at poverty reduction.<sup>12</sup> Socio-economic rights have the potential to assist in developing a legal framework to address socio-economic deprivation.<sup>13</sup> Framing poverty as a violation of socio-economic rights transforms the understanding of poverty as being a product of human decision making. Similarly, framing poverty as violations of socio-economic rights puts the burden on the executive/legislature to justify or change policies and laws that impact negatively on the realisation of socio-economic rights. Using this framework vulnerable people can bring complaints before courts and other institutions.

It should be noted that when economic growth brings about poverty reduction, it has a positive impact on the realisation of socio-economic rights.<sup>14</sup> For example, in countries with very limited resources, options to live the kind of life one values may be limited. Availability

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<sup>8</sup> A McKay & P Vizard, Rights and Economic Growth: Inevitable Conflict or Common Ground in T O'Neil (ed) *Human Rights and Poverty Reduction: Realities, Controversies and Strategies*, Overseas Development Institute (ODI), London, 2006 Pages 41-48

<sup>9</sup> K Tamasevski, Strengthening pro-poor law: Legal Enforcement of Economic and Social Rights, T O'Neil (ed) *Human Rights and Poverty Reduction: Realities, Controversies and Strategies*, Overseas Development Institute (ODI), London, 2006 Pages 28-33

<sup>10</sup> Ibid

<sup>11</sup> Office of the High Commissioner for Human Rights, *Human Rights and Poverty Reduction: A Conceptual Framework*, 2004, Page 14, retrieved 20th March 2010, <http://www2.ohchr.org/english/issues/poverty/docs/povertyE.pdf>

<sup>12</sup> Ibid, Page 11

<sup>13</sup> D Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*, Oxford University Press, USA, 2008, Page 133

<sup>14</sup> Ibid

of resources, may increase options and lead to the realisation of socio-economic rights.<sup>15</sup> McKay and Vizard assert that economic growth needs to be sustainable, because volatile economic growth is unlikely to sustain poverty reduction and expand freedoms. They conclude that economic growth without the participation of the poor will result in limited poverty reduction and inequality.<sup>16</sup> Due to limited resources, the option to live the kind of live one values may be limited in most African states. However, the International Covenant on Economic, Social and Cultural Rights under Article 2 obligates state parties to take steps within their available resources to progressively realise socio-economic rights.<sup>17</sup> Therefore, states parties to the above Covenant need to justify and explain the steps they have taken in progressively realising socio-economic rights.<sup>18</sup> This accountability process which maybe through state reports or judicial/quasi judicial institutions, enables states and other service providers to justify or take corrective actions in cases where public resources have not been effectively utilised to realise socio-economic rights.<sup>19</sup> The accountability process provides a means to measure whether African states are taking reasonable measures to progressively realise socio-economic rights.

Socio-economic rights such as the rights of access to health care, food or education are all indicators of human development and quality of life.<sup>20</sup> Therefore, it is important that public policies put in place for the realisation of socio-economic rights should be accountable to people, rights based and reflect a commitment by public institutions to realise all fundamental rights.<sup>21</sup> Clearly, the principles advanced in the above discussions such as linking/framing poverty as a violation of socio-economic rights, empowerment and accountability all conform to the principles of rights based approach to poverty reduction discussed in the following section.

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<sup>15</sup> A McKay & P Vizard, Rights and Economic Growth: Inevitable Conflict or Common Ground in T O'Neil (ed) *Human Rights and Poverty Reduction: Realities, Controversies and Strategies*, Overseas Development Institute (ODI), London, 2006 Pages 41-48

<sup>16</sup> Ibid

<sup>17</sup> 49 of the 53 state parties to the African Charter are state parties to the International Covenant on Economic Social and Cultural Rights

<sup>18</sup> D Muchena, The Place of economic and social rights in human rights and development discourse, Page 4, 2009, retrieved 15<sup>th</sup> September 2010, [http://www.osisa.org/resources/docs/PDFs/OpenSpace-May2009/2\\_4\\_economic\\_injustice\\_p010-017\\_deprose\\_muchena\\_economic\\_social\\_rights.pdf](http://www.osisa.org/resources/docs/PDFs/OpenSpace-May2009/2_4_economic_injustice_p010-017_deprose_muchena_economic_social_rights.pdf)

<sup>19</sup> Ibid

<sup>20</sup> Ibid

<sup>21</sup> Ibid

### 3. Overview of the Human Rights Based Approach to Poverty Reduction

A human rights-based approach to poverty reduction entails that policies and institutions for poverty reduction should be based explicitly on the norms and values set out in international human rights laws.<sup>22</sup> Therefore, governments, non-governmental organisations, donors and other development actors should incorporate human rights principles in planning and implementing their policies and programmes. The human rights based principles to poverty reduction are universality/indivisibility of all rights, interdependence/interrelatedness of all rights, accountability/transparency, the rule of law, participation/empowerment and non-discrimination/attention to vulnerable groups.<sup>23</sup> These human rights principles are contained and derived from the Universal Declaration of Human Rights as well as International Human Rights Treaties.<sup>24</sup>

There is no particular source that defines human rights based approaches nor is there a uniform approach.<sup>25</sup> The practical implementation of the approach will depend on the mission and objectives of the state or non-state organisation.<sup>26</sup> The United Nations issued a framework in 2003, intended to guide all United Nations agency development activities. The framework incorporated three main elements. These elements are: (1) all programs should intentionally further international human rights, (2) all development efforts, at all levels or programmes, should be guided by human rights standards and principles found in international human rights law and (3) all development efforts must build capacity of “duty bearers” to meet obligations and/or “rights holders” to claim rights.<sup>27</sup>

The human rights approach to poverty reduction advances the goal of poverty reduction in several ways. These include: (a) adopting poverty reduction strategies underpinned by human rights as a matter of legal obligation; (b) broadening the scope of poverty reduction to address the structures of discrimination that generate and sustain poverty (c); urging the expansion of civil and political rights which is instrumental to poverty reduction (d); confirming that socio-economic rights are binding international human rights (e); demanding the participation of the poor in decision making (f); cautioning against non-fulfilment of the

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<sup>22</sup> Food and Agricultural Organisation of the United Nations, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, 2002, Paragraph 3, , retrieved 20th March 2010 [http://www.fao.org/righttofood/KC/downloads/vl/docs/Human%20rights%20approach%20to%20poverty%20reduction%20s strategies\\_draft%20guidelines.pdf](http://www.fao.org/righttofood/KC/downloads/vl/docs/Human%20rights%20approach%20to%20poverty%20reduction%20s strategies_draft%20guidelines.pdf)

<sup>23</sup> The Joint United Nations Programme on HIV/AIDS, (UNAIDS), *What Constitutes a Rights-based Approach? Definitions, Methods, and Practices*, Page 2, 2004, retrieved 20th March 2010, [http://data.unaids.org/Topics/Human-Rights/hrissuepaper\\_rbadeinitions\\_en.pdf](http://data.unaids.org/Topics/Human-Rights/hrissuepaper_rbadeinitions_en.pdf)

<sup>24</sup> Ibid

<sup>25</sup> Ibid, Page 1

<sup>26</sup> Ibid

<sup>27</sup> Ibid

minimum core obligations and (g) creating and strengthening the institutions through which decision makers can be held accountable for their actions.<sup>28</sup>

The introduction of a human rights based approach to poverty reduction transforms the rationale of poverty reduction from the poor merely having needs to include the fact that the poor have rights or entitlements that give rise to legal obligations.<sup>29</sup> These entitlements may be claimed through litigation. This study focuses on how the poor may claim socio-economic rights through litigation.

The application of a human rights framework promotes that case for rule of law, universality/indivisibility of all rights, interdependence/interrelatedness of all rights, non-discrimination, participation, attention to vulnerable people, empowerment and transparency/accountability. Transparency/Accountability includes impact assessment, monitoring and redress when rights are violated.<sup>30</sup> The human rights based approach to poverty reduction ensures that states are under an obligation to protect their populations from poverty and social exclusion as well as create an enabling environment for the realisation of all rights.<sup>31</sup>

Human rights based approach to poverty reduction may be enhanced by legal empowerment. Legal empowerment of the poor focuses on the process through which the poor and excluded are able to use law, legal systems and legal services to protect and promote their rights and interests as citizens and economic actors.<sup>32</sup> Banik, contends that the legal empowerment process is closely related to human rights based approaches, because the empowerment process entails the state respecting, protecting and fulfilling human rights and the poor realising their rights and enjoying the opportunities that come from these rights, through their own efforts or through the support of national and international organisations and state governments.<sup>33</sup>

However, the principles of human rights based approach to poverty reduction should not be seen as a technocratic checklist that does not address the operational challenges involved in practically applying these principles in complex communities.<sup>34</sup> Instead these principles

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<sup>28</sup> Food and Agricultural Organisation of the United Nations, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, Paragraph 24, 2002, retrieved 15th April 2010, [http://www.fao.org/righttofood/KC/downloads/vl/docs/Human%20rights%20approach%20to%20poverty%20reduction%20strategies\\_draft%20guidelines.pdf](http://www.fao.org/righttofood/KC/downloads/vl/docs/Human%20rights%20approach%20to%20poverty%20reduction%20strategies_draft%20guidelines.pdf)

<sup>29</sup> Ibid, Guideline 1

<sup>30</sup> L Arbour, *Using Human Rights to Reduce Poverty*, World Bank Institute, Washington, 2006, Page 1

<sup>31</sup> Ibid, Page 2

<sup>32</sup> D Banik (Ed), *Rights and Legal Empowerment of the Poor*, Ashgate Publishing Ltd, London, 2008, Page 13

<sup>33</sup> Ibid

<sup>34</sup> B Andreassen & D Banik, 'Human Rights and Extreme Poverty: African Dimensions, Editorial Introduction', *International Journal of Human Rights*, Volume 14, No 1, February 2010, Page 7

should be seen to be normative dimensions that guide and help formulate policies, programmes and practices.<sup>35</sup>

#### **4. Socio-Economic Rights as Legal Rights:**

There have been debates about the scope and content of socio-economic rights and their ability to create entitlements or enforceable legal claims. It has been argued that socio-economic rights are ideals that should be realised progressively depending on the availability of resources.<sup>36</sup> Arguments for not considering socio-economic rights legal rights range from their non-justiciability, lack of clarity of their normative nature,<sup>37</sup> the obligations attached to them, the scope of enforcement as well as ineffective remedies. The debates over the content, priorities and legitimate scope of human rights led to the notion of three generations of rights; the first generation of civil and political rights, the second generation of socio-economic rights and the third generation of collective rights. The classification of human rights into categories or generations does not serve any conceptual clarity. Nothing in the Universal Declaration of Human Rights implies that any set of rights is subordinate or inferior to the other, except in respect of those rights which are non-derogable.

Socio-economic rights like other constitutional rights are transformed from background moral claims into legal rights through a variety of law making processes and institutions.<sup>38</sup> The legislature, the executive and the courts all play an important role in the law making process. Several national constitutions as well as regional and international treaties now make provision for socio-economic rights, thereby recognising socio-economic rights as legal rights. For example, the South African constitution makes express provision for access to several socio-economic rights. South African courts have adjudicated socio-economic rights cases and dealt extensively with the challenges to the realisation of socio-economic rights. These include issues such as justiciability, nature of state obligations regarding socio-economic rights as well as remedies and their enforcement. The South African judiciary presents the African Commission and African Court with examples of how socio-economic rights can be protected.

The African Charter makes provision for some socio-economic rights. The socio-economic rights provided for under the African Charter are: right to property (Article 14); the right to work under equitable and satisfactory conditions (Article 15); the right to receive equal pay

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<sup>35</sup> Ibid

<sup>36</sup> K Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights*, Intersentia-Hart, Utrecht, 1999, Pages 16 – 18, 55 – 57.

<sup>37</sup> Standards and Principles considered binding on members of a group and guides and regulates behaviour in society

<sup>38</sup> D Brand, & C Heyns, *Socio-economic Rights in South Africa*, Pretoria University Law Press, Pretoria, 2005, Page 3

for equal work (Article 15); the right to enjoy the best attainable state of physical and mental health including medical care for the sick (Article 16); the right to education (Article 17); the right to freely take part in the cultural life of one's community (Article 17(2)); and the right of women, children, the aged and the disabled to special measures of protection in keeping with their physical or moral needs (Article 18).

There are also other treaties, enacted under the auspices of the Africa Union that make provision for socio-economic rights, these are the African Charter on the Rights and Welfare of the Child adopted in 1990, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted in 2003.

#### **5. National Implementation and Enforcement of Socio-Economic Rights in South Africa and Nigeria: A brief overview:**

South Africa and Nigeria will be used to compare how two African countries have approached implementation and enforcement of socio-economic rights. Socio-economic rights have important economic and social dimensions due to the fact that they reflect specific areas of basic needs.<sup>39</sup> State parties to the African Charter are primarily responsible for the realisation of socio-economic rights and poverty reduction within their jurisdictions. They are also responsible for formulating policies and enacting laws to implement socio-economic rights obligations contained in their constitutions and/or international treaties to which they sign up to. Generally, national implementation and enforcement of socio-economic rights obligations contained in a constitution and/or international treaties such as the African Charter may take place in three ways.<sup>40</sup> First, the state may implement and enforce socio-economic rights obligations through the legislature enacting enabling and relevant legislation; secondly, socio-economic rights may also be implemented and enforced through the executive adopting appropriate policies/programmes and finally, through the judiciary.<sup>41</sup> National courts implement and enforce socio-economic rights by interpreting legislation and developing rules of common law as well as adjudicating constitutional and other challenges to state measures for the realisation of socio-economic rights.<sup>42</sup> In the process of the above, courts may issue relevant orders and/or declarations. In South Africa and Nigeria, there are other state institutions involved in the implementation/enforcement of socio-economic rights

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<sup>39</sup> JC Mubangizi & BC Mubangizi, 'Poverty, human rights law and socio-economic realities in South Africa', *Development Southern Africa*, 1470-3637, Volume 22, Issue 2, 2005, Pages 282

<sup>40</sup> J Mubangizi, 'The Constitutional Protection of Socio-Economic Rights in selected African Countries: A Comparative Evaluation', *African Journal of Legal Studies*, Volume 1, No 2, 2006, Page 10

<sup>41</sup> Ibid

<sup>42</sup> Ibid

apart from the legislature, the executive and the judiciary. These include quasi-judicial institutions such as the National Human Rights Commission and the Ombudsman.

The process of implementing/enforcing socio-economic rights is where the human rights based principles come into play. The human rights based principles may be regarded as procedural principles which should be applied in the process of implementing/enforcing socio-economic rights. These procedural principles may relate to socio-economic rights themselves, for example principles like universality, interdependent and indivisibility of all human rights.<sup>43</sup> The procedural principles may also relate to the implementation of socio-economic rights, in this case principles such as participation, accountability, non-discrimination and attention to vulnerable groups should be adhered to.<sup>44</sup> This ensures that everyone, including the poor benefits from socio-economic rights. When socio-economic rights are not fulfilled the responsibility of different actors should be analysed to determine the relevant actors who may be accountable for the failures. This is where institutions such as judicial and quasi-judicial institutions play a significant role. In analysing the role of actors, judicial and quasi-judicial institutions, like the Human Rights Commissions and courts in South Africa and Nigeria do not only define the duties of the duty holders and the rights of the rights holders. They also identify procedural short comings/non-compliance with relevant laws. For example, this may include failure to respect principles relevant to non-discrimination such as failure to pay attention to vulnerable groups and failure to ensure participation of segments of the community. Therefore, implementation/enforcement of socio-economic rights through constitutional/legislative means and judicial/quasi-judicial institutions are all effective mechanisms for reducing poverty.<sup>45</sup>

South Africa is chosen to examine how a state party to the African Charter has implemented socio-economic rights because the South African constitution makes provision for the right of access to a range of socio-economic rights and South African courts have decided on several socio-economic rights cases. According to Tseliso Thipanyane,<sup>46</sup> Head of Research and Documentation, South African Human Rights Commission:

“The South African society created by apartheid and successive colonial regimes was one with great disparities in wealth between black and white South Africans...and in

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<sup>43</sup> The Joint United Nations Programme on HIV/AIDS, (UNAIDS), What Constitutes a Rights-based Approach? Definitions, Methods, and Practices, Page 3, 2004, retrieved 20th March 2010, [http://data.unaids.org/Topics/Human-Rights/hrissuepaper\\_rbadefinitions\\_en.pdf](http://data.unaids.org/Topics/Human-Rights/hrissuepaper_rbadefinitions_en.pdf)

<sup>44</sup> Ibid

<sup>45</sup> JC Mubangizi & BC Mubangizi, 'Poverty, human rights law and socio-economic realities in South Africa', *Development Southern Africa*, 1470-3637, Volume 22, Issue 2, 2005, Pages 285

<sup>46</sup> South African Human Rights Commission, *Housing for the Poor*, retrieved 6<sup>th</sup> December 2007, [http://www.sahrc.org.za/housing\\_for\\_the\\_poor.htm](http://www.sahrc.org.za/housing_for_the_poor.htm)

which millions of people live in deplorable conditions and in severe poverty.... It was also to address the terrible effects of apartheid that the new constitution with judicially enforceable socio-economic rights was adopted by the people of South Africa in order to ensure a better life for all the people of South Africa....”

The adoption of socio-economic rights into the South African Constitution and the interpretation and application of these rights by South African courts challenge the assertion that these rights are not justiciable. South Africa has ratified the African Charter. However, under the South African constitution, international agreements become law only when the agreement is enacted into law by national legislation.<sup>47</sup> South Africa has not yet incorporated the African Charter into its national laws. Section 39(1) of the South African constitution obligates courts, when interpreting the Bill of Rights to consider international law. It also allows courts to consider foreign law, when interpreting the Bill of Rights. South African courts can therefore refer to the African Charter, when interpreting any right contained in the Bill of Rights.

The South African Constitution provides for a typology of interdependent duties. The South African constitution’s typology of interdependent duties is a modification of the tripartite typology of interdependent duties, developed by Shue,<sup>48</sup> and was endorsed by the Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights.<sup>49</sup> The Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights states that: “Like civil and political rights, economic, social and cultural rights impose three different types of obligations on states: the obligation to respect, protect and fulfil... Failure to perform any of one of the three obligations constitutes a violation of such rights.”<sup>50</sup> Section 7(2) of the South African Constitution requires the state to respect, protect, promote and fulfil the rights in the bill of rights.<sup>51</sup> By giving effect to the typology of interdependent duties the South African Constitution recognises that the obligations imposed by the Bill of Rights may give rise to positive or negative duties. The South African judiciary is not the only organ that oversees the realization of socio-economic rights in South Africa. The South African Human Rights Commission is empowered under section 184(3) of the Constitution to obtain

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<sup>47</sup> S.231(4) South African Constitution

<sup>48</sup> H Shue, *Basic Rights, Subsistence, Affluence and U.S Foreign Policy*, Princeton University Press, Princeton, 2<sup>nd</sup> Edition, 1996, Page 160.

<sup>49</sup> The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, *Human Rights Quarterly Volume 9*, 1987, Pages 122-135

<sup>50</sup> Ibid, Paragraph 2

<sup>51</sup> M Pieterse, ‘Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience’, *Human Rights Quarterly Volume 26*, Number 4, November 2004, Page 889

information from government agencies involved in realizing socio-economic rights on the steps they have taken towards progressive realization of socio-economic rights.<sup>52</sup>

Nigeria is chosen to examine how a state party to the African Charter has implemented socio-economic rights because it is the most populous country in Africa with an estimated population of 128,771,988 million people.<sup>53</sup> Nigeria is an oil rich country and oil accounts for 20% of its GDP, 95% of its foreign exchange earnings and about 65% of its budgetary revenue.<sup>54</sup> The country is yet to diversify its economy. Following nearly 16 years of military rule, a new constitution was adopted in 1999, and a peaceful transition to civilian government was completed. The current government faces the task of rebuilding a petroleum-based economy, whose revenues have been squandered through corruption and mismanagement.<sup>55</sup>

The Nigerian Constitution does not provide for socio-economic rights. However, Chapter 2 of the Constitution provides for Fundamental Objectives and Directive Principles of State Policy. These are declaratory statements of national policy that establish broad political, social and cultural guidelines of government's policy making. The Constitution states that Chapter 2 (Fundamental Objectives and Directive Principles of State Policy) of the Nigerian Constitution is not justiciable. The Constitution makes provision for civil and political rights. In situations where actions are taken by the government in pursuance of the fundamental objectives and directive principles of state policy impact on the rights of individuals, Nigerian courts have tried to find a balance between the respect for individual liberties and state policies. Section 12 of the Nigerian Constitution, 1999 provides that no treaty shall have the force of law except to the extent to which the National Assembly has enacted such treaty into law. Nigeria has however ratified and incorporated the African Charter into its domestic laws. The African Charter can be found in Cap 10 Laws of the Federation of Nigeria. The Supreme Court of Nigeria held in *Fawehinmi v Abacha*<sup>56</sup> that the African Charter is an international obligation which the state voluntarily entered and agreed to be bound. While the Decrees of the Federal Military Government may over-ride other municipal laws, they cannot oust the jurisdiction of the court whenever properly called upon to do so in relation to matters pertaining to human rights under the African Charter. These rights are protected by international law and therefore, the state cannot legally legislate out of its obligations.

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<sup>52</sup> Ibid

<sup>53</sup> United Nations Development Programme, *Nigeria*, retrieved 15<sup>th</sup> April 2006, [www.ng.undp.org](http://www.ng.undp.org)

<sup>54</sup> Ibid

<sup>55</sup> Ibid

<sup>56</sup> (1996) 9 NWLR (Pt. 475)

The Nigerian judiciary is not the only organ that oversees the realization of socio-economic rights in Nigeria. The National Human Rights Commission of Nigeria, is empowered under section 5 of the National Human Rights Act, 1995, to deal with all matters relating to the protection of human rights as guaranteed by the Nigerian Constitution, the African Charter and other international treaties to which Nigeria is a signatory.

## **6. Aim of the Study**

This study aims to critically examine and identify prospects and challenges to the promotion and protection of the socio-economic rights contained in the African Charter and to identify how the prospects support the realisation of socio-economic rights and poverty reduction using rights based approaches to poverty reduction. This study also aims to critically examine how the African Commission and courts in South Africa and Nigeria have interpreted and applied socio-economic rights provisions<sup>57</sup> and the extent to which their decisions in socio-economic right cases uphold the principles of rights based approaches to poverty reduction. Against the backdrop of the above, this study aims to examine the methods non-governmental organisations in South Africa and Nigeria adopt in promoting socio-economic rights and reducing poverty.

### **6.1 The specific objectives of the study are:**

1. To evaluate arrangements for the promotion and protection of socio-economic rights under the African Charter and to examine how these arrangements support the realisation of socio-economic rights and rights based approaches to poverty reduction.
2. To identify prospects and challenges to the justiciability of socio-economic rights contained in the African Charter and to examine the relevance of justiciability to poverty reduction.
3. To examine how courts in South Africa and Nigeria and the African Commission have interpreted and applied socio-economic rights provisions as well as examine the extent to which their decisions in socio-economic rights cases uphold the principles of rights based approaches to poverty reduction.
4. To evaluate the role of non-governmental organisations in South Africa and Nigeria in promoting socio-economic rights as well as reducing poverty.

### **6.2 Research Questions:**

1. What are the prospects and challenges to the promotion and protection of the socio-economic rights contained in the African Charter and how do those prospects support the

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<sup>57</sup> Socio-economic rights contained in national laws and constitutions of South Africa and Nigeria, and the African Charter

realisation of socio-economic rights and poverty reduction using rights based approaches to poverty reduction?

2. How has the African Commission and courts in South Africa and Nigeria interpreted and applied socio-economic rights provisions and to what extent do their decisions in socio-economic rights cases uphold the principles of rights based approaches to poverty reduction?

3. What Methods do non-governmental organisations in South Africa and Nigeria adopt in promoting socio-economic rights and in reducing poverty?

### **6.3 Hypothesis**

Judicial and quasi-judicial decisions on socio-economic rights may impact favourably on the realisation of socio-economic rights and the application of the principles of rights based approaches to poverty reduction even where the decisions do not provide a fundamental right to individuals to claim "positive", judicially enforceable action and services from the state.

### **6.4 Assumptions**

Studies by Shue, (1996)<sup>58</sup> and Eide, (1987)<sup>59</sup> indicate that all human rights have various elements or aspects, which require either positive or negative measures for their realisation. Based on the above assertion, this study makes the following assumptions: Every right has various aspects or elements, which require positive or negative measures by the state for their realisation. Therefore, realisation of any right would involve the performance of multiple kinds of duties by the state.

The above assumption is relevant to this study because a fundamental dynamic of human rights and by extension rights based approach to poverty reduction is that everyone is a right-holder and every right has a corresponding duty-bearer. Therefore, those who have the duty to respect, protect and fulfil the rights of the right holders are duty-bearers. Defining state duties in relation to socio-economic rights and the negative/positive measures needed for the realisation of the rights makes it easier to identify ways in which the rights may be realised or has been violated. It also makes it easier to identify prospects and challenges to realising socio-economic rights.

### **6.5 Justification for this Study:**

This study seeks to fill some gaps in the existing literature on socio-economic rights. These gaps were identified through extensive literature review conducted for this study. This study will fill these gaps by comparing how domestic courts in South Africa, a country with

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<sup>58</sup> H Shue, *Basic Rights, Subsistence, Affluence and the U.S Foreign Policy*, Princeton University Press, Princeton, 2nd Edition, 1996, Page 23

<sup>59</sup> A Eide, *The Right to Food as a Human Right*, United Nations Document, UNDoc E/CN 4/Sub 2/1987/23, July 1987

constitutionally recognised justiciable socio-economic rights and Nigeria, a country with constitutionally recognised non-justiciable directive principles of state policies, have interpreted and applied legislation on socio-economic. This study will also fill gaps in the existing literature on socio-economic rights by assessing the extent to which South African and Nigerian court decisions in socio-economic rights cases uphold the principles of rights based approach to poverty reduction. This study is undertaken because of the role socio-economic rights can play in empowering vulnerable and disadvantaged groups in Africa challenge poverty and socio-economic inequality.

Furthermore, the justification for choosing this topic is that identifying the prospects and challenges to the realisation of socio-economic rights, will ensure the identification of best practices in realising socio-economic rights. It will also highlight challenges to the realisation of socio-economic rights in Africa and identify possible methods of overcoming these challenges. This will contribute to the realisation of socio-economic rights and poverty reduction in Africa, using rights based approaches to poverty reduction.

Poverty is widespread in most African states. African states fall toward the bottom of any list measuring economic activity, such as income per capita or GDP per capita, despite a wealth of natural resources. The denial of socio-economic rights is closely linked to poverty.<sup>60</sup> The realization of socio-economic rights ensures access by all human beings to the resources, opportunities and services necessary for an adequate standard of living.<sup>61</sup> It is therefore important to examine ways of realising socio-economic rights in Africa.

## **6.6 Methodology**

This study proposes to critically analyse the prospects and challenges to the promotion and protection of the socio-economic rights contained in the African Charter and how the prospects support the realisation of socio-economic rights and poverty reduction using rights based approaches to poverty reduction. This will be conducted through comparison of prior research and review of relevant literature.

This study also investigates how the African Commission as well as courts in South Africa and Nigeria have interpreted and applied socio-economic rights provisions and the extent to which their decisions in socio-economic rights cases uphold the principles of rights based approaches to poverty reduction. This investigation will be conducted through jurisprudential analysis of interpretations given by the African Commission and the courts in Nigeria and

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<sup>60</sup> International Human Rights Council on Human Rights Policy, *Duties sans frontières: Human Rights and Global Social Justice* (2003), , Pages 24 – 23, retrieved 27th March 2008, [http://www.ichrp.org/files/reports/43/108\\_report\\_en.pdf](http://www.ichrp.org/files/reports/43/108_report_en.pdf)

<sup>61</sup> S Liebenberg, & K Pillay, K., (eds), *Socio-economic rights in South Africa*, Community Law Centre Publication, University of Western Cape, Cape Town, 2000, Page 16

South Africa to socio-economic rights cases. The analysis will seek to determine whether decisions from the above bodies on socio-economic rights impact favourably on the realisation of socio-economic rights and application of the principles of rights based approaches to poverty reduction even where the decision do not provide a fundamental right to individuals to claim "positive", judicially enforceable action and services from the state.

In addition, this study will investigate the extent to which South Africa and Nigeria have incorporated socio-economic rights into their constitutions as well as incorporated the socio-economic rights provisions of the African Charter into national legislation. This investigation will extend to examining the mechanisms through which socio-economic rights cases are adjudicated in both countries. These investigations will be conducted through a comparative analysis of relevant constitutional and legislative provisions in both countries.

Finally, the study will investigate the methods non-governmental organisations in South Africa and Nigeria adopt in promoting socio-economic rights and reducing poverty. These investigations will be conducted through an illustrative analysis of the methods civil society in South Africa and Nigeria use to promote socio-economic rights and reduce poverty. This will entail an examination of practices, laws and policies affecting the operation of civil society in both countries.

The focus of this study will be on socio-economic rights under the African Charter as well as the constitutions and national laws of South Africa and Nigeria . However, this study will examine other national, regional and international human rights systems addressing similar socio-economic rights issues raised in this study. This examination will be done though the review of relevant literature.

An extensive review will be carried out within the knowledge domain of socio-economic rights, from relevant libraries and other sources where this information is held. Relevant secondary/primary source information will be examined and analysed as part of this study. This study uses jurisprudence from international, regional and national institutions as well as declarations, resolutions and other quasi legal documents to aid the interpretation of human rights provisions under the African Charter.

## **7. Chapter Arrangement and Scope of Study:**

This study will focus on the collective promotion and protection of all socio-economic rights contained in the African Charter. It may focus on particular socio-economic rights merely to illustrate challenges or prospects to the realisation of the socio-economic rights contained in the Charter. To achieve its objectives, this study will evaluate arrangements for the promotion and protection of socio-economic rights under the African Charter and

examine how these arrangements support the realisation of socio-economic rights and rights based approaches to poverty reduction (Chapter 3); identify prospects and challenges to the justiciability of socio-economic rights contained in the African Charter and examine the relevance of justiciability to poverty reduction(Chapter 4); examine how courts in South Africa and Nigeria have interpreted and applied socio-economic rights provisions as well as examine the extent to which their decisions in socio-economic rights cases uphold the principles of rights based approaches to poverty reduction (Chapter 5) and evaluate the role of non-governmental organisations in South Africa and Nigeria in promoting socio-economic rights as well as reducing poverty (Chapter 6).

First of all, it is pertinent to set out the main themes of the study in the introductory chapter. Therefore, the first chapter introduces the main themes of this study and outlines the problems being investigated. After this, it is equally important to review relevant literature in the subject area. The second chapter contains the theoretical content/literature review of this study. This chapter examines the nature of human rights, traces the development of human rights in Africa, reviews the African Human Rights System and examines the notion that all rights are interdependent and indivisible. It further analyses the concepts of poverty and development and their relationship with socio-economic rights. It also examines right based approaches to poverty reduction. Finally, it examines the impact of non-state actors on the realisation of socio-economic rights in Africa, therefore, placing socio-economic rights realisation in Africa in broader perspective. As part of the literature review the rights to education and health under the African charter is used to illustrate how the right based approach to poverty reduction can be implemented.

The third chapter focuses on the African Charter and its institution, the African Commission. However, it examines the African Union's New Partnership for African Development (NEPAD) programme and the African Peer Review Mechanism (APRM) because of their potential to impact favourably on the realisation of socio-economic rights and poverty reduction using rights based approaches. Specifically, the third chapter reviews the arrangements for the promotion and protection of socio-economic rights under the African Charter and critically analyses the African Union's New Partnership for African Development (NEPAD) and African Peer Review Mechanism (APRM) programmes and their impact on the realisation of socio-economic rights. It critically examines the African Commission and the challenges it faces in carrying out its duties. The third chapter analyses a range of decisions on socio-economic rights from the African Commission, to assess how the African Commission has interpreted socio-economic entitlements claimed by poor and

vulnerable individuals and communities in Africa. The case analyses cases analysed also seeks to determine whether the decisions of the African Commission on socio-economic rights impact favourably on the realisation of socio-economic rights and the application of principles of rights based approaches to poverty reduction even where the decision do not provide a fundamental right to individuals to claim "positive", judicially enforceable action and services from the state. This chapter analyses the socio-economic rights provisions of the Charter which were elaborated upon by the African Commission under the Pretoria Declaration and their relevance to poverty reduction. Finally, it examines the African Court on Human and People's Rights.<sup>62</sup>

The fourth chapter analyses the debates around the justiciability of socio-economic rights. The relevance of exploring how to make socio-economic rights justiciable, is that justiciability ensures that rights holders are able to hold duty bearers to account through judicial and quasi-judicial institutions. This study argues that socio-economic rights are justiciable and examines the relevance of justiciability to poverty reduction using rights based approaches. This chapter addresses justiciability using jurisprudence and literature from national, regional and international human rights institutions and courts.

In the fifth chapter, this study conducts a comparative analysis of the extent to which South Africa and Nigeria have incorporated socio-economic rights into their constitutions and incorporated socio-economic rights provisions of the African Charter into their domestic legislations. This chapter equally evaluates the judicial mechanisms through which the poor can claim socio-economic entitlements and the challenges adjudication of socio-economic rights entail in both countries. The purpose is to identify prospects and challenges to the realisation of socio-economic rights through litigation in both countries.

The fifth chapter also analyses a range of decisions on socio-economic rights from courts in South Africa and Nigeria to determine how courts in both countries have interpreted and applied socio-economic rights provisions contained in their constitutions and domestic laws. The cases analysed seek to determine whether these decisions impact favourably on the realisation of socio-economic rights and the application of the principles of rights based approaches to poverty reduction even where the decision do not provide a fundamental right to individuals to claim "positive", judicially enforceable action and services from the state. This chapter also examines factors that affect judicial protection of socio-economic rights in

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<sup>62</sup> The African Court on Human and Peoples' Rights delivered its first judgment on December 15, 2009, however, the court is yet to hear any case on socio-economic right

the two countries. Finally, this chapter examines the National Human Rights Commissions in both countries.

Although national mechanisms for implementing and enforcing socio-economic rights may take many forms, chapter 5 focuses mainly on constitutional provisions/national laws on socio-economic rights and the judiciary in both countries. This is because incorporating socio-economic rights such as those contained in the African Charter into constitutional/national laws enables the state as well as non-state actors play an active role in promoting, monitoring, enhancing and implementing socio-economic rights. The focus on the judiciary is driven by the fact that the judiciary is primarily responsible for interpreting the Bill of Rights and other national legislation dealing with human rights. However, chapter 5 examines the Human Rights Commissions a quasi-judicial institution in both countries; because of the broad mandate these Commissions have regarding all human rights recognised by the constitution or national legislations in both countries.

The analysis of the national practice in South Africa and Nigeria with regard to socio-economic rights is undertaken in one chapter in this study (Chapter 5). This is because the analysis is limited to three main issues. The first is the extent to which South Africa and Nigeria have incorporated socio-economic rights into their constitutions and incorporated socio-economic rights provisions of the African Charter into national legislation. The second issues relates to how courts in both countries have interpreted and applied socio-economic rights provisions and the extent to which their decisions in socio-economic rights cases impact on the realisation of socio-economic rights and the application of the principles of rights based approaches to poverty reduction. Finally, the third issues relates to the factors that affect judicial protection of socio-economic rights in South Africa and Nigeria.

Chapter six illustrates analytically the role of non-governmental organisations (NGOs) in the promotion of socio-economic rights and poverty reduction using right based approaches in South Africa and Nigeria. The conclusion which is the final chapter summarises the findings of this study and makes propositions as to how the African Court on Human and People's Rights, national courts and other institutions involved in implementing socio-economic rights in Africa could effectively implement socio-economic rights.

Although national courts and institutions are the primary venues for implementing socio-economic rights, this study in the third chapter (Chapter 3), introduces the African Charter and in the fourth chapter(Chapter 4), introduces justiciability of socio-economic rights, before the fifth chapter (Chapter 5) examining how socio-economic rights have been implemented by two African states. This is because constitutional/legislative protection of

socio-economic rights as well as the justiciability of socio-economic rights in most African states is still developing, despite the fact that some African countries such as South Africa and to a limited extent Nigeria have made progress in implementing and enforcing socio-economic rights through judicial and quasi-judicial institutions. For example, studies by Mubangizi<sup>63</sup> assessing the constitutional protection of socio-economic rights in selected African states indicate that with the exception of South Africa and to some extent Ghana, most African constitutions recognise civil and political rights and disregard socio-economic rights. He also finds that some African constitutions include socio-economic rights as non-justiciable Directive Principles of State Policies. It can therefore be argued that since the African Charter makes extensive provisions for socio-economic rights and all 53 member states of the African Union have signed up to the African Charter, the primary venue for vindicating socio-economic rights for a lot of Africans remains for now the African Commission and the African Court.

Commenting on exhaustion of domestic remedies, the African Commission on Human and Peoples' Rights stated in *Serac v Nigeria*,<sup>64</sup> that the purpose of exhausting local remedies is to give the domestic courts an opportunity to decide upon cases before they are brought to an international forum, to avoid conflicting judgments of law at the national and international levels. However, where a right is not covered by domestic law, it is unlikely that the case will be heard. Therefore, the potential of conflict does not arise. Similarly, if the right is not acknowledged, there cannot be effective remedial action or any remedial action at all. The state cannot rely on provisions of its own laws or plead deficiencies of domestic law in a claim before the African Commission for an alleged breach of obligations under the Charter. It is the state's duty to ensure that domestic laws conform to its international obligations. Based on the above reasons, this study examines the African Charter and the concept of justiciability before assessing national promotion and protection of socio-economic rights in South Africa and Nigeria.

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<sup>63</sup> JC Mubangizi, 'The Constitutional Protection of Socio-Economic Rights in selected African Countries: A Comparative Evaluation', *African Journal of Legal Studies*, Volume 1, No 2, 2006, Page 19

<sup>64</sup> Communication No. 155/96 of (1996)

## **CHAPTER 2: LITERATURE REVIEW**

### **1 Introduction:**

This chapter contains a review of literature on socio-economic rights. This review seeks to identify information and ideas that are relevant to the study as well as identify gaps in literature. This review has been divided into sections. Specifically, this review examines the nature and scope of human rights, traces the development of human rights in Africa, reviews the African Human Rights System and examines the notion that all rights are interdependent and indivisible. It further evaluates the concepts of poverty and development and their relationship with socio-economic rights. It also examines right based approaches to development and poverty reduction. Finally, it examines the impact of non-state actors on the realisation of socio-economic rights in Africa, therefore, placing socio-economic rights realisation in Africa in broader perspective.

Any study on the promotion and protection of the socio-economic rights provided under the African Charter, will need to critically examine the relationship between poverty and socio-economic rights and how rights based approaches to poverty reduction may aid the realisation of socio-economic rights. It is also important to examine factors that cause poverty and impede development in African and their impact on the realisation of socio-economic rights. This chapter therefore reviews relevant literature on the subject.

### **2. Nature and Scope of Human Rights.**

Algan,<sup>1</sup> argues that the historical origins of the concept of human rights can be found in ancient Greece, where the human rights concept was closely tied to the pre-modern natural law doctrines of stoicism. He further argues that human rights as we know it today did not exist until the seventeenth century. At that time he states that natural law, as implying natural rights, started to be analysed in a detailed way. For example, Locke argued that certain rights; self evidently pertain to individuals as human rights, since they existed in the state of nature before the social contract, where the individual surrendered the right to enforce these natural rights to the state, but not the right itself.

Several definitions have been given to the term human rights by different authors. Human Rights may be defined as “The right one has simply because one is a human being.”<sup>2</sup> Human rights may also be defined as a moral claim on any coercive social institution

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<sup>1</sup> A Bülent, ‘Rethinking Third Generation Human Rights’, *Ankara Law Review* Volume, 1 No. 1 ( 2004), Pages 121-155

<sup>2</sup> J Donnelly, *Universal Human Rights in Theory and Practise*, Cornell University Press, New York 1989, Page 5

imposed upon oneself and therefore a moral claim against anyone involved in their imposition.<sup>3</sup> According to Boutros Boutros-Ghali:

“The human rights that we proclaim and seek to safeguard can be brought about only if we transcend ourselves, only if we make a conscious effort to find our common essence beyond our apparent divisions, our temporary differences, our ideological and cultural barriers. In sum, what I mean to say, with all solemnity, is that the human rights we are about to discuss here at Vienna are not the lowest common denominator among all nations, but rather what I should like to describe as the irreducible human element, in other words, the quintessential values through which we affirm together that we are a single human community. As an absolute yardstick, human rights constitute the common language of humanity. This common language of humanity can take on board various ideological persuasions and still maintain its essence, which is to protect the human dignity and worth of the human person.”<sup>4</sup>

Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual and other needs. They are based on mankind’s increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection.<sup>5</sup> These definitions and assertions raise the question, what is a right? Rights may be defined as titles that ground claims of a special force.<sup>6</sup> A person is said to have a right to something, when he/she is specially entitled to have and enjoy it. Human Rights are fundamental for the effective existence of any society, because human beings need to be protected from abuse from the state and other non-state actors such as individuals and corporations.

Human Rights have now become a subject of international law. International law was primarily between states and did not address issues regarding individuals. The fundamental maxims of international law were the sovereignty of the state and non-interference in the internal affairs of a state.<sup>7</sup> However, during the 18<sup>th</sup> century the idea of human rights became more visible at the international level. This is evidenced by the abolition of slave trade by the

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<sup>3</sup> T Pogge., *World Poverty and Human Rights*, Polity Press, London 2002, Page 46

<sup>4</sup> United Nation’s Document, *Address by the former UN Secretary-General Boutros Boutros-Ghali at the opening of the World Conference on Human Rights at Vienna, Austria*, on 14 June 1993, UN Doc A/CONF 157/22, 12 July 1993

<sup>5</sup> United Nations, *Human Rights: Questions and Answers*. United Nations, New York: 1987  
Page 4

<sup>6</sup> J Donnelly, *Universal Human Rights in Theory and Practise*, Cornell University Press, New York 1989, Page 5

<sup>7</sup> K Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights*, Intersentia-Hart, Utrecht, 1999, Pages11

United Kingdom during that period.<sup>8</sup> This marked the beginning of the internationalisation of human rights. Similarly, the post Second World War era was signified by a shift towards the protection of human rights under international law. Prior to Second World War, the individual was not the main subject of international law.<sup>9</sup> At that time international protection was limited to cases of slavery, humanitarian interventions, treatment of aliens, as well as minorities and prisoners wounded at war.<sup>10</sup> At that stage, the protection was spasmodic, limited in scope, and largely political rather than idealistic.<sup>11</sup> After the Second World War, individuals began to be protected on the international level as single human beings.<sup>12</sup> The reason for this change was the realisation by the victorious countries that Nazi aggression and atrocities perpetrated during the Second World War was as a result of a vicious philosophy based on utter disregard for the human rights of human beings.<sup>13</sup> The victorious countries felt that a means of preventing a repetition of these human rights violations was to have a proclamation of certain basic standards of respect for human rights.<sup>14</sup>

There are debates over the content and scope of human rights and the priorities to be given to them. From these debates, three generations of rights can be identified; the first-generation rights (Civil and Political Rights), the second-generation rights (Socio-economic rights) and the third generation rights (Solidarity Rights). This classification reflects the period of development of particular classes of human rights. Civil and Political rights can be traced to the “natural rights” theories of the 17<sup>th</sup> and 18<sup>th</sup> centuries.<sup>15</sup> Examples of civil and political rights include the right to life, freedom from torture and freedom of expression. The development of socio-economic rights can be traced to the establishment of the International Labour Organisation, by the Treaty of Versailles in 1919.<sup>16</sup> The treaty was adopted after the First World War and it makes provisions for labour related rights.<sup>17</sup> Socio-economic rights include the right to livelihood, right to work under a just and favourable condition and right to form and join trade unions. Third generation rights include the right to development, right to peace and the right to a safe environment and to humanitarian relief. Commenting on the

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<sup>8</sup> The Slave Trade Act (citation 47 Geo III Sess. 1 c. 36) was an Act of Parliament of the United Kingdom passed on 25 March 1807

<sup>9</sup> A Bülent, ‘Rethinking Third Generation Human Rights’, *Ankara Law Review* Volume, 1 No. 1 ( 2004), Pages 122-123

<sup>10</sup> Ibid

<sup>11</sup> Ibid

<sup>12</sup> A Cassese, *International Law*, Oxford University Press, Oxford, 2005, Page 377

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> R Tuck, *Natural Rights Theories: Their Origin and Development*, Cambridge University Press, Cambridge. 1979, Page 3-5

<sup>16</sup> K Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights*, Intersentia-Hart, Utrecht, 1999, Page 11

<sup>17</sup> Ibid

distinguishing criteria of human rights, Van Boven<sup>18</sup> states that human rights are a product of history and of human civilisation and therefore are subject to evolution and change. He asserts that certain rights are of an individualistic nature, such as the right to privacy, freedom of thought and conscience, while others rights, are of a collective nature, such as economic, social and cultural rights. There are also rights that have both elements such as freedom of expression and freedom of religion. He further states that collective rights are rights of minorities that protect, preserve and develop their characteristics and the right of people to self-determination. For example, their right to freely determine their political status and pursue their socio-economic rights.

Civil liberties regulate an individual's relationship with the state in the context of their liberty and security.<sup>19</sup> Although the terms civil liberties and human rights are related and refer to rights which may be considered fundamental for human existence, they may be used differently to distinguish between particular rights and claims.<sup>20</sup> Generally, civil liberties refer to civil and political rights. On the other hand, human rights refer to all rights or claims that may be regarded as fundamental for human existence.<sup>21</sup> This study uses the term human rights to include civil and political rights, socio-economic rights and solidarity rights.

The development of a coherent and systematic protection of human rights evolved after the Second World War.<sup>22</sup> The International Bill of Rights marked the first attempt by the United Nations to protect and promote human rights by drafting the Universal Declaration of Human Rights, 1948 and two legally binding international agreements providing for human rights, namely the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights, 1966.<sup>23</sup> The Human Rights Commission of the United Nations was responsible for drafting the International Bill of Rights. However, due to disagreements on both the form and substance of a legally binding International Bill of Rights among members of the United Nations, the United Nations failed to reach an agreement as to the form and substance of the International Bill of Rights.<sup>24</sup> This disagreement was fuelled by the cold war and ideological differences between the western bloc, led by the United States of America and the Eastern bloc led by the Union of Soviet

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<sup>18</sup> T Van Boven, 'Distinguishing Criteria of Human Rights', in Vasek K and Alston, P.,(Ed) *International Dimension of Human Rights*, Connecticut Wood Green Press, West Port, 1982, Page 43

<sup>19</sup> Foster, S, *Human rights and civil liberties*, Oxford University Press, Oxford, 2006, Page 9

<sup>20</sup> Ibid

<sup>21</sup> Ibid, Page 10

<sup>22</sup> M Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Oxford University Press, Oxford, 1995, Page 17

<sup>23</sup> Ibid

<sup>24</sup> Ibid

Socialist Republics. The Western bloc favoured the advancement of civil and political rights, while the Eastern bloc favoured the advancement of socio-economic rights. Finally, it was decided that the International Bill of Rights, would consist of the declaration, namely the Universal Declaration of Human Rights and two Covenants namely, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. 'The development of legally binding human rights treaties did not stop with the International bill of Rights. Several other international human rights treaties, such as the Convention Against Torture (CAT), 1984, International Convention on the Elimination of all forms of Racial Discrimination (ICERD), 1965, and Convention on the Elimination of all forms of Discrimination against Women. (CEDAW), 1979, are now legally binding international human rights treaties.

The purpose of international human rights norms is to ensure the effective protection of certain fundamental entitlements of all human beings, everywhere without distinction on ground such as race, sex or religion.<sup>25</sup> The idea behind the international human rights regime is to ensure the protection of human rights even in countries that offer no protection for violations of human rights. This is necessary because states cannot be trusted to respect and protect the inherent human dignity of all those who are subject to their jurisdiction. As a result of the tension between the above idea and the principle and practise of national sovereignty, it is critical for these standards to be acknowledged as the product of international agreements.<sup>26</sup> National protection of human rights without recognition of an international obligation to do so can easily slide back into denial of some of those rights in the name of upholding the democratic principle of majority rule, including affecting constitutional amendments if necessary.<sup>27</sup> Therefore, the provision of education, healthcare and other social services by any government should not be accepted as compliance with international human rights standards, if the state in question refuses to acknowledge the human right status of socio-economic rights.<sup>28</sup> The value of the human rights agenda is to provide an international framework of reference to the normal course of ideological, cultural or political domestic politics and foreign policy.<sup>29</sup>

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<sup>25</sup> A.A An-Na'im, 'To affirm the full human rights standing of economic, social & cultural rights' in Y Ghai & J Cottrell (eds) *Economic, Social & cultural rights in practice: The role of the judges in implementing economic, social & cultural rights*, International Centre for the Legal Protection of Human Rights, London, 2004, Page 8

<sup>26</sup> Ibid

<sup>27</sup> Ibid

<sup>28</sup> Ibid, Page 9

<sup>29</sup> Ibid

State obligations in the area of human rights normally apply to individuals who are subject to a state's jurisdiction and within their territory. For example Article 2 of the International Covenant on Civil and Political Rights states "Each state party....undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant." However, the UN Human Rights Committee stated in *Lopez V Uruguay*<sup>30</sup> that in as much as the arrest and initial detention and mistreatment of Lopez Burgos allegedly took place on foreign territory, it is not barred either by virtue of Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights ("... individuals subject to its jurisdiction ...") or by virtue of Article 2 (1) of the International Covenant on Civil and Political Rights ("... individuals within its territory and subject to its jurisdiction ... ") from considering these allegations. This is because the reference to the above articles does not pertain to the place where the violation occurred, but rather to the relationship between the individual and the state in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.

### **3. Development of Human Rights in Africa:**

The concept of Human Rights is not new to Africa. Most African states were born out of anti-colonial human rights struggles, which was primarily a fight for political and economic self-determination.<sup>31</sup> Independent African states also used human rights arguments to delegitimize colonial and minority white rule in African states such as South Africa and Rhodesia (now Zimbabwe)<sup>32</sup> According to Oloka-Onyango,<sup>33</sup> an analysis of the contemporary human rights situation in Africa should be approached against the backdrop of a broad socio-historical perspective, because history continues to exert its influence up to this present day. He further states that the colonial period in Africa marked the negation of all human rights, from the basic right to self-determination to freedoms of expression and association.<sup>34</sup> The colonial agenda focused on how much could be extracted from the territories and people under the control of the colonial power.<sup>35</sup> The colonial authorities paid little attention to the protection of human rights that may threaten or undermine its economic objective.<sup>36</sup> This is evidenced by the fact that resources spent on coercion, for example, the police, prison

<sup>30</sup> Communication No. 52/1979, U.N. Doc. CCPR/C/OP/I at 88 (1984)

<sup>31</sup> M Makau, *The African Human Rights System: A Critical Evaluation*, 2000, Page 5, retrieved 7<sup>th</sup> October 2008, [hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf](http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf)

<sup>32</sup> Ibid

<sup>33</sup> J Oloka-Onyango, 'Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?', *Buffalo Human Rights Review*, Volume 6, 2000, Page 4

<sup>34</sup> Ibid

<sup>35</sup> Ibid

<sup>36</sup> T Falola, *Economic Reforms and Modernization in Nigeria, 1945-1965*, Kent State University Press, Kent Ohio, 2004, Page 9

services and armed forces were far in excess of those spent on social services. Until the 1940s, the colonial government of Nigeria was not ready to accelerate the pace of welfare provision and social change. According to Sir Frederick D Lugard,<sup>37</sup>

“It is in order to foster the growth of trade of this country and to find an outlet for our manufactures and our surplus energy, that our far-seeing statesmen and commercial men advocate colonial expansion...If our advent in Africa introduces civilization, peace and good government, abolishes the slave trade and effects other advantages for Africa..... It must not be therefore supposed that this was our sole and only aim in going there..... However greatly such objectives may weigh with a large and powerful section of the nation, I do not believe that in these days our national policy is based on motives of philanthropy only.”<sup>38</sup>

The first attempt at a regional approach to human rights protection in Africa was pursued under the auspices of the Organisation of African Union (OAU), now called the African Union. The charter of the OAU made reference to human rights in the complex of self-determination, state sovereignty and non-interference with the internal affairs of African states.<sup>39</sup> This was clearly a reflection of the needs of African states at that time, given that apartheid existed in South Africa and Rhodesia (Zimbabwe) and the fact that several African states were still under colonial control.<sup>40</sup> The OAU charter in addressing the conduct of relations between African states ignored the fact that the states were a conglomeration of people to whom human rights protection should have to be logically extended to.<sup>41</sup> Oloka-Onyango argues that the damage done to the concept of human rights in the early years of independence of African states meant that human rights remained in the back burner of political debates and activity for two decades of Africa’s history after the formulation of the OAU.<sup>42</sup> As a consequence of neglect of human rights, single party states and military governments became the dominant form of government in Africa.<sup>43</sup> Oloka-Onyango further argues that some of these governments were responsible for massive violations of the human rights of their own people. He concludes that it was as a result of these human rights violations that the OAU in 1981 adopted the African Charter on Human and Peoples’ Rights.

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<sup>37</sup> Governor-General of Nigeria ((1914–1919)

<sup>38</sup> T Falola, *Economic Reforms and Modernization in Nigeria, 1945-1965*, Kent State University Press, Kent Ohio, 2004, Page 9-10

<sup>39</sup> J Oloka-Onyango, ‘Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?’, *Buffalo Human Rights Review*, Volume 6, 2000, Page 4

<sup>40</sup> Ibid

<sup>41</sup> Ibid

<sup>42</sup> Ibid, Page 5

<sup>43</sup> Ibid

#### 4. The African Human Rights System:

According to Heyns the African regional human rights system created under the auspices of the Organisation of African Unity (OAU), now African Union, is constituted primarily by the following instruments: The African Charter on Human and Peoples Rights of 1981 (African Charter or Charter), which created the African Commission on Human and Peoples Rights (African Commission or Commission); the Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969; and the African Charter on the Rights and Welfare of the Child of 1990.<sup>44</sup> The African Commission monitors compliance by state parties with the African Charter, inter alia in terms of their Rules of Procedure and in terms of the Reporting Guidelines for State Reports. As well as the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples right of 1998, (the African Human Rights Court Protocol) creates an African regional human rights court and the Constitutive Act creates the African Union (AU).<sup>45</sup>

On the other hand, Odinkalu, states that the expression “African human rights system” is usually used to describe the architecture of norms and institutions comprised in the core pan-continental human rights treaties. These treaties are the African Charter, the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples on the Establishment of an African Court on Human and Peoples Rights. He further states that the African human rights system also include other treaties adopted under the auspices of the OAU prior to the above, which include the Convention on the Specific Aspects of Refugee Problems in Africa, (1969) Convention on the Elimination of Mercenaries in Africa (1977), Bamako Convention on the Ban of the Import into Africa and the Control of Trans boundary Movement and Management of Hazardous Wastes within Africa.<sup>46</sup> He concludes that the African human rights system also include institutions of the African Union responsible for constituting, supporting and facilitating the work of the regional human rights monitoring bodies as well as regional economic communities in Africa and their institutions, most of whose founding treaties make reference to respect for human rights in general and the African Charter in particular as a fundamental principle.<sup>47</sup> These include a court set up to interpret the treaty establishing the Southern African Community

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<sup>44</sup> C Heyns, ‘The African regional human rights system: In need of reform?’, *African Human Rights Journal*, Volume 1 No 2, 2001, Page 155

<sup>45</sup> Ibid

<sup>46</sup> C Odinkalu, ‘The role of case and complaints procedures in the reform of the African regional human rights system’, *African Human Rights Journal*, Volume 1, No 2, 2001, Page 226

<sup>47</sup> Ibid

(SADC) and the Community Court of Justice established by a Protocol adopted by member states of the Economic Community of West African States (ECOWAS).<sup>48</sup>

The African Human Rights System covers both supra-national, pan-continental systems and mechanisms. Odinkalu, argues that it would be misleading to analyse or define the African Regional System in isolation of domestic systems, because the supra-national system is only complementary to the domestic legal systems. It is only after the exhaustion of domestic remedies that aggrieved parties can appeal to the African Commission or the African Court. African states are also responsible for the effective functioning of the system, because they are responsible for its funding, appointment of credible members/judges to the African Commission and African Court, periodic reporting and the fulfilment of monitoring obligations.<sup>49</sup> Therefore, Africa's regional human rights system is a composite of national systems, the pan-continental systems and the complementarities: political, legal, diplomatic and judicial between these two.<sup>50</sup> The main contribution of the African Charter to this system was to break through the resistance of African countries to supra-national human rights monitoring.<sup>51</sup>

Article 1 of the African Charter, states that parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them. International human rights treaties aim to set human rights standards which the contracting parties adopt and adhere to. Therefore, all 53 state parties to the Charter should adopt legislative or other measures to give effect to the rights, duties and freedoms enshrined in the Charter. In the same vein, by ratifying the African Human Rights Court Protocol, state parties accept the general jurisdiction of the African Court in respect of inter-state disputes, and matters referred to the African court by the Commission and advisory opinions given by the court. The concept of state sovereignty is at odds with the idea that states can in fact be obliged to regulate their municipal laws under the instruction of a supra-national legal order.<sup>52</sup> The success of the African Court depends mainly on two factors: the first is the willingness of African states to incorporate the Charter into their domestic laws and ensure compliance with the Charter through their domestic

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<sup>48</sup> N Udonbana, *An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?*, 2004, Page 814, retrieved 12<sup>th</sup> December, 2008, [http://www.brooklaw.edu/students/journals/bjil/bjil28iii\\_udombana.pdf](http://www.brooklaw.edu/students/journals/bjil/bjil28iii_udombana.pdf)

<sup>49</sup> C Odinkalu, 'The role of case and complaints procedures in the reform of the African regional human rights system', *African Human Rights Journal*, Volume 1, No 2, 2001, Page 227

<sup>50</sup> Ibid Page 228

<sup>51</sup> Ibid, Page 226

<sup>52</sup> K Hopkins, 'The Effect of an African Court on the Domestic Legal Order of African States', *African Human Rights Law Journal*, Volume 2 No 2, 2002, Page 235

courts. The second is the state party's willingness to comply with judgements of the African Court even when they conflict with decisions of domestic courts.<sup>53</sup>

There will be conflict of ideologies between the municipal law of some African states, for example Islamic states on one hand, and the state's international human rights obligations under the Charter on the other. The Council of Europe like the Africa Union is made of diverse states. Some are Islamic, Christian or Secular states. The experience of the European Court and Commission in developing mechanisms to apply the European Convention in diverse states within the Council of Europe, should serve as an example for the African Commission and Court to follow. Judges in the European Court of Human Rights (European Court) avoided conflicts of ideology by frequently making use of the general principles of law applicable in the relevant municipal state when interpreting the scope and ambit of provisions in the European Convention. Two closely related doctrines have emerged from the European Court of Human Rights for interpretative purposes. They are the twin principles of subsidiarity and the margin of appreciation.<sup>54</sup> General principles of law are sources of law in both national and supranational legal systems. These principles are unwritten. They are norms which exist in the national law of most states and are used frequently. Conflicts of ideology may be avoided by invoking general principles of law. The African Charter makes reference to general principles of law recognised by African States in Article 61, as a subsidiary means of establishing what law to consider in settling disputes.<sup>55</sup> Subsidiarity principle implies that where possible decisions should be taken by lower decision making bodies within the community.<sup>56</sup> The higher decision making bodies within the community should only make decisions where the lower bodies are not able.<sup>57</sup> The basis for the principle of subsidiarity under the European Convention is contained in Article 1 of the Convention which states "The high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of the convention." This implies that the contracting parties are primarily responsible for protecting the rights contained in the convention.<sup>58</sup>

Similarly, the African Charter provides in Article 1 that "member states of the African Union parties to the present Charter shall recognise the rights, duties and freedoms in this Charter and shall undertake to adopt legislative or other measures to give effect to them."

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<sup>53</sup> Ibid

<sup>54</sup> Ibid, Page 241

<sup>55</sup> M Kohen, *Promoting Justice, Human Rights and Conflict Resolution through International Law*, Martinus Nijhoff, Leiden, 2007, Page 241

<sup>56</sup> Ibid, Page 632

<sup>57</sup> Ibid

<sup>58</sup> Ibid, Page 625

Another indication of the adherence to subsidiarity principle in the African Charter and the European Convention is the requirement that individuals must exhaust domestic remedies before applying to the respective regional courts and commissions.<sup>59</sup> Several national and international courts and tribunals also recognise the need for a margin of appreciation in interpreting international treaties within state parties. For example, the Human Rights Committee, in *Leo Hertzberg et al. v. Finland*<sup>60</sup> stated that public morals differ widely, and there is no universal common standard. Therefore, a certain margin of appreciation/discretion should be accorded responsible national authorities.

### **5. Universality, Interdependence and Indivisibility of Human Rights**

The African Charter recognises the indivisibility and interdependence of all human rights. The African Charter states in its preamble that “the satisfaction of economic (and) social....rights is a guarantee for the enjoyment of civil and political rights.” Similarly, the concept of the interdependence and indivisibility of human rights is contained in the Universal Declaration of Human Rights 1948, which makes reference to: “A world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want” as “being the highest aspiration of the common people”<sup>61</sup> The Universal Declaration of Human Rights goes on to make provision for civil and political rights, socio-economic rights and solidarity rights.

Human rights are said to be indivisible, when one right cannot be enjoyed without the other, and are said to be interdependent, when the level of enjoyment of one determines the level of enjoyment of the other. In *Shehla Zia vs. WAPDA*,<sup>62</sup> The Pakistani Supreme Court held that actions encroaching on the health of a person also encroach or threaten their right to life, in this case the exposure to magnetic field from a power station. It was also held in the Indian case of *Olga Tellis v Bombay Municipal Corporation*,<sup>63</sup> that the right to life includes the right to a means of livelihood as well as other rights that make the enjoyment of the right to life meaningful. This integrationist approach to the realisation of socio-economic rights rests on the premise that no right should be treated as exclusively civil and political nor exclusively economic and social. Each right has essential civil and political and economic and social aspects.

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<sup>59</sup> Ibid

<sup>60</sup> Communication No. 61/1979, U.N. Doc. CCPR/C/OP/1 at 124 (1985)

<sup>61</sup> Universal Declaration of Human Rights, U.N Doc A/810 at 71, 1948

<sup>62</sup> PLD 1994 SC 693

<sup>63</sup> AIR 1986 SC 180

According to Sen, social opportunities of education and health care complement individual opportunities of economic and political participation while also helping to foster individuals' initiatives in overcoming their respective deprivations.<sup>64</sup> Commenting on the indivisibility and interdependence of human rights, De Vos states that "starving people may find it difficult to exercise their freedom of speech while a restriction of freedom of speech may make it difficult for individuals to enforce their rights to access to housing."<sup>65</sup> An-Naim<sup>66</sup> argues that the classification of human rights into civil and political rights and socio-economic rights is not only detrimental to the human rights quality of the latter group of rights, but also undermines universality and the practical implementation of human rights. He further argues that the role of judicial enforcement should be assessed and developed in relation to each human right instead of denying it to some rights because they do not fit into the model of judicial enforcement of certain civil and political rights. To affirm the full human rights quality of socio-economic rights he argues, it is necessary to abandon any classification of human rights and approach the implementation of each specific human rights on its own terms, instead of limiting it to what is deemed appropriate for one purposed class of human rights.<sup>67</sup>

The preamble of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights affirm the ideals for the realisation of human rights. The International Covenant on Civil and Political Rights in its preamble states that "In accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights as well as his economic, social and cultural rights."<sup>68</sup> Similarly, the International Covenant on Economic, Social and Cultural Rights in its preamble states that: "Recognising, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions

<sup>64</sup> A Sen, *Development as Freedom*, Oxford University Press, Oxford, 1999, Page 15

<sup>65</sup> P De Vos, 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution', *South Africa Journal of Human Rights* Volume. 13, 1997, Pages 67-101

<sup>66</sup> A.A An-Na'im,, 'To affirm the full human rights standing of economic, social & cultural rights' in Y Ghai & J Cottrell (eds) *Economic, Social & cultural rights in practice: The role of the judges in implementing economic, social & cultural rights*, International Centre for the Legal Protection of Human Rights, London, 2004, Page 7

<sup>67</sup> Ibid

<sup>68</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights.”<sup>69</sup>

Several other United Nations Conventions, resolutions and declarations, have stated that human rights are interdependent and indivisible. Specifically, in Resolution 32/130 of 16th December 1977,<sup>70</sup> (Alternative Approaches and ways and means within the United Nations System for improving the Effective Enjoyment of Human rights and fundamental freedoms), the General Assembly stated that the work of the United Nations regarding human rights would be approached bearing the following considerations: all human rights and fundamental freedoms are indivisible and interdependent and equal attention should be given to promotion and protection of both civil and political rights and socio-economic rights. The interdependent and indivisibility of human rights was further affirmed by the 1986 Declaration of the Right to Development.<sup>71</sup> This declaration under its Article 1 states: “The right to development is an inalienable human right by virtue of which every human being and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political developments, in which all human rights and fundamental freedoms can be realised”<sup>72</sup> Similarly, the Vienna Declaration and Programme of action<sup>73</sup> states that: “All human rights are universal, indivisible and interrelated...the international community must treat human rights globally in a fair and equal manner on the same footing and same emphasis.”<sup>74</sup>

Lindholt contends that none of the conventionalised forms of regulation strictly complies with the established criteria for being sources of universal human rights law, because they are neither “done by all” or “affecting all”.<sup>75</sup> However, the Universal Declaration of Human Rights and to a limited extent some features of the International Covenants come close to fulfilling the criteria for acting as legal sources of universal human rights principle. She further contends that universality may therefore be limited to such fundamental norms that all these covenants have in common such as equality, sanctity of life and personal dignity, satisfaction of physical and mental needs and participation in community life and

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<sup>69</sup> International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976

<sup>70</sup> Alternative Approaches and ways and means within the United Nations System for improving the Effective Enjoyment of Human rights and fundamental freedoms, General Assembly Resolution, 32/130 of 16th December 1977

<sup>71</sup> UN Resolution 41/128 1986

<sup>72</sup> Declaration on the Right to Development, Article 1

<sup>73</sup> UN Doc A/CONF 157/23 at 20, 1993

<sup>74</sup> Vienna Declaration and Programme of Action, Article 5

<sup>75</sup> L Lindholt, ‘The African Charter: Contextual Universality’, in K Hastrup., (Ed) *Human Rights on Common Grounds: The Quest for Universality*, Martinus Nijhoff Publishers, Leiden, 2001, Page 136

governance.<sup>76</sup> She states that the more specific formulation in the form of concert standards such as freedom from arbitrary arrest and capital punishment, the right to fair trial by an independent judiciary, the right to free primary education and health care and freedom from discrimination on the basis of sex are in reality subject to degrees of variation.<sup>77</sup> She therefore concludes that the questions “are human rights universal”, could be answered with a yes and no at the same time. Although the measures provided for the protection of human rights under the African Charter is thin, the Charter still adheres to the overall framework of basic concepts and goes further to include a wider scope of human rights than most other instruments.<sup>78</sup> Therefore, the African Charter on one hand exhibits adherence to the principle of universality, at least with respect to the basic concepts, while at the same time expressing an even stronger commitment to the African context, culturally as well as politically.<sup>79</sup> In spite of the consensus on the universality, indivisibility and interdependence of human rights proclaimed in the African Charter and other international human rights laws, the level of justiciability and implementation of socio-economic rights in Africa is very poor.

Socio-economic rights litigation can benefit from the justiciable aspects of other rights. This concept is reinforced by the fact that all human rights ultimately exist to promote human dignity and give human life a meaningful existence. This concept also operates on the premise that all human rights are interrelated. For example the Indian Supreme Court further stated in *Olga Tellis v Bombay Municipal Corp*<sup>80</sup> that if the right to livelihood is not regarded as part of the constitutional rights to life, then the easiest way of depriving a person’s right to life is to deprive him/her the means of livelihood to the point of abrogation. In another case dealing with the right to life under section 21 of the Indian constitution, *Francis Coralie v Union Territory of Delhi*,<sup>81</sup> the Indian Supreme Court stated that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head. The above cases indicate that the concept of the right to life has overgrown its traditional narrow meaning and now extends into spheres of economic and social security.

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<sup>76</sup> Ibid

<sup>77</sup> Ibid

<sup>78</sup> Ibid, Page 135

<sup>79</sup> Ibid

<sup>80</sup> (1986) A.I.R

<sup>81</sup> AIR 1981 SC 746

## 6. Poverty as a violation of Human Rights

Given the extreme poverty millions of Africans live in, it is necessary to determine if extreme poverty amounts to a violation of human rights. Haugh and Ruan state that poverty, particularly in its extreme forms, amounts to a violation of not only virtually all socio-economic rights, but also through marginalisation and discrimination of civil and political rights.<sup>82</sup> To repay external debt, African states have to forego crucial spending to meet their people's basic needs and to reduce poverty. Debt is one of the main barriers to the realisation of socio-economic rights in Africa. Realisation of socio-economic rights in Africa is also limited by policies such as the Structural Adjustment Programme (SAPs). The basic aim of this policy is the reduction of the role of the state in either guaranteeing or in simply protecting the individual against the violation (or progressive non-realisation) of his or her socio-economic rights.<sup>83</sup> Policies such as privatization, trade liberalisation and deregulation expose individuals to a variety of practises-particularly by transnational corporations that have the effect of minimizing their options and choices.<sup>84</sup> Pogge, contends that the causes of severe poverty is not exclusively domestic to the countries in which it occurs. He contends that the asymmetries inherent in the current global economic World Trade Organisation (WTO) regime are well documented: It allows the rich countries to favour their own companies through tariffs, quotas, anti-dumping duties, export credits and huge subsidies.<sup>85</sup>

The United Nations Conference on Trade and Development (UNCTAD) estimates that the market distortions by rich countries cost the developing countries \$700 billion annually in lost export revenue, a huge amount of money relative to the needs of their poor.<sup>86</sup> The trading opportunities the rich countries give the developing countries do not come for free, to obtain these opportunities; developing countries must spend large amounts on enforcing the intellectual property rights of the rich, thereby depriving their own populations of access to cheap generic versions of patented seed and life-saving medicines.<sup>87</sup> Poverty to a great extent is the consequence of globalisation and more particularly free trade and improper liberalization imposed on developing countries by primarily the World Trade Organisation

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<sup>82</sup> R Haug, & E Ruan, *Integrating poverty reduction and the right to food in Africa*, 2002, retrieved 8<sup>th</sup> February 2009, <http://www.nlh.no/noragric/publications/reports/NoragricRep2B.pdf>

<sup>83</sup> J Oloka-Onyango, 'Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?', *Buffalo Human Rights Review*, Volume 6, 2000, Page 12

<sup>84</sup> Ibid

<sup>85</sup> T Pogge, *Poverty and Human Rights*, 2005, Page 3 retrieved 6<sup>th</sup> January 2009, [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)

<sup>86</sup> Ibid

<sup>87</sup> Ibid

and the World Bank. Sajo<sup>88</sup> contends that the above assertions may be overstated. Poverty related suffering; he argues may have more to do with extremely corrupt and often genocidal political leaders in developing countries. The legal remedy, he further argues may be found in a new obligation linking development enhancement to democratic and transparent governance, and the emerging practise of the donor communities point in this direction.<sup>89</sup> Mutua and Howse,<sup>90</sup> argue that human rights to the extent they are obligations erga omnes, or have the status of custom or of general principles of law will normally prevail over specific, conflicting provisions of treaties such as trade agreements. The World Trade Organisation laws must therefore be interpreted in such a way as to advance human rights, transparency, accountability and representivity<sup>91</sup>. Andras Sajo, disagrees with the above assertion. He argues that it is questionable to what extent socio-economic rights is part of customary law. He states that although the status of human rights in the international law system may be undisputed, it is important to remember that “undisputed” does not necessarily equal jus cogens.<sup>92</sup>

Defining poverty as the “lack of secure access to sufficient quantities of basic necessities, such as food, clothing, shelter and minimum medical care or insufficient income or purchasing power to have a command over basic needs would be the first step towards the recognition of such lack as a violation of human rights”<sup>93</sup> The availability of these necessities would not on its own fulfil human rights, because it is the access to these necessities in a manner consistent with human rights standards of equity, non-discrimination, participation, accountability and transparency, together with availability, that makes them satisfy human rights.<sup>94</sup> Poverty may therefore be defined not just as the lack of sufficient quantities of basic necessities, but as the lack of or violation of the right to these basic necessities such as the right to food, the right to health, the right to education and the like.<sup>95</sup> When these necessities are claimed as rights, they would imply being claimed in a right based manner.<sup>96</sup> These rights have all been recognised in international law through the International Covenant on

<sup>88</sup> A Sajo., ‘Socio-Economic Rights and the new International Economic Order’, *New York University Journal of International Law & Politics*, Volume 35, Number 1, 2002, Page 221

<sup>89</sup> Ibid

<sup>90</sup> R. Howse and M. Mutua, *Protecting Human Rights in Global Economy: Challenges for the World Trade Organization*, International Center for Human Rights and Democratic Development, Policy Paper, 2002 (at 17), retrieved 20<sup>th</sup> January 2009, <http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html>

<sup>91</sup> A Sajo., ‘Socio-Economic Rights and the new International Economic Order’, *New York University Journal of International Law & Politics*, Volume 35, Number 1, 2002, Page 223

<sup>92</sup> Ibid Page 224

<sup>93</sup> A Sengupta, *Poverty Eradication and Human Rights*, 2008, Page 13, retrieved 14<sup>th</sup> March, 2009, <http://www.esocialsciences.com/data/articles/Document12662008320.5880396.pdf>

<sup>94</sup> Ibid

<sup>95</sup> Ibid

<sup>96</sup> Ibid

Economic, Social and Cultural Rights.<sup>97</sup> This concept can be extended to civil and political rights essential to ensuring eradication of poverty as a fulfilment of human rights. Poverty can then be described as the violation of the right to basic necessities and the right to some basic freedoms.<sup>98</sup>

Pogge<sup>99</sup> contends that those who contest the existence of a human right to basic necessities state that a right is plausible only if the duties correlative to it is plausible as well; and that a duty to supply basic necessities to any other human beings who need them is not plausible. He further contends that the argument fails because of two interrelated mistakes. Pogge argues that the first mistake they make is to assume that we already know what the right in question is a right to.<sup>100</sup> The “right to basic necessities” does not specify what claims the holder of this right has on the conduct of others, he further argues that this lack of specificity is shared by other human rights.<sup>101</sup> For example, the brief description of an uncontroversial human right, such as the right to freedom from torture does not tell us what this right binds other agents to do or not to do.<sup>102</sup> Presumably it obligates them not to practice torture, it also obligates them to prevent torture by others (domestically, and also worldwide), or to work toward making torture illegal (under domestic and/or international law).<sup>103</sup> Pogge also argues that the second, related mistake involves a false inference. He acknowledges that a human right to basic necessities, or *some* interpretations of it, entails implausible duties. Therefore, we should reject a human right to basic necessities *so understood*. He further argues that the argument draws a stronger conclusion, namely that there is *no* (plausible interpretation of a) human right to basic necessities. He concludes that the stronger conclusion is unwarranted, because there may be other interpretations of such a human right which do not entail the duties shown to be implausible. For example, we can interpret the human right to basic necessities as forbidding all agents to act in ways that will foresee ably and avoidably deprive some human beings of access to basic necessities.<sup>104</sup>

The capability approach, whether in welfare economics, development, or poverty reduction, is basically a normative framework for assessing alternative policies or states of affairs or options. According to the capability approach, social arrangements should primarily

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<sup>97</sup> Ibid

<sup>98</sup> Ibid, Page 14

<sup>99</sup> T Pogge, ‘Severe Poverty as a Human Rights Violation’, in *Freedom from Poverty as a Human Right: Who owes what to the poor*, Oxford University Press, Oxford, 2007, Page 3

<sup>100</sup> Ibid

<sup>101</sup> Ibid

<sup>102</sup> Ibid

<sup>103</sup> Ibid

<sup>104</sup> Ibid

be evaluated according to the extent of freedom people have to promote or achieve the things they value.<sup>105</sup> Therefore, it follows that the capability approach views poverty as a deprivation of these valuable freedoms and evaluates multidimensional poverty according to capabilities.<sup>106</sup> The core characteristic of the capability approach is its focus on what people are effectively able to do and to be, that is, on their capabilities. According to The Office of the High Commissioner for Human Rights (OHCHR), since poverty denotes an extreme form of deprivation, only those capability failures that are deemed to be basic in order of priority would count as poverty.<sup>107</sup> According to Sen's capability approach the goal of both human development and poverty reduction should be to expand the capacity that people have to enjoy "valuable being and doing", they should have access to the positive resources they need to have these capabilities and be able to make choices that matter to them.<sup>108</sup> Poverty is therefore understood as capability-deprivation. There is a degree of relativity in the concept of poverty from community to community; the OHCHR states that there are certain basic capabilities that are common to all. These include adequate nutrition, adequate health, adequate clothing and adequate housing.<sup>109</sup>

The capability approach has provided the theoretical foundations of the human development paradigm. It should be noted, that the capability approach is not a theory that can explain poverty, inequality or well-being; instead, it provides a tool and a framework within which to conceptualise and evaluate these phenomena.<sup>110</sup> Vizard<sup>111</sup> contends that the capability approach provides support for the valuation of positive as well as negative freedoms and for the elucidation of a class of fundamental freedoms and human rights that focus on the valuable things that people can do and be. For example, if a person (x) values a life without hunger and would choose such a life, then the capability of this person to achieve adequate nutrition is directly relevant to his or her real opportunity to promote his or her objectives, and is expansive of his or her freedom.<sup>112</sup> Conversely, deprivation in the capability to achieve adequate nutrition restricts x's real opportunity to promote his or her

<sup>105</sup> S Alkire, *Choosing dimensions: the capability approach and multidimensional poverty*, CPRC Working Paper 88, 2007, Page 2, retrieved 2<sup>nd</sup> February 2009, <http://www.chronicpoverty.org/pdfs/88Alkire.pdf>

<sup>106</sup> Ibid

<sup>107</sup> Office High Commissioner for Human Rights, *Human rights and poverty reduction: A conceptual framework*, 2003, Page 7, retrieved 2<sup>nd</sup> February 2009, <http://www.ohchr.org/english/issues/poverty/docs/povertyE.pdf>

<sup>108</sup> S Alkire, *Choosing dimensions: the capability approach and multidimensional poverty*, CPRC Working Paper 88, 2007, Page 2, retrieved 2<sup>nd</sup> February 2009, <http://www.chronicpoverty.org/pdfs/88Alkire.pdf>

<sup>109</sup> Office High Commissioner for Human Rights, *Human rights and poverty reduction: A conceptual framework*, 2003, Page 7, retrieved 2<sup>nd</sup> February 2009, <http://www.ohchr.org/english/issues/poverty/docs/povertyE.pdf>

<sup>110</sup> I Robeyns, 'The capability approach: a theoretical survey', *Journal of Human Development and Capabilities*, Volume 6, Issue 1 March 2005, pages 93 - 117

<sup>111</sup> P Vizard, 'Sen v Pogge on global poverty and human rights', *Éthique et économique/Ethics and Economics*, Volume 3 No 2 2006, Pages 3-4

<sup>112</sup> Ibid

objectives, and is admissible as a “freedom restricting” condition.<sup>113</sup> Vizard further states that this idea of “capability-freedom” is associated with a class of “capability-rights” and obligations that have as their object the protection and promotion of valuable states of being and doing. Vizard concludes that in this way minimal demands of well-being (in the form of basic functioning, e.g. not to be hungry), and of well-being freedom (in the form of minimal capabilities, e.g. having the means of avoiding hunger) are conceptualised as rights that “command attention and call for support.”<sup>114</sup>

Pogge’s theory differs from Sen’s treatment of the “capability approach” as a (partial) basis for the development of a theory of fundamental freedoms and human rights. Pogge’s theory emphasises ways in which it is possible to establish severe poverty as a human rights violation under a “minimalist normative position” that is acceptable. This implies that human rights and justice involve fundamental principles of negative duty, which may be referred to as “specific minimal constraints” – more minimal in the context of human rights - on harm people may inflict on others.<sup>115</sup> Pogge concludes that the underlying rationale is to develop a theory of severe poverty as a violation of human rights on the basis of the assumption that human rights impose not a fundamental positive duty to protect the vulnerable or to remedy urgent need, but rather a fundamental negative constraint on conduct (prohibiting conduct that causes severe poverty). Human rights based claims arising from severe poverty are then characterised in terms of rectification for harm done by past and present conduct (rather than on the basis of fundamental positive duties of assistance and aid).<sup>116</sup>

Vizard, has outlined the correlations between the capability approach and international human rights standards. She lists them as (a) a broad concept of human rights that takes account of global poverty, (b) rejection of absolutism and the view that resource constraints represent a theoretical obstacle to the establishment of international legal obligations in the field of global poverty and human rights, (c) recognition of the positive obligation of protection and promotion, (d) recognition of the general goals (as well as specifications) as the object of human rights, (e) assessment of the reasonableness of state actions, (f) recognition of the collective international obligation of cooperation, assistance and aid (g) recognition of the importance of outcomes and results to the evaluation of human rights.<sup>117</sup>

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<sup>113</sup> Ibid

<sup>114</sup> Ibid

<sup>115</sup> Ibid

<sup>116</sup> Ibid

<sup>117</sup> P Vizard, *Poverty and Human Rights: Sen's 'Capability Perspective' Explored*, Oxford University Press, Oxford, 2006, Page 14

## 7. Human Rights based Approach to Poverty Reduction:

Socio-economic rights can be regarded as the legal basis for the poor to claim their rights and poverty reduction strategies as the operational policy instrument for action.<sup>118</sup> As mentioned in the introductory chapter, the idea underlying the adoption of a human rights approach to poverty reduction is that policies and institutions for poverty reduction should be based explicitly on the norms and values set out in the international laws of human rights.<sup>119</sup> The responsibility for poverty reduction is universal. However, the primary responsibility should lie with the state. Other states and non state actors are obliged to protect and fulfil human rights or at the very least respect (not violate) human rights. These duties or obligations should be analysed in terms of the duty to respect, protect and fulfil human rights by duty-holders.<sup>120</sup> These rights may be achieved progressively; however the human rights approach demands that minimum essential levels of all rights or core obligations should be respected.<sup>121</sup> Some poverty reduction strategies have features that reflect international human rights standards. For example emphasis is now placed on civil society participation in the poverty reduction approach advocated by the World Bank (W.B) and the International Monetary Fund (I.M.F). This reflects the right of individuals to take part in the conduct of affairs that affect them.<sup>122</sup>

The Poverty Reduction Strategy (PRS) process reflects the World Bank and International Monetary Fund's approach to development in low-income countries. PRSs are to be developed in a participatory manner and should help the government to prioritize in-country and external resources, including savings related to the Heavily Indebted Poor Countries (HIPC) Initiative for debt relief.<sup>123</sup> The PRS process emerged in response to the disappointing poverty reduction performance in aid-dependent countries, the role played by national policy and the increasing awareness of the limitations of conventional conditionality. The Poverty Reduction Strategy Papers (PRSP) is the document that details the PRS.<sup>124</sup> PRSPs are intended to follow five guiding principles.<sup>125</sup> These principles are as follows: Country-driven,

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<sup>118</sup> R Kapindu, 'Poverty reduction strategies and the right to health and housing: The Malawian and Ugandan experiences', *African Human Rights Law Journal*, Volume 6 No 2, 2006, Page 499

<sup>119</sup> Food and Agricultural Organisation of the United Nations, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, 2004, (2002) Paragraph3, , retrieved 20th March 2010  
[http://www.fao.org/righttofood/KC/downloads/vl/docs/Human%20rights%20approach%20to%20poverty%20reduction%20strategies\\_draft%20guidelines.pdf](http://www.fao.org/righttofood/KC/downloads/vl/docs/Human%20rights%20approach%20to%20poverty%20reduction%20strategies_draft%20guidelines.pdf)

<sup>120</sup> Ibid (Paragraph 6)

<sup>121</sup> Ibid (Paragraph 14)

<sup>122</sup> Ibid (Paragraph 16)

<sup>123</sup> R Kapindu, 'Poverty reduction strategies and the right to health and housing: The Malawian and Ugandan experiences', *African Human Rights Law Journal*, Volume 6 No 2, (2006), Page 494

<sup>124</sup> Ibid

<sup>125</sup> Ibid, Page 498

with broad-based participation by civil society and the private sector; Results-oriented, with a focus on outcomes; Comprehensive, addressing the multidimensional nature of poverty; Partnership-oriented, involving multilateral and bilateral partners and is based on a long-term perspective on poverty reduction. PRSP goals and indicators vary enormously from one country to the other. In general, however, the majority of PRSPs refer to the issues covered by the Millennium Development Goals (MDGs). PRSPs contain a range of goals that lie outside the scope of the MDGs. The most frequently mentioned non-MDG targets are: economic growth, macroeconomic stability, small and medium enterprise growth, governance and accountability issues, roads and rural development. The PRSP, as a key vehicle for donor lending and aid disbursements wields power and influence and for this reason tends to overwhelm and subsume other strategies, leaving participants little choice but to follow the process. Any evaluation of poverty reduction strategies and human rights needs to focus on PRSPs, as it comes with a number of ramifications and impacts, both in terms of process and content that deserve assessment and response from a human rights perspective.<sup>126</sup>

According to the World Bank PRSPs are on the agenda of about seventy low income countries, of this number thirty five are African countries.<sup>127</sup> These African countries have presented their PRSP documents to the board of the World Bank. The PRSP process does not seem to have had any substantial positive impact on poverty reduction in Africa. According to the World Bank Global Monitoring Report (GMR) 2010, the proportion of sub-Saharan Africans living on less than \$1.25 fell from 58% in 1990 to 51% in 2005. However, the total number of poor people in the region rose from 296 million in 1990 to 388 million in 2005. They are unlikely to achieve the MDG target of cutting the 1990 poverty rate by half by 2015.<sup>128</sup>

The Millennium Development Goals (MDGs) are concrete measures for judging performance through a set of interrelated commitments, goals and targets on development, governance, peace, security and human rights.<sup>129</sup> The MDGs address the aims of the Millennium Declaration by defining specific and concrete goals and targets.<sup>130</sup> The

<sup>126</sup> S Mathews, *Poverty reduction strategies and human rights* cited in R Kapindu., 'Poverty reduction strategies and the right to health and housing: The Malawian and Ugandan experiences', *African Human Rights Law Journal*, (2006), Volume 6 No 2, Page 494

<sup>127</sup> World Bank, *Country Papers*, retrieved 20th March 2010, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPRS/0,,contentMDK:20195487~pagePK:210058~piPK:210062~theSitePK:384201,00.html>

<sup>128</sup> World Bank Global Monitoring Report (GMR), 2010, Page 15, retrieved 7<sup>th</sup> May 2010, <http://siteresources.worldbank.org/INTGLOMONREP2010/Resources/6911301-1271698910928/GMR2010WEB.pdf>

<sup>129</sup> United Nations Development Programme (UNDP), *Indicators for Policy Management: A Guide for Enhancing the Statistical Capacity of Policy-makers for Effective Monitoring of the MDGs at the Country Level*, 2005, Page 10, retrieved 20<sup>th</sup> March 2009, [content.undp.org/go/cms-service/download/publication/?version=live](http://content.undp.org/go/cms-service/download/publication/?version=live)

<sup>130</sup> Ibid

Millennium Development Goals (MDGs) include halving extreme poverty, halting the spread of HIV/AIDS and providing universal primary education by 2015 from a blueprint agreed by all members of the United Nations as well as the world's leading financial institutions<sup>131</sup>. The realisation of human rights and the fight against poverty have become duties binding on all states and institutions. The MDGs if implemented would enable the realisation of several socio-economic rights; however, in practice most developing countries are yet to achieve the set goals.

The advantage of the PRSPs is that they move poverty reduction closer to the centre of development strategies. PRSPs also provide a framework of donor coordination based on national priorities. The World Bank and the IMF have placed much emphasis on the importance of monitoring the impact of PRSPs. They have also highlighted the importance of a participatory and inclusive approach, with particular reference to the different perspectives that the engagement of civil society can provide, which can in turn contribute to policy development. However, the experience so far of civil society participation in the development of PRSPs demonstrates that the World Bank and the IMF as well as many of the governments developing PRSPs have viewed civil society participation as a functional necessity, which hardly goes beyond superficial consultations.

## **8. Implementing the rights based approach to poverty Reduction:**

A human rights approach to poverty reduction pays attention to vulnerable groups and the abuse on their human dignity that accompanies poverty. This approach takes into account resources as well as the capabilities, choices, security and powers needed for the realization of human rights. Socio-economic rights are amenable to minimum core obligations, notwithstanding the applicability of the notion of progressive realisation in their implementation. These obligations are designed to ensure the realisation of minimum essential levels of each of socio-economic rights.<sup>132</sup>

Banik argues that human rights based approaches to poverty reduction and development may not live up to expectation in the process of implementation from global theory to national practice, unless three related issues are addressed. The first issue he contends is that the substance of the human rights based approach will be lost if attention is not paid to global issues such as trade, capital flows and migration.<sup>133</sup> The second issue relates to international

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<sup>131</sup> United Nations, *Millennium Development Goals*, retrieved 5<sup>th</sup> July 2008, [www.un.org/millenniumgoals](http://www.un.org/millenniumgoals)

<sup>132</sup> R Kapindu, 'Poverty reduction strategies and the right to health and housing: The Malawian and Ugandan experiences', *African Human Rights Law Journal*, Volume 6 No 2, 2006, Page 507

<sup>133</sup> D. Banik, *Implementing Human Rights based approach: Some preliminary evidence from Malawi*, 2007, Page 3, retrieved 20<sup>th</sup> August, 2010, [http://www2.ohchr.org/english/issues/poverty/expert/docs/Dan\\_Banik.pdf](http://www2.ohchr.org/english/issues/poverty/expert/docs/Dan_Banik.pdf)

accountability; donors, multilateral institutions and other international institutions should be accountable to right holders.<sup>134</sup> The balance of power between African states and donor agencies is unequal and characterised by a lack of transparency with regard to how these agencies allocate resources, set priorities and assess performance.<sup>135</sup> International donors and multilateral institutions are rarely held accountable by individuals and communities in African states where they provide aid.<sup>136</sup> Finally, unfair practices by transnational corporations that affect the poor should be addressed. State parties to the African Charter, also need to ensure that human based approach to poverty reduction is not drained of political power, which will make it difficult to implement at national and local levels.<sup>137</sup>

Qualitative as well as quantitative methods may be used to define the minimum level of capability attributes below which a person is to be deemed poor.<sup>138</sup> These minimum level of capability below which a person is deemed poor, may be regarded as the core minimum obligation in respect of the right. The right to health and education are chosen for illustration because of their relevance to poverty. The African Charter on Human and Peoples' rights provides for the rights to health and education under articles 16 and 17 which states:

**Article 16**

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

**Article 17**

1. Every individual shall have the right to education. 2. Every individual may freely, take part in the cultural life of his community. 3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State

The Committee on Economic, Social and Cultural rights (CESCR), in General Comment 14 have outlined the minimum core obligation of the right to health. These core obligations include ensuring the following: (a) equal access to primary health services,<sup>139</sup> especially for vulnerable and marginalised groups;<sup>140</sup> (b) access to minimum essential nutrition for

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<sup>134</sup> Ibid

<sup>135</sup> L H Piron, *Human Rights and Poverty Reduction: The Role of Human Rights in Promoting Donor Accountability*, 2005, Pages 7-10, retrieved 20<sup>th</sup> August, 2010, [www.odi.org.uk/resources/download/1555.pdf](http://www.odi.org.uk/resources/download/1555.pdf)

<sup>136</sup> D. Banik, *Implementing Human Rights based approach: Some preliminary evidence from Malawi*, 2007, Page 14, retrieved 20<sup>th</sup> August, 2010, [http://www2.ohchr.org/english/issues/poverty/expert/docs/Dan\\_Banik.pdf](http://www2.ohchr.org/english/issues/poverty/expert/docs/Dan_Banik.pdf)

<sup>137</sup> Ibid

<sup>138</sup> Ibid, Page 496

<sup>139</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, available at: <http://www.unhcr.org/refworld/docid/4538838d0.html> [retrieved 18th August 2010], Paragraph 43(a)

<sup>140</sup> Ibid, Paragraph 43(b)

everyone;<sup>141</sup> (c) access to basic shelter, sanitation, safe and potable water; and (d) access to essential drugs as defined by World Health Organisation from time to time.<sup>142</sup> The core obligation of the right to education include: (a) ensuring free and compulsory primary education available to all children; (b) ensuring equal access for all to secondary education; (c) eliminating gender disparity in primary and (d) secondary education, improving the quality of primary and secondary education.<sup>143</sup> These core minimum obligations may also be considered as the key targets which a state will have to achieve to reduce poverty for the most vulnerable people within the state. Therefore, where it is shown that the state is not ensuring the realisation of these minimum core obligations, (key targets) then the state is in violation of the right.<sup>144</sup>

Indicators, similar to those used by the UNDP to measure the level of human development, as stated in the UNDP Human Development Reports, may be adopted to measure the state's realisation of specific targets (or core minimum obligation).<sup>145</sup> Indicators are data used by analysts or institutions and organisations to describe situations that exist or to measure changes or trends over a period of time. They are communicative descriptions of conditions or performance that may provide insights into matters of larger significance beyond that which is actually measured.<sup>146</sup> In the human rights field distinction is usually made between indicators of conduct and indicators of result.<sup>147</sup> This reflects human rights assessment which emphasises respectively duty-bearers and their compliance with human rights obligations and right holders and their enjoyment of human rights.<sup>148</sup> The obligation of conduct requires action reasonability calculated to realise the enjoyment of a particular right. The obligation of result requires the state to achieve specific targets to satisfy a substantive right. Indicators of results therefore focus on measuring the conditions which exist as regards individuals or groups at a point in time, while indicators of conduct focuses on measuring commitment or compliance of duty-holders, for example states. Indicators of conduct and

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<sup>141</sup> Ibid, Paragraph 43(c)

<sup>142</sup> Ibid, Paragraph 43(d)

<sup>143</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant)*, 10 May 1999, E/1992/23, available at: <http://www.unhcr.org/refworld/docid/4538838c0.html> [retrieved 18th August 2010]

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, available at: <http://www.unhcr.org/refworld/docid/4538838c22.html> [retrieved 18 August 2010]

<sup>144</sup> R Kapindu, 'Poverty reduction strategies and the right to health and housing: The Malawian and Ugandan experiences', *African Human Rights Law Journal*, Volume 6 No 2, 2006, Page 507

<sup>145</sup> Ibid

<sup>146</sup> E André Andersen and H Sano, *Human Rights Indicators at Programme and Project Level Guidelines for Defining Indicators, Monitoring and Evaluation*, The Danish Institute for Human Rights Copenhagen, Copenhagen, 2006, Page 9

<sup>147</sup> Ibid Page 18

<sup>148</sup> Ibid

result are often applied in country wide assessment of the human rights situation and compliance with human rights standards. The principles of the right-based approach to poverty reduction should be used to check indicators from a human rights perspective.

There are four steps for implementing human rights based approach to poverty reduction: (a) Understanding the importance of the right in the context of poverty;<sup>149</sup> (b) Extracting the content and scope of the right by drawing upon human rights jurisprudence. This involves identifying the rights of the right holders and duties of the duty holders;<sup>150</sup> (c) identification of key targets in relation to the right and to develop for each target, some indicators that will help assess the extent to which these targets are achieved over time;<sup>151</sup> (d) developing a strategy for achieving the specified target.<sup>152</sup> The United Nations draft guidelines for implementing the rights based approach to poverty reduction illustrate how these four steps can be applied in practice. See Annex 1

## 9. Development and Human Rights

Development and poverty are multi-dimensional terms requiring an integrated social, economic and cultural approach; they both depend on an integrated human rights approach.<sup>153</sup> Socio-economic rights aim to ensure that people have access to resources, opportunities and services that support their development. In quantifying poverty and development, focus should not be only on access to infrastructures such as housing, water, health care etc, but also on policies that give effect to these rights.<sup>154</sup> These policies should be accompanied by a sustainable plan that ensures that the poor are empowered to self-sustain these services.<sup>155</sup> Both human rights and human development aim to promote well-being and freedom based on the inherent dignity and equality of all people. Therefore, the main objective of development policies and programmes should be the fulfilment of human rights.<sup>156</sup> One of the greatest challenges facing human rights implementation is mainstreaming. Mainstreaming would

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<sup>149</sup> United Nations High Commission for Human Rights, *Summary of the Draft Guidelines on a human rights approach to poverty reduction*, 2002, retrieved 4<sup>th</sup> August 2008, [www.unhchr.ch/development/SwissSummary1.doc](http://www.unhchr.ch/development/SwissSummary1.doc)

<sup>150</sup> Ibid

<sup>151</sup> Ibid

<sup>152</sup> Ibid

<sup>153</sup> S Khoza, *The Link between development, social and economic rights: Are socio-economic rights development rights?*, Unpublished paper prepared for the NADEL conference entitled: 'Equality and Justice: Gains and Challenges', September 2002, Cape Town, retrieved 2<sup>nd</sup> April 2007, [www.communitylawcentre.org.za/ser/research.php](http://www.communitylawcentre.org.za/ser/research.php)

<sup>154</sup> Ibid

<sup>155</sup> Ibid

<sup>156</sup> Ibid

bring human rights into the core of all policy planning, so that it is central to all activities, for example policy development, policy implementation as well as monitoring and evaluation.<sup>157</sup>

Article 1 of the Declaration of the right to development states that “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.<sup>158</sup> Development from a human rights stand point should be people-centred, participatory and environmentally sound. It should involve not just economic growth, but equitable distribution, enhancement of people’s capabilities and widening of their choices. It should give top priority to poverty elimination, integration of women into the development process, self-reliance and self-determination of people and governments as well as the protection of the rights of indigenous people.<sup>159</sup> A rights-based approach to development is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.<sup>160</sup>

#### **10. Non-State Actors and Economic, Social and Cultural Rights:**

The economic power non-state actors such as Transnational Corporations (TNCs) yield make it essential for them to be involved in poverty reduction.<sup>161</sup> This may be realised by streamlining TNCs activities through national and international programmes that focus on human development.<sup>162</sup> This would impact favourably on the realisation of socio-economic rights and poverty reduction. However, TNCs are responsible for massive violations of human rights in different parts of the world. The type of human rights violations committed by TNCs may fall into several categories and their impact on local population may differ. The type and impact of human rights violations committed by TNCs should therefore be judged on a case by case basis.

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<sup>157</sup> Y Ghai and J Cottrel, (ed) ‘The role of courts in the protection of Economic, Social and Cultural Rights’ in *Economic, Social and Cultural Rights in Practise*, International Centre for the Legal Protection of Human Rights, London, 2003, Page 65

<sup>158</sup> United Nation High Commission for Human Rights, *The content of the right to development*, 1999, retrieved 4<sup>th</sup> September, 2008, <http://www.unhchr.ch/development>

<sup>159</sup> Ibid

<sup>160</sup> Ibid

<sup>161</sup> P Muchlinski, ‘Social and Human Rights Implications of TNC activities in the Extractive industries’, *Transnational Corporations*, Volume 18 No 1, 2009, Page 177

<sup>162</sup> Ibid

These impacts range from direct role in violations, such as abuse of employees to pollution of the environment.<sup>163</sup> In the case of the environment this abuse may be as a result of the impact of their operational activities. For example, it is estimated that about 1.5 million tons of oil has spilled into the Nigerian Niger Delta.<sup>164</sup> In a report on the activities of oil companies in the Niger Delta area of Nigeria, the Vanguard newspaper<sup>165</sup> reported that:

“About ten people have been admitted at various hospitals in Sapele, Delta, as a result of the side effect of oil spillage which occurred at Ugborikoko village, near Sapele. The oil spillage occurred on a Shell Petroleum Development Company (SPDC) facility located on the Mayuka creek on the river Ethiope, adjacent to the Sapele gas station. The victims our sources revealed were rushed to hospitals, because of complications arising from the consumption of polluted water from the adjoining river. Already the accident has destroyed aquatic life and other economic life of the people in the neighbourhood. Specifically fishing activities had been paralysed in the entire Sapele and its environs as the spillage reportedly killed fish in all rivers in the area. Our correspondent who visited the scene yesterday sighted condensed crude oil floating on the river and an uncountable number of burnt shacks and dry trees. The Vanguard checks in the area revealed that the crude had spilled over 35 kilometres on the river. The secretary Sapele/Okpe community, Mr Onoriode Temiagin who spoke with Vanguard, confirmed the admission of ten of his kinsmen at various hospitals in Sapele. Temiagin who claimed that the incident had brought untold hardship to his people, since they were predominantly fishermen, further lamented that “It had rendered us jobless” it is unfortunate to recall that nobody has caught fish since the incident occurred”.

These spills violate the rights to life, clean environment and livelihood. Indirect role in human rights violations may include support for governments guilty of repression of socio-economic rights.<sup>166</sup> This situation would normally arise when states forcefully suppress protests against the exploitation of natural resources.<sup>167</sup> This was the case in Nigeria, when

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<sup>163</sup> C Jochnick, ‘Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights’, *Human Rights Quarterly*, Volume 21, Number 1, February 1999, pp. 56-79

<sup>164</sup> Shell Environmental Devastation in Nigeria, *Oil Spills*, retrieved 27<sup>th</sup> March 2010, <http://wiwavshell.org/shell%E2%80%99s-environmental-devastation-in-nigeria>

<sup>165</sup> Oil Spillage occurs in Sapele, *Vanguard*, February 2002, Page 18

<sup>166</sup> C Jochnick, ‘Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights’, *Human Rights Quarterly*, Volume 21, Number 1, February 1999, pp. 56-79

<sup>167</sup> P Muchlinski, ‘Social and Human Rights Implications of TNC activities in the Extractive industries’, *Transnational Corporations*, Volume 18 No 1 (2009), Page 126

Shell was alleged to be complicit in the arbitrary detention and execution of the Ogoni 9.<sup>168</sup> Other reported examples of TNCs activities that violate human rights include TNCs taking sides and assisting in conflicts for the control of natural resources.<sup>169</sup> For example, reports by Human Rights Watch indicate that Talisman Energy was complicit in the violation of the laws of war and the right to life.<sup>170</sup> Human Rights Watch claimed that the company supplied logistical assistance and infrastructure such as airstrips for the government's military attacks on Southern Sudan.<sup>171</sup> The situation in Southern Sudan has further resulted in massive violations of socio-economic rights and poverty. TNCs have also been responsible for violations of labour rights. For example, the International Labour Rights Fund alleges that children were forced to work unpaid to meet their parents quotas at the Bridgestone's rubber plantation in Liberia.<sup>172</sup>

There is tension between the demands for a market economy in the light of globalisation and the protection of socio-economic rights. This is because the realisation of socio-economic rights may entail some state control of private actors such as transnational corporations. It can be argued that through economic globalisation; socio-economic rights such as the rights to an adequate standard of living can be realised. African states therefore, should take advantage of the benefits of globalisation, while ensuring that TNCs operating within their jurisdictions adhere to international human rights standards. The main challenge from a human rights perspective is how to ensure that the activities of TNCs are consistent with human rights standards and TNCs are accountable for their actions. The main difficulty in holding TNCs accountable for human rights violations under international human right laws is that they are not signatories to human rights treaties. The main international human rights conventions namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights expressly state that only states hold human rights obligations. Therefore, in attempting to hold transnational corporations to account for human rights violations, it is important to explore domestic remedies.

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<sup>168</sup> Corporate Accountability Working Group, *Collective Report on Business and Human Rights Submission to the 8<sup>th</sup> Session of the United Nations Human Rights Council, June 2008*, Page 14, retrieved 27<sup>th</sup> March 2010, [http://www.escr-net.org/usr\\_doc/BHRCCollectiveReport\\_ESCR-Net.pdf](http://www.escr-net.org/usr_doc/BHRCCollectiveReport_ESCR-Net.pdf)

The Ogoni Nine were a group of nine activists from the Ogoni region of Nigeria, including outspoken author and playwright Ken Saro-Wiwa, Saturday Dobee, Nordu Eawo, Daniel Gbooko, Paul Levera, Felix Nuata, Baribor Bera, Barinem Kiobel, and John Kpuine, who were executed by hanging in 1995 by the military dictatorship of General Sani Abacha.

<sup>169</sup> Ibid, Page 126

<sup>170</sup> Corporate Accountability Working Group, *Collective Report on Business and Human Rights Submission to the 8<sup>th</sup> Session of the United Nations Human Rights Council, June 2008*, Page 15, retrieved 27<sup>th</sup> March 2010, [http://www.escr-net.org/usr\\_doc/BHRCCollectiveReport\\_ESCR-Net.pdf](http://www.escr-net.org/usr_doc/BHRCCollectiveReport_ESCR-Net.pdf)

<sup>171</sup> Ibid

<sup>172</sup> Ibid, Page 14

According to Murray, the Africa Charter differs from other international human rights laws that focus exclusively on the relation between the individual and the state and thereby inevitably fail to recognise that violations of human rights can occur in the private sphere.<sup>173</sup> Under the African Charter, the concept of duties may play an important role in providing for protection for the violation of human rights in the private sphere. The African Charter under Articles 28 and 29 provides for duties individuals have to the family, community and country. Individuals may be interpreted to include corporate bodies.

In most African countries, the regulatory regimes are almost nonexistent. Therefore, there is little or no regulation of the activities of TNCs. According to Daniel Aguirre the control of corporate activity in Africa remains underdeveloped.<sup>174</sup> Human rights protection is fully integrated into the objectives of the Constitutive Act of the African Union, as per state parties' responsibility to protect and fulfil the African Charter on Human and Peoples' Rights. However, neither the Charter nor the Constitutive Act directly provides for regulation of corporations.<sup>175</sup> The regional economic organisations are extremely dependent upon fostering investment in order to promote much needed economic growth.<sup>176</sup> According to Pieterse,<sup>177</sup> conventional human rights discourse has often assumed that rights are not fit for application against non-state actors. He states that public law was initially designed to curb the excesses of public power rather than regulate private-commercial or interpersonal relationships. He further states that over time, the distinction between the public and the private sphere as respectively being appropriate and inappropriate venues for the application of human rights as been unmasked as artificial, counter-productive and oppressive especially in the lived reality where much harm is suffered by vulnerable members of the society at the hands of private entities.<sup>178</sup> The transfer of state power to private entities through privatization policies has increased the social significance of corporate action and transferred many of the welfare-related functions of the state to the private sector.<sup>179</sup>

Horizontal application of socio-economic rights will impose overly onerous duties to private actors. As a result, section 8(2) of the South African Constitution recognises that not

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<sup>173</sup> R Murray, *The African Commission on Human and Peoples' Rights and international law*, Hart Publishing, Oxford, 2000, Page 39

<sup>174</sup> D Aguirre, 'Corporate social responsibility and human rights in Africa', *African Human Rights Law Journal*, Volume 5 No 2 2005, Page 241

<sup>175</sup> Ibid

<sup>176</sup> Ibid

<sup>177</sup> M Pieterse, *Rethinking the boundaries of social rights litigation: The private-law impact of justiciable socio-economic rights*, 2007, Page 1, retrieved 3<sup>rd</sup> February 2009,

<http://www.enclsyn.gr/papers/w13/Paper%20by%20Marius%20Pieterse.pdf>

<sup>178</sup> Ibid

<sup>179</sup> Ibid

all obligations imposed by a particular right are capable of horizontal application. According to Piterse a further factor that is relevant to a judicial decision on whether to allow for the horizontal application of socio-economic right is the nature or identity of the person or entity against whom the right is to be applied. This is so because everyone does not have equal capacity to comply with the various obligations imposed by a particular socio-economic right.<sup>180</sup> Ellman, contends that the extent to which private parties will be held accountable for violations of socio-economic rights should depend on the nature and extent of the power exercised by the entity, the degree to which the power emulates state powers and the impact of the power on the enjoyment of socio-economic rights.<sup>181</sup> He suggests that entities which exercise power or functions similar to that of a state, or that such power or functions impacts on the exercise of rights of citizens in a similar manner should be bound by the relevant socio-economic provisions of the South African Bill of Rights.<sup>182</sup>

Section 8 (3) of the South African Constitution provides that when applying a provision of the Bill of Right to a natural or legal person, a court must apply, or if necessary develop the common law to the extent that legislation does not give effect to that right. Further Section 39(2) of the South African Constitution provides that when interpreting any legislation, and when developing the common or customary law, every court, tribunal or forum must promote the spirit, purport and objectives of the Bill of Rights. Section 8(3) therefore suggests that the preferred manner to vindicate the rights in the Bill of Rights in the private sphere would be through legislative enactments or through developing or limiting the rules of common law, which would conceivably generate more effective remedies for private rights infringements.<sup>183</sup>

International financial institutions such as the World Bank and the International Monetary Fund (IMF) play a vital role in the ability of governments particularly in developing countries to provide for the general welfare of their populations.<sup>184</sup> The conditions for their loans and investments often impact negatively on the enjoyment of socio-economic rights, for example the structural adjustment programme of the IMF and the World Bank violated socio-economic rights in several developing countries.<sup>185</sup> The United Nations Special Rapporteur

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<sup>180</sup> Ibid Page 4

<sup>181</sup> S Ellmann, 'A Constitutional Confluence: American 'State Action' Law and the Application of South Africa's Socioeconomic Rights Guarantees to Private Actors', *New York Law School Review*, Volume 45, 2001, Pages 21-75

<sup>182</sup> Ibid

<sup>183</sup> M Pieterse, *Rethinking the boundaries of social rights litigation: The private-law impact of justiciable socio-economic rights*, 2007, Page 5, retrieved 3<sup>rd</sup> February 2009,

<http://www.enelsyn.gr/papers/w13/Paper%20by%20Marius%20Pieterse.pdf>

<sup>184</sup> C Jochnick, C., 'Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights', *Human Rights Quarterly*, Volume 21, Number 1, February 1999, Pages 56-79

<sup>185</sup> Ibid

on Economic, Social and Cultural Rights has listed aspects of SAPs which are threats to the enjoyment of socio-economic rights. The threats are as follows: (a) Devaluation of local currency; (b) Decrease of government expenditure on social services; (c) Abolition of price controls; (d) Imposition of wage controls; (e) Reduction of trade and foreign exchange control; (f) Restriction on domestic credit; (g) Reduction of the role of the state in the economy; (h) Increasing basis for the export economy; (i) Decreasing imports, and; (j) Privatization of public enterprises.<sup>186</sup> However, there are three main reasons for contending that the Covenant on Economic, Social and Cultural Rights does not apply to the World Bank and the I M F. The reasons are as follows: The obligations imposed by the Covenant apply to states not to international organisations; The World Bank and IMF are not parties to the Covenant and The Covenant states in Article 24 that nothing in the present Covenant shall be interpreted as impairing the provisions of the constitutions of specialised agencies in regard to matters dealt with in the present Covenant.<sup>187</sup>

On the other hand it has been argued that the World Bank and IMF are subjects of international law and specialised agencies within the United Nations, therefore should be bound by general norms of international law. The other assertion is that members of the World Bank and IMF who are parties to the Covenant should discharge their obligations of cooperation with other states, irrespective of whether the state in question is a party to the Covenant.<sup>188</sup> Policies and decisions of international institutions should be in conformity with the obligations of state parties under the International Covenant on Economic, Social and cultural Rights.<sup>189</sup> This can be realised by state parties to the International Covenant on Economic, Social and cultural Rights, voting against policies sought to be implemented by states seeking IMF/World Bank loans, such as the Structural Adjustment Policies (SAP) and the Poverty Reduction Strategy Papers (PRSPs) where policies fail to adequately integrate or take account of socio-economic rights.<sup>190</sup>

These are exceptions to the general rule that international law is not applicable to non-state actors.<sup>191</sup> These exceptions include the fact that state-owned corporations can be held liable for human violations, since they are considered a part of the state. In some jurisdictions such as India, the Supreme Court has placed human rights obligations on non-state actors. For

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<sup>186</sup> Ibid

<sup>187</sup> F Gianviti, Economic, Social, and Cultural Rights and the International Monetary Fund" in P Alston , *Non state actors and Human Rights*, Oxford University Press, Oxford, 2005,Page 113

<sup>188</sup> Ibid

<sup>189</sup> Ibid

<sup>190</sup> Ibid

<sup>191</sup> Module 9: *Obligations of States and Non state Actors*, retrieved 3<sup>rd</sup> February 2009, <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module9.htm>

example, in *Consumer Education & Research Centre v Union of India*,<sup>192</sup> The Supreme Court of India, decided it could give appropriate directions to employers be it the state or its undertaking or a private employer to make the right to life meaningful, to prevent pollution of work place; protection of the environment, protection of the health of the workman or to preserve free and unpolluted water for the safety and health of the people. Some treaties, such as the Genocide Convention and the treaty setting up the International Criminal Court impose human rights obligations on non-state actors. On 13th August 2003, the United Nations (UN) Sub-Commission on the Promotion and Protection of Human Rights approved the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.<sup>193</sup>

## **11. Interim Conclusion:**

Effects of the Structural Adjustment Programme, external debts, unfair trade regime, corruption as well as the activities of non-state actors undermine the prospects of the affected states to provide even the most basic facilities needed to meet socio-economic rights obligations. The above named challenges to the realisation of socio-economic rights also perpetuate poverty and impede development. Millions of people in Africa die from poor nutrition, lack of access to health care and other poverty related causes.<sup>194</sup> In some cases African states are limited by lack of resources; although socio-economic rights do not always require resources. These rights can be realised by efficient management of limited resources. There is a direct link between poverty and all human rights, because poverty is a cause as well as a product of human rights violations. An example of poverty as a cause of human rights violations can be found where low income prevents people from accessing education (a socio-economic right), which may in turn prevent them from participating in public life and limit the ability to influence policies that effect them. (civil and political right). On the other hand, poverty may be a product of human rights violations. Examples of poverty as a product of human rights violation include cases where discrimination and unequal access to resources lead to poverty.

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<sup>192</sup> (1995) 3 SCC 42

<sup>193</sup> Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2002/13 at 15-21 (2002)

<sup>194</sup> T Pogge, *World Poverty and Human Rights*, Polity Press, London, 2002, Page 2

## CHAPTER 3: ARRANGEMENTS FOR THE PROMOTION AND PROTECTION OF SOCIO-ECONOMIC RIGHTS UNDER THE AFRICA CHARTER.

### 1. Introduction:

This chapter introduces and analyses the arrangements for the promotion and protection of socio-economic rights under the African Charter. This analysis is undertaken to identify the prospects and challenges to the promotion and protection of the socio-economic rights contained in the African Charter and to examine how the prospects support the realisation of socio-economic rights and poverty reduction using the rights based approaches to poverty reduction. This chapter will also identify possible ways of addressing identified challenges.

The best manner of vindicating socio-economic rights as well as other rights is through the domestic legal system. However, socio-economic rights are not justiciable in most national legal systems in Africa. It is therefore necessary to adopt regional instruments such as the African Charter and provide complaint mechanisms such as the African Commission and Court. This will enable victims of socio-economic rights violations seek redress and remedy situations that cause poverty.<sup>1</sup> The realisation of the rights to food, shelter, health, education and culture, through the exercise of the right to participation, expression and other civil and political rights is essential for individuals to realise their full potential and reduce poverty.<sup>2</sup> Although poverty raises complex multi-sector issues, the application of a human rights based approach will ensure that the essential elements of poverty reduction strategies, such as non-discrimination, equality, participation and accountability receive adequate attention.<sup>3</sup>

Socio-economic rights serve as powerful tools in the struggle to reduce and eliminate poverty, therefore, Africans should be active in designing and implementing strategies to ensure that their states work through law, policy, budgeting and service delivery to fulfil their obligations.<sup>4</sup> Express references to the need to protect socio-economic rights under the African Charter emerged from two colloquiums held in 1978: the Butare Colloquium<sup>5</sup> and the

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<sup>1</sup> L. Lamarche, *Beyond the Rhetoric of Social Rights for the Poor, the Need to Promote a Methodology at Reinforcing International and national Institutions*, (Paper prepared for UNESCO), UNESCO Poverty Project: Ethical and Human Rights Dimensions of Poverty: Towards a new Paradigm in the fight against Poverty, 2004, Page 30, retrieved 27th March 2010, [http://www.criec.uqam.ca/Page/Document/textes\\_en\\_lignes/Lamarche\\_Beyond.pdf](http://www.criec.uqam.ca/Page/Document/textes_en_lignes/Lamarche_Beyond.pdf)

<sup>2</sup> United Nations High Commissioner for Human Rights, *Report of the Expert Seminar on Human Rights and Extreme Poverty*, 7-10 February 2001, E/CN.4/2001/54/Add 1, Paragraph 20, retrieved 27th March 2010, [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/b60d65532fe992adc1256a1e005ba01d/\\$FILE/G0112025.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/b60d65532fe992adc1256a1e005ba01d/$FILE/G0112025.pdf)

<sup>3</sup> Economic and Social Council of the United Nations, *Statement Adopted by the Committee on Economic, Social and Cultural Rights* on May 2001, E/C.12/2001/10 paragraph 9, retrieved 27th March 2010, <http://www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.10Poverty-2001.pdf>

<sup>4</sup> S Khoza (ed.) *Socio-economic Rights in South Africa: A Resource Book*, 2<sup>nd</sup> Edition, University of the Western Cape: Socio-Economic Rights Project, Cape Town, 2007, Page 8

<sup>5</sup> H Hannum, 'The Butare Colloquium on Human Rights and Economic Development in Francophone Africa: A Summary and Analysis', *Universal Human Rights*, Vol. 1, No. 2 (Apr. - Jun., 1979), Pages. 63-87

Dakar Colloquium,<sup>6</sup> both on human rights and development. The participants at the Butare Colloquium discussed the relationship between human rights and development and concluded that the lack of resources in many African countries did not justify lack of respect for civil and political rights as well as socio-economic rights.

The African Charter makes provision for some socio-economic rights. The socio-economic rights provided for under the African Charter are: the right to property (Article 14); the right to work under equitable and satisfactory conditions (Article 15); the right to receive equal pay for equal work (Article 15); the right to enjoy the best attainable state of physical and mental health including medical care for the sick (Article 16); the right to education (Article 17); the right to freely take part in the cultural life of one's community (Article 17(2)); and the right of women, children, the aged and the disabled to special measures of protection in keeping with their physical or moral needs (Article 18). The main purpose of socio-economic rights is to place the state under a legal obligation to utilise its available resources maximally to correct social and economic inequalities and imbalances.

It has been confirmed by practical experience that democratisation and the protection of rights can be attained only if the social and economic conditions of individuals improved.<sup>7</sup> Modernisation theorists argue that economic development is critical for successful democratisation, and accordingly for the protection of rights.<sup>8</sup> They hold that without modernisation and a minimum threshold of economic development, democracy in divided societies is hopeless.<sup>9</sup> Salim A. Salim, former Secretary General of the African Union concludes that, "Good governance and democracy or the respect for human rights cannot thrive on empty stomachs. [...] Democracy must deliver on bread-and-butter issues, otherwise democratic transitions will be reversed and the continent will slide back into situations where the politics of poverty gives rise to the poverty of politics."<sup>10</sup>

This chapter is divided into sections and each section examines one of the following topics: the structure of the African Union, the NEPAD programme of the African Union, the relationship between NEPAD and the African Union, the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights, challenges faced

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<sup>6</sup> C Mbazira, 'Enforcing the Economic, Social and Cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides', *African Human Rights Journal*, Volume 6 No 2, 2006, Page 337

<sup>7</sup> B de Villiers, *The protection of social and economic rights. International perspectives*, Occasional Paper 9, Centre for Human Rights, University of Pretoria, 1996, Page 2.

<sup>8</sup> Ibid

<sup>9</sup> Ibid

<sup>10</sup> A.S Salim, quoted in S Hellinger & F O'Regan, *Aid for Just Development: Report on the Future of Foreign Assistance*, 1988, Lynne-Rienner, Publishers., Boulder and London

by the Commission, the jurisprudence of the African Commission on socio-economic rights, the African Commission's approach to remedies, the African Commission's efforts at promoting socio-economic rights and the African Court on Human and Peoples' Rights. This chapter uses the above sections to outline prospects and challenges to the promotion and protection of socio-economic rights under the African Charter. This chapter under the section on the jurisprudence of the African Commission on socio-economic rights analyses a range of the Commission's decisions on socio-economic rights. As earlier stated, the aim of analysing these decisions is to assess how the African Commission has interpreted socio-economic entitlements claimed by poor and vulnerable individuals and communities in Africa. The analysis also aims to determine whether the decisions impact favourably on the realisation socio-economic rights and rights based approaches to poverty reduction even where the decision do not provide a fundamental right to individuals to claim "positive", judicially enforceable action and services from the state.

## **2. The African Union:**

The Organisation of African Unity (OAU) was transformed into the African Union (AU) by the heads of states and governments of the OAU in September, 1999. In July 2000 they adopted the Constitutive Act which establishes the AU. The Constitutive Act has been ratified by all 53 members of the African Union.<sup>11</sup> The Assembly which is composed of the Heads of State and Government of all the participating countries is empowered under the Constitutive Act to impose sanctions on states that fail to comply with the decisions or policies of the African Union.<sup>12</sup> They are also empowered to impose sanctions on states that fail to make their contribution to the budget of the AU.<sup>13</sup>

The Constitutive Act of the AU provides for the following bodies: The Assembly of heads of state and governments. The Assembly is the supreme organ of the AU and its annual meetings are referred to as 'Summit Meetings'. The Executive Council is composed of the

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<sup>11</sup>For list of counties which have signed, ratified/acceded to the Constitutive Act of the African Union; retrieved 20<sup>th</sup> June 2010, <http://www.africaunion.org/root/au/Documents/Treaties/List/Constitutive%20Act%20of%20the%20African%20Union.pdf>

<sup>12</sup> Article 23 (2) Constitutive Act

23(2). Furthermore, any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly

<sup>13</sup> Article 23(1) Constitutive Act, 23(1). The Assembly shall determine the appropriate sanctions to be imposed on any Member State that defaults in the payment of its contributions to the budget of the Union in the following manner: denial of the right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from any activity or commitments there from.

Ministers of Foreign Affairs of all participating countries. The functions of the Executive Council include co-ordinating and taking decisions on policies in areas of common interest to the member states and the Pan-African Parliament. The Constitutive Act in addition sanctioned the establishment of a number of other specialised Pan-African institutions, including: An African Central Bank; the African Monetary Fund; the African Investment Bank; the Pan-African Parliament; the Economic, Social and Cultural Council and a Court of Justice. The Constitutive Act makes provision for a Court of Justice whose jurisdiction is set out in the Protocol on the African Court of Justice adopted at the Maputo Summit in July 2003. The protocol has been ratified by fifteen countries required to bring it into force. The countries that have ratified the Protocol are Algeria, Comoros, Egypt, Gabon, Libya, Lesotho, Mali, Mozambique, Mauritius, Niger, Rwanda, South Africa, Sudan, Tanzania and Tunisia.

The AU Commission was established with a Secretariat to provide administrative services to the various institutions of the AU. The headquarters of the AU was placed in Addis Ababa in Ethiopia. Article 3 of the Constitutive Act provides that the objectives of the AU includes the promotion of human rights in accordance with the African Charter and other human rights instruments, the promotion of sustainable development at the economic, social and cultural levels as well as working with international partners in the eradication of preventable diseases and the promotion of good health. The Constitutive Act however makes no specific mention of the African Commission on Human and Peoples' Rights or the African Court on Human and Peoples' Rights. However, the African Commission on Human and Peoples' Rights is a product of the African Charter, which is expressly recognised by the Constitutive Act. The African Court on Human and Peoples' Rights came into force through an optional protocol to the African Charter.

The next section examines NEPAD an African Union programme that aims to reduce poverty and enhance growth and sustainable development.

### 3. New Partnership for Africa's Development (NEPAD)

NEPAD is a programme of the African Union adopted in 2001. It has as its objectives the promotion of accelerated growth and sustainable development, eradication of widespread and severe poverty, halting the marginalisation of Africa in the globalisation process and accelerating the empowerment of women in Africa. In order to achieve these objectives, African leaders will take joint responsibility for promoting and protecting democracy and human rights in their respective countries and regions, by developing clear standards of accountability, transparency and participatory governance at national and sub national levels.<sup>14</sup> These objectives translate into several broad sector priorities namely agriculture and food security, infrastructure (water and sanitation, transport, energy and ICT), human resources development (education and health), science and technology, trade and market access, environment and climate change, culture and tourism, governance and capacity development as well as gender development.

These priorities all have a bearing on socio-economic rights and their successful implementation will lead to the realisation of socio-economic rights, such as the rights to food, education, health and clean water. These priorities also indicate that the NEPAD programme reinforces the socio-economic rights and the right to development provisions of the African Charter. The implementation of these priorities will reduce poverty and bring about economic growth and sustainable development. African countries have experienced economic growth in the last few years. Specifically, African countries have had a growth rate of 5% over the past four years.<sup>15</sup> However, this economic growth has not translated to large scale poverty reduction. The United Nations Economic Commission for Africa (UNECA) states that poverty rates in Africa has remained largely unchanged, 44.6% in 1990 and 44% in 2004.<sup>16</sup> This economic growth has been driven by internal factors such as increased agricultural production and external factors such as global demand for key African export commodities.<sup>17</sup>

Policies that aim to achieve economic growth should be supported by complimentary policies aimed at poverty reduction. Pro poor growth entails formulation and implementation of policies that enable the poor to participate in and also benefit from economic growth.<sup>18</sup> Pro

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<sup>14</sup> NEPAD base Document, Paragraph 49, retrieved 20<sup>th</sup> April, 2010, <http://www.nepad.org/home/lang/en>

<sup>15</sup> African Union Commission & the United Nation's Economic Commission for Africa, *Boosting Economic Growth and Poverty Reduction: An African Perspective*, Paper prepared in Consultation with the African Union Commission and the United Nation's Economic Commission for Africa, 2009, Page 1, retrieved 4<sup>th</sup> April, 2010, <http://www.africapartnershipforum.org/dataoecd/28/54/41084681.pdf>

<sup>16</sup> Ibid Page 5

<sup>17</sup> Ibid, Page 3

<sup>18</sup> Ibid, Page 6

poor economic growth and poverty reduction are more likely to occur when discriminatory barriers are removed.<sup>19</sup> Ensuring participation of the poor in economic growth and removing discriminatory barriers will promote a rights based approach to poverty reduction. Similarly, NEPAD's objective of applying the rights based principle of empowering women will go a long way in addressing the barriers and discrimination women face in Africa. Evidence from several studies indicates that gender equality correlates with poverty reduction and economic growth.<sup>20</sup> Studies from 13 African countries between 1975 and 1985, indicate that a 10% increase in female literacy reduced child mortality by 10%.<sup>21</sup> Changes in male literacy had very little influence.<sup>22</sup> Improved micro economic management in many African countries has resulted in improved domestic balances and has helped sustain economic growth. Domestic saving rate in African countries went up from 25.3% in 2006 to 26.3% in 2007.<sup>23</sup> This is also supported by improved political governance. According to the United Nations Economic Commission for Africa and African Governance Report 2009,<sup>24</sup> Africa has made progress in improving political and economic governance. It may be argued that NEPAD policies have contributed to these improvements.

The implementation of the NEPAD programme is overseen by the Heads of State Implementation Committee (HSIC).<sup>25</sup> The function of the HSIC include identifying strategic issues that need to be researched, planned and managed at the continental level; setting up mechanisms for reviewing the progress in the achievement of mutually agreed targets and compliance with mutually agreed standards; reviewing progress in the implementation of past decisions and taking appropriate steps to address problems and delays.<sup>26</sup> NEPAD also adopts the Millennium Declaration's International Development goals to achieve the objective of eradicating poverty in Africa. To achieve effective implementation, the HSIC established the African Peer Review Mechanism (APRM). The Purpose of the APRM as stated in the base document attached to the NEPAD declaration states that:

“The primary purpose of the APRM is to foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration

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<sup>19</sup> Ibid, Page 10

<sup>20</sup> Ibid, Page 9

<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> Ibid, Page 3

<sup>24</sup> United Nations Economic Commission for Africa, *African Governance Report 2009*, Oxford University Press, USA

<sup>25</sup> NEPAD Framework Document, Paragraph, 200/201 retrieved 8<sup>th</sup> August 2007,

<http://www.nepad.org/2005/files/documents/inbrief.pdf>

<sup>26</sup> Ibid

through sharing of experiences and reinforcement of successful and best practise, including identifying deficiencies and assessing the needs of capacity building.”<sup>27</sup>

It should be noted however that the participation in the APRM process is voluntary. So far 25 African states are part of the APRM process. The states are Algeria, Angola, Benin, Burkina Faso, Cameroon, Congo-Brazzaville, Egypt, Ethiopia, Gabon, Ghana, Kenya, Lesotho, Malawi, Mali, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Sudan, Tanzania, Uganda, and Zambia.<sup>28</sup>

The APRM process covers four broad areas namely: The democratisation process and good governance at the political level; Socio-economic development, which includes providing the basic needs of people, such as education, shelter and health care; Macro-economic policies including fiscal, monetary, trade and labour policies; and Corporate governance which includes licensing, regulation, competition policy, ownership protection, solvency/liquidation rules and good governance.

The APRM entrenches a mechanism of accountability, because it requires states to account on how far they have gone in achieving the objectives of NEPAD. The APRM if used effectively would be a very good review mechanism for promoting and protecting socio-economic rights, given the fact that NEPAD’s programmes have a direct bearing on socio-economic rights. The APRM process supports participating countries in adopting laws, policies and practices that will ensure political stability, economic growth, sustainable development and continental economic integration. The questions contained in the APRM questionnaire are designed to assess states compliance to African Charter and other international human rights treaties and standards.<sup>29</sup> Therefore, the APRM process ensures that participating countries respect their international commitments. The effect of the APRM process is that participating state subject themselves to public scrutiny and accountability.<sup>30</sup> The APRM guidelines states that ensuring consistency with national and international efforts like Poverty Reduction Strategy Report (PRSP), National Human Rights Action Plan and the Millennium Development Goals (MDGs) are all essential factors underpinning the effectiveness of the APRM process. The APRM process therefore, recognises the

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<sup>27</sup> The African Peer Review Mechanism, (AHG/235(XXXV111) annex 11, Paragraph 3, retrieved 4 July, 2010, <http://www.uneca.org/aprm/Documents/APRM%20Base%20Document.pdf>

<sup>28</sup> Danish Institute for Human Rights, *African Human Rights Complaints Handling Mechanisms A Descriptive Analysis*, 2008, Page 95, retrieved 8<sup>th</sup> August, 2009, [http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/Dokumenter%20til%20Nyhedsarkiv/African\\_HR\\_Complaints\\_Handling\\_Mechanisms.pdf](http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/Dokumenter%20til%20Nyhedsarkiv/African_HR_Complaints_Handling_Mechanisms.pdf)

<sup>29</sup> B. Gawanas, *The African Union: Concepts and Implementation Mechanisms relating to Human Rights*, 2008, Page 151, retrieved 10<sup>th</sup> April 2010, [www.kas.de/upload/gawanas/pdf](http://www.kas.de/upload/gawanas/pdf)

<sup>30</sup> Ibid, Page 152

complimentary link between the PRSPs, MDGs strategies and the APRM process. This approach ensures that enabling conditions are in place for realising PRSPs and MDGs goals as well as the realisation of socio-economic rights.

The practical effect of the APRM process on policy formulation is that participating states are encouraged to adopt rights based approaches to policy formulation. The process also promotes the right based principle of accountability. Specific aspects of the APRM review process also incorporate rights based approaches. For example, the corporate governance aspect of the review focuses on human rights and labour rights issues as well as corporate social responsibility issues relating to the environment. It also encourages states to pass relevant laws supportive of the rule of law and respect for human rights. For example, in implementing its Programme of Action (POA) developed as a recommendation of the APRM review process for Ghana, the government of Ghana passed a bill to protect whistleblowers and promote access to information.<sup>31</sup> Similarly Rwanda as a result of the APRM review process reformed its business environment and evidence from several Rwandan government indicators show that these reforms have had a positive impact on reducing corruption, improving government effectiveness and promoting transparency of domestic regulatory frameworks.<sup>32</sup>

It is important to review how the APRM operates in practice, given that the process has the potential to impact positively on the realisation of socio-economic rights in Africa. Reviews under the APRM are conducted by a panel of eminent persons. The panel members do not represent government or other interests.<sup>33</sup> They are therefore independent. The panel prepares a document referred to as a questionnaire, which contains the objectives of NEPAD as well as the standards, norms criteria and nominal indicators of the four areas covered by the APRM process.<sup>34</sup> These standards and norms are set by the panel bearing in mind best practices and the realities of Africa.<sup>35</sup> Sample questionnaires are sent out to the country to be reviewed to conduct a self assessment prior to a visit by the review panel and the panel encourages broad participation in the review process.<sup>36</sup> Therefore, non-governmental organisations, trade union, opposition parties etc take part in the process. The final report is sent to the peers-heads of states and governments of countries participating in APRM. Within

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<sup>31</sup> M Chene, *African Peer Review Mechanism*, 2009, Page 7, retrieved 4<sup>th</sup> April, 2010  
<http://www.u4.no/helpdesk/helpdesk/query.cfm?id=204>

<sup>32</sup> Ibid, Page 8

<sup>33</sup> Ibid

<sup>34</sup> Ibid

<sup>35</sup> Ibid

<sup>36</sup> Ibid

six months after the heads of states and governments of countries participating in APRM have dealt with the report it is made public by presenting it to the Pan-African parliament. The state reviewed will be encouraged to rectify identified shortcomings and will receive assistance from other participating states, who will urge other governments and donor agencies to assist the country reviewed.<sup>37</sup> The APRM process will promote the development of best practices in the four areas within its scope. This would stimulate the realisation of socio-economic rights and reduce poverty. The APRM mechanism is not designed to punish states, but to support gradual realisation of the set objectives through co-operation and dialogue.

### **3.1 Relationship between NEPAD and the African Union**

As mentioned earlier, the AU adopted as its developmental framework, the New Partnership for Africa's Development (NEPAD). There are Heads of states and governments of AU countries as well as officials of the AU actively involved in implementing NEPAD. For example, NEPAD Heads of State Implementation Committee (HISC) report annually to the African Union Summit. The Chair of the African Union as well as the Chair of the Commission of the African Union are ex-officio members of the Implementation Committee (HISC). The AU Commission is expected to participate in NEPAD's Steering Committee meetings. The Steering Committee is composed of the personal representatives of the five initiating Presidents, and is tasked with the development of the terms of reference for identified programmes and projects, as well as overseeing the Secretariat.<sup>38</sup> According to Awasom, NEPAD cannot be seen as competing with the African Union. He contends that NEPAD provides the focal point and the overall strategic framework for engagement and does not seek to replace or compete with existing initiatives and programmes within the African Union. He concludes that NEPAD attempts to establish linkages and synergies between AU activities and it is expected that all activities focused on Africa can be pursued in an integrated and coordinated manner.<sup>39</sup> The APRM is not the only African protecting human rights enforcement mechanism; There is also the African Commission on Human and Peoples' Rights (the African Commission), which is arguably the most effective regional human rights protection mechanism in Africa.

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<sup>37</sup> Ibid

<sup>38</sup> Department for International Affairs and Co-operation, Republic Of South Africa, *An overview of NEPAD*, retrieved 8<sup>th</sup> September, 2008, [www.dfa.gov.za/au.nepad/nepad\\_overview.htm](http://www.dfa.gov.za/au.nepad/nepad_overview.htm)

<sup>39</sup> F Awasom., *NEPAD AND AU: Prospects of Strengthening the Synergies*, Report of the Joint CODESRIA/DPMF Conference on the theme: "The African Union and New Strategies for Development in Africa" 26<sup>th</sup>-28<sup>th</sup> January 2004, UNECA Conference Centre, Addis Ababa, Ethiopia, 2004, Page 4, retrieved 8<sup>th</sup> September 2007, <http://www.codesria.org/Links/conferences/dpmf/awasom.pdf>

The African Commission was not involved in the drafting of the NEPAD. However now that the NEPAD and the APRM have been implemented, the major challenge is how to build a sustainable partnership with the African Commission and the other AU bodies monitoring human rights on the continent. In this regard, state reports to the African Commission could be used by the APRM. The recommendations of the African Commission may also be incorporated into the APRM recommendations and the findings and reports from the Commission's Special Rapporteurs could be of a great help to the APRM process. So far, there is no formal relationship between the NEPAD and APRM structures and the African Commission.<sup>40</sup>

The following section will now examine the main human rights instrument of the African Human Rights System, the African Charter on Human and Peoples' Rights.

#### **4 The African Charter on Human and Peoples' Rights (African Charter)**

The above discussions have been centred on the structure of the African Union and its NEPAD programme, which can impact positively on the realisation of socio-economic rights and poverty reduction. However, the main regional human rights treaty protecting socio-economic rights in Africa remains the African Charter. This section reviews the African Charter.

The African Charter was adopted on 27<sup>th</sup> of June 1981 by the OAU (now AU) and entered into force on 21st October 1986. As earlier stated, it has been ratified by all 53 members of the African Union. The African Charter was adopted because of the appalling human rights abuse in some African states.<sup>41</sup> For example, President Julius Nyerere of Tanzania justified his invasion of Uganda on the grounds of the appalling human rights record of Idi Amin.<sup>42</sup> As a result of the appalling human rights abuses in some African states at the time, there was agreement amongst African leaders on the need to draw up a Charter on human rights.<sup>43</sup> The Secretary –General of O.A.U (now A.U) was requested to convene a committee of experts to draft a charter on human and people's rights.<sup>44</sup> The Secretary –General emphasized to the committee of experts the need to take cognizance of the African concept of human rights in

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<sup>40</sup> Danish Institute for Human Rights, *African Human Rights Complaints Handling Mechanisms A Descriptive Analysis*, 2008, Page 95, retrieved 8<sup>th</sup> August, 2009, [http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/Dokumenter%20til%20Nyhedsarkiv/African\\_HR\\_Complaints\\_Handling\\_Mechanisms.pdf](http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/Dokumenter%20til%20Nyhedsarkiv/African_HR_Complaints_Handling_Mechanisms.pdf)

<sup>41</sup> O Olusola & S Amadu, 'O.A.U and Human Rights: Prospects for the 1980s and Beyond', *Human Right Quarterly*, Volume 8, Issue 1, 1986, Page 93

<sup>42</sup> Ibid, Idi Amin Dada (c.1925 – 16 August 2003) was the military dictator and President of Uganda from 1971 to 1979

<sup>43</sup> Ibid, Page 94

<sup>44</sup> Ibid

drafting the Charter.<sup>45</sup> According to Okere, in formulating rights and correlative duties under the African Charter, the drafters were obviously guided by the universalist vocation and naturalist principles which underlie human rights. However, he concludes that the Charter has specific characteristics inspired by Africa's colonial history, philosophy of law and concept of man.<sup>46</sup>

The rights guaranteed by the Charter are enforceable. The Charter makes provision for an African Commission on Human and People's Rights and vests it with the power to hear complaints patterning to violations of human rights contained in the Charter.<sup>47</sup> Similarly, the Protocol to the African Charter on the establishment of an African Court of Human and People Rights is in force and the court is also empowered to hear matters patterning to violations of the human rights in the Charter.

The African Charter is divided into four parts, namely Human and Peoples' Rights, Duties, Procedures of the Commission and Applicable principles. The African Charter makes provision for socio-economic rights, civil and political rights as well as solidarity rights in one document. It also recognises duties as well as rights and codifies group rights as well as individual rights. The scope of the socio-economic rights in the Charter is not defined. However, the Commission on Human and Peoples' Rights has tried to remedy this by broadening the scope and bridging the gaps in the vagueness of the rights to property, work, health, education and culture guaranteed under the Charter. The African Charter omits some important individual socio-economic rights guaranteed under the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>48</sup> These are the right to rest, reasonable limitation of working hours, periodic holidays with pay and remuneration for public holidays (Art 7(d) ICESCR), trade union rights (Art 8I CESCR), right to social security (Art 9(b) ICESCR), the right to adequate standard of living including adequate food, clothing, housing, and continued improvement of living conditions (Art 11 ICESCR); and the prohibition of forced labour.<sup>49</sup> These omissions are however, remedied to some extent, by the African Commission which provides in its guidelines for National Periodic Reports (1989), that states should provide information on the rights to rest, limitation of working hours and holidays with pay, trade union rights and the right to social security.<sup>50</sup>

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<sup>45</sup> Ibid

<sup>46</sup> O Okere, 'Protection of Human Rights in Africa and the African Charter on Human and People's Rights: A Comparative Analysis with the European and American Systems', *Human Right Quarterly*, Volume 6, Number 2, 1984, Page 141

<sup>47</sup> Article 45, African Charter on Human and People's Rights

<sup>48</sup> M Baderin & R McCorquodale (Ed), *Economic, Social and Cultural Rights In Action*, Oxford University Press, Oxford 2007, Page 142

<sup>49</sup> Ibid

<sup>50</sup> Ibid, Page 143

The duties recognised under the African Charter have also been criticised. For example, Donnelly contends that totalitarian states, frequently used duties to abrogate individual rights<sup>51</sup>. On the other hand, Mutua argues that the duties to the state enshrined in the African Charter are inspired by the continent's history of domination and occupation by outside powers.<sup>52</sup> According to Mutua, these duties to the state represent an extension of the principle of self-determination by demanding citizen loyalty as a shield against foreign exploitation.<sup>53</sup> He further argues that the duty to place one's intellectual abilities at the service of the state is a legitimate state interest, for 'brain drain' has robbed Africa of massive intellect.<sup>54</sup> The African Charter asks individuals to promote African unity, an essential role, given arbitrary balkanization by the colonial powers and the ethnic animosities fostered within and between the imposed states.<sup>55</sup> Mutua concludes that the duty to the family is informed by the fact that the care of the aged and needy falls squarely on family and community members. This requirement, a necessity today has its roots in the past. In the past it was unthinkable to abandon a parent or relative in need.<sup>56</sup>

The African Charter contains "claw back" clauses. Claw back clauses are qualifications or limitations.<sup>57</sup> They include clauses like "except for reasons and conditions previously laid down by law," "subject to law and order," "within the law," "abides by the law," "in accordance with the provisions of the law," and other restrictions justified for the protection of national security.<sup>58</sup> Claw back clauses permit state parties to a treaty such as the African Charter to break its obligations under a treaty for public reasons. These public reasons may include collective security, public morality or common interest. Therefore, in order to protect public security, public morality or common interest, a state can legitimately limit individual rights.

The role of claw back clauses contained in the African Charter should therefore be assessed bearing in mind that the ultimate aim of protecting the rights and freedoms of people within state parties to the African Charter.<sup>59</sup> It should be noted that the role of the limitation clauses in the African Charter is to reconcile the exercise of individual rights with community

<sup>51</sup> J Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press, New York, 1989, Pages 55-57.

<sup>52</sup> M Mutua, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties', *Virginia Journal of International Law*, Volume 35, 1995 Page, 372

<sup>53</sup> Ibid

<sup>54</sup> Ibid

<sup>55</sup> Ibid

<sup>56</sup> Ibid

<sup>57</sup> M Mutua, *The African Human Rights System: A Critical Evaluation*, 2000, Page 6, retrieved 14<sup>th</sup> December, 2008, [hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf](http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf)

<sup>58</sup> Ibid

<sup>59</sup> F Ouguergouz, *The African Charter on Human and People's Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, Martinus Nijhoff, Leiden, 2003, Page 432

or common interests.<sup>60</sup> Therefore, it would be contrary to the object and purpose of the African Charter to place limitations on the rights contained in the African Charter not necessary for the common interest concerned.<sup>61</sup> Ouguergouz, concludes that in interpreting claw back clauses, freedom must be the rule and limitation the exception.<sup>62</sup> The African Commission adopts this approach. It held in *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*,<sup>63</sup> that the only legitimate reasons for limitation under the Charter are found in Article 27(2).<sup>64</sup> The Commission concluded that the justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow.

Similarly, in *Legal Resources Foundation v. Zambia*,<sup>65</sup> the Commission stated that no State Party to the Charter should avoid its responsibilities by recourse to the limitations and "claw-back" clauses in the Charter. The Commission further stated the Charter cannot be used to justify violations of sections of it. The Commission concluded that the Charter must be interpreted holistically and all clauses must reinforce each other. Therefore, the purpose or effect of any limitation should be examined, as the limitation of rights contained in the Charter, can be used to subvert rights already enjoyed. An examination of the jurisprudence of the Commission reveals that four conditions must be met before the Commission can invoke a claw back clause limiting a right set out in the Charter<sup>66</sup>. These conditions are: (a) limitations shall be exercised with due regard to the rights of others, collective security, morality and common interest; (b) the justification for limitations must be strictly proportionate with and absolutely necessary for the purposes that follow; (c) a limitation may not erode a right such that the right itself becomes illusory; (d) limitations must be consistent with the obligations of state parties under the Charter.

Lindholt contends that the African Charter enjoys a large number of ratifications because the obligations are such that the Charter poses no serious threat to the autonomy of its member states.<sup>67</sup> She further contends that, for example, the enforcement mechanism is weak, claw back clauses may reduce the obligations inherent in the provisions and the provision for

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<sup>60</sup> Ibid

<sup>61</sup> Ibid, Page 433

<sup>62</sup> Ibid

<sup>63</sup> Communications 140/94, 141/94 & 145/95, Constitutional Right Project, Civil Liberties Organisation and Media Rights Organisation/Nigeria, 13<sup>th</sup> Activity Report of the OAU, 1999-2000, Paragraph 36

<sup>64</sup> The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

<sup>65</sup> Legal Resources Foundation v/ Zambia, No. 211/98 (2001)

<sup>66</sup> C Odinkalu, 'The role of the case and complaints procedures in the reform of the African regional human rights system', *African Human Rights Law Journal*, Volume 1, Number 2, 2001, Page 242

<sup>67</sup> L Lindholt, 'The African Charter: Contextual Universality', in Hastrup, K., (Ed), *Human Rights on Common Grounds: The Quest for Universality*, Martinus Nijhoff Publishers, Leiden, 2001, Page 136

individual duties contained in the Charter may neutralise the exercise of the rights and freedom contained in the Charter.<sup>68</sup> She concludes that the African Charter's vagueness or force can be seen as an indicator on how African States stand on issues addressed in the Charter at the time of its conception. Such an approach does not sell out all the ideas of human rights but tempers them with the necessary degree of realism, which may in the end provide the best foundation for their fulfilment.<sup>69</sup>

After examining the Charter, it is necessary to examine how main institution of the Charter that supports the realisation of socio-economic rights functions. Therefore, the next five sections focus on the African Commission on Human and Peoples' Rights. The sections are as follows, the African Commission on Human and Peoples' Rights, challenges faced by the Commission, the jurisprudence of the African Commission on socio-economic rights, the African Commission's approach to remedies and the African Commission's efforts at promoting socio-economic rights.

## **5. The African Commission on Human and Peoples' Rights**

The African Charter makes provision for an African Commission on Human and Peoples' Rights (The Commission).<sup>70</sup> The Commission is funded by the African Union.<sup>71</sup> The Commission was inaugurated on November 2, 1987 and consists of eleven members, each elected for six years. Although members of the Commission serve in their personal capacity,<sup>72</sup> the Secretary-General of the African Union invites state parties to the African Charter to nominate candidates to be elected to the Commission.<sup>73</sup> The members of the Commission are elected by secret ballot by the Assembly of Heads of State and Government<sup>74</sup> and the Commission shall not include more than one national of the same state.<sup>75</sup> The Commission has three primary functions namely, to promote, protect and interpret the provisions of the African Charter.<sup>76</sup> It may also carry out other functions, as assigned by the African Union. In promoting human rights, the Commission may undertake studies and research, organise seminars and symposia, disseminate information, make

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<sup>68</sup> Ibid

<sup>69</sup> Ibid

<sup>70</sup> Article 30, African Charter on Human and Peoples' Rights

<sup>71</sup> The African Union, *10th ordinary session 25-26 January 2007 in Addis Ababa*, retrieved 26<sup>th</sup> February 2009, [http://www.issafrica.org/dynamic/administration/file\\_manager/file\\_links/AUECDECJAN07.PDF](http://www.issafrica.org/dynamic/administration/file_manager/file_links/AUECDECJAN07.PDF)

<sup>72</sup> Article 31(2) of the African Charter

<sup>73</sup> Article 35 of the African Charter

<sup>74</sup> Article 33 of the African Charter

<sup>75</sup> Article 32 of the African Charter

<sup>76</sup> Article 45 African Charter on Human and Peoples' Rights

recommendations to governments, and encourage national and international human rights institutions.<sup>77</sup>

Under its protective mandate the commission receives “communication” (complaints) of human rights violations from state parties, individuals and non-governmental organizations.<sup>78</sup> With regard to inter-state communications there has so far been only one communication submitted to the Commission.<sup>79</sup> The interpretative function of the Commission empowers the Commission to interpret the provisions of the African Charter, if required by a state party, an institution of the African Union or an organization recognised by the African Union.<sup>80</sup> Till date, there is no record of any state, organisation or institution that has requested for the interpretation of the scope of rights contained in the African Charter.<sup>81</sup> Despite the fact that the Commission can receive complaints from state parties, individuals and non-governmental organisations, the number of socio-economic rights cases that have come before the Commission is negligible given that Africa is affected by massive violations of socio-economic rights.<sup>82</sup> The condition for considering a communication by the Commission is set out in Article 56 of the African Charter. Firstly, the name of the author of the communication must be indicated (even if anonymity is requested).<sup>83</sup> Secondly, the communication shall be “compatible with the Charter of the Organization of African Unity” [now the Constitutive Act of the AU].<sup>84</sup> Thirdly, the communication may not be “written in disparaging or insulting language directed against the state concerned and its institutions” or the AU.<sup>85</sup> Fourthly, a communication must not be based exclusively on information from the mass media.<sup>86</sup> Fifthly, a communication must not be submitted prior to “exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.”<sup>87</sup> The sixth condition is that communications shall be submitted “within a reasonable period from the time local remedies are exhausted”<sup>88</sup> and the seventh condition is that a communication may not “deal with cases which have been settled by the states involved in accordance with the principles of the

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<sup>77</sup> Article 25, African Charter on Human and Peoples’ Rights

<sup>78</sup> Articles 47 and 55, African Charter on Human and Peoples’ Rights

<sup>79</sup> M Baderin & R McCorquodale (Ed) ,*Economic, Social and Cultural Rights In Action*, Oxford University Press ,Oxford, 2007, Page 149

<sup>80</sup> Article 45 (3), African Charter on Human and Peoples’ Rights

<sup>81</sup> M Baderin & R McCorquodale (Ed) ,*Economic, Social and Cultural Rights In Action*, Oxford University Press ,Oxford, 2007, Page 148

<sup>82</sup> J Oloka-Onyango, ‘Beyond the Rhetoric: Reinvigorating the Struggle for Economic, Social and Cultural Rights in Africa’, *California Western International Law Journal*, Volume 26(1995), Page 2

<sup>83</sup> Article 5(1)

<sup>84</sup> Article 5(2)

<sup>85</sup> Article 5(3)

<sup>86</sup> Article 5(4)

<sup>87</sup> Article 5(5)

<sup>88</sup> Article 5(6)

Charter of the United Nations, or the Charter of the Organisation of African Unity” (now the Constitutive Act of the AU).<sup>89</sup>

The African Commission in accordance with Article 60 of the African Charter draws inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organisation of the African Union, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights. It further draws inspiration from the provisions of various instruments adopted within the specialised Agencies of the United Nations of which the parties to the present Charter are members. The Commission may draw inspiration from other human rights instruments, but all cases must be decided with reference to the African Charter.

Article 42(2) states that the Commission will lay down its own rules of procedure. Based on this and in accordance with rule 28 of the 1995 Rules of Procedure, the Commission has established Working Groups on (i) Specific Issues related to the work of the African Commission; (ii) Indigenous Populations/ Communities in Africa; (ii) Economic, Social and Cultural Rights in Africa; (iii) the Robben Island Guidelines; and (iv) Death Penalty in Africa. The Commission has also appointed Special Rapporteurs on (i) Prisons and Conditions of Detention in Africa; (ii) Rights of Women in Africa; (iii) Freedom of Expression in Africa; (iv) Human Rights Defenders in Africa; (v) Refugees, Asylum Seekers, Migrants and Internally Displaced Persons in Africa; and (vi) Summary, Arbitrary and Extra-Judicial Executions in Africa. Article 58 provides that the Commission shall initially look into whether one or more communications “reveal the existence of a series of serious or massive violations of human and peoples’ rights”. If this is the case, the Commission shall inform the AU Assembly, which can then request the Commission “to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations”. The Commission’s Information Sheet no. 2 (Guidelines to the Submission of Communications states that “the practice of the Commission has been to consider every communication even if it refers to only a single violation of the Charter. The rationale behind this practice is that a single violation still violates the dignity of the victim and is an affront to international human rights norms. The complaint procedure before the African Commission has done very little in protecting individual complaints of violations of

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<sup>89</sup> Article 5(7)

socio-economic rights in Africa, because in practice the Commission's role is limited to pronouncing on allegations of violations of human rights protected by the African Charter.<sup>90</sup> The process usually starts too late, takes too much time, does not lead to a binding result and lacks effective enforcement.<sup>91</sup>

#### **6. Challenges faced by the Commission:**

The challenges faced by the Commission are not only specific to the Commission's mandate to promote and protect socio-economic rights; they also affect the Commission's ability to carry out its functions. The Commission lacks resources and this limits the ability of the Commission to function as an effective human rights institution. This challenge has been mentioned in several AU Assembly resolutions and decisions. In a resolution of the AU Assembly from the 25th ordinary session in Addis Ababa, 24-26 July 1989, the AU Assembly requested that the Secretary-General, "in collaboration with the Advisory Committee on Administrative, Budgetary and Financial Matters find, prior to the next financial year, appropriate solutions to the budgetary, financial and personnel problems raised by the African Commission on Human and Peoples' Rights."<sup>92</sup> Similarly, the Commission stated in its 20th activity report, covering the period January-June 2006, that "the work of the Secretariat of the African Commission continues to be severely compromised due to lack of funding even for its staffing requirements." The report noted that the African Commission continues to depend more on extra budgetary resources than on the AU for funding. The report further noted that notwithstanding the extra-budgetary resources, the staffing situation still remains inadequate, given the increasing workload of the African Commission. The report concluded that there is an urgent need to recruit more staff of all categories to ensure the smooth running of the Commission.<sup>93</sup> However this challenge is being addressed by the AU Executive Council, who has authorised the Commission to "beginning from 2008 financial year, to present and defend before the Permanent Representative Committee (PRC) its annual budget independently from the budget of the Political Affairs Department."<sup>94</sup>

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<sup>90</sup> N Udombana, *The African Human Rights Court, Modelling Its Structure of Procedure*, Danish Centre for Human Rights, Copenhagen, 2002, Page 19, retrieved 19<sup>th</sup> June, 2008, [http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/udombana\\_-\\_african\\_human\\_rights\\_court.pdf](http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/udombana_-_african_human_rights_court.pdf)

<sup>91</sup> Ibid

<sup>92</sup> African Union, 28th ordinary session of the AU Assembly in Dakar, 29 June-1 July 1992; 30th ordinary session in Tunis, Tunisia, 13-15 June 1994; 31st ordinary session in Addis Ababa 26-28 June 1995; 32nd ordinary session in Yaounde, Cameroon, 8-10

<sup>93</sup> African Commission on Human and Peoples' Rights, *20th activity report of the African Commission*, retrieved 26<sup>th</sup> February 2009, [www.achpr.org/english/activity\\_reports/20th%20Activity%20Report.pdf](http://www.achpr.org/english/activity_reports/20th%20Activity%20Report.pdf)

<sup>94</sup> African Union, *10th ordinary session 25-26 January 2007 in Addis Ababa*, , retrieved 26<sup>th</sup> February 2009, [http://www.issafrica.org/dynamic/administration/file\\_manager/file\\_links/AUECDECJAN07.PDF](http://www.issafrica.org/dynamic/administration/file_manager/file_links/AUECDECJAN07.PDF)

Hopefully, the fact that the Commission shall prepare its own budget from 2008 should improve its funding from AU.

Another challenge that the Commission faced in the past was the quality and independence of its commissioners, since some commissioners have been serving government officials in their home states. According to Article 31 of the Charter, the Commission shall consist of 11 members who shall serve in their personal capacity. The Commissioners shall be “chosen amongst African personalities of the highest reputation, known for their morality, integrity, impartiality and competence in matters of human and peoples’ rights; particular consideration being given to persons having legal experience.” The Charter makes no other requirement for membership of the Commission. In a *Note Verbale* to the ministers of foreign affairs of member states, the AU Commission requested member states to ask nominees to provide information on their judicial, practical, academic, activist, professional and other experience in the field of human and peoples’ rights. The AU Commission also proposed that nominees be asked to submit statements indicating how they fulfil the criteria for eligibility contained in the Charter.<sup>95</sup> Similarly, The Kigali Declaration, adopted by the AU Ministerial Conference on Human Rights in Africa on 8th May 2003, called upon AU Policy organs to review the operation and composition of the African Commission on Human and Peoples’ Rights with a view to strengthening its independence and operational integrity and ensuring appropriate gender representation and to report on the progress made to the appropriate AU Organs as soon as possible.<sup>96</sup> The present composition of the Commission reflects the above stated principles.

Another challenge to the effective functioning of the Commission is the provision of *Article 59(1)* of the African Charter. It provides that, “All measures taken within the provisions of the present chapter shall remain confidential until such a time as the Assembly of Heads of States and Governments shall decide otherwise”. This confidentiality clause casts doubts on the transparency of the work of the Commission. Under the Charter, state parties are required to submit every two years from the date the Charter came into force, a report on the legislative and other measures they have taken with a view to giving effect to the rights and freedoms guaranteed by the African Charter.<sup>97</sup> Murray<sup>98</sup> contends that the procedure by

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<sup>95</sup> African Union, the 11th ordinary session of the AU Executive Council 28-29 June 2007 in Accra, Ghana.

<sup>96</sup> The 1st African Union (AU) Ministerial Conference on Human Rights in Africa meeting on 8 May 2003 in Kigali, Rwanda, *Kigali Declaration*, retrieved 26<sup>th</sup> February 2009, [http://www.africaunion.org/Structure\\_of\\_the\\_Commission/Political%20Affairs/x/KIGALI%20DECLARATION%20as%20adopted%20in%20Kigali.pdf](http://www.africaunion.org/Structure_of_the_Commission/Political%20Affairs/x/KIGALI%20DECLARATION%20as%20adopted%20in%20Kigali.pdf)

<sup>97</sup> Article 62, African Charter on Human and Peoples’ Rights.

<sup>98</sup> R. Murray, ‘The African Charter on Human Rights and Peoples’ Rights 1987 - 2000: An overview of its progress and problems’, *African Human Rights Journal*, Volume 1, No 1, 2001, Page 11

which the reports are examined could be improved. She states that state's parties are invited to send a representative to the session, where questions are posed by Commissioners, but the Commissioners don't probe for answers from state representatives, if none is given. The effect of this weak monitoring procedure is that the Commission does not really monitor the on-going human rights situation in states through this mechanism.<sup>99</sup> Mugwanya<sup>100</sup> contends that the African Commission does not issue concluding comments or a concluding evaluation of state reports. He further contends that individual commissioners express views in the course of examining state reports but no uniform position is taken by the Commission on the various issues raised. Therefore, the Commission does not adequately advise state parties on how to improve their human rights situations. He concludes that if at the end of examining each state report; concluding comments and recommendations are made in respect of areas for improvement, then when the Commission next considers a report of that country, these comments and recommendations could provide the basis upon which to evaluate a state's efforts, if any, to improve its human rights record.<sup>101</sup>

Other challenges include the fact that there are no detailed records of debates and decisions reached at the sessions.<sup>102</sup> The final communiqué produced does not give detailed accounts of debates and decisions and as a result some point raised during the session may not be noted.<sup>103</sup> There also does not appear to be any follow-up or supervisory function under-taken by the AU organs.<sup>104</sup>

A proper follow-up mechanism needs to be adopted by the Commission. This follow-up mechanism may be adopted within the structure of the Commission.<sup>105</sup> While the Commission's practice of making recommendations has improved, the Commission has not always specified clearly its recommended remedies.<sup>106</sup> The most common formulation at the conclusion of decisions is the 'urging' of states to 'draw the necessary legal conclusions' (*Avocats Sans Frontiers (on behalf of Bwampamye) v Burundi*)<sup>107</sup> or 'take the necessary steps'

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<sup>99</sup> Ibid

<sup>100</sup> G Mugwanya, 'Examination of state reports by the African Commission: A critical Appraisal', *African Human Rights Journal*, Volume 1 No2, at 268, 2001, Page 278

<sup>101</sup> Ibid, Page 284

<sup>102</sup> R Murray, 'The African Charter on Human Rights and Peoples' Rights 1987 - 2000: An overview of its progress and problems', *African Human Rights Journal*, Volume 1 No 1 2001, Page 8

<sup>103</sup> Ibid

<sup>104</sup> Ibid, Page 9

<sup>105</sup> G Wachira, & A Ayinla, 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy', *African Human Rights Journal*, Volume 6, No. 2, 2006, Page 476

<sup>106</sup> Ibid, also see C Odinkalu, 'The role of the case and complaints procedures in the reform of the African regional human rights system', *African Human Rights Law Journal*, Volume 1, No. 2, 2001 Page 242,

<sup>107</sup> Communication 231/99

to bring their practice in conformity with the African Charter.<sup>108</sup> (eg *Abubakar v Ghana*).<sup>109</sup> The African Commission should adopt a standard approach to its findings, specifying the violations, remedies recommended and time limit for implementation.<sup>110</sup> The Commission should also include reports on the status of compliance by states in its activity reports, this report should be submitted to the AU Assembly, which then adopts them in line with article 59 of the African Charter.<sup>111</sup> This would help ensure that the recommendations of the Commission are implemented by the state party concerned.

According to Odinkalu,<sup>112</sup> the understanding and analysis of the African human rights system are often attended by two prominent errors: one is laying on the African Commission, as the sole functioning continental human rights institution, the burden of responsibility for the failings of the state parties to the Charter. The Commission cannot take responsibility for the failure of states to implement its recommendations, decisions or views. The second problem he contends is the unduly legalistic focus on the pan-continental norms and systems to the exclusion of the domestic political, judicial and diplomatic measures required to make human rights meaningful to African peoples. It is thus useful, he concludes, to remember that enforcement in international law is often a function of the political values of states subject to any regime of international obligation and responsibility.

There is general consensus that the African regional system is in need to reform.<sup>113</sup> Reform of the Charter system could take place in a number of ways. It could, for example, involve amendment of the Charter<sup>114</sup> itself, or the African Human Rights Court Protocol,<sup>115</sup> or the Rules of Procedure<sup>116</sup> Odinkalu points out that even if we were to assume that all of the shortcomings of the African regional mechanism are established and founded, they are unlikely to respond to a single, undifferentiated intervention. He concludes that constraints like poor funding, the absence of impartiality, and even ineffectiveness cannot be rectified

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<sup>108</sup> G Wachira & A Ayinla, 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy', *African Human Rights Journal*, Volume 6, No. 2, 2006, Page 476

<sup>109</sup> Communication No. 103/93

<sup>110</sup> G Wachira & A Ayinla, 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy', *African Human Rights Journal*, Volume 6, No. 2, 2006, Page 477.

<sup>111</sup> Ibid

<sup>112</sup> C Odinkalu, 'The role of the case and complaints procedures in the reform of the African regional human rights system', *African Human Rights Law Journal*, Volume 1, No. 2, 2001, Page 228.

<sup>113</sup> See Generally, C Heyns, 'The African regional human rights system: In need of reform?'

Volume 1, No 2, 2001 *African Human Rights Law Journal*; K Acheampong, 'Reforming the substance of the African Charter on Human and Peoples' Rights: Civil and political rights and socio-economic rights', Volume 1, No 2, 2001, *African Human Rights Law Journal*; C Odinkalu, 'The role of the case and complaints procedures in the reform of the African regional human rights system', Volume 2, No. 1, 2001 *African Human Rights Law Journal*.

<sup>114</sup> Art 68 of the Charter provides that amendments to the Charter need to be approved by a majority of state parties.

<sup>115</sup> Art 35 of the Protocol provides that the Assembly has to approve amendments to the Protocol by a simple majority.

<sup>116</sup> Rules 121 & 122 (Rules of Procedure of the African Commission) provides that the Commission can change its own rules.

with a treaty-based response or reform. Some of the challenges faced by the African regional human rights system, such as submitting state reports, require political will to overcome.<sup>117</sup>

## **7. The Jurisprudence of the African Commission on Socio-Economic Rights**

The two preceding sections examined the African Commission and the challenges the Commission faces in functioning as an effective institution that promotes and protects human rights. The following section examines some socio-economic right cases that have come before the African Commission in order to determine how the Commission has approached the protection of socio-economic rights. Violations of socio-economic rights as well as civil and political rights can be a cause, a consequence or a constitutive element of poverty. The African Commission on Human and Peoples' Rights has elaborated on several socio-economic rights contained in the African Charter. In the process, the African Commission has defined the scope of the rights as well as the nature of state obligation attached to the rights. In most cases, these decisions have impacted favourably on the realisation of socio-economic rights and upheld the principles of rights based approaches to poverty reduction.

### **7.1 Right to Health**

The right of access to physical and mental health care is recognised by Article 16 of the African Charter. In practice most people in Africa do not have access to basic health care and cannot afford essential medicines. However, in *Purohit and Moore v The Gambia*<sup>118</sup> the African Commission established that state parties should pay special attention to people with mental health disability in order to enable them realise their full potential. In this case, the Commission elaborated extensively on the substantive content of the right to health under Article 16 of the African Charter. The African Commission stated that it is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable of providing the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, as a result of this depressing but real state of affairs, the African Commission read into Article 16 an obligation on part of state parties to the African Charter to take concrete and targeted steps to reach human rights goals, while taking full advantage of its available resources to ensure that the right to health is fully realised in all its aspects without discrimination of any kind. This appears to limit the obligation of state

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<sup>117</sup> C Odinkalu, 'The role of the case and complaints procedures in the reform of the African regional human rights system', (2001) *African Human Rights Law Journal*, Volume 1, No. 2, 2001, Page 233.

<sup>118</sup> Communication No. 241/2001

parties to progressively realize the right to health and do no more than its maximum available resources permits even though there is no such qualification in the text of Article 16.<sup>119</sup> This is a significant weakening of the obligation imposed on states under Article 16(2) of the African Charter.<sup>120</sup> The fact that the Commission did not clearly specify the details of this exception to a state's general obligations under the Charter gives room for further development of jurisprudence in this area.

In the above case, the complainants alleged that the legislative regime in the Gambia for mental health patients violated the right to enjoy the best attainable state of physical and mental health (Article 16) and the right of the disabled to special measures of protection in keeping with their physical and moral needs (Article 18(4)). Both rights are guaranteed in the African Charter on Human and Peoples' Rights. They also alleged a violation of Articles 2,<sup>121</sup> 3,<sup>122</sup> 5,<sup>123</sup> 7(1)(a) and (c),<sup>124</sup> 13(1)<sup>125</sup> of the Charter. The Commission held that Gambia fell short of satisfying the requirements of Articles 16 and 18(4) of the African Charter. The Commission stated that the enjoyment of the right to health is crucial to the realisation of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind. The Commission iterated that mental health patients should be accorded special treatment to enable them to attain and sustain their optimum level of independence and performance. This would be consistent with Article 18(4)<sup>126</sup> and the standards outlined in the UN Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care.

The Commission stated that Articles 2<sup>127</sup> and 3<sup>128</sup> of the African Charter basically form the anti-discrimination and equal protection provisions of the African Charter. Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while Article 3 is important because it guarantees fair and just treatment of individuals within the legal system of a given state party.

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<sup>119</sup> Analysis of *Purohit and Moore v. The Gambia*, retrieved 6<sup>th</sup> December 2008, <http://www.escri-net.org/caselaw/caselaw>

<sup>120</sup> Ibid

<sup>121</sup> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

<sup>122</sup> 1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law.

<sup>123</sup> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

<sup>124</sup> The right to defence, including the right to be defended by counsel of his choice

<sup>125</sup> Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

<sup>126</sup> The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

<sup>127</sup> See 121 above

<sup>128</sup> See 122 above

These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided under the African Charter. The Commission further stated that it is willing to accept legal arguments with the support of appropriate and relevant international and regional human rights instruments, principles, norms and standards taking into account the well recognised principle of universality which was established by the Vienna Declaration and Programme of Action of 1993 and which declares that “all human rights are universal, indivisible, interdependent, and interrelated.” The Commission urged the Government of The Gambia to -: (a) Repeal the Lunatics Detention Act and replace it with a new legislative regime for mental health in The Gambia compatible with the African Charter on Human and Peoples’ Rights and International Standards and Norms for the protection of mentally ill or disabled persons as soon as possible; (b) Pending (a), create an expert body to review the cases of all persons detained under the Lunatics Detention Act and make appropriate recommendations for their treatment or release; (c) Provide adequate medical and material care for persons suffering from mental health problems in the territory of The Gambia.

Clearly this decision impacts favourably on the realisation of socio-economic rights and the material needs of those with mental disability in the Gambia. The enactment of a new mental health legislation compatible with the African Charter on Human and Peoples’ Rights and International Standards and Norms for the protection of mentally ill or disabled persons will ensure that the socio-economic rights of the mental ill in the Gambia is protected in a right based manner. This decision upholds the fact that all human rights are universal, indivisible, interdependent and interrelated. It also establishes that the rights to non- discrimination and equality as provided by Articles 2 and 3 of the African Charter are non-derogable and must be respected in all circumstances in order for anyone to enjoy all the other rights provided under the African Charter.

With regard to right based approach to poverty reduction, this decision upholds the principles of non-discrimination, universal/indivisible, interdependent/interrelated and paying attention to the needs of vulnerable people, in this case, the patients with mental health disability. As a result of this decision, the Gambian government drafted a mental health policy and new mental health legislation.<sup>129</sup>

The right to enjoy the best attainable state of physical and mental health may be violated by polluting the environment. In many developing countries such as Nigeria, the activities of

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<sup>129</sup> Analysis of *Purohit and Moore v. The Gambia*, retrieved 6<sup>th</sup> December 2008, <http://www.escri-net.org/caselaw/caselaw>

transnational corporations and other organisations involved in extracting natural resources are poorly regulated. Their activities pollute the environment and violate the health rights of many rural poor people, as well as several other socio-economic rights such as the rights to water and livelihood. For example, in *SERAC v Nigeria*,<sup>130</sup> The rural communities in Ogoni land (Nigeria) contended that the Nigerian National Petroleum Corporation and Shell Development Corporation had been exploiting oil reserves in their communities with no regard for the environment or the health of the community.<sup>131</sup> They alleged that toxic wastes were deposited in their communities, and there were no facilities put in place to prevent the wastes from spilling into the villages and as a result soil and water in their communities were contaminated leading to health problems, such as skin infections, cancer, respiratory and reproductive complications.<sup>132</sup> They also claimed that they lost their farm land and fresh water for fishing and drinking. They further alleged that the Nigerian government condoned and aided the activities of the oil companies by using legal and military power to protect the companies.<sup>133</sup>

In spite of failure to exhaust domestic remedies, the Commission considered the communication admissible on the grounds that: The communication had alleged multiple atrocities committed by the oil companies; The Nigerian military government had passed decrees ousting the jurisdiction of domestic courts; The Nigerian government had ample notice to remedy the situation, particularly in the light of international attention the Ogoni situation had received. The decision of the Commission in this case is significant because the Commission implied the rights to food and housing/shelter from the right to life, right to health, right to property, right to protection of family and the right to economic, social and cultural development. The Commission therefore, recognises that the rights expressly set out in the Charter are not exhaustive of the rights protected by it. The Commission also fleshed out the negative and positive obligations imposed on states by Articles 16<sup>134</sup>, 24<sup>135</sup> and 21.<sup>136</sup>

<sup>130</sup> Communication No. 55 of 1996

<sup>131</sup> M Chirwa, 'A fresh Commitment to Implementing Economic, Social and Cultural Rights In Africa: Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria', *Economic and Social Review*, Volume 3, No. 2, 2002, Pages 24-27.

<sup>132</sup> Ibid

<sup>133</sup> Ibid

<sup>134</sup> Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

<sup>135</sup> All peoples shall have the right to a general satisfactory environment favourable to their development.

<sup>136</sup> All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law. 4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to

Another significant aspect of this decision is the recognition by the Commission that governments have a duty to protect their citizens from damaging acts that may be perpetrated by private parties and that this duty calls for positive action on part of governments.

In considering the Communication, the Commission stated that all rights impose duties to respect, protect and fulfil and these obligation have both positive and negative dimensions. The Commission further stated that Nigeria had violated the right to health and the right to a clean environment guaranteed by Articles 16 (Right to Health) and 24 (Right to a general satisfactory environment favourable to their development) of the Charter, by failing to protect its citizens from the harm caused by the activities of the oil companies. The Commission stated that: “Compliance with the above rights included undertaking or at the least permitting independent scientific monitoring of threats to the environment, and publishing environmental and social impact duties prior to any major industrial development” This is consistent with paragraph 51 of General Comment 14 of the Committee on Economic, Social and Cultural Rights, which states that violations of the obligation to protect follow from the failure of a state to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties.

The Commission further held that Nigeria had violated the rights to food and shelter, which are not expressly provided in the African Charter. The Commission stated that the right to shelter could be inferred from the totality of the right to enjoy the best attainable standard of mental and physical health, the right to property and right to protection of family. They also stated that the right to food could be inferred from the right to life, right to health and the right to economic, social and cultural development. The position of the African Commission is consistent with paragraph 11 of General Comment 14 of the Committee on Economic, Social and Cultural Rights which states that:

“The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.”

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strengthening African unity and solidarity. 5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

The Commission also found violations of Articles 2,<sup>137</sup> 4,<sup>138</sup> 14,<sup>139</sup> 18(1)<sup>140</sup> and 21<sup>141</sup> of the African Charter. The Commission appealed to the Nigerian Government to ensure protection of the environment, health and livelihood of the Ogoni people by: stopping all attacks on Ogoni communities; conducting an investigation into human rights violations and prosecuting officials of security forces, Nigerian National Petroleum Corporation and relevant agents involved in human rights violations; ensuring adequate compensation to victims of human right violations, including relief and resettlement assistance to victims of government sponsored raids and undertaking a comprehensive cleaning up of lands and rivers damaged by oil operations; ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry. The implementation of these recommendations will help reduce poverty in Niger Delta area of Nigeria.

The Commission also appealed to the Nigerian government to provide information on health and environmental risks as well as meaningful access to regulatory and decision making bodies to communities likely to be affected by oil operations.<sup>142</sup> This will promote principle of accountability under the rights based approach to poverty reduction. Unfortunately, there is no evidence that these recommendations were taken seriously by the Nigerian government.<sup>143</sup>

Good health depends not only on effective health care; it also depends on other factors such as access to safe water, sanitation, food, shelter as well as freedom from discrimination. These elements or core contents of the right to health under Article 16, has been outlined by the resolution on Economic, Social and Cultural Rights in Africa.<sup>144</sup>

Poverty is a social justice issue because it limits the options poor people have to realise their full potential. Poverty also impacts more on vulnerable people within a community or country. Examples of vulnerable people include children, elderly, minorities, prisoners and

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<sup>137</sup> See 121 above

<sup>138</sup> Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

<sup>139</sup> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

<sup>140</sup> The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.

<sup>141</sup> See 136 above

<sup>142</sup> M Chirwa, 'A fresh Commitment to Implementing Economic, Social and Cultural Rights In Africa: Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights v Nigeria', *Economic and Social Review*, Volume 3, No. 2, 2002, Pages 24-27.

<sup>143</sup> Ibid

<sup>144</sup> ACHPR /Res.73 (XXXVI) 04(Pretoria Declaration)

disabled people. The African Commission has made it clear that the health rights of prisoners/detainee need special attention. This is consistent with rights based principle of paying special attention to vulnerable groups. In this case, paying special attention to the health needs of prisoners/detainees. The African Commission affirmed this principle in *Media Rights Agenda*.<sup>145</sup> The adoption of this principle in the national health policies of African states will go a long way in ensuring that the health needs of vulnerable people receive adequate attention. This will also help ensure that people within these vulnerable groups can effectively participate in economic activities and earn a livelihood.

In the above case, the complainant was arrested and detained by the Nigerian authorities. The Constitutional Rights Project alleged that he was not told the reason for his arrest and that no charge were made against him. Furthermore, Constitutional Rights Project alleged that he was denied access to his family, doctors and lawyers and that he received no medical help even though his health was deteriorating. The communications alleged violations of Articles 6,<sup>146</sup> 7,<sup>147</sup> 9,<sup>148</sup> 14<sup>149</sup> and 16<sup>150</sup> of the Charter. The Commission stated that the responsibility of the government is heightened in cases where the individual is in their custody. The Commission further stated that the complainant was therefore someone whose integrity and well-being is completely dependent on the activities of the Nigerian authorities and concluded that to deny the detainee access to doctors while his health was deteriorating is a violation of Article 16 of the African Charter. The position of the African Commission is consistent with paragraph 34 of General Comment 14 made by the Committee on the International Covenant on Economic, Social and Cultural Rights. It states that state parties are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services.

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<sup>145</sup> *Media Rights Agenda and Constitutional Rights project v. Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/96 (1998)

<sup>146</sup> Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

<sup>147</sup> 1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal. 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender

<sup>148</sup> Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.

<sup>149</sup> See 139 above

<sup>150</sup> See 134 above

Similarly in *Malawi African Association and others v Mauritania*,<sup>151</sup> the African Commission upheld the principle of non-discrimination/equality and attention to vulnerable people in the context of the right of access to health care. In this case, five joint communications alleged the existence of slavery and analogous practices in Mauritania and of institutionalized racial discrimination perpetrated by the ruling Moor community (also known as 'Beidanes') against the more populous black community. The communication alleged that black Mauritians were enslaved, routinely evicted or displaced from their lands, which were then confiscated by the government along with their livestock. The communication also alleged that the members of the black community of Mauritania were denied access to employment and were subjected to tedious and unremunerative work. The communication further made allegations about the conditions of detention of people who had been imprisoned for political cause and other reasons.

In finding that the state violated Article 16 of the African Charter, the African Commission stated that "the state's responsibility in the event of detention is even more evident to the extent that detention centres are its exclusive preserve, hence the physical integrity and welfare of detainees is the responsibility of competent public authorities." The Commission stated that the confiscation and looting of the property of black Mauritians and the expropriation or destruction of their land and houses before forcing them to go abroad constituted a violation of the right to property as guaranteed in Article 14 as well as of the right to freedom of movement and residence (Article 12(1)). The Commission also found a violation of Article 2 (the prohibition on discrimination in the enjoyment of Charter rights).

The Commission stated that, in the light of Article 23(3) (the right to just and favourable remuneration) of the Universal Declaration of Human Rights and Article 7 (The right of everyone to the enjoyment of just and favourable conditions of work) of the International Covenant on Economic, Social and Cultural Rights, there had been a violation of Article 5<sup>152</sup> of the Charter due to practices analogous to slavery. The Commission, however, did not conclude that there was a practice of slavery based on the evidences before it. Furthermore, the Commission stated that it had insufficient evidence upon which to determine if there has been a violation of Article 17(2) (the right to partake the cultural life of one's community) in terms of the government denying black groups the right to speak their own languages.

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<sup>151</sup> *Malawi African Association and Others v. Mauritania*, African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000).

<sup>152</sup> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

The Commission illustrated in this decision that acts that violate socio-economic rights (denial of food, health services) also constituted violations of civil and political rights, a clear illustration of the indivisibility and interdependence of human rights. The Commission reference to the Universal Declaration of Human Rights and International Covenant on Economic, Social and Cultural Rights, as well as the emphasis on the 'heightened' responsibility of the state in relation to the right to health in cases where the individual is incarcerated should be noted.

## **7.2 Right to Education:**

The African Commission has determined that closing schools is a retrogressive measure which amounts to a failure to respect the right to education. For example, in *Free Legal Assistance Group v Zaire*,<sup>153</sup> it was alleged that the mismanagement of public finances, the failure to provide basic services, the shortage of medicines and closure of schools and universities was a violation of Articles 16(1)<sup>154</sup> and 17(1)<sup>155</sup> of the African Charter.<sup>156</sup> The applicants also accused the government of torture, arbitrary detention, restrictions of peaceful assembly and suppression of freedom to respond to allegations made against them.

In finding that there was a violation of the right to education, the African Commission stated that the closure of secondary schools and universities violated the right to education under Article 17(1) of the African Charter. They further held that failure to provide basic services such as drinking water, electricity and medicines amounted to a violation of the right to attain the best physical and mental health under Article 16 of the African Charter.<sup>157</sup> The African Commission also found that the government of Zaire (now Democratic Republic of Congo) violated the right to life (Article 4), the prohibition of torture and inhuman or degrading treatment, the right to liberty and security of person (Article 6), the right to have ones cause heard (Article 7) and the right to freedom of conscience, religion and belief (Article 8).<sup>158</sup>

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<sup>153</sup> Communication 25/89

<sup>154</sup> Every individual shall have the right to enjoy the best attainable state of physical and mental health

<sup>155</sup> Every individual shall have the right to education

<sup>156</sup> C Mbazira, 'Enforcing the Economic, Social and Cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides', *African Human Rights Journal*, Volume 6 No 2, 2006,

Page 345

<sup>157</sup> Ibid

<sup>158</sup> Communication 25/89

### 7.3 Freedom from Discrimination:

Non-discrimination and equality are principles of rights based approach to poverty reduction. Discrimination and inequality cause poverty and the universal equality of all constitutes the central institution of human rights. Articles 2 and 3 of the African Charter provide for non-discrimination and equality. While Article 2 specifies the prohibited grounds of discrimination in human rights enjoyment, Article 3 provides for the principle of equality before the law and the equal protection of the law.<sup>159</sup>

The African Commission's decision in *Legal Resources Foundation v. Zambia*,<sup>160</sup> is relevant because it establishes that international treaties impose obligation on African states and that equality or lack of it affects the capacity of a person to enjoy other rights. This case dealt with the rights to non discrimination and equality as provided by Articles 2 and 3 of the African Charter. In the case, the complainant alleged that the Zambian Government had enacted into law, a constitution which is discriminatory, divisive and violates the human rights of 35 percent of the entire population. The Constitution (Amendment) Act of 1996, it was alleged, had not only violated the rights of its citizens, but had also taken away the accrued rights of other citizens, including the first President, Dr. Kenneth Kaunda. The Complainant alleged that the Constitution of Zambia Amendment Act of 1996 provides *inter-alia* that anyone who wants to contest the office of the president has to prove that both parents are/were Zambians by birth or descent.

The Commission stated that in as much as international agreements are not self-executing in Zambia; the government of Zambia should not seek to avoid its international responsibilities in terms of the treaties it is party to. The Commission also stated that international treaties, such as the African Charter which are not part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on state parties. The Commission concluded that equality or lack of it affects the capacity of one to enjoy many other rights. For example, one who bears the burden of disadvantage because of one's place of birth or social origin suffers indignity as a human being. He may vote for others but has limitations when it comes to standing for office. In other words the country may be deprived of the leadership and resourcefulness such a person may bring to national life. The Commission held that the Republic of Zambia is in violation of Articles 2, 3(1) and 13 of the African Charter.

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<sup>159</sup> K Acheampong, 'Reforming the substance of the African Charter on Human and Peoples' Rights: Civil and political rights and socio-economic rights', *African Human Rights Journal*, Volume 1, No 2, 2001, Page195

<sup>160</sup> Communication No. 211/98 (2001)

#### 7.4 Conclusion on the Jurisprudence of the African Commission on Socio-Economic Rights:

According to Mbazira, the approach of the African Commission in making recommendations arising from socio-economic rights complaints has occurred in two stages, the first stage being the ‘redundancy’ stage and the second the ‘progression’ stage. The redundancy stage represents a period when the African Commission seemed either reluctant or unable to give socio-economic rights contained in the African Charter their fullest interpretation.<sup>161</sup> At that stage, most decisions of the Commission just declared that a right had been violated without elaborating on it. At this stage very few complaints invoking socio-economic rights were filed. The redundancy stage also represents the period when there was a high degree of apathy exhibited towards socio-economic rights at the international human rights arena. Subsequently, the Commission began to proclaim socio-economic rights in a more progressive manner. Mbazira contends that the progression stage represents the period when the African Commission began to proclaim socio-economic rights in a more progressive manner.<sup>162</sup> Two decisions in this period also demonstrate a shift from making declaratory statements to giving normative content to some of the socio-economic rights contained in the Charter.<sup>163</sup> These decisions were observed in the cases of *SERAC v Nigeria*<sup>164</sup> and *P v The Gambia*.<sup>165</sup>

The main difference between decisions in the redundancy phase and the progression stage is that, the African Commission seemed to have invested more time on research and writing the decisions, given the quality and content of the decision.<sup>166</sup> Mbazira,<sup>167</sup> concludes that the change in the way the Commission examined petitions brought before was influenced by a number of factors. These factors include the increase in co-operation between the Commission and human rights organisations both within and outside Africa. Non-governmental organisations (NGOs) began to file and prosecute communications in a professional manner.<sup>168</sup> NGOs also started sponsoring interns to provide technical assistance to the Commission as well as pointing out challenges to the realisation of all human rights during ordinary sessions of the Commission. They also made statements and submitted

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<sup>161</sup> C Mbazira, ‘Enforcing the Economic, Social and Cultural rights in the African Charter on Human and Peoples’ Rights: Twenty years of redundancy, progression and significant strides’, *African Human Rights Journal*, Volume 6, No 2, 2006, Page 343

<sup>162</sup> Ibid, Page 347

<sup>163</sup> Ibid

<sup>164</sup> Communication No. 55 of 1996

<sup>165</sup> Communication No. 241/2001

<sup>166</sup> Ibid, Page 348

<sup>167</sup> Ibid

<sup>168</sup> Ibid

research report on human rights issues. All of these factors helped in advancing the normative understanding of the rights in the Charter. Organisations such as the Centre for Human Rights at the University of Pretoria have engaged in high-level research on the African human rights system and also trained students in the field.<sup>169</sup> This has increased academic knowledge and literature on the African system for the protection of human rights.

An examination of some of the cases reviewed in this study, indicate that in remedial terms the Commission goes beyond making declarations of violations of rights, to making comprehensive recommendations of things that have to be done to remedy the violation.<sup>170</sup> For example, recommendations have included the repeal of legislation, investigations to be conducted, those responsible for violations to be prosecuted and compensation paid to those who had suffered violations of their rights.<sup>171</sup> The Commission recommendations have also included the conduct of an environmental and social impact assessment.<sup>172</sup>

These cases demonstrate that recommendations merely asking a state to stop a practice, change a law or policy and/or adopt laws or policies that incorporate the principles of rights based approach to poverty reduction can impact favourably on the realisation of socio-economic rights and poverty reduction. However, the recommendation has to be implemented by the state with the active participation of civil society for it to be effective in reducing poverty. Although some recommendations have asked the state to make material provisions to remedy violations of socio-economic rights, the recommendations have nowhere suggested that individuals have a right to claim "positive", judicially enforceable action and services from the state.

## **8. The African Commission's Approach to Remedies**

Following the examination of the jurisprudence of the African Commission, it is pertinent to examine the approaches taken by the Commission in awarding remedies. The decision of the Commission with respect to a communication is called a recommendation. Recommendations state the Commission's view as to whether a right provided under the Charter, has been violated or not. Recommendations also state the steps a state should take if a right is violated. The African Charter makes no express provision for remedies. However, the Commission has issued remedies and based its mandate to issue remedies on article 1 of the African Charter. Some states such as Nigeria, have questioned the African Commission's assumption of a quasi-judicial function, in response to which the Commission has tried to

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<sup>169</sup> Ibid

<sup>170</sup> Ibid, Page 351

<sup>171</sup> Ibid

<sup>172</sup> Ibid

define the extent of its mandate and the status of its decisions.<sup>173</sup> With regard to the allegations of its lack of judicial capacity raised by Nigeria in *Civil Liberties Organisation v Nigeria*,<sup>174</sup> the African Commission held that the communications procedure as set out in Article 55 of the Charter is quasi judicial, in that communications are not necessarily adversarial. Complainants are complaining against some act or neglect of a government, and the Commission must ultimately, if it is unable to effect a friendly settlement, decide for one side or the other.

On the other hand, the protocol to the European Social Charter on the collective complaint mechanism was adopted in 1995. It provides for a system of collective complaint, which allows certain social partner organisations and non-governmental organisations to bring complaints of violations of the provisions of the European Social Charter to the European Committee on Social Rights. This Committee is a quasi-judicial body that assesses whether state party laws and practices are consistent with the European Social Charter. The European Committee on Social Rights has developed a substantial body of jurisprudence on social rights. The European Committee on Social Rights does not have remedial powers. Its role is limited to determining whether or not a law/practice of a state party conforms to the European Social Charter.<sup>175</sup> If the state takes no action on the European Committee on Social Rights' report, then the Committee of Ministers may make recommendations asking the state to rectify the law or practice inconsistent with the Charter.

It may be argued that the African Commission should adopt the approach of just determining whether or not a law/practice of a state party conforms to the African Charter. The African Commission like other quasi-judicial bodies may make recommendations. In making recommendations the African Commission should leave the state parties a wide discretion to choose the best option to implement its obligations and allocate resources. Cases come before supranational bodies such as the African Commission after domestic remedies have been exhausted. It is therefore clear, that the national authority in question is not inclined to enforce the human rights guarantee in contention through domestic avenues.<sup>176</sup> Domestic compliance with decisions of supranational bodies in most cases correspond to the degree to which the defendant state as well as majority of the population feel that the

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<sup>173</sup> G Wachira & A Ayinla, 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy', *African Human Rights Journal*, Volume 6, No. 2, 2006, Page 473.

<sup>174</sup> Communication No. 129/94

<sup>175</sup> Ibid

<sup>176</sup> T Melish, 'Rethinking the "Less or More" Thesis: Supra national Litigation of Economic, Social and Cultural Rights in the America', *NYU Journal of International Law & Politics*, 2006, Page 184.

judgement has encroached on their national sovereignty and national interest.<sup>177</sup> Therefore, the African Commission in dealing with human rights issues or issues of sensitive national security/interest should grant the state a larger margin of appreciation consistent with the principle of subsidiarity.<sup>178</sup> Supranational bodies such as the African Commission need to craft remedial orders bearing in mind the boundaries of its supervisory role.<sup>179</sup>

In *Legal Assistance Group & Others v Zaire*,<sup>180</sup> the Commission stated that the main goal of the communication's procedure is to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the state concerned, which remedies the prejudice complained of. These remedies are given in form of recommendations by the African Commission to be implemented by the state party. Remedies may be considered by the Commission in two contexts, namely in admissibility proceedings and in substantive jurisprudence in the elaboration of the rights contained in the Charter. Within the context of substantive rights contained in the African Charter, remedies may be viewed as a substantive right on its own or as a constituent element of some other rights. The African Commission has addressed remedies in the procedural/admissibility context and as a constituent element of rights contained in the African Charter. In admissibility proceedings the African Commission considers if domestic remedies have been exhausted. At this stage, the domestic mechanism is under scrutiny to determine how effective it is as an avenue of recourse for victims of human right violations.<sup>181</sup> This procedural guarantee can be used to protect socio-economic rights contained in the Charter. The right of access to an independent and impartial tribunal, the right to due process, the right to judicial protection as well as adequate and effective judicial remedies are applicable to all human rights. It would seem that the Commission may not accept a communication for breach of the right to remedies as a substantive right on its own, because for a communication to be admissible it must allege among other things a breach of a right set out in the African Charter.<sup>182</sup>

The reports/recommendations of the Commission submitted in accordance with Articles 53 and 59 of the African Charter, become African Union decisions once adopted by the African Union assembly of heads of states and governments. This is in accordance with Article 9(1)(b) of the Constitutive Act, which provides that one of the functions of AU

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<sup>177</sup> Ibid, Page 187

<sup>178</sup> Ibid

<sup>179</sup> Ibid

<sup>180</sup> Communication 25/89

<sup>181</sup> G Musila, 'Rights to Effective Remedies under the African Charter on Human and Peoples' Rights', *African Human Rights Journal*, Volume 6, No. 2, 2006 Page 444

<sup>182</sup> Ibid, Page 454

Assembly shall be to receive, consider and take decisions on reports and recommendations from other organs of the Union.<sup>183</sup> Regarding the decisions of the AU Assembly, it is important to note that Article 23(2) of the Constitutive act provides that: “Any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.” It would seem that non-compliance with decisions of the Commission adopted by the African Union Assembly of heads of state and governments may attract sanctions. However, Rule 33 of the Rules of Procedure of the AU Assembly states that the decisions of the Assembly shall be issued in the following forms: (a) Regulations: these are applicable in all member states which shall take all necessary measures to implement them; (b) Directives: these are addressed to any or all member states or to individuals. Non-implementation of Regulations and Directives shall attract appropriate sanctions in accordance with Article 23(2) of the Constitutive Act. Recommendations of the African Commission are adopted as recommendations under Rule 33 of the Rules of the AU Assembly. They are not adopted as directives or regulations and therefore are not legally binding. Wachira and Ayinla<sup>184</sup> suggest that a pro-human rights interpretation of Article 23(2) of the Constitutive Act will extend the application of this provision to recommendations, notwithstanding the provision of Rule 33(2), which restricts its application to regulations and directives of the AU alone.

Provisional measures which are provided for under the Commission’s Rules of Procedure Rule 111(1), states “Before making its final views known to the Assembly on the Communication, the Commission may inform the state party concerned of its views on the appropriateness of taking provisional measures to avoid irreparable damage being caused to the victim of the alleged violation.” In so doing, the Commission shall inform the state party that the expression of its views on the adoption of those provisional measures does not imply a decision on the substance of the communication. For example, in *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*,<sup>185</sup> the African Commission called on Nigeria not to execute the complainant, pending the final outcome of the communication before it. The Federal military government of Nigeria executed the complainant in total disregard of the provisional measures issued by the Commission. The Commission subsequently found that the death penalty imposed and execution of the complainant violated the African Charter. The

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<sup>183</sup> Ibid

<sup>184</sup> G Wachira & A Ayinla, ‘Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples’ Rights: A possible remedy’, *African Human Rights Journal*, Volume 6, No. 2, 2006, Page 484

<sup>185</sup> Communication No 137/94, 1999

Commission also found that the execution in the face of the Commission's provisional measures under its Rule 111 defeated the purpose of the rule. Provisional measures allow a meaningful consideration of the Commission's eventual findings and states should consider them as binding.<sup>186</sup>

## **9. The African Commission's Efforts at Promoting Socio-Economic Rights: The Pretoria Declaration**

The relevance of the Pretoria Declaration<sup>187</sup> is that it defines clearly the rights of the rights holders and the obligations of the duty bearers with regard to some socio-economic rights contained in the African Charter. This is relevant in holding states to account where they fail in their obligations. By extension this will impact positively on the realisation of socio-economic rights and on poverty reduction. In pursuance of its mandate to promote human rights, the African Commission hosted a seminar in Pretoria from the 13<sup>th</sup> to 17<sup>th</sup> September, 2004. The theme of the seminar was "Economic, Social and Cultural Rights in Africa" The objectives of the seminar were: to specify the nature of state obligation in relation to socio-economic rights as enshrined in the African Charter and to identify in the light of African realities, the priorities for the African Commission regarding the promotion of these rights as well as determine the measures to be undertaken to effectively realise socio-economic rights on the continent.<sup>188</sup> The seminar held in Pretoria adopted a declaration which was subsequently adopted as a resolution in December 2004 by the African Commission.<sup>189</sup> This resolution is generally referred to as the Pretoria Declaration. The Pretoria Declaration (the Declaration) elaborates upon, broadens the scope and bridges the gaps in the vagueness of the rights to property, work, health, education and culture guaranteed under the African Charter.<sup>190</sup>

The Declaration sets out the obligation of various stakeholders in realising socio-economic rights. Stakeholders named by the Declaration are state parties to the African Union, the African Commission, civil society, National Human Rights institutions and international and regional entities. It also sets out the core contents of socio-economic rights under the African Charter. However, the core contents set out by the resolution are non-

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<sup>186</sup> Ibid, Page 475

<sup>187</sup> African Commission on Human and Peoples' Rights, *Resolution on Economic, Social and Cultural Rights in Africa*, ACHPR/Res.73(XXXVI)04

<sup>188</sup> S Khoza, 'Promoting economic, social and cultural rights in Africa: The African Commission holds a seminar in Pretoria', *African Human Rights Law Journal*, Volume 4, No. 2, 2004, Page 334

<sup>189</sup> Ibid

<sup>190</sup> M Baderin & R McCorquodale (Ed), *Economic, Social and Cultural Rights In Action*, Oxford University Press, Oxford, 2007, Page 148

exhaustive and give room for the African Commission and other judicial bodies to develop it further. The Declaration also reiterates the obligation of the states to eliminate all forms of discrimination. It states under paragraph 4 that:

“State parties have also undertaken to eliminate all forms of discrimination, including all forms of discrimination against women, and to promote the equal enjoyment of all human rights. Non-discrimination and equal treatment are key components of economic, social and cultural rights since vulnerable and marginal groups including refugees and internally displaced persons are disproportionately affected by a failure of the state to respect, protect and fulfil.”<sup>191</sup>

This elaboration does not cover all socio-economic rights guaranteed under the Charter. The Declaration only considers those it considers as “core contents” of socio-economic rights under the Charter.<sup>192</sup> The Declaration further states in paragraph 10 that socio-economic rights provided by the Charter, should be read with other rights contained in the Charter. Clearly, socio-economic rights in Africa would be further advanced if the Commission follows up the Pretoria Declarations with other resolutions clarifying the scope of other socio-economic rights contained in the Charter.<sup>193</sup> The Declaration finally states in its conclusion that the African Union, its Member States, international and national organisations and non-state actors should fully recognise human rights as a fundamental objective of development and that development has to achieve the full realisation of all human rights. Socio-economic rights should therefore be integrated into development planning and implementation so that African needs and aspirations are fully addressed.

### **9.1 Analysis of the Pretoria Declaration**

This section establishes the link between the socio-economic rights elaborated upon by the Declaration and poverty. This section, also analyses the socio-economic rights elaborated upon by the Declaration using General Comments made by the Committee on Economic, Social and Cultural Rights on the respective socio-economic rights. Decisions and comments of the European Committee on Social Rights are also used in this analysis. The European Committee on Social Rights was introduced under the remedies section and its functions were discussed. Therefore, this study turns to examine the functions of the Committee on Economic, Social and Cultural Rights.

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<sup>191</sup> Ibid

<sup>192</sup> Ibid

<sup>193</sup> Ibid

The Committee on Economic, Social and Cultural Rights is a body of independent experts established under United Nations Economic and Social Council (ECOSOC) Resolution 1985/17 to undertake the monitoring functions assigned to ECOSOC in Part IV of the International Covenant on Economic, Social and Cultural Rights.<sup>194</sup> Therefore, the Committee monitors the implementation of the International Covenant on Economic, Social and Cultural Rights. The Committee on Economic, Social and Cultural Rights in its General Comments on right to housing, education, health water etc, stated that the realisation of these rights entails that these rights must be accessible, available and affordable without discrimination. The Committee added the adaptability requirement in protecting the right to education and the quality requirement in protecting the right to health care and right to work. It equally added the adaptability and appropriateness requirements in protecting cultural rights.<sup>195</sup> Governments and non-governmental organisations can respond to poverty and design poverty reduction strategies in terms of accessibility, availability, affordability etc.<sup>196</sup>

## 9.2 The right to property in Article 14 of the African Charter

The right to property impacts on poverty reduction. In most rural communities in Africa, access to land can contribute to reducing rural poverty. The above assertion is supported by studies in Tanzania by Ellis & Mduo, where they found that the population in the highest income quartile owned twice the amount of land owned by the population with the lowest quartile.<sup>197</sup> Similarly, Noyoo, asserts that the South African Native Land Act of 1913 legitimised the dispossession of land from native South Africans by European settlers. He concludes that this curtailed native South African's ability to use land as a productive asset, thereby perpetuating poverty.<sup>198</sup> Article 14 of the African Charter makes provision for the right to property. It however does not differentiate between movable and immovable property. In the civil law system, there is a distinction between movable and immovable property. Movable property refers to personal property, while immovable property refers to real estate or real property, and the associated rights and obligations thereon.<sup>199</sup>

<sup>194</sup> Office of the High Commissioner for Human Rights, *Committee on Economic, Social and Cultural*, retrieved 28<sup>th</sup> June 2010, <http://www2.ohchr.org/english/bodies/cescr/>

<sup>195</sup> L Lamarche, *Beyond the Rhetoric of Social Rights for the Poor, the Need to Promote a Methodology at Reinforcing International and national Institutions*, (Paper prepared for UNESCO), UNESCO Poverty Project: Ethical and Human Rights Dimensions of Poverty: Towards a new Paradigm in the fight against Poverty, (2004) Page 20

<sup>196</sup> Ibid

<sup>197</sup> F Ellis & N Mduo, *Livelihood and Rural Poverty in Tanzania*, cited in E Mwangi & H Markelova, *Collective Action and Property Rights for Poverty Reduction*, 2008, Page 20, retrieved 4<sup>th</sup> April, 2010, <http://www.capri.cgiar.org/pdf/capriwp82.pdf>

<sup>198</sup> N Noyoo, *Civil Society and Poverty Reduction in South Africa*, 2000, Pages 5-6, retrieved 4<sup>th</sup> April, 2010, [http://www.sarpn.org.za/documents/d0002086/Civil-society\\_PR\\_SA\\_Noyoo.pdf](http://www.sarpn.org.za/documents/d0002086/Civil-society_PR_SA_Noyoo.pdf)

<sup>199</sup> A Mayss, *Principles of Conflict of Laws*, Cavendish Publishing Limited, London, 1999, Pages 191-192

The Pretoria declaration, elaborated on the right to property in Article 14 of the African Charter relating to land and housing. A close examination of the scope of the right to property as elaborated in the Pretoria Declaration reveals that it bears some similarities with the elaboration of the scope and content of the right to housing under Article 11 of the International Covenant on Economic Social and Cultural Rights (ICESCR) by the Committee on Economic, Social and Cultural Rights (The Committee) in General Comment 4. The Committee identified certain aspects of the right to housing that must be taken into account for the purpose of determining adequate housing.

The Committee stated that notwithstanding the type of tenure; all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. Likewise, The European Committee on Social Rights in *European Roma Rights Centre v Greece*,<sup>200</sup> concluded that the obligation to promote and provide housing extends to security from unlawful eviction. Similarly, the Pretoria Declaration (the Declaration), states that right to property in Article 14 of the Charter relating to land and housing entails among other things the protection from arbitrary deprivation of property; peaceful enjoyment of property and protection from arbitrary eviction as well as adequate compensation for public acquisition, nationalization or expropriation.

The Committee in General Comment 4, also states that adequate housing must be accessible to those entitled to it and disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Similarly, the Declaration states that the right to property under Article 14 of African Charter includes equitable redistribution of land through due process of law to redress historical and gender injustices and ensure equitable and non-discriminatory access, acquisition, ownership, inheritance and control of land and housing, especially by women.

The Committee further stated in the General Comment 4 that the right to adequate housing includes affordability of housing and that state parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. Similarly, the Declaration states that the scope of the right to property under the African Charter includes equitable and non-discriminatory access to affordable loans for the acquisition of property. According to the Committee in General Comment 4, adequate housing must contain certain facilities essential for health, security, comfort and nutrition as well as be habitable, in terms of providing the inhabitants with

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<sup>200</sup> Complaint No. 15/2003

adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. Likewise, the Declaration states that the right to property includes acceptable living conditions in a healthy environment. The European Committee on Social Right in *European Roma Rights Centre v Greece*,<sup>201</sup> further stated that in order to satisfy the right to housing under Article 16 of the European Social Charter, state parties must promote the provision of an adequate supply of housing for families. They must also take the needs of families into account in housing policies and ensure that existing houses be of an adequate standard and includes essential services such as heating and electricity.

The main differences between the right to housing under Article 11 of the ICESCR as elaborated in General Comment 4 and the right to property as elaborated in the Pretoria declaration, is that General Comment 4, additionally states that adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities and that the way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Similar comments are not contained in the Declaration. However, according to the Pretoria Declaration the right to property under the African Charter includes the recognition and protection of lands belonging to indigenous communities. This is not contained in General Comment 4.

### **9.3 The right to education in Article 17 of the African Charter**

Education entails the acquisition of literacy and other skills which may be used to earn an income. Therefore, education is the primary means by which the poor can lift themselves out of poverty.<sup>202</sup> Education empowers people and enables them make informed decisions. The right to education also impacts on the enjoyment of other rights such as the right to political participation and the right to primary health care. Denial of the right of access to education is also constitutive of poverty because it amounts to the deprivation of the capability (freedom) to access to education.<sup>203</sup> According General Comment 13 of the Committee,<sup>204</sup> education in all its forms and at all levels shall exhibit the following interrelated and essential elements. These elements are availability, accessibility, acceptability and adaptability.

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<sup>201</sup> Ibid

<sup>202</sup> Asian Development Bank, *Policy on Education*, 2003, Page 7, retrieved 18 August 2010, <http://www.adb.org/Documents/Policies/Education>

<sup>203</sup> Ibid

<sup>204</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, retrieved 18 August 2010, <http://www.unhcr.org/refworld/docid/4538838c22.html>

Availability means that functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the state party. Additionally, the Committee in General Comment 13, states that primary education has two distinctive features: (a) it is "compulsory" and (b) it is "available free to all" as formulated in article 13 (2) (a)<sup>205</sup> of the ICESCR. The Declaration broadens the scope of the right to education under Article 17 of the African Charter to meet the above requirement. For example, the Declaration states that the right to education entails addressing social, economic and cultural practices and attitudes that hinder access to education by girl children; provision of free and compulsory basic education that will also include a programme in psycho-social education for orphans and vulnerable children and provision of special schools and facilities for physically and mentally disabled children.

Accessibility entails that educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the state party.<sup>206</sup> Accessibility has three overlapping dimensions, which are non-discrimination, physical accessibility and economic accessibility. The Declaration also broadens the scope of the right to education under Article 17 of the African Charter to meet the above requirement. For example, the Declaration states that the right to education entails access to affordable secondary and higher education; accessible and affordable vocational training and adult education; availability of educational institutions that are physically and economically accessible to everyone. Accessibility under the European Social Charter requires fair distribution of schools and basic free education. Any hidden cost must be reasonable. It also requires that assistance is offered to vulnerable groups to meet hidden costs and equal access guaranteed for all children.<sup>207</sup> In this regard, The European Committee on Social Rights has also stated that contracting parties must pay particular attention to vulnerable groups to ensure that they benefit from the right of access to education.<sup>208</sup>

Acceptability,<sup>209</sup> refers to the form and substance of education, including curricula and teaching methods which have to be acceptable (e.g. relevant, culturally appropriate and of

<sup>205</sup> The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all.

<sup>206</sup> Ibid

<sup>207</sup> European Committee on Social Rights, *Conclusions in respect of Romania, in The Right to Education Under the European Social Charter*, Information Document Prepared by the Secretariat of European Social Charter, 2006, Page 2, retrieved 2<sup>nd</sup> January 2010, [http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/FactsheetEducation\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/FactsheetEducation_en.pdf)

<sup>208</sup> European Committee on Social Rights, *Conclusions in respect of Slovenia, 2005 in The Right to Education Under the European Social Charter*, Information Document Prepared by the Secretariat of European Social Charter, 2006, Page 3, retrieved 2<sup>nd</sup> January 2010, [http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/FactsheetEducation\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/FactsheetEducation_en.pdf)

<sup>209</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, retrieved 18 August 2010, <http://www.unhcr.org/refworld/docid/4538838c22.html>

good quality) to students and, in appropriate cases, parents and is subject to the educational objectives required by article 13 (1)<sup>210</sup> (ICESCR) and such minimum educational standards as may be approved by the State (see art. 13 (3)<sup>211</sup> and (4))<sup>212</sup> (ICESCR). The Declaration further broadens the scope of the right to education under Article 17 of the African Charter to meet the acceptability requirement. For example the Declaration states that the right to education entails liberty of parents and guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down by the state, and to ensure that the religious and moral education of their children in conformity with their own convictions.

Adaptability infers that education has to be flexible so that it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.<sup>213</sup> Similarly, the Declaration states that the right to education entails development of curricula that address diverse social, economic and cultural settings and which inculcate human rights norms and values for responsible citizens and the continued education for teachers. However, the European Committee on Social Rights stated in *International Centre for the Legal Protection of Human Rights v Croatia*,<sup>214</sup> that it is not its role to assess the fine details of the content of the national school curricula, because it involves complex overlapping questions. The European Committee on Social Rights concluded that the answer to these questions may vary according to country or circumstances.

The European Committee on Social Rights had developed the concept of effectiveness as an essential feature of education.<sup>215</sup> According to the European Committee on Social Rights, an effective educational system is assessed by examining the number of children in school, number of schools, class size, teacher pupil ratio, provisions for teacher training as

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<sup>210</sup> The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

<sup>211</sup> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

<sup>212</sup> No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

<sup>213</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, retrieved 18 August 2010, <http://www.unhcr.org/refworld/docid/4538838c22.html>

<sup>214</sup> Complaint No 45/2007

<sup>215</sup> European Committee on Social Rights, *Conclusions in respect of Romania, in The Right to Education Under the European Social Charter*, Information Document Prepared by the Secretariat of European Social Charter, 2006, Page 2, retrieved 2<sup>nd</sup> January 2010 [http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/FactsheetEducation\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/FactsheetEducation_en.pdf)

well as dropout rates.<sup>216</sup> The European Committee on Social Rights also asserts that an effective educational system should have a mechanism which monitors the quality of education.<sup>217</sup>

#### **9.4 The right to health in Article 16 of the African Charter**

Ill-health should be viewed as both a cause and consequence of poverty. An example of ill-health as a cause of poverty occurs where a person is prevented from working and earning a living due to ill-health.<sup>218</sup> Examples of ill-health as a consequence of poverty include cases where people become vulnerable to diseases because they are not eating properly.<sup>219</sup> Health related targets are included in the Millennium Development Goals and they include reducing child mortality, improving maternal health and combating HIV/AIDS, malaria and other diseases. The Committee in General Comment 14 states that the right to health in all its forms and at all levels contains the following interrelated and essential elements. These elements are availability, accessibility, acceptability and quality.

Availability infers that functioning public health and health-care facilities, goods and services, as well as programmes are available in sufficient quantity within the State party.<sup>220</sup> The Declaration broadens the scope of the right to health under Article 16 of the African Charter to meet the above requirement. For example the Declaration states that the right to health entails availability of accessible and affordable health facilities, goods and services of reasonable quality for all.

Accessibility means that health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the state party.<sup>221</sup> Accessibility has four overlapping dimensions: non-discrimination, physical accessibility, economic accessibility (affordability) and information accessibility. The Declaration broadens the scope of the right to health under Article 16 of the African Charter to meet the above requirement. For example the Declaration states that the right to health entails: access to food which is nutritionally adequate; access to basic shelter, housing and sanitation and adequate supply of safe and potable water; access to reproductive, maternal and child health care based on the life cycle approach to health; immunization against major infectious diseases; Access to

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<sup>216</sup> Ibid

<sup>217</sup> Ibid

<sup>218</sup> Organization for Economic Co-operation and Development, *DAC Guidelines and Reference Series, Poverty and Health*, (OECD), Paris, 2003, Page 20, retrieved 18th August, 2010, [bookshop.blackwell.co.uk/jsp/preview2.jsp?jsessionid](http://bookshop.blackwell.co.uk/jsp/preview2.jsp?jsessionid)

<sup>219</sup> Ibid

<sup>220</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, retrieved 18th August 2010, <http://www.unhcr.org/refworld/docid/4538838d0.html>

<sup>221</sup> Ibid

dignified care of the elderly and persons with mental and physical disabilities and public health education for the prevention of diseases.

It should be noted that discrimination aspect of accessibility ensures that attention is paid to vulnerable or excluded people. For example, the European Committee on Social Rights stated in *European Roma Right Centre v Bulgaria*,<sup>222</sup> that lack of sufficient health care for vulnerable and socially excluded persons violated the right to health under the European Social Charter.

Acceptability infers that all health facilities, goods and services must be respectful of medical ethics and culturally appropriate. The Declaration does not elaborate on aspects of the right to health under the African Charter, which pertain to acceptability.<sup>223</sup> General Comment 14 further states that the right to health entails quality. It states that, as well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality.<sup>224</sup> Similarly, the Pretoria declaration extends the scope of the right to health to entail training for health personnel including education on health and human rights. The Declaration also states that health facilities, goods and services should be of reasonable quality.

Under the European Social Charter, contracting parties fulfil their obligations under the right to protection of health if they can provide evidence of the six elements.<sup>225</sup> These elements are a health care system that includes public health arrangements, adequate personnel, equipment, attention to vulnerable groups and policies that ensure their access to the health care system, public health protection measures and health education.<sup>226</sup> The obligation to protect public health is fulfilled by the provision of vaccination, disinfection, control of epidemic, providing the means to combat epidemics and bearing the cost or at least part of the cost of health.<sup>227</sup>

## 9.5 The right to work in Article 15 of the African Charter

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<sup>222</sup> Complaint No 48/2008

<sup>223</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, retrieved 18th August 2010, <http://www.unhcr.org/refworld/docid/4538838d0.html>

<sup>224</sup> Ibid

<sup>225</sup> T Hervey, We Don't see a Connection: 'The Right to Health' in the E.U Charter and European Social Charter in G Burca & B Witte, (ed) *Social Rights in Europe*, Oxford University Press, Oxford, 2005, Page 311

<sup>226</sup> Ibid

<sup>227</sup> Ibid

Inadequate livelihood is constitutive of poverty. Therefore, the right to work plays a direct role in poverty reduction. According to the Committee in General Comment 18, Articles 6,<sup>228</sup> 7,<sup>229</sup> and 8<sup>230</sup> of the ICESCR are interdependent. The Committee also stated in General Comment 18, that the exercise of work in all its forms and at all levels requires the existence of the following interdependent and essential elements, implementation of which will depend on the conditions present in each state party. The elements are availability, accessibility, acceptability and quality.

Availability entails that states parties must have specialized services to assist and support individuals in order to enable them to identify and find available employment.<sup>231</sup> The Declaration makes no statement regarding obligation of African states to provide specialized services to assist and support individuals in order to enable them to identify and find available employment. With regard to availability, the European Committee on Social Rights elaborated on the right to work in its conclusions on the first 7 supervision circles.<sup>232</sup> It stated that maintaining a “high and stable level of employment as possible” and to strive for “full employment,” means that the contracting states should adopt coherent economic policies bearing in mind the above aims.<sup>233</sup> They concluded that the emphasis is on the means of realising the right to work rather than the result.<sup>234</sup> They stated that if a state at any time abandons the objective of full employment in favour of an economic order providing for a permanent pool of unemployed, it would amount to a violation of the European Social Charter.<sup>235</sup> It would seem from the above, that as long as the contracting parties adopt reasonable policies aimed at the realisation of the right to work they would be fulfilling their obligations under the European Social Charter.

Accessibility means that the labour market must be open to everyone under the jurisdiction of states party.<sup>236</sup> Accessibility comprises three dimensions: non-discrimination, physical accessibility and right to seek, obtain and impart information on the means of gaining access to employment. In this regard, the Declaration extends the right to work under

<sup>228</sup> Provides for the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.

<sup>229</sup> Provides for the right of everyone to the enjoyment of just and favourable conditions of work.

<sup>230</sup> Provides for the right of everyone to form trade unions and join the trade union of his/her choice.

<sup>231</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18, retrieved 18 August 2010, <http://www.unhcr.org/refworld/docid/4415453b4.html>

<sup>232</sup> D Ashiagbor, *The Right to Work in G Burca & B Witte, (ed) Social Rights in Europe*, Oxford University Press, Oxford, 2005, Page 244

<sup>233</sup> Ibid

<sup>234</sup> Ibid

<sup>235</sup> Ibid

<sup>236</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18, retrieved 18 August 2010, <http://www.unhcr.org/refworld/docid/4415453b4.htm>

the African Charter to include equality of opportunity of access to gainful work, including access for refugees, disabled and other disadvantaged persons and conducive investment environment for the private sector to participate in creating gainful work. The decision of the European Committee on Social Rights in *Syndicat National des Professions du Tourisme v France*,<sup>237</sup> supports the principle that work should be made accessible without discrimination. In that case, the European Committee on Social Rights established that a difference in treatment of workers doing similar jobs amounted to discrimination in relation to the right to work.

Acceptability and quality refer to the ability to freely to choose and accept work, as well as to join or form trade unions. Acceptability and quality also entail just and favourable conditions of work as well as safe working conditions.<sup>238</sup> Likewise, the Declaration extends the scope of the right to work to include: protection of women in the workplace including parental leave; fair remuneration, a minimum living wage for labour, equal remuneration for work of equal value, equitable and satisfactory conditions of work, measures to promote the rights and opportunities of those in the informal sector, the right to freedom of association, including the rights to collective bargaining, strike and other related trade union rights.

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<sup>237</sup> Complaint No 6/1999

<sup>238</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18, retrieved 18th August 2010, <http://www.unhcr.org/refworld/docid/4415453b4.html>

## 9.6 The right to culture in Articles 17 and 18 of the African Charter

Tomashevski, contends that customary laws that prevents wives and daughters from inheriting and owning land is the reason why women are poorer than men among the rural poor.<sup>239</sup> In the Nigerian case of *Ukeja v Ukeja*,<sup>240</sup> the Nigeria High Court held that a customary rule that deprives a woman from inheriting her father's estate was repugnant to natural justice, equity and good conscience. Nigeria courts have applied the doctrine of natural justice, equity and good conscience in the context of customary laws in Nigeria. The Pretoria Declaration (The Declaration) also recognises that some traditional social and cultural practices may be harmful to the human rights of individuals and urges state parties to eradicate these practices.

The Declaration states that the right to culture under Articles 17(2)<sup>241</sup> and 18(2)<sup>242</sup> of the Charter entails amongst other things positive African values consistent with international human rights standards. The promotion and protection of the right to take part in cultural life is essential for the realisation of human dignity as well as the promotion of good social relations between individuals and communities in a multicultural world.<sup>243</sup>

The Committee in General Comment 21 outlined the core elements of the right to take part in cultural life. The elements are: (a) Availability: this entails that cultural goods and services, such as folklore, literature and cinema should be open for everyone to enjoy and benefit from. (b) Accessibility, entails that these cultural goods and services should be financially and physical accessible in both urban and rural areas without discrimination. (c) Acceptability, entails that laws and policies adopted for the realisation of the rights to take part in cultural life should be formulated and implemented in a way acceptable to the individuals and communities involved. (d) Adaptability, entails that policies, laws and programmes adopted by the state for the realisation of the right to take part in cultural life should be flexible and should respect the cultural diversity of individuals and communities. (e) Appropriateness, entails that measures adopted for the realisation of the right to take part in cultural life should respect the culture of individuals and communities.<sup>244</sup> The Declaration does not elaborate on the right to culture under Articles 17(2) and 18(2) of the African Charter in terms of

<sup>239</sup> K Tamasevski, *Strengthening pro-poor law: Legal Enforcement of economic and Social Rights*, Rights in Action Series, Overseas Development Institute (ODI), 2005, Page 4

<sup>240</sup> Unreported, No. OAI/174/93

<sup>241</sup> Every individual may freely, take part in the cultural life of his community.

<sup>242</sup> The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

<sup>243</sup> General Comment 21, Paragraph 1, *Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights*, retrieved 4<sup>th</sup> July 2009, <http://www2.ohchr.org/english/bodies/cescr/comments.htm>

<sup>244</sup> Ibid, Paragraph 16

availability, accessibility, acceptability, adaptability and appropriateness. However, the Declaration states that African states should recognise and respect the diverse cultures that exist in Africa. The Declaration also states that state parties should ensure participation at all levels in the determination of cultural policies and in cultural and artistic activities, as well as adopt measures for protecting tangible and intangible cultural heritage. According to the Declaration, the right to culture under the Charter has various components, which include, right to take part in cultural life; right to enjoy the benefits of scientific progress, right of individual to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he/she is the author, right to freedom from the interference of the state in scientific or creative pursuits.

The last five sections have focused on the African Commission, the next section will focus on the African Court on Human and Peoples' Rights.

## **10. The African Court on Human and Peoples' Rights**

In order to strengthen the protection of the human rights contained in the African Charter, the African Union adopted the Protocol to the African Charter establishing an African Court of Human and Peoples' Rights. (ACHR). The African Court on Human and Peoples' Rights complements the protective mandate of the African Commission on Human and Peoples' Rights. On December 15, 2009, the Court delivered its first judgment, finding an application against Senegal inadmissible.<sup>245</sup> The court is yet to hear any case on socio-economic rights. The Protocol to the African Charter establishing an ACHR entered into force on 25<sup>th</sup> January 2004, after fifteen states ratified it. Article 34(3) of the Protocol provides that the Protocol shall enter into force; thirty days after fifteen instruments of ratification or accession have been deposited. The ratification of the Protocol by Comoros (fifteenth State to ratify the Protocol) on 26<sup>th</sup> December 2003, paved the way for entry into force of the protocol and the establishment of an ACHR. States that have ratified the Protocol are: Algeria; Burkina-Faso; Burundi; Côte d'Ivoire; Gambia; Lesotho; Libya; Mali; Mauritius; Rwanda; Senegal; South Africa; Togo; Uganda; Gabon; Ghana; Kenya; Mali; Malawi; Mozambique; Mauritania; Nigeria; Niger; Tanzania and Tunisia.

There are two views on the creation of an African Court. One view is that a court should be established as soon as possible. This view contends that the normative and institutional deficiencies of the African system can be redeemed by an African Court.<sup>246</sup> The court is seen here as a proxy for putting some teeth and bite in the African human rights system. The other view holds that the challenge with the realisation of human rights in Africa is lack of awareness by the general public. This view maintains that the African System should focus on promoting human rights through the Commission.<sup>247</sup>

The Protocol to the African Charter on the establishment of an African Court on Human and Peoples' Rights does not make provisions for rules of procedure; rather the Protocol in Article 33 provides that the court shall draw up its own rules of procedure. These rules of procedure, when adopted by the court, do not need to be approved by some other external body, such as the Assembly of the African Union.<sup>248</sup> This differs from position in most international judicial bodies such as the Court of Justice of the European Union, which requires unanimous approval of the council.<sup>249</sup> Under contemporary international law state parties to a treaty are usually vested with the power to draw up rules of procedure for judicial

<sup>245</sup> Michelot Yogogombaye v the Republic of Senegal, application No. 001/2008

<sup>246</sup> M Makau, *The African Human Rights System: A Critical Evaluation*, 2000, Page 23, retrieved 7<sup>th</sup> October 2008, [hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf](http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf)

<sup>247</sup> Ibid

<sup>248</sup> Ibid, Page 22

<sup>249</sup> Ibid

bodies created by the treaty. Any adjustment will need be approved by the body responsible for drawing up the rules of procedure.<sup>250</sup> Clearly, the failure to provide rules will lead to delays in functioning of the court, as it will first need to draw up rules of procedure.<sup>251</sup> However, the advantage is that the court will draw up the kind of rules that will enable it discharge its mandate.<sup>252</sup> The Court will also be able to react to new situations in a flexible manner, because rules of court adopted by the court will be easier to adjust, given that the court can amend its rules.<sup>253</sup> It is therefore important to examine the extent to which the rules of procedure not incorporated as part of the substantive treaty or where the devise was not agreed upon by the state parties bind state parties. Given that Article 33 of the Protocol to the African Charter empowers the court to draw up its own rules; state parties to the Charter are therefore bound by the rules adopted by the court.<sup>254</sup> Under the Common law principal of agency a principal is bound by the agents' acts, provided that such acts are performed in the course of the agent's express or implied authority.<sup>255</sup>

Article 4 (1) of the Protocol on the African Court provides three kinds of jurisdiction for the African Court, namely adjudicatory, advisory and conciliatory.<sup>256</sup> The adjudicatory jurisdiction of the African Court can be further divided into subject matter jurisdiction (the kind of cases the African Court can entertain) and personal jurisdiction (who can bring a complaint before the African Court)<sup>257</sup>. Under articles 3 and 7 of the Protocol, the African Court has jurisdiction to adjudicate disputes against a state party to the protocol where it is alleged that the state party has violated the African Charter on Human and Peoples' Rights (African Charter) or any other human rights instruments that the state has ratified. The advantage of this is that a state to the protocol may be held accountable for human rights violations in areas not covered by the African charter.<sup>258</sup> This will mean that all human rights treaties ratified by state parties to the Protocol will become justiciable and future ratifications will have the same consequence.<sup>259</sup> The extension of the jurisdiction of the African Court to other international human rights treaties such as the International Covenant on Economic, Social and Cultural Rights ratified by state parties to the protocol may lead to jurisprudential

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<sup>250</sup> Ibid

<sup>251</sup> Ibid

<sup>252</sup> Ibid, Page 23

<sup>253</sup> Ibid

<sup>254</sup> Ibid, Page 25

<sup>255</sup> Ibid

<sup>256</sup> R Wundeh Eno, 'The jurisdiction of the African Court on Human and Peoples' Rights', *African Human Rights Law Journal*, Volume, 2, 2002, Page 225

<sup>257</sup> Ibid

<sup>258</sup> Ibid, Page 227

<sup>259</sup> Ibid

chaos.<sup>260</sup> On the other hand, it may be argued that the fears are unfounded as the African Courts discretionary jurisdiction over cases filed by individuals and NGOs will limit the number of cases that actually reach the court to a manageable number, ensuring that those with the greatest merit will be heard.<sup>261</sup>

Article 5(1) provides that the following are entitled to submit cases to the Court: The Commission; The State Party which had lodged a complaint to the Commission; The State Party against which the complaint has been lodged at the Commission; The State Party whose citizen is a victim of human rights violation and African Intergovernmental Organizations. Article 5(3) of the Protocol on the African Court provides that the African Court may entitle relevant non-governmental organisations with observer status before the African Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of the Protocol. Article 34(6) states that at the time of the ratification of this protocol or any time thereafter, the state shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. Currently, only two states, Mali and Burkina Faso, have made such declarations.<sup>262</sup>

The African Court also has discretion to grant or deny access to will. The African Court should be an institution that protects the rights of individuals and AU organs. The limitation imposed by Article 34(6) will impact on the courts ability to effectively protect the rights of individuals against the states in Africa. An African Court of Human Rights will only be effective if it provides victims of human rights violations in Africa an accessible forum to vindicate their rights.<sup>263</sup> On the other hand, this may be a way of preventing frivolous petitions from coming before the Africa. Article 30 provides that parties should comply with the judgement of the court within the time stipulated by the court and should guarantee its execution. The state is therefore primarily responsible for the execution of the judgement of the court.<sup>264</sup> To ensure effective implementation of the court's decision, Article 31 of the Protocol provides that the Court submit it reports to the regular session of the Assembly, and should specify the cases in which a state has not complied with the African Court's judgement. Therefore, the African Union Assembly has some responsibility for implementing the decisions of the African Court.<sup>265</sup> The African Court's reports become decisions of the

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<sup>260</sup> Ibid

<sup>261</sup> Ibid

<sup>262</sup> M. Fagbongbe, *Operationalizing the African Court of Human and Peoples' Rights*, 18 May 2007, retrieved 27<sup>th</sup> March 2008, <http://www.thecourt.ca/2007/05/18/operationalizing-the-african-court-of-human-and-peoples%E2%80%99-rights>

<sup>263</sup> Ibid, Page 31

<sup>264</sup> N.B Pityana, 'Reflections on the African Charter on Human and Peoples' Rights', *African Human Right Law Journal*, Volume 4, Number, 1, 2004, Page 127

<sup>265</sup> Ibid

African Union Assembly, once they have been adopted by the Assembly. Non-compliance with the decisions of the Assembly may attract sanction under article 23(2) of the Constitutive act. This procedure is also similar to the Peer Review Mechanism provided for under the NEPAD programme.<sup>266</sup>

The African Union has merged the African Court on Human and Peoples' Rights and the African Court of Justice. Articles 5 and 17 of the Constitutive Act provides for the establishment of the African Court of Justice. The single Protocol replaces the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights adopted in 1998 (the old Protocol), and the Protocol of the Court of Justice of the African Union which was adopted in 2003.

As at 14<sup>th</sup> June 2010, a total of twenty one (21) Countries in Africa had signed the African Union Protocol on the Statute of the African Court of Justice and Human Rights.<sup>267</sup> The countries that have signed the Protocol are Algeria, Benin, Burkina Faso, Chad, Congo, Cote d'Ivoire, Democratic Republic of Congo, Gabon, Ghana, Gambia, Guinea, Libya, Mali, Nigeria, Niger, Sao Tome & Principe, Senegal, Sierra Leone, Tanzania, Togo and Zambia.<sup>268</sup> The African Court of Justice and Human Rights protocol will only come into force when 15 countries have ratified it and deposited their instruments of ratifications.<sup>269</sup>

Individuals and NGOs can only submit cases against states if the states concerned have made declarations accepting the competence of the Court to do so under Article 30(f) of the single Protocol. Unless the state make such a declaration, this limitation, limits access to justice for human rights victims. The merger is seen as part of the implementation of the African Union's Assembly of Heads of States and Governments decision to rationalize institutions of the African Union and avoid duplication of roles and ensure effectiveness. The adopted Protocol on the Statute of the African Court of Justice and Human Rights; provides for the African Court of Justice and Human Rights, which will be a product of the merger of the two courts. The proposed court will comprise of two sections namely the "General Section" and the "Human Rights Section". However, the operations of the African Court on Human and Peoples' Rights will continue until the instrument establishing the proposed court is in force. The draft merger instrument provides for a transitional period of one year, from the date it enters into force for the African Court on Human and Peoples' Rights to transfer

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<sup>266</sup> Ibid

<sup>267</sup> The African Union Treaties Database, retrieved 3<sup>rd</sup> March 2009, <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>

<sup>268</sup> Ibid

<sup>269</sup> Article 9, Protocol on the Statute of the African Court of Justice and Human Rights

all rights and obligations to the proposed court. The African Court on Human and Peoples' Rights shall then cease to exist. It should however be noted that the Vienna Convention on the Laws of treaties provides that only state parties to a treaty can amend or suspend it. In the same vein Article 35 of the Protocol to the African Charter on Human and Peoples' Rights establishing an African Court states that, "the present Protocol may be amended if a State Party to the Protocol makes a written request to that effect to the Secretary-General of the AU. The Assembly may adopt, by simple majority, the draft amendment after all the State Parties to the present Protocol have been duly informed of it and the Court has given its opinion on the amendment."

It would seem from the above that the African Union Assembly of Heads of States and Governments can suspend or amend the protocol, if a state party to the Protocol makes a written request. The adoption of a new protocol that purports to amend or suspend an existing protocol by some states parties should amount to a written request for amendment or suspension of the said protocol, since the proposed protocol amending or suspending the former is expressly written.

## **11. Interim Conclusion:**

While the usual condition of progressive realization of socio-economic rights is not contained in the Charter, the contribution of the African Commission established to enforce

them has so far been minimal. The need to reform the African Charter and strengthen the monitoring mechanism is unquestionable. However, some of the challenges to the realisation of socio-economic rights such as states refusing to implement the recommendations of the African Commission require political will to overcome. The presence of a functional African Court on Human and Peoples' Rights should facilitate the realization of socio-economic rights under the Charter.

The NEPAD programme of the African Union adopts policies that are favourable to the realisation of socio-economic rights and the promotion of rights based approaches to poverty reduction. Similarly, the African Peer Review Mechanism establishes a system of accountability, which will help ensure that state parties adopt policies and programmes consistent with the African Charter and other international human rights standards.

The Commission's jurisprudence on socio-economic rights would be better developed if more cases on socio-economic rights come before the Commission. The recommendations of the Commission on socio-economic rights demonstrate that the socio-economic rights provisions of the African Charter are justiciable. Although the recommendations of the African Commission has not provided anyone with a fundamental right to claim "positive", judicially enforceable action and services from the state, the recommendations have impacted favourably on the realisation of socio-economic rights and the application of the principles of rights based approaches to poverty reduction.

## CHAPTER 4: JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS

### 1. Introduction:

This chapter examines the justiciability of socio-economic rights in order to explore methods of making socio-economic rights justiciable. As a result of the instrumental and intrinsic value of socio-economic rights to poverty reduction, the justiciability of socio-economic rights will enable right holders challenge poverty and socio-economic inequality through judicial and quasi-judicial institutions. It is therefore necessary to assess the concept of justiciability and explore methods of making socio-economic rights justiciable. Additionally, state obligations under the African Charter for the realisation of socio-economic rights will be meaningless if the duty bearers cannot be held accountable to the right holders. Furthermore, a principle of the rights based approach to poverty reduction is accountability and international human rights treaties, such as the African Charter provide that state parties are under a legal obligation to establish accountable mechanisms.<sup>1</sup> However, it does not stipulate that these mechanisms must be through courts.<sup>2</sup> Therefore accountability can be achieved through both judicial and non judicial means. Apart from judicial accountability other accountable mechanisms have included quasi-judicial bodies such as National Human Rights Commissions, the African Commission, and non judicial bodies such as the African Peer Review Mechanism and political/parliamentary commissions of inquiry.<sup>3</sup> However, the advantage of judicial and quasi-judicial bodies elaborating on socio-economic rights is that they define the scope and attributes of the rights. This makes the obligations of states clearer.

The African Commission clearly stated in *SERAC v Nigeria*<sup>4</sup> that there is no right in the African Charter that cannot be made effective. Therefore, the challenges to the justiciability of socio-economic rights under the Charter does not stem from the wording of either the pertinent provisions or the procedures. Additionally, the challenges associated with the realisation of the socio-economic rights, relates to their application and not to their validity.

In the next section, this study will examine the concept of justiciability and then the following section examines the debates around the justiciability of socio-economic rights. The last three sections examine the concept of remedies, the nature of duties inherent in socio-economic rights and aspects of socio-economic rights which may be easily enforced.

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<sup>1</sup> Office of the High Commissioner for Human Rights, *Human Rights and Poverty Reduction: A Conceptual Framework*, 2004, Page 16, retrieved 20th March 2010. <http://www2.ohchr.org/english/issues/poverty/docs/povertyE.pdf>

<sup>2</sup> Ibid

<sup>3</sup> Ibid

<sup>4</sup> Communication No. 155/96

## 2. The Concept of Justiciability:

The variable nature of the concept of justiciability, depending on the nature of the issue sought to be adjudicated upon as well as on the constitutional role envisaged for the court, defies formulation of precise standards to control judicial functioning in the area.<sup>5</sup> Non-Justiciability may be divided into two namely, Explicit non-justiciability and non-justiciability as a matter of appropriateness. Explicit non-justiciability refers to situations where a law or constitution states that an entitlement or right cannot be raised by the courts. For example, the Directive Principles of State Policy contained in some constitutions state that these principles are not justiciable.<sup>6</sup> On the other hand, non-justiciability as a matter of appropriateness refers to situations where an entitlement or right is considered inherently unsuitable for judges to interpret or adjudicate.<sup>7</sup> Examples include matters considered to be within the preserve of the executive arm of government.

In discussing justiciability, it is also important to make a distinction between justiciability and enforceability and between justiciability and judicialism. Justiciability may be defined as “susceptibility of a right to third party adjudication”<sup>8</sup> It can therefore be argued that the subjection of a right to the examination of a court of law or some quasi-judicial entity amounts to justiciability. Enforceability of a right may have similar connotation with the justiciability of the right. However enforceability additionally suggests that the decisions of a court or supervisory body, such as the African Commission, can actually be executed.<sup>9</sup> Commenting on the concept of justiciability, Vierdag, asserts that when we say a right is enforceable it is intended to mean that an authority within the state or an international authority is competent to receive complaint about violations of rights.<sup>10</sup> That authority should be able to give redress, and if that authority is a court, the term justiciability is a more appropriate term to use.<sup>11</sup>

On the other hand, Mapulanga-Hulston,<sup>12</sup> contends that the enforcement of human rights deals with the identification of the entitlements and duties created by the legal regime, which

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<sup>5</sup> M Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Clarendon press, Oxford, 1995, Page 28

<sup>6</sup> Y Ghai & J Cottrel (Ed) ‘The role of courts in the protection of Economic, Social and Cultural Rights’ in *Economic, Social & cultural rights in practice: The role of the judges in implementing economic, social & cultural rights*, International Centre for the Legal Protection of Human Rights, London, 2004, Page 66

<sup>7</sup> Ibid

<sup>8</sup> B Toebes, *The Right to Health as a Human Right in International Law*, Intersentia-Hart, Utrecht, 1999, Page 168

<sup>9</sup> Ibid

<sup>10</sup> E.G Vierdag, ‘The Nature of Rights Created by the International Covenant on Economic, Social and Cultural Rights’, *Netherlands Yearbook of International Law*, Volume 9, 1978, pages 69-103

<sup>11</sup> Ibid

<sup>12</sup> J Mapulanga-Hulston, ‘Examining the Justiciability of Economic, Social and Cultural Rights’, *International Journal of Human Rights* Volume 6, No 4, 2002, Page 37

can be executed and maintained. Justiciability on the other hand, presupposes the existence of a review mechanism to determine non-compliance with the terms of the legal regime.<sup>13</sup> He further contends that the concept of justiciability is different from the concept of judicialism. Although all judicialism may entail justiciability not all justiciability is judicial. This is because judicialism focuses on the court system, while justiciability is directed at all reviews, although this does not exclude the court process.<sup>14</sup>

These reviews include reviews by bodies such as National Human Rights Commissions, African Commission on Human Rights, National Ombudsman and other review bodies. A judicial body may be described as an “independent and impartial body competent to give on the basis of facts determined by due process, legally binding judgements.”<sup>15</sup> While, quasi-judicial bodies also apply due process rules, they are not always completely independent and their decisions may not be binding. Viljoen,<sup>16</sup> contends that for a claim to be justiciable it must be based on the alleged infringement of a substantive right. He states that justiciability should be distinguished from the implementation of a court’s decision.

Viljoen, also differentiates between justiciability at an international level and justiciability at a national level. He argues that at a national level a court’s enforcement order is backed by domestic institutional force, whereas on an international level enforcement mainly takes the form of “naming and shaming”. He further contends that socio-economic rights may be made justiciable in domestic law in three main ways, namely through constitutional reference to international treaties containing socio-economic rights, inclusion of socio-economic rights in the Bill of Rights of a constitution as specific socio-economic rights or as Directive Principles of State Policy and finally through domestic legislation. Domestic legislation tends to be more precisely formulated than constitutional standards and international treaties, thereby overcoming the argument that vagueness implies non-justiciability.<sup>17</sup>

According to Steiner and Alston “the accountability of governments and other entities as well as the availability of remedies in cases of violations are indispensable elements of international human rights law.”<sup>18</sup> They however concede that justiciability i.e whether the court will provide a remedy for aggrieved individuals claiming violations need not be seen as

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<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> B Toebes, *The Right to Health as a Human Right in International Law*, Intersentia-Hart, Utrecht, 1999, Page 15

<sup>16</sup> F Viljoen, ‘National Legislation as a source of Justiciable Human Rights’ *Economic and Social Review*, Volume 6 No. 3 (2005) Pages 1-3

<sup>17</sup> Ibid

<sup>18</sup> H Steiner & P Alston, *International Human Rights Law in Context: Law, Politics, Morals*, Oxford University Press, Oxford, 2000, Page 275

an indispensable characteristic of human rights. This position is consistent with the approach adopted by the Collective Complaint Mechanism of the Council of Europe. As earlier mentioned, under the European system for the protection of social rights, the protocol on the collective complaint mechanism provides for a system of collective complaint. After deciding on a complaint, the Committee draws up a report/recommendation. The recommendation usually urges the defendant state to bring the situation into conformity with the Charter, if the state does not show immediate signs of doing so. Alternatively, the Committee of Ministers may take note of the government's undertaking to bring the situation into conformity and of any measures already taken to achieve this.<sup>19</sup>

As the Committee has no remedial powers, a request for compensation made in *Confederation Francaise de l'Encadrement CFE-CGC V France*,<sup>20</sup> was summarily dismissed without discussion. Although the Committee is not empowered under the Protocol to award compensation, it has been argued that it is up to the Committee of Ministers to recommend reparation when making their recommendation to the defendant state.<sup>21</sup> In practice however, the Committee has limited its decisions to pronouncing on whether a state has complied with the Charter or not. This is in accordance with Article 8(1) of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints. It provides that “the Committee shall draw up a report in which it shall describe the steps taken by it to examine the complaint and present its conclusions as to whether or not the Contracting party concerned has ensured the satisfactory application of the provision of the Charter referred to in the complaint”. This procedure is similar to an administrative review and circumvents debates around the allocation of resources. Similarly, in *Syndicat National des Professions du Tourisme v France*,<sup>22</sup> the Committee only examined the complaint to determine if the state policy conformed to the European Social Charter. It found that the differences in treatment between approved lecturer guides of *Villes et Pays d'Art et d'Histoire* network and the interpreter guides/national lecturers with a state diploma constituted discrimination in breach of Article 2(1) in combination with Article E of the revised Charter in terms of the right to employment.

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<sup>19</sup> G Scappucci, *The European Social Charter Collective Complaints Procedure and its relevance for Roma and Travellers*, Presentation, 2010, retrieved 18<sup>th</sup> April, 2010, [www.coe.int/.../The\\_European\\_social\\_charter\\_collective\\_complaints\\_procedure\\_and\\_its\\_relevance\\_for](http://www.coe.int/.../The_European_social_charter_collective_complaints_procedure_and_its_relevance_for)

<sup>20</sup> Complaint No 9/2000

<sup>21</sup> R Churchill & U Khalia, ‘The Collective Complaint System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?’, *European Journal of International Law*, Volume 15, No 3, 2004, Page 423

<sup>22</sup> Complaint No 16, 2003

### 3. The justiciability debate

The previous section examined the concept of justiciability, this section will now examine the debates around justiciability. According to Arambulo,<sup>23</sup> the notion of non-justiciability of socio-economic rights is used as a significant argument against placing these rights on the same footing with civil and political rights. The arguments against non-justiciability have also been used to block the adoption of an individual complaint procedure for socio-economic rights for a long time. The two main systems for implementing human rights in International Law are the reporting procedure and individual/group complaint procedure. The complaint procedure includes both individual/group petitions as well as inter-state petitions. However, the International Covenant on Economic, Social and Cultural Rights until recently adopted only the reporting procedure. Article 16 of the International Covenant on Economic, Social and Cultural Rights provides that “The state parties to the present covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognised herein”<sup>24</sup>

The Optional Protocol to the International Covenant on Economic, Social and Rights (OP-ICESCR) was adopted in December 2008 by the United Nations General Assembly. The Optional Protocol was opened for signing on 24<sup>th</sup> September 2009.<sup>25</sup> The Protocol will enter into force when ratified by 10 parties<sup>26</sup> The Protocol provides for a complaint procedure that allows individuals whose socio-economic rights are violated to bring complaints before the Committee on Economic, Social and Cultural Rights. According to Craven,<sup>27</sup> the reporting procedure depends on the goodwill of state parties to send relevant and accurate information. The International Covenant on Civil and Political Rights adopts both a reporting procedure and an individual/group complaint procedure. The main function of the reporting procedure may be seen as promoting human rights as opposed to protecting human rights, which the individual/group complaint procedure provides.<sup>28</sup> The individual/group complaint procedure and the application of civil and political rights in domestic law have resulted in the rapid development of jurisprudence on civil and political rights. On the other hand, the lack of an

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<sup>23</sup> K Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights*, Intersentia / Hart, Utrecht, 1999, Page 56

<sup>24</sup> Article 16, International Covenant on Economic, Social and Cultural Rights

<sup>25</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, retrieved 16<sup>th</sup> June, 2010, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3-a&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en)

<sup>26</sup> Ibid, Article 18.

<sup>27</sup> M Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Clarendon press, Oxford, 1995, Page 30

<sup>28</sup> Ibid, Page 32

individual/group complaint procedure under the International Covenant on Economic, Social and Cultural Rights and the non-application of socio-economic rights in domestic law have resulted to its slow development. Craven contends that the supervision of socio-economic rights would be strengthened if an optional protocol making provision for individual and groups to bring petitions before the Committee on Economic, Social and Cultural Rights is adopted. This would lead to the adoption of domestic remedies and an increase in the participation of non-governmental organisations in the field of socio-economic rights.<sup>29</sup> Indications from regional and national judicial and quasi-judicial bodies implementing socio-economic rights support the above assertion. For example, the Constitutional Court of South Africa and the African Commission have elaborated on several socio-economic rights. This has resulted in the development of jurisprudence on socio-economic and increased participation of non-governmental organizations in the promotion and protection of socio-economic rights.

Arambulo, states that the alleged non-justiciability of rights in the International Covenant on Economic, Social and Cultural Rights is generally based on two main features.<sup>30</sup> The first is the vagueness of formation of socio-economic rights contained in the covenant; and the second is their opaque normative contents.<sup>31</sup> Koch,<sup>32</sup> a researcher at the Danish Institute of Human Rights, states that many socio-economic rights are worded in vague and unclear terms. She contends that they are not formulated as individual rights; therefore there is no link between the facts and legal consequences but merely a relation between an end and the means supposed to lead to that end. She further contends that there is no doubt as to the progressive nature of socio-economic rights. The progressive nature of these rights can be seen in Article 2 of the International Covenant on Economic, Social and Cultural Rights which states that “Each state party to the present covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present covenant by all appropriate means including particularly the adoption of legislative measures”. On the other hand, Beetham,<sup>33</sup> states that the human rights agenda necessarily has a promotional or aspirational dimension.

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<sup>29</sup> Ibid, Page 100

<sup>30</sup> K Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights*, Intersentia / Hart, Utrecht 1999, Page 56

<sup>31</sup> Ibid

<sup>32</sup> J Koch, ‘The Justiciability of Indivisible Rights’, *Nordic Journal of International Law* Volume 72, No 1, 2003 Page 4

<sup>33</sup> D Beetham, What future for economic and social rights in H Steiner & P Alston, (2000) *International Human Rights Law in Context: Law, Politics, Moral*, Oxford University Press, Oxford, Pages 255-256

He argues that the two main international human rights covenants aim to cajole state signatories to take necessary domestic policy and legislation to ensure that the covenants are realised.

The United Nations Committee on Economic, Social and Cultural Rights, has outlined the nature of state obligation under the International Covenant on Economic, Social and Cultural Rights in General Comment 3.<sup>34</sup> In this statement, the Committee stated that, “To take steps,” means “such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the covenant.” The phrase “By all appropriate means” signifies that “legislative measures are by no means exhaustive.... State must decide for themselves, which means are most appropriate under the circumstances with respect to each of the rights...State reports should indicate not only the measures that have been taken, but also the basis on which they are considered to be most “appropriate” under the circumstances.... However the ultimate determination as to whether all appropriate measures have been taken remains one for the committee to make.” The Committee went on to state that the concept of “progressive realisation” constitutes recognition of the fact that “the full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.”

The United Nations Committee on Economic, Social and Cultural rights has also identified several socio-economic rights that can be implemented immediately. These rights are contained in the International Covenant on Economic, Social and Cultural Rights. They are article 3 (equal rights for men and women), article 7(a) (i) (equal remuneration for work of equal value), article 8 (trade union rights), article 10 (3) (protection of children from exploitation), article 13(2)(a) (free and compulsory education), article 13(3) (respect for parental choice in education), article 13(4) (right to establish and direct educational institutions) and 15(3) (freedom of scientific research and creative activity). The obligations in respect of other socio-economic rights in the African Charter are stated as being immediate. The broad nature of the obligations of states merely provides that: The member states of the [African Union] parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative and other measures to give effect to them.<sup>35</sup> Socio-economic rights in the African Charter should be

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<sup>34</sup> UN Doc E/1991/23

<sup>35</sup> Article 1, African Charter on Human and People's Rights

realised progressively due to the underdevelopment of most African countries.<sup>36</sup> However, states should start taking immediate measures for the realisation of socio-economic rights. It should be noted that socio-economic circumstances and standards are not static. Socio-economic rights are progressive, because people standards improve continuously, due to a host of facts including technology.<sup>37</sup> Therefore, there is no point at which we can confidently say that the zenith of human socio-economic development has been reached.<sup>38</sup>

Vierdag,<sup>39</sup> holds that socio-economic rights do not qualify for incorporation into international law. He argues that the term right should be reserved for those rights capable of being enforced by the duty bearer in a court of law or a comparable institution. He further argues that the enforceability of rights is one of the main requirements of the real rights of an individual in international law. In his view, social rights are not directed at government action that can be described in terms of law. His contention therefore is that the nature of state obligation under the International Covenant on Economic, Social and Cultural Rights is not defined; they are broadly formulated programmes for government policies. The implication of this is that the rights in the International Covenant on Economic, Social and Cultural Rights cannot be granted to individuals. Vierdag, therefore concludes that these rights are not justiciable. On the other hand, Arambulo, argues that enforceability and justiciability do not have the same meaning as presented in Vierdag's argument. She maintains that enforceable rights have a more comprehensive scope than the conclusion that a certain right is justiciable. She asserts that generally enforceability is more difficult to tackle at the international level, because the international means of actually enforcing rights are practically absent. Furthermore, she asserts that the justiciability of a right is basically achieved when an independent and objective national or international judicial or quasi judicial body elaborates on the merits of the case and reaches a decision pertaining to the right concerned. She concludes that given the fact that enforceability and justiciability cannot be construed in the same manner, it is far-reaching to use enforceability as a criterion to assess a right in international law.<sup>40</sup>

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<sup>36</sup> C Mbazira, 'Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides', *African Human Rights Law Journal*, Volume 6, No 2, 2006, Page 341.

<sup>37</sup> Ibid

<sup>38</sup> Ibid

<sup>39</sup> E.G Vierdag, 'The Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights', *Netherlands Yearbook of International Law*, Volume 9, 1978, Pages 69-103

<sup>40</sup> K Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights*, Intersentia / Hart, Utrecht, 1999, Page 84

Arambulo equally argues that the ultimate decisive factor for the present non-existence of an individual complaint procedure under the International Covenant on Economic, Social and Cultural Rights was political and not of an international legal nature. Finally, she adds that several other international human rights instruments lack an individual complaint procedure. Therefore, if Vierdag's criterion were applied strictly the provisions contained in these covenants would not be considered as rights. Commenting on the justiciability of socio-economic rights, the United Nations Committee on Economic, Social and Cultural Rights stated in General Comment 9<sup>41</sup> that the general approach of each legal system needs to be taken into account. They stated that there is no Covenant right which in most legal systems would not have justiciable aspects. They concluded that the adoption of a rigid classification of socio-economic rights, which put them by definition beyond the reach of the courts, would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would greatly limit the ability of courts to protect the rights of the most vulnerable and disadvantaged groups in society. Ghai,<sup>42</sup> on the other hand argues that the key issues raised by socio-economic rights are different from those raised by civil and political rights. He further argues that there are no standards which are accepted for the levels of education, health and housing that are necessary to meet these obligations. He concludes that courts are not suitable institutions to establish these standards, because they raise policy decision about the distribution of resources, these decisions should be made by political bodies rather than judicial bodies. Finally, he argues that there is increasing recognition that while courts may be the ultimate custodians of rights, there are severe limits to what can be done through litigation.<sup>43</sup>

Koch,<sup>44</sup> concludes that the vagueness, the means and end approach and the progressive nature of socio-economic rights are cited as evidence of a dichotomous relationship between civil and political rights on the one hand, and socio-economic rights on the other. She however notes that opponents of this line of thinking have introduced uniting trichotomies or have rejected the idea of a categorisation of rights. Scott<sup>45</sup> illustrates the dichotomies as follows:

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<sup>41</sup> UN Doc E/C 12/1998/24

<sup>42</sup> Y Ghai, "An Approach to Implementation of Economic and Social Rights", a paper prepared for the INTERRIGHTS Advisory Council meeting, London, 7-9 July, 2000

<sup>43</sup> Ibid

<sup>44</sup> I Koch, 'The Justiciability of Indivisible Rights', *Nordic Journal of International Law*, Volume 72, No 1, 2003, Page 5

<sup>45</sup> C Scott, 'The Interdependence and Permeability of Human Rights: Towards a Partial Fusion of the International Covenant on Human Rights', cited in I Koch, 'The Justiciability of Indivisible Rights', *Nordic Journal of International Law*, Volume 72 No 1, Page 883, 2003

Economic, Social and Cultural Rights	Vs	Civil and Political Rights
(1) Positive	Vs	Negative
(2) Resource Intensive	Vs	Cost Free
(3) Progressive	Vs	Immediate
(4) Vague	Vs	Precise
(5) Unmanageably complex	Vs	Manageable
(6) Ideologically Divisive	Vs	Non-Ideological
(7) Political	Vs	Non-Political
(8) Non-Justiciable	Vs	Justiciable
(9) Aspirations or Goals	Vs	Real or Legal Rights

Justice O'Regan<sup>46</sup> of the South African Constitutional Court argues that any rigid distinction between socio-economic rights and civil and political rights would result in a false dichotomy. She agrees that there are differences between rights, but argues that the rights and obligations they impose form part of a spectrum, they do not fall into different categories.<sup>47</sup>

Justiciability includes all reviews by judicial and quasi judicial bodies. It is quite clear that several judicial and quasi judicial bodies have effectively elaborated on socio-economic rights. However, socio-economic rights litigation should aim to ensure conformity with socio-economic rights provisions and maintain separation of powers. Courts and other quasi-judicial bodies can elaborate on socio-economic rights and at the same time give the executive/legislature the discretion to make policy choices. As Steiner and Alston rightly pointed out, a remedy for an aggrieved individual claiming violations need not be seen as an indispensable characteristic of human rights.

#### 4. Remedies in Socio-Economic Rights Cases

The preceding sections examined justiciability, this section now focuses on the closely related concept of remedies. According to Mbazira, the term remedy has both generic and legal meanings.<sup>48</sup> Remedy in legal terms means the process of legal redress. This includes all legal procedures a person has to follow to redress the violation of his/her rights.<sup>49</sup> Mbazira concludes that the term remedy in the generic sense, refers to all methods through which

<sup>46</sup> C O' Regan, 'Introducing Socio-Economic Rights', *Economic Social Review*, Volume 1, 1999 Page 3

<sup>47</sup> Ibid

<sup>48</sup> C Mbazira , *Strategies for Effective Implementation of Court Orders in South Africa, Socio-Economic Right Project*, Community Law Centre, University of the Western Cape, Cape Town, 2008, Page 3

<sup>49</sup> Ibid

rights are vindicated, including non-judicial means.<sup>50</sup> Appropriate remedies can have a dissuasive effect on those who would commit socio-economic rights violations. In addition remedies also redress the wrongs done to victims of socio-economic rights violations and ensure the rule of law.<sup>51</sup> Remedies may range from declaratory judgements to awards of compensation.

A declaration is a judgement which clarifies the rights and obligations of the parties to a dispute.<sup>52</sup> A declaration may be made by the court without the court giving coercive orders. Judicial institutions may adopt declaratory judgements in relation to positive obligations in socio-economic rights cases. Therefore, in reviewing socio-economic rights cases, courts should make the distinction between negative and positive obligations/duties with regard to realising socio-economic rights. This would ensure that debates around resources/separation of powers are to some extent avoided. This will also help ensure the realisation of socio-economic rights and by extension poverty reduction.

Where a state fails to fulfil its positive or negative constitutional/legislative obligations/duties with regard to socio-economic rights, the courts can order it to do so. Therefore, the remedies at the disposal of the courts in socio-economic right cases may result in courts making orders, which have direct implications for budgetary matters. The orders may also require the state to review programmes and policies, but it is doubtful whether the courts will be prepared to order a specific distribution of financial and other resources.<sup>53</sup> It should be noted that the implementation/ enforcement of a court's order which requires resources will depend on the availability of resources. A court may grant a remedy, but it still needs to be implemented or given practical application. An appropriate remedy should be effective in meeting the exigencies of the particular claim. In *Fose v Minister of Safety and Security*,<sup>54</sup> the South African Constitutional Court stated that "appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts.

Trengrove,<sup>55</sup> states that litigation around socio-economic rights tends to present features, which call for the development of new and effective remedies. These features he states

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<sup>50</sup> Ibid

<sup>51</sup> D Sheldon, *Remedies in International Human Rights Law*, Oxford University Press, Oxford, 2000, Page 6

<sup>52</sup> Ibid

<sup>53</sup> M Olivier, 'Constitutional Perspectives on the Enforcement of Socio-Economic Rights: Recent South African Experiences' *Victoria University of Wellington Law Review*, Volume 1, No 33, Page 132

<sup>54</sup> (1997) 3 SA 786

<sup>55</sup> T Wintrengove, 'Judicial Remedies for the Violation of Socio-Economic Rights', *Economic and Social Review* Volume 1 No. 4, 1999, Pages 1-6

include the fact that litigation is undertaken in the interest of a community or a class of people. These people are usually poor and depend on the state for the provision of socio-economic services. The community or group of people usually have a particular interest in the enforcement of the positive duties of the state to provide the socio-economic services. He argues that a court's choice of remedy in any case where a fundamental right has been violated or threatened is determined only by what is just, equitable and appropriate. He further argues that conventional remedies serve as a vehicle for the development of new remedies. Finally, he suggests that there are four types remedies which he classified as preventive damages, reparation in kind, supervisory jurisdiction and orders to enact legislation. Preventive damages may be achieved by making an award of preventive damages against the state, in favour of an independent state or private agency skilled in and dedicated to the prevention of the misconduct.<sup>56</sup> Reparations in kind include ordering the state to provide remedial services for the benefit of a victimised class as whole, rather than individual cash compensation<sup>57</sup>. Where a court has ordered remedial action, the court may exercise supervisory jurisdiction of its implementation.<sup>58</sup> Finally, a court may order the legislature to enact relevant legislation necessary for the realisation of a socio-economic right.<sup>59</sup> The court may also order repeal of a legislation or provisions of legislation inconsistent with the constitution. For example, in *Gbemre v Shell*,<sup>60</sup> the Nigerian Court of Appeal held that the Nigerian gas flaring law is inconsistent with the Nigerian Constitution and ordered that it should be repelled.

Tushnet,<sup>61</sup> states that the main concern over judicial capacity to enforce socio-economic rights is the ability of courts to coerce the political branches of government into creating programmes of social distributions by means of taxes and transfer payments. This concern is based on the assumption that judicial enforcement of socio-economic rights would entail the courts granting coercive orders to the political branches of government. He advocates a weak form of judicial review for socio-economic rights. A weak review is a review that allows the court to declare legislation unconstitutional without issuing coercive orders, but which would have a substantial effect on the adoption and development of policy.<sup>62</sup> An example of legislation that would give rise to a weak form of judicial review is the Directive Principles of

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<sup>56</sup> Ibid

<sup>57</sup> Ibid

<sup>58</sup> Ibid

<sup>59</sup> Ibid

<sup>60</sup> FHC/B/CS/53/05

<sup>61</sup> M Tushnet, 'Enforcing Socio-Economic Rights Lessons from South Africa', *Economic and Social Review*, Volume 6 No. 3, 2005, Pages 1-2

<sup>62</sup> Ibid

State Policy contained in some constitutions. These principles are exempt from judicial enforcement. Tushnet, further argues that non-justiciable rights, such as those contained in Directive Principles of State Policy are not irrelevant, because they can be used to identify contract provisions inconsistent with public policies, to interpret ambiguous statutes and support interpretations. The requirement of reasonableness review developed by the Constitutional Court of South Africa is also consistent with weak socio-economic rights, because it gives the legislature broad discretion regarding the realisation of socio-economic rights.<sup>63</sup> Weak forms of review are not always immune from judicial enforcement, for example in the *Grootboom* case,<sup>64</sup> the Constitutional Court of South Africa held that the existing government policy was unreasonable and had to be adjusted to make provision for people in desperate need.

Mbazira, contends that corrective justice demands that victims be put in the position they would have been in, but for the violation of their rights.<sup>65</sup> On the other hand, distributive justice is based on the recognition of the constraints of corrective justice. Distributive justice focuses not just on the interest of the victim, but the society at large. Mbazira further contends that in the case of socio-economic rights, “appropriate, just and equitable remedies” cannot be determined solely from the litigant’s standpoint.<sup>66</sup> Appropriate just and equitable remedies should be determined by assessing the overall impact of the remedy on the state’s policy or policies on the right in issue.<sup>67</sup> For example, the judgement in *Grootboom*<sup>68</sup> case may not have resulted in any tangible goods and services for the *Grootboom* community. However, the decision forced the government to shift its housing programme to cater for the needs of those in intolerable conditions and those threatened with eviction.<sup>69</sup> Mbazira concludes that socio-economic rights should be considered in the light of collective or societal interests and remedies in socio-economic right cases should not be ordered in isolation for one individual, without the impact on others being considered.<sup>70</sup>

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<sup>63</sup> Ibid

<sup>64</sup> (2000), BCLR 1169. (CC)

<sup>65</sup> C Mbazira, ‘Enforcing socio-economic rights as individual rights the role of corrective and distributive forms of justice in determining “appropriate relief”, *Economic and Social Review* Volume 9, No. 1, 2008, Page 4

<sup>66</sup> Ibid

<sup>67</sup> Ibid

<sup>68</sup> (2000), BCLR 1169. (CC)

<sup>69</sup> C Mbazira, ‘Enforcing socio-economic rights as individual rights the role of corrective and distributive forms of justice in determining “appropriate relief”, *Economic and Social Review* Volume 9, No. 1, 2008, Page 7

<sup>70</sup> Ibid, Page 8

Bilchitz<sup>71</sup> agrees with the above assertions and points out that this was the major flaw in the corrective justice approach adopted by Brazilian courts, where individuals came to court requesting for individual medication and the court ordered medication to be provided. These orders however, distorted the budget to the point that other individuals who needed life-saving medication could not acquire them. Courts need to adopt a holistic view that embraces the wider impact of a case on society at large.<sup>72</sup> Bilchitz states that socio-economic rights are essentially individual rights that nevertheless need to be considered in the light of all individuals in the society.<sup>73</sup> Bilchitz advocated the use of structured injunctions, which allows for the expertise and participation of other branches of government in devising just outcomes.<sup>74</sup>

Judicial creativity is needed for the realisation of socio-economic rights. Decision-making in the area of socio-economic rights is controversial. This has its roots in the institutional role of the judiciary in most states. The enforcement of socio-economic rights raises the question of separation of powers and in some cases resources. It has been argued that positive obligations/duties in relation to socio-economic rights require expenditure by governments therefore it should not be enforced by the courts; rather it should be a matter for the parliament. It is also contended that the parliament and not the judiciary better undertake prioritising rights in the light of limited resources. However, under most constitutions the powers of the judiciary are far reaching. Relief granted by courts on any claim can vary and does not need to conform to any set standards. Most constitutions give the courts unlimited opportunity to develop on case-by-case basis, the most appropriate form of remedy. Therefore judges are vested with the discretion to make case based evaluation that informs the nature of remedies the judge of the court may grant. Justice Bhagwati of the Indian Supreme Court commenting on the justiciability of socio-economic rights stated that judges can incorporate socio-economic rights into their domestic jurisprudence by taking into account socio-economic rights when interpreting and applying human rights in domestic constitutions. He concludes that everything depends on the creativity, valour and activism of the judge deciding the particular case.<sup>75</sup>

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<sup>71</sup> D Bilchitz, 'Judicial remedies and socio-economic rights: A response to Christopher Mbazira', *Economic and Social Review*, Volume 9, No 1, 2008, Page 11

<sup>72</sup> Ibid

<sup>73</sup> Ibid

<sup>74</sup> Ibid

<sup>75</sup> P.N Bhagwati, 'Fundamental Rights in their Economic, Social and Cultural Rights Context', *Developing Human Rights Jurisprudence*, Volume 2, Commonwealth Secretariat, February 1988

## 5. The Concept of State Duties:

After examining justiciability and remedies in the context of socio-economic rights, it is pertinent to examine the nature of state duties/responsibilities in the context of socio-economic rights. This is necessary because judicial and quasi-judicial institutions streamline socio-economic rights by elaborating on the contents of the rights, indicating the responsibilities/duties of the state and the entitlements of the right holders. Identifying duties makes it easier to identify ways in which the socio-economic rights have been violated. Identifying states duties and individual entitlements also helps define the framework within which poverty reduction policies can be made.<sup>76</sup> This ensures the realisation of socio-economic rights and promotes the application of rights based approaches to poverty reduction.

In *SERAC v. Nigeria*,<sup>77</sup> the African Commission pointed out that all human rights entail four general obligations: to respect, protect, promote and fulfil. Therefore, the realisation of each separate right in the African Charter may involve duties to respect, to protect, to promote and to fulfil. A State Party should not limit itself to observance of one specific obligation only. In most cases, implementation of civil and political rights as well as socio-economic rights will require observance of all levels of duties and all types of obligations which are interrelated and interdependent.<sup>78</sup> Shue gives credence to this assertion. He states that for every right, three kinds of duties must correlate. The duties are duty to avoid depriving, duty to protect the deprived and duty to aid the deprived. The first duty to avoid depriving is the most negative and it may be considered the primary duty of the state.<sup>79</sup> The duty to protect involves designing laws and institutions for the protection of the right. The duty to aid, involves providing resources for those who cannot fend for themselves. The duty to aid also includes the duty to provide recovery from failures in the performance of the duties to respect and protect. These duties entail the state taking positive actions for their realisation.<sup>80</sup> Shue, states that basic rights are everyone's minimum reasonable demand upon the rest of humanity. He identifies three types of basic rights, namely: (1) Right to Security: Shue describes these as rights to physical security, for example the right not to be tortured,

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<sup>76</sup> Y Ghai & J Cottrel (Ed) 'The role of courts in the protection of Economic, Social and Cultural Rights' in *Economic, Social & cultural rights in practice: The role of the judges in implementing economic, social & cultural rights*, International Centre for the Legal Protection of Human Rights, London, 2004, Page 66

<sup>77</sup> Communication No. 155/96

<sup>78</sup> F Coomans, , *The Ogoni Case before the African Commission on Human and Peoples' Rights*, Page 5, retrieved 5<sup>th</sup> July, 2008, <http://www.righttoenvironment.org/ip/uploads/downloads/OgoniCaseProf.Coomans.pdf>

<sup>79</sup> H Shue, *Basic Rights, Subsistence, Affluence and the U.S Foreign Policy*, Princeton University, Princeton, Second Edition, 1996, Pages 13-35

<sup>80</sup> Ibid

murdered, raped or assaulted; (2) Right to Liberty: These rights include freedom of physical movement and freedom to participation in the control of the economic and political policies and institutions that determine the fulfilment of security and (3) Right to Subsistence: These are rights to minimal economic security which include unpolluted air, economic security, adequate food, clothing, shelter and preventive public health care.<sup>81</sup>

Shue maintains that with every person's subsistence rights three duties correlate, namely, duty not to eliminate a person's only available means of subsistence- (duties to avoid depriving), duty to protect people against deprivation of the only available means of subsistence- (duties to protect from deprivation), duty to provide for subsistence of those unable to provide for their own- (duties to aid the deprived). He further states that all activities and institutions of government, such as the police, courts and jails are attempts at providing social guarantees for individual security. These programs are extremely expensive and require positive action to be taken by the state for their realisation. Shue concludes that a demand for physical security is not normally a demand to be left alone, but a demand to be protected against harm.<sup>82</sup>

A former United Nations Special Rapporteur on the Right to Food, Asbjorn Eide,<sup>83</sup> applied the doctrine of tripartite typology in his report. He however modified the terms used by Shue. Eide, stated that states have duties or obligations to respect, protect and fulfil. The obligation to respect entails that the state abstains from doing anything that violates the right. The obligation to protect entails that the state, makes law and sets up institutions for the protection of the rights and prevents third parties from violating the right<sup>84</sup>. The obligation to fulfil entails that the state takes measures to provide for those in need. Pogge, contends that a concept of rights, which suggests an interactional understanding matching each right with corresponding duties, sustains the dispute about what duties human rights entail. In his view, human rights are moral claims on society.<sup>85</sup> He states that by postulating a human right to x, the society or other social system should be organised or reorganised in such a way that all its members have access to the right x.<sup>86</sup> On the other hand, Hohfeld,<sup>87</sup> states that a duty or a legal obligation is that which one ought to or ought not to do. He further states that duties and

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<sup>81</sup> Ibid

<sup>82</sup> (Ibid)

<sup>83</sup> United Nations, *The Right to Adequate Food as a Human Right*, Human Rights Studies, Series I, final report of A Eide, Special Rapporteur on the right to adequate food, U.N Doc, E/CN 4/ sub2/1987/23

<sup>84</sup> Ibid

<sup>85</sup> T Pogge, 'The International Significance of Human Rights', *The Journal of Ethics*, Volume 4, Number 1, March 2000 , Page 52

<sup>86</sup> Ibid

<sup>87</sup> W.N Hohfeld, *Fundamental Legal Concepts As Applied in Judicial Reasoning and Legal Essays*, Yale University Press, New Haven 1923, Pages 35-65

rights are correlative terms, for example if A has a right against B, this would be meaningless unless B has a duty to honour A's right.<sup>88</sup> Tomuschat, contends that only if clearly definable duties are imposed on states can subjective individual human rights arise.<sup>89</sup> The concept of typology is useful in determining the nature of state obligation inherent in any human right. There are aspects of socio-economic rights that are negative, such as the obligation to respect, and can easily be subjected to judicial scrutiny. However, Arambulo, contends that: "All basic rights have various aspects which require either positive or negative measures in other words, either action or abstention from action... These various aspects correlate with different kinds of duties that are incumbent upon a state in order to achieve realisation of the right concerned."<sup>90</sup>

According to Koch,<sup>91</sup> the duty to respect and protect differs from the duty to fulfil, since there already exists the object for the respect and the protection. She contends that although the duty to respect and protect may have positive and resource demanding implications, they are not the primary subjects of the debates on justiciability of human rights. At the point of fulfilment, we move from the level of non-interference and protection. The duty to fulfil implies that the state parties are under an obligation to overcome obstacles to the enjoyment of the right in question. This is where the debate over justiciability mainly lies. Debates around allocation of resources come up at the fulfilment level. Koch further contends that when we talk of the duty to fulfil we leave the state governed by law paradigm and move to a state welfare paradigm; this applies to the fulfilment of both socio-economic rights as well as civil and political rights. She concludes that "civil rights are fulfilled by means of social initiatives and one may say that civil rights become social rights at the fulfilment level."<sup>92</sup> The right to a fair hearing can be fulfilled by several social initiatives such as legal aid, provision of courts, a police force, and training of personnel for the courts and the police force. The fulfilment of a human right is associated with the provision of the object to be respected and protected.

Charlesworth and Chinkin,<sup>93</sup> assert that different rights point to different types of state duties. The type of state duty they contend depends on the nature of the right and the problems that the right is meant to overcome or prevent. They further state that an

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<sup>88</sup> Ibid

<sup>89</sup> C Tomuschat, *Human Rights: Between Idealism and Realism*, , Oxford University Press, Oxford, 2003, Page 39

<sup>90</sup> K Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights*, Intersentia / Hart, Utrecht, 1999, Page 10

<sup>91</sup> I Koch, 'The Justiciability of Indivisible Rights', *Nordic Journal of International Law* Volume 72, No 1, 2003, Page 15

<sup>92</sup> (Ibid) Page 16

<sup>93</sup> H Charlesworth & C Chinkin, 'The Gender of Jus Cogens' in H Steiner & P Alston, (2000) *International Human Rights Law in Context: Law, Politics, Moral*, Oxford University Press, Oxford, Page 181

understanding of the multiple duties that may be relevant to any one right sharpens an understanding of what is distinctive to and necessary to realise that right. They identified five types of state duties, namely: (a) Duty to respect for the rights of others: This duty requires that the state treats people equally and respects their dignity. The state should not interfere or impair their rights; (b) Duty to create institutional machinery essential for the realisation of the right: Some rights may be annulled or impaired not just by government's interference, but by its failure to put in place the institutional machinery essential for their realisation; (c) Duty to protect/prevent violations: The state has a duty to protect and prevent the violation of the rights of its citizens. Several international human right treaties such as the International Covenant on Civil and Political Rights provide that states should protect and prevent violations of the rights contained in the covenant; (d) Duty to provide goods and services to satisfy rights. Charlesworth and Chinkin, state that the state's duty here is primarily to provide material resources to the right-bearer, resources like housing, food and health care may go indirectly to right bearer through subsidies, or may reach them through agencies such as non-governmental organisations.<sup>94</sup>(e)Duty to promote rights: This duty entails the state creating awareness about a given problem or issue. Violence against women, is an example and may involve public education. Public campaigns help change public attitude and prevent violations. There may be several duties required for a right to be fulfilled. Shue concludes that typologies are at best abstract instruments for temporarily fending off the complexities of concrete reality.<sup>95</sup>

Brand contends that the distinctions between positive and negative duties are relevant in South Africa, because courts in South Africa subject negative breaches of socio-economic rights to a more robust scrutiny than failure to meet positive duties.<sup>96</sup> He concludes that courts do this as a result of separation of power concerns and the fact that the structure of the South African Constitution seems to demand it.<sup>97</sup> Gauri and Brinks assert that too much energy is spent on debates regarding classification of the kinds of duties that rights entail.<sup>98</sup> They argue that legally reviewable duties and liberties that arise from the application of formal rights are always evolving as new technologies interact with new social relationships

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<sup>94</sup> Ibid

<sup>95</sup> H Shue, *Basic Rights, Subsistence, Affluence and the U.S Foreign Policy*, Princeton University Press, Princeton, Second Edition, 1996, Page

<sup>96</sup> D Brand, Introduction to Socio-Economic Rights in South Africa, in D Brand & C Heyns, (Ed), *Socio-Economic Rights in South Africa*, Pretoria University Press, Pretoria, 2005, Page 12

<sup>97</sup> Ibid

<sup>98</sup> V Gauri & D Brinks, (Ed) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, New York, 2008, Page 13

to create new demands and new rights.<sup>99</sup> They assert that there are three kinds of actors involved in the production and distribution of social goods and services, namely the state, providers and clients.<sup>100</sup> Clients may be described as citizens or recipients.<sup>101</sup> Providers are the group of individuals that render essential social goods and services to clients.<sup>102</sup> They further assert that even where social goods and services are publicly funded, the providers are public sector employees and the providers are distinct from the state.<sup>103</sup> They describe the class of legally reviewable duties and liberties that extend between the state and providers as regulation. Regulation includes duties of the state to issue licenses; set standards for independent schools or health care facilities etc.<sup>104</sup> They refer to the legally reviewable duties and liberties extending between the state and client as financing.<sup>105</sup> These include making services more accessible to vulnerable people, increasing financing to meet statutory targets as well as duties to provide particular treatments or medication, such as treatment for HIV/Aids.<sup>106</sup> Finally they describe the legally reviewable duties and liberties existing between providers and clients, and which clients themselves have to enforce as private obligations. Examples of private obligations include conditions under which independent schools can admit, expel or award degrees.<sup>107</sup> They conclude that this essentially private relationship between providers and service users is a significant area of socio-economic rights litigation.<sup>108</sup>

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<sup>99</sup> Ibid

<sup>100</sup> Ibid, Page 9

<sup>101</sup> Ibid

<sup>102</sup> Ibid

<sup>103</sup> Ibid, Page 10

<sup>104</sup> Ibid

<sup>105</sup> Ibid

<sup>106</sup> Ibid

<sup>107</sup> Ibid, Page 11

<sup>108</sup> Ibid

## **6. Subjective Aspects of Socio-Economic Rights**

The previous sections have examined the concept of justiciability, the debates around justiciability, remedies and state duties in respect to socio-economic rights, this section now examines aspects of socio-economic rights that can easily be made justiciable. These aspects are discussed in sections 6.1, 6.2 and 6.3. As earlier mentioned state obligations under the African Charter for the realisation of socio-economic rights will be meaningless if the duty bearers cannot be held accountable to the right holders. It is necessary to explore ways of making socio-economic rights justiciable because it enables judicial and quasi-judicial institutions define state obligations and individual entitlements.

### **6.1 Negative/Non-Interventionist concept of Rights**

Some aspects of socio-economic may be easily made justiciable. As regards socio-economic rights, aspects that deal with freedom from the state, such as the freedom to form and join trade unions are easily justiciable. This right imposes a duty on the state to respect the individuals' freedom. The duty to respect is all the more important because it constitutes a liberal element, which removes the suspicion that socio-economic rights lead to big bureaucracies, and eventually ends up suppressing individual freedom.<sup>109</sup> Hirschl, conducted a quantitative-qualitative analysis of interpretations by national courts in three countries, namely Canada, Israel and New Zealand of their newly enacted Bill of Rights. This included a complete survey of all Bill of Rights cases in each country. The analysis sought to determine the extent to which a negative or non-interventionist concept of rights is upheld by national courts in these three countries at the expense of a more positive concept of rights. The result of the study showed that in these countries judicial interpretation of constitutional rights appeared to possess very limited capacity to advance progressive notions of social justice in areas such as employment, health, housing and education, which may require greater state intervention. Judicial interpretations of negative rights, which require the state to desist from interfering in the human and economic spheres, were given much more generous interpretations.<sup>110</sup>

It should be noted that the realisation of most socio-economic rights may require the state to take positive actions and ensure an equitable distribution of productive resources such as land and capital to everybody under its jurisdiction. This would require a powerful state, which may impact negatively on individual freedom and would have a negative impact on the

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<sup>109</sup> C Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford University Press, New York, 2003, Page 39

<sup>110</sup> R Hirschl, 'Negative' Rights v 'Positive' Rights Entitlements: A Comparative Study of Judicial Interpretation of Rights in an Emerging Neo-Liberal Economic order', *Human Rights Quarterly*, Volume 22, 2000. Pages 1061-1098

creation of wealth.<sup>111</sup> Bard-Anders Andreassen et al, asserts that the application principles of distributive justice to achieve the full realisation of all socio-economic rights is in today's economic world order an unrealistic aspiration. They further assert that this is as a result of the uncertainty regarding incentives to produce the surplus wealth that will be redistributed. They conclude that large scale redistribution may produce disincentives to production, which may limit the realisation of socio-economic rights.<sup>112</sup>

## 6.2 Minimum Core Obligations:

Even among poor people, some are more vulnerable than others. This is because for some survival is threatened by lack of access to basic necessities such as food, water and shelter. It is this group of people whose needs should be considered minimum core entitlements. They should be given priority by those allocating resources, in order for the state to satisfy its minimum core obligations.<sup>113</sup> A socio-economic right may require different levels of provisions for its realisation. The state is therefore obligated to prioritize the realisation of the minimum core of the right, while working progressively to the full realisation of the right.<sup>114</sup> The minimum core obligation does not represent the means by which a right is realised; it represents the standard of the provision needed for the realisation of the right in question.<sup>115</sup> The courts by elaborating on socio-economic rights may set the general standards for the minimum core obligation of the state.<sup>116</sup>

A minimum threshold for human rights realisation may be established by means of country-specific thresholds measured by indicators measuring nutrition, infant mortality, disease frequency, life expectancy, income, unemployment and indicators relating to food consumption.<sup>117</sup> The application of this approach would not have far reaching consequences on the distribution of goods and services, but would ensure that vulnerable groups in society are protected.<sup>118</sup> The application of this approach would also mean that realisation of socio-economic rights will vary depending on the available resources in a country. The minimum threshold approach requires the identification of the most deprived and vulnerable groups in

<sup>111</sup> A Eide, 'Realisation of Social and Economic Rights and the Minimum Threshold Approach', *Human Rights Law Journal*, Volume 10, 1989, Page 45

<sup>112</sup> A Bård-Anders Andreassen, 'Assessing Human Rights Performance in Developing Countries: The Case for a Minimal Threshold Approach to the Economic and Social Rights', in A Bård-Anders Andreassen & A Eide eds, *Human Rights in Developing Countries 1987/88: A Yearbook on Human Rights in Countries Receiving Nordic Aid*, Akademisk Forlag, Copenhagen, 1988, Pages 333-356.

<sup>113</sup> D Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights*, Oxford University Press, New York, 2008, Page 208

<sup>114</sup> Ibid 207

<sup>115</sup> Ibid 198

<sup>116</sup> Ibid 207

<sup>117</sup> A Eide., 'Realisation of Social and Economic Rights and the Minimum Threshold Approach', *Human Rights Law Journal*, Volume 10, (1989) Page 46

<sup>118</sup> Ibid

society, not only according to conventional distinction such as race, colour, gender, but distinctions defined by sectors or control over assets, for example, land owners and landless labourers as well as the urban and rural dwellers.<sup>119</sup>

Some aspects of socio-economic rights are regarded as minimum entitlements available to everybody. These rights require the effort of the state for their realisation.<sup>120</sup> An example is the right to primary education free of charge. Failure to comply with minimum entitlements can easily be subjected to judicial review. However, some countries may not have the means to fulfil the core minimum entitlement of a right. Under Article 9 of International Covenant on Economic, Social and Cultural Rights, the provision of social security for the aging may be considered as the minimum core content of the right to social security. Several developing countries do not have an effective system of social security.

Makinen,<sup>121</sup> investigated the relationship between the constitutional right to income assistance (often referred to as social security) and the spending on social policies, which provide the aid. She hypothesized that countries with a stated right to social security and judicial enforcement of the right will be obligated to spend more on public assistance which she defined as pensions, sickness and unemployment compensation and income assistance. She tested the hypothesis using data from 22 OECD member states. The results showed that countries with a stated right to social assistance and judicial review tended towards higher growth and less fluctuations in spending on social programmes. Therefore, the fulfilment of the right to social security would clearly have financial implications.

The Committee on Economic, Social and Cultural Rights has stated that for a country to establish that its failure to meet its minimum core obligation was as a result of lack of resources, it must demonstrate that every effort was made to use its available resources to satisfy its minimum core obligation.<sup>122</sup> The concept of minimum core obligation was developed by the Committee on Economic, Social and Cultural Rights to describe the minimum expected of states in order to comply with their obligations under the International Covenant on Economic, Social and Cultural Rights. On the other hand the minimum threshold is the floor beneath which the conduct of a state must not drop if the state is to be in compliance with the socio-economic right in question. The minimum core obligation has a

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<sup>119</sup> Ibid, Page 47

<sup>120</sup> C Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford University Press, New York, 2003, Page 39

<sup>121</sup> A Makinen, 'Rights, Reviews and Spending: Policy Outcomes with Judicially Enforceable Right', *European Journal of Political Science*, Volume 39, 2001, Pages 23-32

<sup>122</sup> Committee on Economic, Social and Cultural Rights (CESCR) General comment 3, Paragraph 11, retrieved 20<sup>th</sup> June, 2010, <http://www.unhcr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument>

universal scope, while the minimum threshold of socio-economic rights must be established for each state individually.<sup>123</sup>

### 6.3 Concept of Equality/Non Discrimination

Discrimination and inequality cause and perpetuate poverty. When people are marginalised, discriminated against or left out of social relations, they can be described as being socially excluded.<sup>124</sup> As a result of social exclusion, the lack basic security and the capability to lead a life they value. The principle of equal treatment and non-discrimination in the enjoyment of rights, applies across the board to all categories and generations of rights. Specifically, The African Charter in Article 2 prohibits discrimination based on race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status in the enjoyment of the rights and freedoms recognized and guaranteed in the Charter. Article 3 of the African Charter states that every individual is equal before the law and every individual is entitled to equal protection before the law. Likewise, Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that “the state parties to the present covenant undertake to guarantee that the rights enunciated in the present covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Article 3(ICESCR), also provides that state parties to the present covenant, undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present covenant. Similarly, the International Covenant on Civil and Political Rights (ICCPR) also makes similar provision under Article 26, which provides that “all persons are equal before the law and are entitled without discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any such grounds as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status.” Article 26 applies whether or not the subject matter of the law is covered by provisions of the ICCPR. Article 26 therefore has the potential to be widely used to oppose discrimination.

In *S.W.M. Broeks v. The Netherlands* the Human Rights Committee considered the scope of Article 26 of International Covenant on Civil and Political Rights. Under Netherlands

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<sup>123</sup> K Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights*, Intersentia / Hart, Utrecht, 1999, Page 130

<sup>124</sup> B Andreassen & D Banik, ‘Editorial Introduction: Human Rights and Extreme Poverty: African Dimensions’, *The International Journal of Human Rights* Volume 14, No 1, 2010, Page 7

Unemployment Benefits Act, married women could not claim continued unemployment benefits unless they proved they were either "breadwinners" (meaning that they earned over a certain proportion of their family's total income) or that they were permanently separated from their husbands. This condition did not apply to married men. Mrs Broeks contested the decision of the relevant Netherlands authorities to discontinue unemployment payments to her and in the course of exhausting domestic remedies invoked Article 26 of the International Covenant on Civil and Political Rights, claiming that the relevant Netherlands legal provisions were contrary 'to the right to equality before the law and equal protection of the law without discrimination guaranteed by Article 26 of the International Covenant on Civil and Political Rights.

The Human Rights Committee found that the law differentiated on the ground of sex, placing married women at a disadvantage compared with married men and noted that this differentiation was unreasonable. The Committee also found that the Unemployment Benefits Act violated (based on sex) Mrs Broeks rights under Article 26 of the ICCPR. The Committee noted that the State party had not intended to discriminate against women and further noted with appreciation that the discriminatory provisions in the law applied to Mrs. Brooks have been eliminated. Although the State party had taken the necessary measures to put an end to the kind of discrimination suffered by Mrs. Brooks at the time complained of, the Committee stated that the State party should still offer Mrs. Brooks an appropriate remedy. This case is an example of Article 26 of the ICCPR providing protection from discrimination that is not related to a civil or political right but socio-economic rights.

The South African Constitutional Court has stated that in determining the reasonableness of government's measures, consideration must be given to whether significant segments of the society have been excluded or not. Discrimination has been the basis for denial of several socio-economic rights. In *Hoffman v South African Airways*,<sup>125</sup> the South African Constitutional Court held that refusal of the South African Airways to employ Mr Hoffman merely because he was H.I.V positive was based on an invalid and unjustified premise, i.e the appellant's medical condition made him unsuitable for employment. Further, it amounted to discrimination against him in a manner that was unfair and unconstitutional. Although the commercial interests of South African Airways was a valid consideration in recruiting people for employment, however in this case, the consideration had been influenced by a common

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<sup>125</sup> (2000) 2 SA 628

prejudice and stereotyping and took inadequate value of human dignity in a constitutional democracy like South Africa.

Similarly, in considering the right to education under the Nigerian Constitution, the Federal Court of Appeal applied the doctrine of non-discrimination in *Adamu v Attorney General of Borno state, Nigeria*.<sup>126</sup> In this case, the plaintiffs' alleged unconstitutional discrimination against Christian pupils by the local government authority, on the ground that Christian parents were required to fund Christian instruction to their wards in primary schools in Gwon local government area of Nigeria. This practice was not applicable to Muslim parents for Muslim instructions to their wards. The defendants argued that the right to a particular form of education fell under Chapter 2, of the Nigerian Constitution. Chapter 2, of the Nigerian Constitution provides for "Fundamental Objectives and Directive Principles of State Policy" They are declaratory statements of national policy that establish broad economic, social and cultural guidelines. They are not justiciable under the Nigerian Constitution.

The Nigerian Federal Court of Appeal held that although Chapter 2 of the Nigerian constitution is not justiciable, it is the law that where the provisions of the constitution defines a cause of action or enshrines certain rights, these provisions must be applied without any inhibition emanating from Fundamental Objectives and Directive Principles of State Policy contained in Chapter 2 of the constitution. The court concluded that where a local authority in the implementation of the fundamental objectives of state policy, adopts a system which infringes on a citizen's fundamental right, such as the freedom of religion and freedom from discrimination that breach of the citizen's right is justiciable.

Equality and non-discrimination are relevant to the implementation of all rights in the African Charter, but the prohibition on discrimination also provides a useful and specific focus for claims relating to socio-economic rights, which might be dismissed as long-term objectives.<sup>127</sup> The concept of equality may be viewed from a positive or negative standpoint. In positive terms, the principle of equality requires that everybody be treated in the same manner, unless there is some good reason for not doing so.<sup>128</sup> In negative terms, the principle of equality requires difference in treatment, unless based on a number of prohibited areas.<sup>129</sup> A law that prescribes a high level of education as a precondition for employment will, even if

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<sup>126</sup> 1996 8 NWLR 203, at page 225

<sup>127</sup> M Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Clarendon press, Oxford, 1995, Page 115

<sup>128</sup> Ibid

<sup>129</sup> Ibid

applied equally, have the effect of excluding a large number of people. Therefore in some cases, unequal treatment may be required to achieve equality, and in other cases equal treatment may lead to inequality.

The principle of non-discrimination approaches the matter from a negative standpoint. It is a legal technique to check unjustified inequality and operates on the presumption that unequal treatment is legitimate, unless based on a prohibited ground.<sup>130</sup> The Human Rights Committee in its General Comment on Article 2(1) of the International Covenant on Civil and Political Rights stated that the term discrimination should be understood to “Imply any distinction based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin property, birth or other status, and which has the effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.”<sup>131</sup>

It follows therefore that a difference in treatment on its own may not amount to discrimination, unless it is based on the grounds set out in the definition, and has the effect of impairing or nullifying the recognition or enjoyment by all persons on equal footing of all rights and freedoms contained in the International Covenant on Civil and Political Rights.

## **7. Conclusion:**

Socio-economic rights impose three different types of obligations on States. The obligations are to respect, protect and fulfil the socio-economic right. Failure to perform any one of these three obligations constitutes a violation of the rights. The justiciability of socio-economic plays a pivotal role in the realisation of socio-economic rights. The implementation of socio-economic rights enshrined in the Africa Charter, will contribute in reducing poverty and dealing with development challenges in the continent.

The interpretation of the rights by courts and other quasi judicial bodies is important in benchmarking and standard-setting. Justiciable rights grant right-holders a legal course of action to enforce them, whenever the duty-bearer does not comply with his or her duties. The term legal remedy may be understood both in the sense of providing a procedural remedy (effective access to an appropriate court or tribunal) when a violation has occurred or is imminent, and the process of awarding adequate reparation to the victim.

Some aspects or elements of socio-economic rights may be easily justiciable, these include: non-interventionist aspects of socio-economic rights. These aspects impose a duty on the state to respect the individuals' freedom. The principle of non-discrimination can be

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<sup>130</sup> Ibid

<sup>131</sup> Human Rights Committee, General Comment 18

applied across and used protect all human rights. For example, the South African Constitutional Court has stated that in determining the reasonableness of government's measures, consideration must be given to whether significant segments of the society have been excluded or not. The principle of minimum core obligations where established can also be made justiciable.

## CHAPTER 5: PROTECTING AND PROMOTING SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA AND NIGERIA.

### 1. Introduction

This Chapter analyses the extent to which South Africa and Nigeria have incorporated socio-economic rights into their constitutions and incorporated socio-economic rights provisions of the African Charter into their domestic legislations. This chapter also analyses how courts in both countries have interpreted socio-economic rights provisions and upheld the principles of the rights based approaches to poverty reduction. These analyses aim to identify prospects and challenges to the realisation of socio-economic rights in the two countries. The attention on state parties to the African Charter is driven by the fact that the primary responsibility for the realisation of socio-economic rights, enactment of relevant laws and policies as well as application of right based approaches to poverty reduction lies with states.

Litigation is one method of realising socio-economic rights, however there are other methods such as lobbying government to implement socio-economic rights or to implement poverty reduction programmes. Similarly, domestic implementation of socio-economic rights can be advanced through national courts and quasi-judicial bodies such as national human rights commissions as well as other legal entities within the state. Litigation has several uses, it may be used to raise awareness about a problem, clarify/define a programme or a right, make an individual claim or it may serve as a strategy for law reform. Human rights lawyers have addressed several poverty related life threatening situations through domestic courts and quasi judicial bodies. For example, the judgement in *Grootboom*<sup>1</sup> has led to housing policy changes in South Africa, ensuring that special attention is paid to vulnerable people. Similarly, the *Treatment Action Campaign*<sup>2</sup> case saved a lot of lives by ensuring access to anti-retroviral drugs to pregnant women with HIV/AIDs to prevent mother to child transmission of H.I.V.

Courts have to achieve a critical balance between effectively protecting the socio-economic rights of the poor, while also respecting the roles of the legislature and executive as the main branches of government responsible for realising socio-economic rights and managing the country's finances.<sup>3</sup> Jurisprudence developed by domestic courts, defines the nature of the state's obligations in relation to socio-economic rights, the conditions under

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<sup>1</sup> (2000), BCLR 1169. (CC)

<sup>2</sup> (2002) 5 SA 721 (CC)

<sup>3</sup> S Liebenberg, 'Basic Rights Claims: How Responsive is Reasonableness Review?' *Economic and Social Review*, Volume 5, No. 5, 2004, Page 11

which these rights can be claimed, and the nature of the relief that those who turn to the courts can expect.<sup>4</sup> The evolving jurisprudence is not only significant for future litigation aimed at enforcing socio-economic rights, but also in guiding the adoption and implementation of policies and legislation by government to facilitate access to them.<sup>5</sup>

In most developing countries like Nigeria and South Africa, laws, policies and institutions do not afford equal opportunities and protection for the poor.<sup>6</sup> Poor people in these countries do not have access to justice because the laws are too complicated for them to understand and getting legal advice is expensive.<sup>7</sup> Legal empowerment of the poor is rooted in right based approaches to poverty reduction. This is because right based approaches recognise that poverty results from disempowerment, exclusion and discrimination.<sup>8</sup>

Liebenberg contends that without effective policies and laws to implement the human rights commitments in the Constitution and international instruments, these rights will amount to little more than paper promises. A coherent framework of laws and policies is needed to translate broad human rights commitments into detailed and concrete programmes that have a real impact on the lives of millions of people.<sup>9</sup> Human rights serve as tools for social mobilisation and have the potential to function as a framework for decision making.<sup>10</sup> Human rights require implementation and can be conceptualised in a way that does not require just one method of compliance.<sup>11</sup> According to Cottrell and Ghai, the purposes of human rights show that the relevance of rights is not exhausted by litigation as human rights have a moral force which can be mobilised even in the absence of judicial enforcement. However enforcement through the courts strengthens the potential of human rights for change. They conclude that the critical question is how strategies of litigation domestically or redress internationally can be tied in to other forms of struggle for rights, and what kind of judicial approaches can best promote these forms.<sup>12</sup>

This chapter uses the South African and Nigerian judicial experience in adjudicating socio-economic rights to outline the prospects and challenges in both countries. Section two of this chapter examines the extent to which the South African and Nigerian constitutions

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<sup>4</sup> Ibid

<sup>5</sup> S Liebenberg, 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty', *Law, Democracy and Development*, Volume 6, 159, 2002, Pages 2-3

<sup>6</sup> United Nations, Legal Empowerment of the Poor and Eradication of Poverty, UN/Doc A/64/133, July 2009, Paragraph 2, retrieved 15<sup>th</sup> July 2010, [www.un.org/esa/socdev/documents/legalempowerment](http://www.un.org/esa/socdev/documents/legalempowerment)

<sup>7</sup> Ibid

<sup>8</sup> Ibid

<sup>9</sup> Y Ghai & J Cottrell (eds), *Economic, Social & cultural rights in practice: The role of the judges in implementing economic, social & cultural rights*, International Centre for the Legal Protection of Human Rights, London, 2004, Page 58

<sup>10</sup> Ibid Page 59

<sup>11</sup> Ibid Page 60

<sup>12</sup> Ibid

incorporate socio-economic rights as well as the extent to which both countries have incorporated socio-economic rights provisions of the African Charter into their domestic laws. Section three examines the justiciability of socio-economic rights in both countries. Section four examines the process of enforcing socio-economic rights in both countries. This section addresses key issues affecting enforcement, namely jurisdiction of courts, interpretation and locus standi. Thereafter, the next two sections examine how South African and Nigerian courts have interpreted and applied socio-economic rights provisions. These sections will also assess if courts in both countries provides a fundamental right to individuals to claim "positive", judicially enforceable action and services from the state. The last six sections covers the following topics, namely litigation strategies emerging in South African and Nigeria in relation to socio-economic rights litigation, transformation of constitutional socio-economic claims into enforceable legal rights in South Africa and Nigeria, institutions and the legalization of socio-economic rights in South Africa and Nigeria, institutions that complement the judiciary in administering justice in South Africa and Nigeria, challenges to the realisation of socio-economic in South Africa and Nigeria and conclusion.

## **2. Incorporation of socio-economic rights into the constitutions of South Africa and Nigeria**

The South African Constitution contains a Bill of Rights which makes provision for civil and political rights as well as socio-economic rights. Speaking about the Bill of Rights in the *Soobramoney* case,<sup>13</sup> Justice Chaskalson described the context in which the Bill of Rights under the South Africa constitution should be interpreted. He stated that the South African society is one with great disparities in wealth and millions of people live in deplorable conditions and in great poverty. He further stated that there is high level of unemployment, inadequate social security and many people do not have access to clean water or adequate health care services and these conditions already existed when the constitution was adopted. He concluded that a commitment to address these conditions and to transform the South African society into one in which there will be socio-economic rights recognised in the South African Constitution resulted in the incorporation of socio-economic rights into South Africa's Bill of Rights. The socio-economic rights in the South African Bill of Rights are: labour rights (s 23); the right to an environment that is not harmful to health or well-being, and to have the environment protected through reasonable legislative and other measures that secure sustainable development (s 24); equitable access to land; security of land tenure; and

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<sup>13</sup> (2005), CCT 32/97

restitution of property or equitable redress for property that was dispossessed after 1913 as a result of past racially discriminatory laws or practices (s 25(5) - (9)); the right of access to adequate housing and a prohibition on the arbitrary eviction of people from their homes or the demolition of homes (s 26); the right of access to health care services (including reproductive health care), sufficient food and water, and social security (s 27); the right against the refusal of emergency medical treatment (s 27(3)); the right of children to basic nutrition, shelter, basic health care services and social services (s 28(1)(c)); educational rights (s 29); adequate accommodation, nutrition, reading material and medical treatment at State expense for persons deprived of their liberty (s 35(2)(e)).

Most cases on socio-economic rights that have come before the South African Constitutional Court have been based on the rights under sections 26 and 27.<sup>14</sup> Section 26(1) provides for the right of access to adequate housing while section 27(1) provides for the right of access to health care services; sufficient food and water; and social security. According to Mubangizi,<sup>15</sup> the particular significance of these rights is grounded in the fact that they guarantee everyone the right of access not only to important components of an adequate standard of living but also to things that are ordinarily regarded as basic necessities of life. This has to be seen in the context of the preamble to the South African Constitution, which envisions the adoption of the Constitution as the supreme law of the Republic in order to, inter alia, 'improve the quality of life of all citizens and [to] free the potential of each person.'<sup>16</sup>

A critical analysis of the socio-economic rights provided for under the South African constitution reveals that three groups of socio economic rights can be established.<sup>17</sup> The first group of socio-economic rights can be described as qualified socio-economic rights.<sup>18</sup> They are formulated as access to as opposed to the right to the socio-economic right. They impose qualified positive duties, for example the duties are described as duties to take reasonable steps, within available resources, to achieve progressive realisation of the right. The qualified socio-economic rights are contained in, Sections 26 (2),<sup>19</sup> 27 (2),<sup>20</sup> 24(B),<sup>21</sup> 25(5),<sup>22</sup> and 29 (1)

<sup>14</sup> JC Mubangizi, 'Prospects and Challenges in the Protection and Enforcement of Socio-Economic Rights: Lessons from the South African Experience', *African Yearbook of International Law*, Volume 15, 2007, Page 92

<sup>15</sup> Ibid

<sup>16</sup> Ibid

<sup>17</sup> D Brand, 'Introduction to Socio-Economic Rights in South African Constitution', in D Brand & C Heyns (Ed) *Socio-Economic Rights in South Africa*, Pretoria University Law Press, Pretoria, 2005, Page 3

<sup>18</sup> Ibid

<sup>19</sup> The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

<sup>20</sup> The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(b).<sup>23</sup> The second group of socio-economic rights may be described as basic socio-economic rights.<sup>24</sup> This group are formulated as the right to as opposed to access to a right and the positive duties they impose are not qualified.<sup>25</sup> They are, 29 (1) (a), <sup>26</sup>28 (1) (c)<sup>27</sup> and 35(2) (e).<sup>28</sup> The third group of socio-economic rights are formulated as prohibition of certain forms of conduct rather rights to particular things. These rights are not subject to any special qualifications and are attached to qualified socio-economic rights. They are contained in: 26(3)<sup>29</sup> and 27(3).<sup>30</sup> Some rights not formulated as socio-economic rights, but can be interpreted to create entitlements to material conditions of human welfare; they include Section 11 (right to life), section 9 (right to equality) and section 33 rights to administrative justice.<sup>31</sup>

Unlike the South African Constitution, the Nigerian Constitution does not provide for justiciable socio-economic rights. In Nigeria, Fundamental Objective and Directive Principles of States Policy similar to socio-economic rights were accorded recognition for the first time under the 1979 Constitution. The current 1999 Constitution makes the same provision for non-justiciable Fundamental Objective and Directive Principles of States Policy under Chapter 2. Though the 1979 constitution was replaced in 1999 with the 1999 constitution, the provisions in respect of human rights have remained the same. The Fundamental Objectives and Directive Principles of State Policies make provisions for Fundamental obligations of the Government,<sup>32</sup> it makes provision for democratic relationship between the Government and the people,<sup>33</sup> as well as Political objectives,<sup>34</sup> Economic objectives,<sup>35</sup> Social objectives,<sup>36</sup>

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<sup>21</sup> 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.

<sup>22</sup> The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

<sup>23</sup> Everyone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible.

<sup>24</sup> D Brand, 'Introduction to Socio-Economic Rights in South African Constitution', in D Brand & C Heyns (Ed) *Socio-Economic Rights in South Africa*, Pretoria University Law Press, Pretoria, 2005, Page 3

<sup>25</sup> Ibid

<sup>26</sup> Everyone has the right to a basic education, including adult basic education

<sup>27</sup> Every child has the right to basic nutrition, shelter, basic health care services and social services

<sup>28</sup> Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

<sup>29</sup> No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions

<sup>30</sup> No one may be refused emergency medical treatment

<sup>31</sup> D Brand, 'Introduction to Socio-Economic Rights in South African Constitution', in D Brand & C Heyns (Ed) *Socio-Economic Rights in South Africa*, Pretoria University Law Press, Pretoria, 2005, Page 3

<sup>32</sup> Section (13), Nigerian Constitution

<sup>33</sup> Section (14), Nigerian Constitution.

<sup>34</sup> Section (15) Nigerian Constitution

<sup>35</sup> Section (16) Nigerian Constitution

<sup>36</sup> Section (17) Nigerian Constitution

Educational objectives,<sup>37</sup> Foreign policy objectives,<sup>38</sup> Environmental objectives,<sup>39</sup> Directive on Nigerian cultures,<sup>40</sup> Obligation of the mass media,<sup>41</sup> National ethics<sup>42</sup> and Duties of the citizen.<sup>43</sup> The Nigerian Constitutional Drafting Committee (1979) defined what is meant by Fundamental Objectives and Directive Principles. It stated that by “Directive principles we refer to the identification of the ultimate objectives of the nation whilst Directive Principles of state policy indicate the paths which lead to those objectives. Fundamental Objectives are ideals towards which the nation is expected to strive whilst Directive principles lay down the policies which are expected to be pursued in the efforts of the nation to realise the national ideals<sup>44</sup> The reason for incorporating these ideals into the constitution according to the Nigerian Constitutional Drafting Committee is that “Governments in the developing countries have tended to be pre-occupied with power and its material perquisites, with scant regard for political ideas as to how society can be organised and ruled to the best advantage of all.”<sup>45</sup>

In March 1983, the Nigerian National Assembly enacted the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act (“African Charter Act”), thereby incorporating the African Charter on Human and Peoples’ Rights (“African Charter”) into domestic law. The Nigerian Constitution under section 12 provides that “No treaty between the Federation and any other country shall have the force of law, except to the extent to which any such treaty has been enacted into law by the National Assembly”. Therefore the provisions of the African Charter have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities. Interestingly, the incorporating act did not desegregate the rights but imported, word for word and letter for letter, the full text of the Charter, meaning that all the rights accorded recognition by the Charter (civil and political, socio-economic and cultural as well as solidarity rights) presently constitute part of the domestic law of Nigeria.<sup>46</sup> The South African Constitution makes similar provision to section 12 of the Nigerian Constitution. Section 231(4) of the South African Constitution provides that “any international agreement becomes law in the Republic when it is enacted

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<sup>37</sup> Section (18) Nigerian Constitution

<sup>38</sup> Section (19) Nigerian Constitution

<sup>39</sup> Section (20) Nigerian Constitution

<sup>40</sup> Section (21) Nigerian Constitution

<sup>41</sup> Section (22) The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this Chapter and uphold the responsibility and accountability of the Government to the people.

<sup>42</sup> Section (23) The national ethics shall be Discipline, Integrity, Dignity of Labour, Social, Justice, Religious Tolerance, Self-reliance and Patriotism.

<sup>43</sup> Section (24)

<sup>44</sup> Report of the Nigerian Constitutional Drafting Committee, Volume 1, Part V, Government Printer, Lagos, 1976

<sup>45</sup> Ibid

<sup>46</sup> Ibid

into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament." South African is a party to the African Charter; however it is yet to incorporate the Charter into its domestic legislation.

The Nigerian Constitution does not mandate Nigeria courts to consider international or foreign law. However, there is nothing in the Constitution that prevents Nigeria courts from considering international treaties to which the country is a party to. In practice, some courts in Nigeria have taken account of international treaties to which Nigeria is a party, in considering cases before them. For example, in *Mojekwu v Ejikeme*<sup>47</sup> The issue for determination was whether customary rules of succession which limit the freedom of women to enter into marriage and deny inheritance to those who do is consistent with the fundamental rights of women, the Constitution and other laws in Nigeria. Niki Tobi (Justice of the Court of Appeal as he then was) stated that, the applicant Virginia cannot be discriminated against on grounds of her sex, because section 42(1) of the Nigerian constitution forbids discrimination on grounds of sex. Furthermore, Virginia has protection under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). By this article, state parties condemn discrimination against women in all its forms and agree to pursue a policy of eliminating discrimination against women. He further stated that, Article 5 of CEDAW, calls upon state parties to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped role of men and women. He concluded that, Virginia was a victim of the prejudices anticipated in Article 5 and in view of the fact that Nigeria is a party to the Convention; Nigerian courts of law should give or provide teeth to its provisions.

However, the Supreme of Nigeria in *Fawehinmi vs. Abacha*<sup>48</sup> adopted the dicta in *Higgs & Anor. V. Minister of National Security & Ors*<sup>49</sup> stating that domestic courts had no jurisdiction to construe or apply a treaty, nor could unincorporated treaties change the law of the land. The court concluded that unincorporated treaties had no effect on citizens' right and duties in common or statute law. The court, however noted that international treaties to which the state is a party may have an indirect effect upon the construction of statutes or may give

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<sup>47</sup> CA/E/7/99

<sup>48</sup> S.C. 45/1997

<sup>49</sup> (2000) 2 AC 228

rise to a legitimate expectation by citizens that the government, in its act affecting them, would observe the terms of the treaty.

On the contrary, the South African Constitution provides scope for the consideration of the African Charter and other international treaties in interpreting the Bill of Rights. For example, South African Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law; and may consider foreign law.<sup>50</sup> The South African Constitution further provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law<sup>51</sup> and customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.<sup>52</sup> In practice, minimal mention has been made of the African Charter in South African judicial decisions.<sup>53</sup> According to Viljoen, the minimal impact of the African Charter on judicial decisions in South Africa since the ratification of the Charter in 1996 is disappointing.<sup>54</sup> He concludes that this was evident in the *Certification of the Constitution case*,<sup>55</sup> where extensive mention was made of other constitutions and international instruments. However, mention of the African Charter was made only in the context of developments in international human rights law and in support of the assertion that a right to intellectual property is rarely recognised in regional human rights treaties.<sup>56</sup>

The preceding section has examined the extent socio-economic rights have been incorporated into the constitutions of South Africa and Nigeria as well as the extent to which both countries have incorporated the African Charter into their domestic laws. The following section examines the justiciability of socio-economic rights in both countries.

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<sup>50</sup> Section 39(1) (b) and (C), South African Constitution

<sup>51</sup> Section 233, South African Constitution

<sup>52</sup> Section 232, South African Constitution

<sup>53</sup> F Viljoen, 'Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa', *Journal of African Law*, Volume 43, No. 1, 1999, Page 12-13

<sup>54</sup> Ibid

<sup>55</sup> (1996) 4 SA 744 (CC)

<sup>56</sup> Ibid

### 3. Justiciability of socio-economic rights in South Africa and Nigerian

Nolan, Porter and Langford, contend that the notion of what is 'justiciable' is largely determined by assumptions about the role and competence of courts, and that these assumptions themselves must be subject to question. They further contend that the question of what rights or components of rights should be subject to adjudication and remedy by courts or other bodies raises critical questions about how governments are to be made accountable, in practical terms, to human rights norms. They conclude that understanding the role of courts must evolve with our changing understanding of fundamental rights and respond to new challenges and problems in relation to accountable governance and human rights. In the context of socio-economic rights therefore, it must be noted that many civil and political rights have socio-economic aspects or implications and the acknowledged interrelationship and indivisibility of both kinds of rights have led to elements of socio-economic rights being protected by means of provisions relating to civil and political rights.<sup>57</sup>

The question of justiciability of socio-economic rights under the South African Bill of Rights is settled. The Constitutional Court of South Africa has stated that socio-economic rights are expressly included in the Bill of Rights and South African courts are constitutionally bound to ensure that they are protected and fulfilled. The Constitutional Court of South Africa stated further that the question is therefore not whether socio-economic rights are justiciable under the South African Constitution, but how to enforce them in given cases.<sup>58</sup> The inclusion of socio-economic rights into the South African Bill of Rights was facilitated by multi-party negotiations that led to the new constitutional dispensation.<sup>59</sup> These negotiations resulted in the inclusion of socio-economic rights initially in the 1993 Interim Constitution and later in the 1996 'final' Constitution.<sup>60</sup>

The inclusion of socio-economic rights into the South African Bill of Rights was not uncontested due to the fact that some argued that socio-economic rights were inherently non-justiciable and not suited to judicial enforcement.<sup>61</sup> As a result of this disagreement, the inclusion of socio-economic rights in the Bill of Rights was considered in the *First Certificate Judgement*<sup>62</sup> in which the Constitutional Court stated that although socio-economic rights are not universally accepted as fundamental rights, they are at least to some

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<sup>57</sup> A Nolan, B Porter, & M Langford, *Justiciability of Social and Economic Right: An Updated Appraisal*, 2007, Page 27, retrieved 18<sup>th</sup> December, 2008, <http://www.chrgj.org/publications/docs/wp/NolanPorterLangford.pdf>

<sup>58</sup> *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

<sup>59</sup> J.C Mubangizi, 'Prospects and Challenges in the Protection and Enforcement of Socio-Economic Rights: Lessons from the South African Experience', *African Yearbook of International Law*, Volume 15, 2007, Page 88

<sup>60</sup> Ibid

<sup>61</sup> Ibid, Page 89

<sup>62</sup> (1996) 4 SA 744 (CC)

extent justiciable; and at the very minimum can be negatively protected from invasion. The Court conceded that socio-economic rights might result in courts making orders that have direct budgetary implications, but pointed out that the enforcement of certain civil and political rights would often also have such implications.<sup>63</sup>

Liebenberg contends that the way the socio-economic rights are framed in the Bill of Rights suggests that they should not be regarded as commodities to be dispensed by the state, free of charge to a passive citizenry. She concludes that the state's primary duty is to create an enabling environment through which people can gain "access to" the various rights. An enabling environment has the following key elements: ensuring that resources, services and opportunities are made available without unfair discrimination; creating mechanisms for accessing the rights that are transparent and enable equitable participation by all social groups; adopting special measures to assist vulnerable and disadvantaged groups to gain access to the rights and refraining from erecting barriers that make it more difficult for people to access or enjoy their rights.<sup>64</sup>

On the other hand, section 6 (6) (c) of the Nigerian Constitution 1999 declares Chapter 2 (Fundamental Objective and Directive Principles of State Policy) of the Constitution non-justiciable. It states that the jurisdiction of the court "shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter 2 of this Constitution." Section 13 of the Nigerian Constitution, seems to contradict the above provision. It states that "It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this Chapter of this Constitution." This provision seems to suggest that Chapter 2 is applicable to the judiciary and Nigerian courts can therefore apply and enforce Chapter 2 rights.

However, the Nigerian Court of Appeal in *Archbishop Okogie & others v Attorney – General of Lagos State*,<sup>65</sup> stated that they are precluded by section 6 (6) (c) of the Nigerian Constitution from enforcing the provisions of Chapter 2, including socio-economic rights. The court further stated that while section 13 of the Constitution makes it a duty and responsibility of the judiciary, among other organs of government, to conform to and apply

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<sup>63</sup> Ibid

<sup>64</sup> S Liebenberg, *Human Development and Human Rights: South African Country Study, 2000*, United Nations Development Programme, retrieved 3<sup>rd</sup> January 2009, <http://hdr.undp.org/en/reports/global/hdr2000/papers/sandra%20liebenberg.pdf>

<sup>65</sup> NCLR, 337

the provisions of Chapter 2, Section 6 (6) (c) of the same Constitution makes it clear that no court has jurisdiction to pronounce any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles of State Policy. The court concluded that it is therefore clear that Section 13 has not made Chapter 2 of the Constitution enforceable. Similarly in *Uzoukwu v Ezeonu*,<sup>66</sup> Nasir, President of the Court of Appeal, stated that there are other rights which may pertain to a person which are neither fundamental nor justiciable in the courts. These may include rights given by the Constitution under the Fundamental Objectives and Directive Principles of State Policy contained in Chapter 2 of the Constitution. Fundamental Objectives and Directive Principles' of State Policy are declaratory statements of national policy that establish broad political, social and cultural guidelines of government policy making. They are not formulated as rights. He concludes that they should be read in conjunction with the fundamental rights contained in the Constitution in a way in which both mutually reinforce and complement each other.

It is important to note that that Chapter 2 of the Nigerian Constitution is not exclusively dedicated to socio-economic rights. It is a conglomerate of several rights, ideals and programmes. The clause making Chapter 2 non-justiciable is therefore not specifically directed at socio-economic rights but at the contents of Chapter 2. It is also pertinent to note that Nigeria is a federation and legislative powers are shared between the federal, state and local governments. Section 4(1) of the Nigerian Constitution provides:

The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation, which shall consist of a Senate and a House of Representatives; 4(2) The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution; 4(3) The power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, save as otherwise provided in this Constitution, be to the exclusion of the Houses of Assembly of States.

Part I of the second schedule to the constitution (the exclusive legislative list) extends the authority of the National Assembly to include: (a) to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution.<sup>67</sup> ( Item

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<sup>66</sup> 1991 6 NWLR pt 2000 P 708 at 761

<sup>67</sup> Part I of the second schedule to the constitution (the exclusive legislative list) 60(A)

60 a). The net effect of these provisions is that the Federal Government has exclusive competence to legislate for the application or realisation of items in Chapter 2. (Fundamental Objectives and Directive Principles of State Policy). It has been argued that although the African Charter has been incorporated into domestic laws in Nigeria, it cannot introduce justiciable rights that the Constitution has declared non-justiciable. However, it can be argued that the Charter, being a statute of its own, stands on its own, and its provisions can be enforced without the outer provision of section 6 (6) (C) of the Constitution.<sup>68</sup> According to Nnamuchi,<sup>69</sup> what item 60(a) seems to suggest is that the National Assembly may, by legislative fiat, confer justiciability status to the Directive Principles in Chapter 2 of the constitution. The impact of such a measure would be to abrogate completely the application of section 6(6) (c), thus allowing state organs to “conform to, observe and apply the provisions” of the Directive Principles as stipulated in section 13. He concludes that the combined effect of sections 4(1) and (2) and item 60(a) on the exclusive legislative list may be interpreted as follows: the National Assembly may (a) enact legislation declaring the provisions of Chapter 2 legally enforceable and therefore justiciable, and/or (b) repeal section 6(6)(c), thus conferring jurisdiction on the courts. Option (a) could be implemented in two ways, namely (i) by enacting a new statute through the regular legislative process or (ii) by domesticating a treaty to which Nigeria is a party.<sup>70</sup>

The above assert is correct, because ultimately, it is immaterial whether a new statute is enacted or a treaty is domesticated; the effect is the same: both are legally enforceable and enjoy the same legal imprimatur as other statutes duly passed by the National Assembly. It is a fact that item 60(a) of the exclusive legislative list of Part 1 of the Second Schedule to the Nigerian Constitution empowers the National Assembly to legislate for the federation or any part of it for the purpose of promoting and enforcing the observation of the Fundamental Objectives and Directive Principles of State Policy contained in Chapter 2. Therefore, it can be concluded that any step taken by the National Assembly such as domesticating a treaty to which Nigeria is a party in the furtherance of the above renders the domesticated treaty purporting to promote and enforce the observation of the Fundamental Objective and Directive Principles of State Policy contained in Chapter 2, valid and enforceable in Nigerian courts.

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<sup>68</sup> C Obiagwu, & C Odinkalu, ‘Combating the legacies of colonialism and militarism’, in An-Na’im, A.,(ed), *Human rights under African constitution: Realising the promise for ourselves*, University of Pennsylvania Press, Pennsylvania, 2002, Page 227

<sup>69</sup> O Nnamuchi, ‘Kleptocracy and Its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria’, *Journal of African Law*, Volume 52, No.1, 2008, 1–42, Page 19

<sup>70</sup> Ibid

The Supreme Court of Nigeria, in *Attorney General of Ondo State v Attorney General of the Federation and 35 others*<sup>71</sup> affirmed the above assertion. One of the issues for determination before the Supreme Court of Nigeria in that case, was whether a law made by the National Assembly pursuant to sections 13 and 15(5) (which are under the non-justiciable provisions of the constitution) was beyond the powers of parliament and therefore unenforceable. The court also considered whether the law can be enforced against a private person as the law purported to do. The National Assembly had enacted the Anti Corruption Bill pursuant to the stated sections in order to deal with the prevalent issues of corruption in Nigeria. The Supreme Court held that although the Fundamental Objectives and the Directive Principles of State Policy are meant for authorities that exercise legislative, executive and judicial powers, enactments to enforce their observance can also be extended to private persons, companies or private organizations. The court further held that, even though the provisions of the Chapter 2 are unenforceable, the National Assembly has the power to legislate on the provisions and make them enforceable against government bodies and private persons. The Supreme Court concluded that, item 60(a) of the exclusive legislative list of Part 1 of the Second Schedule to the Nigerian constitution empower the National Assembly to legislate for the federation or any part of it for the purpose of promoting and enforcing the observation of the Fundamental Objectives and Directive Principles of State Policy contained in Chapter 2. Therefore, any step taken by the National Assembly in the furtherance of the above is valid and enforceable in Nigerian courts. Similarly in *A.G Lagos State v A.G Federation*,<sup>72</sup> the Nigerian Supreme Court upheld the competence of the National Assembly to enact the Federal Environmental Protection Agency Act for the purpose of protecting the environment in furtherance of section 20 of the 1999 Constitution.

Ruling on the Status of the African Charter in *Fawehinmi vs. Abacha*<sup>73</sup> the Nigerian Supreme Court stated that where a treaty is enacted into law by the National Assembly, as was the case with the African Charter which is incorporated into municipal (i.e. domestic) law by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap. 10 Laws of the Federation of Nigeria 1990 (hereinafter is referred to simply as Cap. 10), it becomes binding and Nigerian courts must give effect to it. The court further stated that Cap. 10 is a statute with international flavour therefore, if there is a conflict between it and another domestic statute, its provisions will prevail over those of that other domestic

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<sup>71</sup> [2002] 6 SC (pt 1) at 1.

<sup>72</sup> (2003) 6SC (pt 1) 24

<sup>73</sup> S.C. 45/1997

statue for the reason that it is presumed that the legislature does not intend to breach an international obligation. However, the Charter is not superior to the Constitution.

The South African Constitution under section 8 (1) states that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. Section 8 (2) extends the Bill of Rights to private entities. On the other hand, the Nigerian Constitution does not make express provision regarding horizontal application of human rights. However, courts in Nigeria have ruled that the human rights provisions in the Nigerian Constitution apply to non-state actors. For example in *Peterside v I.M.B* the Nigerian Court of Appeal stated that it was wrong in law to say that the fundamental rights guaranteed in Chapter IV of the constitution can only be enforced against government but cannot be enforced by one individual against another. While some of the provisions of Chapter IV can only be enforced against the government, there are some others which can be enforced against both the government and an individual. Whether fundamental right is enforceable against the government or against an individual or against both depends on whether the provisions of the section in question guarantees the right against the state only or against both the state and private person.

After examining the justiciability of socio-economic rights in both countries, it is pertinent to examine how human rights are enforced in both countries. Therefore, in the next section, this study examines the enforcement of human rights in both countries and some issues relevant to the enforcement of human rights, namely jurisdiction, interpretation and locus standi.

#### **4. Enforcement of Human Rights in South African and Nigeria:**

Courts play a prominent role in economic and social policy and make governments as well as other entities more accountable for responding to extreme poverty and deprivation.<sup>74</sup> on the other hand, Hirschl contends that courts represent elite interests, and that they will, in interpreting constitutional rights, advance a predominantly neo-liberal conception of rights that reflect and promote the ideological premises of the new “global economic order,” social atomism, anti-unionism, formal equality, and “minimal state policies.”<sup>75</sup> In enforcing provisions of a Bill of Rights contained in a constitution, courts may be called upon to interpret the provisions. A person may also challenge legislation, common law or customary

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<sup>74</sup>V Gauri & D Brinks, ‘The Elements of Legalisation and Triangular Shape of Social and Economic Rights’, in V Gauri & D Brinks,(ed),*Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, New York, 2008, Page 2

<sup>75</sup> R Hirschl, The political origins of judicial empowerment through constitutionalization: Lessons from four constitutional revolutions, in V Gauri & D Brinks,(ed),*Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, New York, 2008, Page 3

law, on the grounds that it is inconsistent with the constitution. If legislation is successfully challenged, then the court may overturn the legislation in which case the common law position will prevail or the court may read words into the impugned provision.

There are three judicial procedures under which individuals may initiate human rights claims in Nigeria. The first is a special process called Fundamental Rights (Enforcement Procedure) Rules made by the Chief Justice of Nigeria, pursuant to section 46 (3) of the Nigerian Constitution. This rule provide that the applicant, obtain leave (permission) ex parte from either the State or Federation High Court to institute a claim. If the leave is granted, then the applicant may initiate the substantive claim. Human rights may also be enforced in Nigeria through judicial reviews, in accordance with rules of various High Courts in Nigeria. Finally, human rights may be enforced through ordinary writ. The African Charter as incorporated into Nigerian domestic law does not provide for any special enforcement machinery to secure the rights contained in the Charter. However, the Supreme Court of Nigeria held in *Ogugu v State*,<sup>76</sup> that the Charter may be enforced in the same manner as Chapter IV (Bill of Rights) of the constitution. The court further stated that the rights in the African Charter may also be enforced in accordance with rules, practice and procedure of several High Courts in the federation depending on the circumstances of the case.

The procedure for initiating constitutionally recognised human rights in South Africa is by motion on notice, commencing either in the High Court or Constitutional Court for urgent matters. The other methods of enforcement of human rights are through judicial reviews, in accordance with rules of the various courts in South Africa. The South African constitution states in section 173, that the Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice.

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<sup>76</sup> (1994) 9 NWLR (Pt 366) 27 AT 47

#### 4.1 Jurisdiction of Courts in South Africa and Nigeria

The Nigerian Constitution states that any person who alleges that any of the provisions of this Chapter IV has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that state or a Federal High Court for redress.<sup>77</sup> Any party not satisfied with the decision of the High Court may appeal to the Federal Court of Appeal, thereafter the Supreme Court. Commenting on jurisdiction, the Nigerian Court of Appeal stated in *Abaribe v Abia State House of Assembly Speaker*,<sup>78</sup> that if a question arises as to a court's jurisdiction to entertain a case, the first thing a court called upon to decide the case should examine is the relief sought by the initiator of the proceedings. The reliefs sought specify what the initiator of the case wants the court to do for him. The grounds only specify the reason why, in the opinion of the initiator, the reliefs ought to be granted. If after checking the reliefs sought against the constitution and/or any other valid law the courts finds no provision debarring it from doing what is requested therein, a court is then at liberty to consider the grounds in the light of whatever evidence there may be with a view to deciding whether or not the grounds warrant granting the reliefs. If on the other hand, the court finds that a provision of the constitution or other valid law expressly or by necessary implication, ousts its jurisdiction to do the thing requested, then the grounds become totally irrelevant. If the law says the court cannot do what the plaintiff or the applicant has asked it to do for him/her, it would be an exercise in utter futility for the court to proceed to consider reasons for or against doing that thing.

Similarly, under the South African Constitution, a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.<sup>79</sup> The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.<sup>80</sup> The above provisions indicate that proceedings for enforcement of the rights contained in South Africa's Bill of Rights should be commenced at the High court. However, only the Constitutional Court is the highest court in all constitutional matters<sup>81</sup> and makes the final decision as to whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of

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<sup>77</sup> Section 46(1), Nigerian Constitution

<sup>78</sup> CAPH/83m/2000

<sup>79</sup> Section 170 South African Constitution

<sup>80</sup> Section 172 (2) (A), South African Constitution

<sup>81</sup> Section 167 (3) (A), South African Constitution

constitutional invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.<sup>82</sup> All courts in South Africa function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.<sup>83</sup>

Section 168 (3) of the South African Constitution empowers the Supreme Court of Appeal to decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only appeals; issues connected with appeals; and any other matter that may be referred to it in circumstances defined by an Act of Parliament. In *Minister of Safety and Security v Hamilton*,<sup>84</sup> a case where the appellant jurisdiction of the Supreme Court was in question, the Supreme Court of Appeal stated that ‘Though s 168(3) of the Constitution provides without qualification that this court may decide “appeals in any matter,” this must obviously be read in the light of the Supreme Court Act 59 of 1959. The Supreme Court of Appeal further stated in *Minister of Safety and Security v Hamilton*<sup>85</sup> that there is clear indication that the framers had no intention to speak in s 168(3) of matters of forensic rules, procedures and function. Appealability meaning when to appeal and what to appeal against is essentially a subject within the ambit of rules, procedures and function of the South African Supreme Court of Appeal.

#### **4.2 Interpreting Human Rights provisions in South Africa and Nigeria**

In interpreting the socio-economic rights provisions of the constitution, courts in South Africa are guided by two constitutional provisions; section 39<sup>86</sup> and 7(2).<sup>87</sup> Commenting on role of South African courts in interpreting the Constitution, Froneman stated when interpreting the Constitution and more particularly the Bill of Rights it has to be done against the backdrop of our chequered and repressive history in the human rights field. He further states that in the apartheid era, the state by legislative and administrative means curtailed the human rights of most of its citizens, while the courts looked on powerless. He concludes that

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<sup>82</sup> Section 167 (5), South African Constitution

<sup>83</sup> Section 171, South African Constitution

<sup>84</sup> 2001 (3) SA 50 (SCA)

<sup>85</sup> Case No 65/04 245/04

<sup>86</sup> 39. Interpretation of Bill of Rights

1. When interpreting the Bill of Rights, a court, tribunal or forum
  - a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - b. must consider international law; and
  - c. may consider foreign law.
2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
3. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

<sup>87</sup> The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

it is this malpractice which the Bill of Rights seeks to combat and it does so by laying down the ground rules for state action which may interfere with the lives of its citizens.<sup>88</sup>

In *Carmichele v Minister of Safety and Security and another*,<sup>89</sup> the Constitutional Court of South Africa stated that the Constitution is the supreme law and that the Bill of Rights under the South African Constitution applies to all law. The court stressed that section 7(2) of the South African Constitution, states that the Bill of Rights enshrines the rights of all people in South Africa, and obliges the state to respect, protect, promote and fulfil these rights and section 39(2) of the Constitution provides that when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights. It follows implicitly that where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.

The Nigerian Constitution makes provision for a general interpretation provision.<sup>90</sup> This general interpretation provision basically empowers courts to refer interpretation of substantial questions of law to higher courts. This provision covers the civil and political rights provided for under the Nigerian Constitution. Section 1 of the Nigerian Constitution states that the Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria. The Supreme Court has emphasized in *A.G Ondo State v A.G Federation*,<sup>91</sup> that where provisions of a statute (including the Constitution) are clear and unambiguous, they must be read in their plain and ordinary meaning which best gives their meaning. The court further stated that the Constitution is the organic law or grundnorm of the country. Therefore, any narrow

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<sup>88</sup> 1994 (6) BCLR 124 (T) at 128J - 29B; Cf. the dictum of J Froneman in *Qozoleni v Minister of Law and Order and Another*

<sup>89</sup> Case CCT 48/00

<sup>90</sup> 295. (1) Where any question as to the interpretation or application of this Constitution arises in any proceedings in any court of law in any part of Nigeria (other than in the Supreme Court, the Court of Appeal, the Federal High Court or a High Court) and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if any of the parties to the proceedings so requests, refer the question to the Federal High Court or a High Court having jurisdiction in that part of Nigeria and the Federal High Court or the High Court shall

(a) if it is of opinion that the question involves a substantial question of law, refer the question to the Court of Appeal;  
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(b) if it is of opinion that the question does not involve a substantial question of law, remit the question to the court that made the reference to be disposed of in accordance with such directions as the Federal High Court or the High Court may think fit to give.

(2) Where any question as to the interpretation or application of this constitution arises in any proceedings in the Federal High Court or a High Court, and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the Court of Appeal; and where any question is referred in pursuance of this subsection, the court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision.

(3) Where any question as to the interpretation or application of this constitution arises in any proceedings in the Court of Appeal and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the Supreme Court which shall give its decision upon the question and give such directions to the Court of Appeal as it deems appropriate.

<sup>91</sup> [2002] 6 SC (pt 1) at 1.

interpretation of its provisions will do violence to it and will fail to achieve the goal set by the Constitution. As noted earlier, socio-economic rights in Nigeria may be protected via the domesticated African Charter. According to Dakas<sup>92</sup> the vagueness of the provision of the African Charter, would ordinarily pose a constructionist nightmare, however there is a sense in which it is both a challenge and an opportunity. It could enable a creative judge to elaborate on those rights in a manner that draws inspiration from the jurisprudence of international and other regional courts and tribunals, while reckoning with African values.

#### **4.3 Locus Standi:**

Socio-economic rights are public in nature and one of the greatest threats to the effective remedy for violations of socio-economic rights in Nigeria is the issue of locus standi (standing to sue). Communities, groups, or persons seeking remediation for the violation of their socio-economic rights must show they have sufficient interest in the violation which weigh far and above the interests of others before they can have the right to sue. Nigerian courts have held locus standi to be a condition precedent to the initiation of any judicial process. For example in *Uzoukwu V Ezeonu*,<sup>93</sup> the Court of Appeal stated that section 42 1979 (Section 46 1999) of the Nigerian Constitution requires a person who wishes to claim that, (this includes a group of person claiming together) he/she is entitled to a fundamental right, to show that he/she is the person whose right has been or is likely to be contravened.

On the Contrary, the South African Constitution provides for a more liberal approach to locus standi. Section 38 of the South African Constitution states that anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are - anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members. This approach ensures that violations of socio-economic rights are redressed by the courts. Where a South African court finds the government to be in breach of its obligations, the court is required to provide effective relief to remedy that breach. In formulating that relief, the court will be alert both to the proper functions of the legislature or executive under our Constitution, and to the need to ensure that constitutional rights are vindicated.

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<sup>92</sup> C.J Dakas, 'Beyond Officialdom: Fallacies and Hypocrisy in Economic, Social and Cultural Rights Discourse and Implementation in Nigeria', *African Yearbook of International Law*, Volume 15, 2007 Page 46

<sup>93</sup> (1991 6 NWLR pt 2000 p708 at 761)

The preceding section has examined enforcement of human rights in both countries. In the following two sections, (section 5 & 6) this study goes on to examine how Nigerian and South African courts have interpreted and applied socio-economic rights provisions. The following two sections will also assess if courts in both countries will grant a fundamental right to individuals to claim "positive", judicially enforceable action and services from the state.

## **5. Analysis of Cases from Nigeria on Socio-economic Rights:**

Analysis of cases from Nigeria indicate that even in cases where socio-economic rights are not directly invoked, the decisions may still impact favourably on the realisation of socio-economic rights. For example, the education cases though not recognising an exclusive right of access to education have had a positive impact on the right of access to education. The decisions emanating from the cases have also had the effect of expanding choices, ensuring equal treatment as well as ensuring that students can only be excluded from education after due process has been followed.

### **5.1 Legal Implementation of the Right of Access to Education in Nigeria:**

The cases on education surveyed indicate that most judicial enforcement of the right of access to education in Nigeria has been through the route of civil and political rights. This demonstrates that all rights are indivisible and interrelated. For example, in *Adamu v Attorney General of Borno state, Nigeria*,<sup>94</sup> the Court of Appeal stated that although the Fundamental Objectives and Directive Principles of State Policy (Chapter 2) of the Nigerian constitution is not justiciable, it is the law that where the provisions of the constitution defines a cause of action or enshrines certain rights, these provisions must be applied without any inhibition emanating from Chapter 2. The implication of this decision is that where a policy or law pursuant to the fundamental objectives of state policy (in this case education policy) infringes on a citizen's fundamental right, such as the freedom of religion and/or freedom from discrimination on grounds of religion, the breach of the citizen's right is justiciable.

Similarly in *Archbishop Okogie & others v Attorney –General of Lagos State*,<sup>95</sup> where the proprietors of private schools invoked the right to fair hearing under section 36 (1) of the Nigerian Constitution (1979) to challenge a circular of the then Lagos state government purporting to abolish privately owned schools in Lagos state. The court upheld the right to

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<sup>94</sup> 1996 8 NWLR 203, at page 225

<sup>95</sup> 2 NCLR 337 (1981)

private ownership of schools on the bases of a mixture of entitlements to economic activity, rights to freedom of expression and information and the right to property.<sup>96</sup>

The next two cases establish that a student can only be excluded from Nigerian universities after due process has been followed. In *Garba v University of Maiduguri*,<sup>97</sup> one of the issues for determination was whether principles of fair trial applied to administrative tribunals. The university expelled a student for various alleged criminal activities, which included looting and arson. The panel set up by the university, included the deputy vice chancellor whose house was burned. The Supreme Court declared the expulsion of the student unlawful as neither the investigative panel nor the disciplinary board of the university senate was competent to adjudicate a crime. The Supreme Court also stated that the principles of fair trial also applied to administrative tribunals. Similarly, in the case of *Esiaba vs. University of Calabar*,<sup>98</sup> the Supreme Court held that the university had authority within its premises to discipline any erring or misbehaving student. The court noted that if the act of the student amounted to a crime, the normal report should be lodged with the police but this will not preclude the university from exercising its power under its statute to punish misconduct by any student.

Odinkalu concludes that it remains doubtful whether Nigerian courts are prepared to recognise and protect a human right to education with a constitutional basis. What has emerged from jurisprudence he contends is a consequential recognition of education-related entitlements in the interstices of other constitutional rights rather than the right itself.<sup>99</sup>

## **5.2 Legal Implementation of the Right to a Clean Environment in Nigeria:**

A few cases have come before Nigerian courts invoking the right to a general satisfactory environment under the African Charter (Ratification and Enforcement) Act<sup>100</sup> and Nigerian courts have upheld the justiciability of this provision. For Example, in *Oronto Douglas v Shell Petroleum Development Company Limited*,<sup>101</sup> the Court of Appeal in Nigeria upheld the justiciability of an action brought on the basis of Article 24<sup>102</sup> of the African Charter (Ratification and Enforcement) Act. The fact that the provisions of Article 24 of the African

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<sup>96</sup> C Odinkalu, 'The Impact of Economic and Social Rights in Nigeria', in V Gauri, & D Brinks, (ed), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, New York 2008, Page 219

<sup>97</sup> (1986) 1 NWLR (Pt. 18) 550

<sup>98</sup> (2004) ALL F.W.L.R (Pt. 206) 381

<sup>99</sup> C Odinkalu, 'The Impact of Economic and Social Rights in Nigeria', in V Gauri, & D Brinks, (ed), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, New York 2008, Page 220

<sup>100</sup> Act domesticating the African Charter in Nigeria

<sup>101</sup> (1999) 2 NWLR (Pt 591) 466.

<sup>102</sup> All peoples shall have the right to a general satisfactory environment favourable to their development

Charter (or at least its spirit) are similar to the provisions of section 20 of the 1999 Nigerian Constitution<sup>103</sup> (Fundamental Objectives and Directive Principles of State Policy) did not stop the Nigerian Court of Appeal from upholding its justiciability.

Similarly in *Gbemre v Shell*,<sup>104</sup> the plaintiffs claimed that the oil exploration and production activities by Shell, has led to incessant gas flaring. The plaintiff claimed that gas flaring violated their rights to life and human dignity under sections 33(1) and 34(1) of the Nigerian Constitution. They equally alleged that gas flaring violated their right to life, rights to enjoyment the best attainable state of physical and mental health and rights to a satisfactory environment under articles 4, 16 and 24 of the African Charter (Ratification and Enforcement) Act. The Federal High Court held that gas flaring is a "gross violation" of the constitutionally-guaranteed rights to life and dignity, which include the right to a "clean poison-free, pollution-free healthy environment." The Court ordered Shell to stop flaring in the Iwerekhan community immediately and declared the gas flaring laws in Nigeria to be "unconstitutional, null and void"; and ordered the Attorney General to meet with the Federal Executive Council to set in motion the necessary processes for new gas flaring legislation that is consistent with the constitution. The court also held that the state violated articles 4, 16 and 24 of the African Charter (Ratification and Enforcement) Act.

### **5.3 Legal Implementation of the Right of Access to Health Care in Nigeria:**

The Nigerian Federal High Court has established that the Nigerian government must observe the right to enjoy the best attainable state of physical and mental health provision of the African Charter because it has incorporated the Charter into its domestic laws. In *Odafe and Others v Attorney-General and Others*,<sup>105</sup> a case invoking the right to enjoy the best attainable state of physical and mental health under the African Charter, The Nigerian High Court held that everybody without distinction, including those prisoners awaiting trial, have a legal right to seek redress for alleged breaches of their constitutional rights pursuant to s. 46(1)<sup>106</sup> of the Nigerian Constitution and Article 16<sup>107</sup> of the African Charter.

The Court stated that there is a lack of awareness of how the HIV/AIDs disease can be spread and therefore, it is not surprising that prison officials are discriminating against the HIV positive applicants. However, the court stated that discrimination on the grounds of

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<sup>103</sup> The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria

<sup>104</sup> (Unreported) Suit no: FHC/B/CS/53/05.

<sup>105</sup> FHC/PH/CS/680/2003

<sup>106</sup> Any person who alleges that any of the provisions of this Chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress

<sup>107</sup> 1. Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

illness, virus or disease is not covered by s. 42(1) of the Nigerian Constitution and therefore cannot be invoked in this case. The court further stated that the government, having incorporated the African Charter and its socio-economic rights into domestic law, must observe its provisions.<sup>108</sup> In turn, this requires the courts to evaluate the state's socio-economic policies for compliance with both the Charter and the Constitution. The court held that in this case the state failed in its obligations to provide health care to prisoners. Whilst recognising that the economic cost of embarking on the provision of medical treatment is quite high, the court declared that the state had a responsibility to provide medical treatment to all prison inmates, regardless of the offences they have allegedly committed.

#### **5.4 Conclusion on Analysis of Cases from Nigeria on Socio-economic Rights:**

The Nigerian cases reviewed indicate that most cases impacting on socio-economic rights in Nigeria hardly address the obligations of the state in reference to socio-economic rights. Therefore, elaboration of state duties to the poor in Nigeria or the incorporation of concepts such as attention to those in urgent need is generally limited in court decisions. However, there are a few exceptions such as the *Odafe*<sup>109</sup> case, where the Nigerian Federal High Court evaluated the state's health care policy for prisoners, to determine if it complied with the right to enjoy the best attainable state of physical and mental health under Article 16 of the African Charter. The court found that the state failed in its obligation. It should be emphasised that in this case that the court merely evaluated the state health care policy for prisoners to determine if it complied with the provisions of Article 16 of the African Charter. Therefore, the court has given the executive/parliament a wide discretion to determine how the health rights of prisoners may be realised.

Similarly, in *Gbemre v Shell*<sup>110</sup> case, the Appeal Court of Nigeria determined that the Nigerian gas flaring law was inconsistent with the constitution. The court also found that the right to enjoy the best attainable state of physical and mental health (Article 16 of the African Charter) and the right to a general satisfactory environment favourable to development (Article 24 of the African Charter) had been violated. Clearly, some of the principles coming from these cases will impact favourably on the realisation of socio-economic rights and poverty reduction if implemented. Some of the decisions have also upheld the rights based principles to poverty reduction such as attention to vulnerable groups of people and non-discrimination. However, none of the decisions indicate that the Nigerian courts have granted

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<sup>108</sup> ( see also *Ubani v Director SSS* 1999 11 NWLR Pt. 625 129)

<sup>109</sup> FHC/PH/CS/680/2003

<sup>110</sup> FHC/B/CS/53/05

anyone a fundamental right to claim "positive", judicially enforceable action and services from the state.

## **6. Analysis of Cases from South Africa on Socio-economic Rights:**

The South African Constitutional Court has developed a substantial body of jurisprudence on both negative and positive duties imposed by the socio-economic rights contained in the South African Constitution. The Constitutional Court of South Africa has developed the "reasonableness review" in reviewing claims which seek to enforce the positive duty to fulfil qualified socio-economic rights, under the South African Constitution.

### **6.1 Legal Implementation of the Right of Access to Adequate Housing in South Africa:**

South African Courts have granted procedural and substantive protections against state interference with the right to housing. For example, in the *Government of the Republic of South Africa v Grootboom*,<sup>111</sup> The Constitutional Court held that the measures of the provincial government to provide systematic housing over a period of time were unreasonable, since no contingent plans were made for the temporary shelter of the homeless and destitute people. The Court also held that the state had failed to meet the obligations placed on it by section 26 and declared that the state's housing programme was inconsistent with section 26(1) of the Constitution.

The Constitutional Court laid out in comprehensive manner elements of the reasonableness review. The programme must be comprehensive, coherent, coordinated; Appropriate financial and human resources must be made available; It must be balanced and flexible and make appropriate provision for short, medium and long-term needs; It must be reasonably conceived and implemented; It must be transparent, and its contents must be made known effectively to the public. The element of the reasonableness test that comes closest to a threshold requirement is that a reasonable government programme must cater for those in urgent need. Addressing the core minimum requirement of the right to housing, the Constitutional Court stated that:

"The determination of a minimum core in the context of 'the right to have access to adequate housing' presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core

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<sup>111</sup> 2000 (11) BCLR 1169 (CC)

obligation should be defined generally or with regard to specific groups of people. As will appear from the discussion below, the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core access to water; ...”

According to Liebenberg, The assessment of the reasonableness of government programmes is influenced by two further factors. The internal limitations of sections 26(2) and 27(2) require that the rights may be ‘progressively realised’ and that the availability of resources is ‘an important factor in determining what is reasonable.’<sup>112</sup> She concludes that while both concepts provide the state with a potential justification for failing to ensure access to socio-economic rights, they can also support a finding of unreasonable acts or omissions by the state. Thus claimants could rely on the interpretation of ‘progressive realisation’ by the Court and the UN Committee on Economic, Social and Cultural Rights to argue that the state has not taken any steps or made sufficient progress in dismantling obstacles that impede access to the rights.<sup>113</sup>

South African courts have held that forced evictions constitute violations of the obligation to respect the right to housing. In *Port Elizabeth Municipality v Various Occupiers*<sup>114</sup> a number of persons who were unlawfully occupying private land were evicted by the municipality. After they successfully challenged their eviction the municipality appealed to the Constitutional Court. In a unanimous judgment by Justice Sachs the Court held that for it to be persuaded that it was “just and equitable” to evict people from their homes, the state would have to show that serious consideration was given to the possibility of providing alternative accommodation to the occupiers.<sup>115</sup> Municipalities must show equal accountability to occupiers and land owners. While holding that there is no unqualified constitutional duty on governments to provide alternative accommodation or land in any eviction, the Constitutional Court stated that courts should be “reluctant” to grant evictions against

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<sup>112</sup> S Liebenberg, *Beyond Civil and Political Rights: Protecting Social, Economic and Cultural Rights under Bills of Rights - The South African Experience*, Paper prepared for conference: Protecting Human Rights, Centre for Comparative Constitutional Studies, Melbourne Law School, 25 September 2007, Page 11, retrieved on 15<sup>th</sup> December, 2008, <http://acthra.anu.edu.au/articles/Liebenberg.pdf>

<sup>113</sup> Ibid

<sup>114</sup> 2004 (12) BCLR 1268 (CC)

<sup>115</sup> Ibid

relatively settled occupiers unless a reasonable alternative is available. This decision is a significant development in right to housing jurisprudence.

The South African Constitutional Court's decision in the eviction case of *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*,<sup>116</sup> represents a significant advance in assessing the positive duties on the state to ensure that social problems leading to disputes between private actors are resolved in a manner that respects socio-economic rights. In the case, a landlord was unable to execute an eviction order granted against 40, 000 occupiers on his land. He was asked by the sheriff's office to deposit R1.8 million, more than the value of the land, to engage a private security company. Unable to execute the order; he approached the High Court where he was successful. The state appealed against this decision. The Constitutional Court unanimously held that the state had failed to take reasonable steps to assist the property owner. The Court found that in these circumstances it is unreasonable of the state to stand by and do nothing. It found this to be a violation of the principle of the rule of law as well as the right of access to the courts. The Court held that the state compensate the landowner for the unlawful occupation of his property. In addition, the occupiers were to continue living there until alternative accommodation was found by the state.

Similarly, in *Minister of Public Works & Ors V. Kyalami Ridge Environmental Association & Ors*<sup>117</sup> Local residents challenged the establishment of an emergency housing camp in their neighbourhood as contrary to zoning laws; obligation of government to realize right of access to adequate housing; powers of government to make decision regarding transit camp on state land; resident's rights to administrative justice and the housing rights of flood victims. The Constitutional Court held that there was no law that prevented the government from taking the decision to establish the temporary camp but that some laws may possibly affect the implementation of the programme. The residents also complained of lack of consultation, a decline in property values and possible environmental hazards, but the Court held that there had been no violation of constitutional rights to administrative justice. The Constitutional Court stated that although the interests of the Kyalami residents may be affected, this case concerns not only their interests, but also the interest of the flood victims. The principles derived from this decision may impact negatively on social rights, because legislative and executive conduct will be liable to challenge if there is a breach of other provisions of the Bill of Rights (e.g. the right to just administrative action) despite its pro-poor objectives.

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<sup>116</sup> 2005 (8) BCLR 786 (CC)

<sup>117</sup> [2002] 1 LRC 139; (2002) 3 CHRLD 313

The Constitutional Court of South Africa has addressed and reinforced the protection of the rights of those who risk losing their existing access to adequate housing due to debts. In *Jaftha , Van Rooyen v Stoltz and Other*<sup>118</sup> the issue for determination was whether the provisions of the Magistrates' Court Act that permitted the sale of people's homes in order to satisfy (sometimes trifling) debts without judicial oversight was constitutional. The Constitutional Court held that the provisions of the Act authorised a negative violation of s 26(1) of the South African Constitution because it permitted a person to be deprived of existing access to adequate housing.

The Constitutional Court of South Africa has further strengthened the protection of the right of access to housing for the poor in South Africa. It has done this by ruling that government and its agencies consult residents affected by policy decisions that may involve eviction and publicly report on the process. In *Occupiers of 51 Olivia Road & Others v City of Johannesburg*,<sup>119</sup> the Constitutional Court of South Africa approved a settlement between the City of Johannesburg and residents of several informal communities in Johannesburg who had sought to prevent the City from evicting them as part of an inner-city regeneration project. Rather than imposing a direct remedy, the Court instead constitutionalised a novel 'engagement' requirement in housing-rights cases. Engagement, which requires government entities to consult with residents affected by policy decisions that may involve eviction and publicly report on that process, offers a novel and potentially powerful mechanism for enforcing socioeconomic rights that limits court intervention in policy decisions.

## **6.2 Legal Implementation of the Right of Right of Access to Health Care Services in South Africa:**

The South African Constitutional Court has ruled on several cases invoking the right of access to health care services provided by the South African Constitution. *Soobramoney v Minister of Health, KwaZulu-Natal*,<sup>120</sup> was the first case invoking the socio-economic rights provisions of the South African Constitution. It marked the beginning of the development of the reasonableness review model adopted by the Constitutional Court of South Africa in socio-economic cases. In the above case, the applicant Thiagraj Soobramoney, suffered from chronic renal failure (among other diseases) and was in dire need of renal dialysis in order to stave off death. The hospital refused Soobramoney treatment because his general physical condition did not qualify him for treatment under the criteria or guidelines used by the

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<sup>118</sup> Case CCT 74/03

<sup>119</sup> Case CCT 24/07 [2008]

<sup>120</sup> 1997 (12) BCLR 1696 CC

hospital to determine eligibility for such treatments. He brought a Claim alleging a violation of health rights by South African health authorities when he was refused renal dialysis treatment. The Constitutional Court adopted a thin standard of ‘rationality’ review and implied that there might be grounds for the challenge of executive policies if such policies were unreasonable or if they were not applied fairly and reasonably.

Subsequently, the Constitutional Court of South Africa began to develop the reasonableness review. This can be ascertained from the ruling in *Grootboom*, discussed under cases on the right of access to adequate housing. In *Minister for Health and Others v Treatment Action Campaign*,<sup>121</sup> the Constitutional Court of South Africa further developed the reasonableness review concept. The ruling also advanced the right of access to health care services to HIV positive pregnant women in South Africa. In the above case, Treatment Action Campaign (TAC), a non-governmental organisation, in a bid to force government to provide anti-retroviral drugs under the public health care system, specifically demanded that nevirapine, a drug that could reduce by half the rate of HIV transmission from mothers to babies, be freely distributed to women infected with the virus. The Constitutional Court applied the reasonableness test to the policy of the government to combat mother-to-child-transmission of HIV. In its judgment the Court formulated an additional element of reasonableness review. Given the magnitude of the HIV/AIDs problem and the need for a comprehensive national plan of prevention, counselling and treatment, proper communication to the public at large was considered to be essential. Consequently, a national health program must be made known to all concerned. Transparency, information and communication were held to be additional requirements of the reasonableness test.<sup>122</sup> The Court held that the government’s policy and measures to prevent mother-to-child transmission of HIV at birth fell short of compliance with section 27(1) and (2) of the Constitution and ordered the state to provide the required medication and remedy its programme.

### **6.3 Legal Implementation of the Prohibition of Unfair Discrimination in South Africa:**

Nolan, Porter and Langford, contend that the relationship between the right to equality and non-discrimination and socio-economic rights is of central importance to the adjudication of socio-economic rights. This is because the violations of most socio-economic rights are directly linked to systemic inequalities and may, in many cases, be challenged as such.<sup>123</sup> For

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<sup>121</sup> 2002 (5) SA 703 (CC).

<sup>122</sup> F Coomans, *Reviewing Implementation of Social and Economic Rights: An Assessment of the “Reasonableness” Test as Developed by the South African Constitutional Court*, 2005, Page 178, retrieved, 16<sup>th</sup> December, 2008, [http://www.zaerv.de/65\\_2005/65\\_2005\\_1\\_a\\_167\\_196.pdf](http://www.zaerv.de/65_2005/65_2005_1_a_167_196.pdf)

<sup>123</sup> A Nolan, B Porter, & M Langford, *Justiciability of Social and Economic Right: An Updated Appraisal*, 2007, Page 33, retrieved 18<sup>th</sup> December, 2008, <http://www.chrgj.org/publications/docs/wp/NolanPorterLangford.pdf>

example, in *Khosa v Minister of Social Development*,<sup>124</sup> *Mahlaule v Minister of Social Development*,<sup>125</sup> legislation that excluded permanent residents and their children from access to social assistance was successfully challenged and found to be inconsistent with the section 27(1) right of everyone to have access to social security and assistance and also with the section 9(3) prohibition of unfair discrimination.

In the judgment, the Constitutional Court introduced a proportionality test as an additional element of reasonableness review. In considering whether the exclusion of Mozambican nationals living as permanent residents in South Africa from social security benefits was reasonable, the Court considered three factors: the purpose served by social security, the impact exclusion had on permanent residents and the relevance of the citizenship requirement to that purpose. In addition, the Court also looked at the impact of the exclusion on other rights, in particular on the right to equal protection and benefit of the law and non-discrimination (Section 9).<sup>126</sup> The court concluded that the inclusion of permanent residents in the social assistance legislation would not have a significant budgetary impact. It would represent an increase of less than 2% on the present cost of social grants. The Court granted the remedy of 'reading in' the excluded group of permanent residents into the social assistance legislation. One of the main issues of contention in this case was whether to adjudicate the 'reasonableness' of government measures as part of the enquiry into the internal limitation contained in section 27(2)<sup>127</sup>, or whether the enquiry should revolve around section 36,<sup>128</sup> the general clause which governs the limitation of rights under the Constitution. The court had heard no argument on the point, so it declined to rule on the matter. The majority held, however, that even if it was assumed that a different threshold of reasonableness applied in sections 26(2) and 27(2) to that used in s 36, they were satisfied that the exclusion of permanent residents from the scheme was 'neither reasonable nor justifiable within the meaning of section 36.

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<sup>124</sup> 2004 (6) BCLR 569 (CC)

<sup>125</sup> 2004 (6) BCLR 569 (CC)

<sup>126</sup> Ibid

<sup>127</sup> The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights;

<sup>128</sup> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

#### 6.4 Legal Implementation of Right of Access to Sufficient Water in South Africa:

Several cases on the right of access to sufficient water have come before South African Courts. For example, in *Bon Vista Mansions*,<sup>129</sup> the High Court of South Africa found a violation of the constitutional right to water on the basis that the applicants had existing access to water before the council disconnected the supply. “The act of disconnecting the supply was *prima facie* in breach of the Council’s constitutional duty to respect the right of access to water, in that it deprived the applicants of existing access.”<sup>130</sup> Similarly, in *Nkonkobe Municipality v Water Services South Africa (PTY) Ltd and others*,<sup>131</sup> a court nullified a 6-year-old water privatisation contract on the basis that the municipality did not comply with the necessary consultation and public participation requirements.

The *Mazibuko*<sup>132</sup> case is particularly relevant to the right of access to sufficient water because it elaborates on whether socio-economic rights have a minimum legal content or a “minimum core” as posited by the UN Committee on Economic, Social and Cultural Rights in its 1990 General Comment No. 3 on the Nature of States Parties’ Obligations. It also considered the obligations imposed by the right to access sufficient water set out in Section 27(2) of the South African Constitution. In *Mazibuko* case, the High Court judge stated that he did not agree that the learned Judge in the *Grootboom*’s<sup>133</sup> case disavowed the core minimum principle. The High Court judge stated that he understood the learned Judge in the *Grootboom*<sup>134</sup> case to be saying that the minimum core in the context of the right to have access to adequate housing presents difficult questions. Furthermore he stated, the learned Judge went further to point out that it may be possible to determine the core minimum if sufficient information is placed before a court. He concluded that the difficulties presented by the determination of the core minimum do not amount to rejection of that principle and the learned Judge did not reject the core minimum as part of our law. The trial judge found the city to have violated the applicants’ water rights, and ordered the city to provide 50 litres of FBW per person per day (roughly double the current allocation in a household of eight people) and the choice of conventional credit meters (as provided to other Johannesburg residents).

The Supreme Court of Appeal on 25 March 2009 upheld the decision of the High Court in substance, but on different grounds. The Court found that (1) the free basic water policy was in violation of section 27(1) but on the basis of expert evidence that the minimum amount of

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<sup>129</sup> 2002 (6) BCLR 625 (W)

<sup>130</sup> Residents of Bon Vista Mansions v SMLC 2001 (High Court) App No.12312 (South Africa), para. 20.

<sup>131</sup> Case No. 1277/2001 (unreported)

<sup>132</sup> CCT 39/09, [2009] ZACC 28

<sup>133</sup> 2000 (11) BCLR 1169. (CC)

<sup>134</sup> Ibid

water required by the Constitution was 42 litres per person per day; and (2) while installation of pre-paid meters was unlawful, the declaration of unlawfulness should be suspended for two years to give the City time to bring its water policy in line with the reasonableness requirement of the Constitution.

Contrary to the findings of both the High Court and Supreme Court of Appeal, the Constitutional Court of South Africa held (1) the City's free basic water policy of 25 litres per person per day to be reasonable under section 27(1) of the Constitution, and (2) the introduction of pre-paid water meters to be lawful, procedurally fair, and not discriminatory. The court upheld the reasonableness test and not the minimum core. Regarding the minimum core, the Constitutional Court stated it is a matter for the legislature and the executive. They further stated that the institutions of government are best placed to investigate social conditions in the light of available budgets. They concluded that, it is desirable as a matter of democratic accountability that the legislature and the executive should determine the minimum core, for it is their programs and promises that are subjected to democratic popular choice. The Constitutional Court also stated that, the positive obligations imposed upon government by socio-economic rights in the constitution, will be enforced by courts in the following ways: (a) where government takes no steps to realise the rights; (b) where the government's adopted measures are unreasonable; and (c) where the government fails to give effect to its duty under the obligation of progressive realization to continually review its policies to ensure that the achievement of the right is progressively realised.

The assertion by the Constitutional Court of South Africa that the legislative and executive arms of the state are best suited to determine the minimum core content of socio-economic rights seems valid. Therefore, the determination of the minimum core content of a socio-economic right should be the first step taken by the state to ensure the realisation of the socio-economic right in question. The determination of the minimum core content of socio-economic rights by the state will also ensure that the state works towards ensuring that those in urgent need receive at the least the minimum core of the socio-economic rights in question.

### **6.5 Conclusion on Analysis of Cases from South Africa on Socio-economic Rights:**

The South African cases analysed under the heading "Analysis of Cases from South Africa on Socio-economic Rights" are those where litigants directly invoked constitutional socio-economic rights before the Constitutional Court of South Africa. The decisions have upheld and/or constitutionalised several principles of the right based approaches to poverty reduction such as attention to vulnerable groups or those in urgent need, transparency, non-discrimination and participation. The reasonableness approach adopted by the South African

Constitutional Court ensures that government policies pay attention to those in urgent need, as decided in *Grootboom* case<sup>135</sup> and where the government policy has unreasonable limitations or exclusions as in *TAC*,<sup>136</sup> the courts may order that the limitations or exclusions be removed.

The decisions also demonstrate that the Constitutional Court of South Africa has not provided a fundamental right to individuals to claim "positive", judicially enforceable action and services from the state.<sup>137</sup> In some eviction cases the Constitutional Court has prevented the state from taking certain action (e.g. eviction) on the basis that it will encroach on socio-economic rights, but did not provide a fundamental right to individuals to claim "positive", judicially enforceable action and services from the state. Generally, the judgements so far indicate that the Constitutional Court has used socio-economic rights contained in the Constitution as yardstick for the evaluation of government policy in general and spending priorities of particular departments, therefore rights could thus become important directive principles of state policy.<sup>138</sup>

Dugard, argues that courts in South Africa have not adequately realised their potential to promote socio-economic transformation in the interests of materially-disadvantaged South Africans<sup>139</sup>. She further states that although the Constitutional Court was premised on a transformative constitution, the court has not always functioned as an institutional voice of the poor. This is evidenced by the low number of cases brought by the poor as a percentage of the total number of cases decided by the Constitutional Court.<sup>140</sup>

Although most cases on socio-economic rights decided by the Constitutional Court of South Africa have favoured the applicants, Dugard and Roux contend that there are two broad reasons why its social rights jurisprudence is disappointing from a pro poor standpoint. The first reason is that the decisions do not provide a substantive relief to the applicant.<sup>141</sup> This, they argue, is a disincentive for other poor litigants to seek relief through constitutional litigation. The second is that the reasonable review standard adopted by the Constitutional Court of South Africa requires that policies, legislation and practices adopted by the state in a

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<sup>135</sup> 2000 (11) BCLR 1169. (CC)

<sup>136</sup> 2002 (5) SA 703 (CC).

<sup>137</sup> B Villiers, *Protection of Social and Economic Rights: International Perspectives*, 1996, (Paper 9) retrieved 18<sup>th</sup> December, 2008, [http://www.chr.up.ac.za/centre\\_publications/occ\\_papers/occ9.html](http://www.chr.up.ac.za/centre_publications/occ_papers/occ9.html)

<sup>138</sup> Ibid

<sup>139</sup> J Dugard, 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice', *South African Journal on Human Rights*, Volume 24 No2, 2009, Page 215

<sup>140</sup> J Dugard, 'Court of First Instance?: Towards a Pro-Poor Jurisdiction for the South African Constitutional Court', *South African Journal on Human Rights*, Volume. 22, No2, 2006, Page 261

<sup>141</sup> J Dugard & T Roux, 'The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor:1990-2004', in R Gargarella, P Domingo & T Roux T, *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?*, Ashgate Publishers, Hampshire, 2006, Page 113

particular sector be reasonable.<sup>142</sup> This approach they argue requires the litigants to understand complex policy and budgetary issues. This requirement they further argue, acts as a disincentive to the poor to bring cases to the court. They conclude that the Constitutional Court's reasonableness standard of review is a product of its aversion to pulling too strongly on the complex web of choices that determine the state's welfare programme.<sup>143</sup>

The assertion that South African Constitutional Court's decisions on socio-economic rights cases do not provide a substantive relief to the applicant, can be extended to the few socio-economic rights cases that have come before Nigerian courts. As rightly asserted by Dugard and Roux, the reasons for not granting substantive reliefs and adopting the reasonable review standard is to avoid debates around separation of powers. However, although declaratory decisions may not provide any tangible benefit to the litigants, it may have a wider impact, which will include non-litigates. In this way the collective interest of the poor is protected. For example, the decision in the *Grootboom's*<sup>144</sup> case significantly affected the government's housing policy. It led to the adoption by the national and provincial governments of a policy of short-term emergency relief for people in desperate circumstances. Therefore, the substantive benefit to the litigants in the *Grootboom*<sup>145</sup> case may not have been much, but the decision will affect positively a wider range of people in need of emergency shelter.

Dugard and Roux affirm that in a number of cases such as *Jaftha v Schoeman & Others*; *Van Rooyen v Stoltz & Others*,<sup>146</sup> where pro poor legislation, policies and practices have been challenged the Constitutional Court has dismissed the challenge and strongly endorsed the state's attempt to promote pro-poor policies legislation and practices. They contend that the poor were not direct parties to these cases, rather the state played proxy to their interest, either by enacting pro poor legislation or engaging in conduct aimed at reducing poverty.<sup>147</sup> They conclude that the South African experience has demonstrated that it's possible to enforce social rights, but the usefulness of this power will be limited by the inherent limits on the judiciary in a system based on the separation of powers.<sup>148</sup>

The next section examines emerging litigation strategies in South Africa and Nigeria in regard to socio-economic rights litigation. This section examines emerging litigation

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<sup>142</sup> Ibid

<sup>143</sup> Ibid, Page 119

<sup>144</sup> 2000 (11) BCLR 1169. (CC)

<sup>145</sup> Ibid

<sup>146</sup> Case CCT 74/03

<sup>147</sup> Ibid, Page 116

<sup>148</sup> Ibid

strategies with a view to assessing strategies litigants may use to approach courts in both countries.

## **7. Litigation Strategies Emerging in South African and Nigeria in Relation to Socio-economic Rights Litigation**

According to Jonathan Berger, there are two models of litigation strategies emerging in South Africa in relation to socio-economic rights litigation. The first is based on the administrative model of judicial review and the second relies on express constitutional protections to make sense of or transform where necessary, the particular provision of law—whether common, statutory or constitutional—that forms the basis for the claim in question.<sup>149</sup> Nigerian courts to a great extent are more favourably disposed to the enforcement of civil and political rights than to socio-economic rights. Most judicial enforcement of socio-economic rights in Nigeria has been achieved through the route of civil and political rights.<sup>150</sup> These claims are based on express constitutional civil and political rights provisions.

A close examination of the administrative model of judicial review reveals that administrative laws regulate the power and control of government agencies or those agencies granted statutory powers of administration. These powers include those necessary to operate the agency or to implement its purposes, as well as the power to make quasi-judicial decisions (such as determining tax liability, granting licenses or permits, or hearing complaints against the agency or its officers). A permit or license revoked without due process can be challenged in court. The advantage of the administrative model of judicial review is that it circumvents the separation of power debate. Where the court invalidates a decision; it refers it back to the decision maker for reconsideration.

The South African and Nigerian legal environments, provide space for litigates to initiate socio-economic rights claims using the administrative model of judicial review. For example, under the Nigerian Constitution, the Federal High Court of Nigeria has the sole jurisdiction in any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision of the Federal Government or any of its agencies.<sup>151</sup> The Nigerian State High Courts have jurisdiction to decide on the validity of executive or

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<sup>149</sup> J Berger, 'Litigating Social Justice in Post-Apartheid Africa', in V Gauri & D Brinks, (ed), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, New York, 2008, Page 85

<sup>150</sup> C Odinkalu, (2008) 'The Impact of Economic and Social Rights in Nigeria', in V Gauri & D Brinks, (ed), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, New York, Page 220

<sup>151</sup> Section 251 (1) (r), Nigerian Constitution.

administrative actions of state and local governments in Nigeria.<sup>152</sup> Similarly, Section 33 (3) (a) of the South African Constitution, provides for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal. Furthermore, section 46 (2) of the Nigerian Constitution (1999), empowers a High Court to make orders, issue writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within the state of any rights which the person making the application may be entitled under Chapter 4. Similarly, Section 38 of the South African constitution empowers a competent court to grant appropriate relief, including a declaration of rights, wherever it is alleged that a right in the Bill of Rights has been infringed or threatened. Therefore, the courts may issues orders or directions regarding socio-economic rights cases, while allowing the parliament/executive a wide margin of discretion to make policy choices.

In *President of the Republic of South Africa v South African Rugby Football Union*<sup>153</sup> the Constitutional Court articulated the test for determining whether conduct constitutes administrative action as follows: “In section 33 the adjective “administrative” not “executive” is used to qualify “action”. This suggests that the test for determining whether conduct constitutes “administrative action” is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not.”

Judicial reviews entail allowing judges scrutinize legislative or executive action, to establish that it conforms to constitutional or legislative provisions.<sup>154</sup> The aim is to ensure that the executive or the legislature has acted within the powers granted them by the constitution, an act of parliament or common law. In Nigeria and to some extent in South Africa, judicial reviews extend to both the acts of the executive and legislature.<sup>155</sup> Generally, judicial reviews challenge the process through which a decision has been made rather than the decision itself. This is referred to as procedural grounds of judicial review and may be

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<sup>152</sup> 272. (1), Nigerian Constitution

<sup>153</sup> Case CCT 16/98

<sup>154</sup> D Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights*, Oxford University Press, USA, 2008, Page 103

<sup>155</sup> South African Constitution, Section 167 (4) (b) Only the Constitutional Court may: decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121.

Section 167 (5): The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force. Nigerian Constitution, Section 4 (8): Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.

invoked in instances where the rules of fair hearing were not adhered to by administrative bodies. For example, in *Olaniyan v University of Lagos*,<sup>156</sup> the Supreme Court of Nigeria held that a public employee cannot be removed from office unless and until he has been given a fair hearing.

Judicial reviews may also be brought before courts on substantive grounds. Substantive grounds challenge the content or outcome of executive decisions. There are two main grounds of substantive administrative review namely illegality and irrationality.<sup>157</sup> Illegality may arise, when the executive or some other executive body exercises powers it does not possess.<sup>158</sup> On the other hand irrationality (also referred to as unreasonableness) arises if a decision is so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his/her mind to the question to be decided could have arrived at the decision made.<sup>159</sup> Ian Loveland asserts that the irrationality test does not permit courts to perform executive decision making duties; however what the courts are concerned with is if the substantive decision made has any merit at all.<sup>160</sup> To this extent, the irrationality test is concerned with the political merits of government's decisions.<sup>161</sup>

A third ground for judicial review is the proportionality test. This test is part of the general principles of European community law established by the European Court of Justice.<sup>162</sup> The idea behind the proportionality review is that the means chosen to achieve a legislative objective should impact or impair the rights of citizens as little as possible.<sup>163</sup> This is consistent with the minimum restriction test, which states that policy objectives should be achieved through the least restrictive means. For example, a stated legislature objective "A" may be achieved through two policies, namely policy B1 and policy B2. However, achieving A will entail some restriction of rights represented by R. Policy B1 restricts R to a less extent than B2 and ensures the realisation of objective A just as policy B2 does. Where the executive chooses B2, the minimum restriction test allows the court to hold that B1 should be adopted.<sup>164</sup>

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<sup>156</sup> (1985) 1 NWLR (Part 9) 599

<sup>157</sup> I Loveland, *Constitutional Law, Administrative Law, And Human Rights: A Critical Introduction*, 5<sup>th</sup> edition, Oxford University Press, Oxford, 2009, Page 455

<sup>158</sup> Ibid

<sup>159</sup> GCHQ (1985), AC 374 at 410-411, HL. reported in I Loveland, *Constitutional Law, Administrative Law, And Human Rights: A Critical Introduction*, 5<sup>th</sup> edition, Oxford University Press, Oxford, 2009 Page 455

<sup>160</sup> I Loveland, *Constitutional Law, Administrative Law, And Human Rights: A Critical Introduction*, 5<sup>th</sup> edition, Oxford University Press, Oxford, 2009, Page 474

<sup>161</sup> Ibid

<sup>162</sup> Ibid, Page 479

<sup>163</sup> B Foley, *The Proportionality Test: Present Problems*, 2008, Page 69, retrieved 25<sup>th</sup> March, 2010, [www.js.journal.ie](http://www.js.journal.ie)

<sup>164</sup> A Alexy, *A Theory of Constitutional Rights*, Oxford University Press, Oxford, 2002, Pages 44-110

The South African Constitution and by extension the South African Constitutional Court have incorporated some of these grounds for judicial review into litigation that relies on express constitutional protections to make sense of or transform particular provision of law—whether common law or statutory law. For example in *Jaftha, Van Rooyen v Stoltz and Others*,<sup>165</sup> the Constitutional Court of South Africa held that the negative duty under section 26 (1)<sup>166</sup> is not subject to any qualifications. The violation of the negative duty under 26(1) constitutes a limitation of rights which falls to be justified in terms of the stringent requirements of the general limitations clause (s 36). The general limitations clause(s 36) in the Bill of Rights requires that rights can only be limited in terms of a law of general application ‘to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.’ Among the factors that a court must consider in evaluating the justifiability of a limitation is whether there are ‘less restrictive means’ for the state to achieve its purpose. However, South African courts use the internal limitations in qualified socio-economic rights “a standard of reasonableness” instead of section 36 (1), to decide whether or not failure in meeting positive obligations imposed by qualified social rights can be justified.<sup>167</sup> For example in *Grootboom*,<sup>168</sup> the court noted that measures to establish a housing programme directed towards the progressive realisation of the right of access to adequate housing within the state’s available means must be capable of facilitating the realisation of the right. The precise content of the measures is to be determined by the executive and the legislature. However, whatever measures they chose to adopt must be reasonable. Wherever, the right to adequate housing is invoked (section 26(2)),<sup>169</sup> the question the court should be asking is whether the measures adopted by the state is reasonable. Once it is shown the measures are reasonable the requirement is met. In the present case, the court determined that a reasonable measure must cater for those in urgent need.

Section 36 (1) of the South African constitution states that rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –(a) the nature of the

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<sup>165</sup> Case CCT 74/03

<sup>166</sup> Everyone has the right to have access to adequate housing

<sup>167</sup> D Brand, ‘Introduction to Socio-Economic Rights in South Africa’, in D Brand & C Heyns, *Socio-economic Rights in South Africa*, Pretoria University Law Press, Pretoria, 2005, Page 27

<sup>168</sup> (2000), BCLR 1169. (CC)

<sup>169</sup> The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. Under section 36 (1), South African courts considers the purpose and the benefits of infringement against its nature, effect and severity and considers the relative efficacy of the infringing measure in achieving the purpose to decide whether or not it is justified.<sup>170</sup> The reasonableness test does not allow courts to consider the relative efficacy of the challenged state measures compared to other possible measures.<sup>171</sup> The effect is that the standards of reasonableness in qualified socio-economic rights allow courts more lenient standard of scrutiny with regard to qualified socio-economic rights, than that which would apply in terms of section 36(1). This gives the executive and legislature a wide margin of discretion to make policy choices regarding qualified socio-economic rights. The limitation clause (a standard of reasonableness) that applies to positive duties of qualified socio-economic rights in lieu of section 36(1) does not apply to negative duties of qualified socio-economic rights and any positive or negative duty of basic socio-economic rights. Where possible, it is therefore better to characterise a case brought based on qualified socio-economic rights as a negative infringement of the qualified socio-economic right.<sup>172</sup>

Remedies awarded in judicial reviews include declarations, prerogative orders and injunctions. Prerogative remedies entail the courts issuing an order quashing the administrative action in contention or prohibiting a public body from carrying out a proposed act or prohibiting a continuing act<sup>173</sup>. Prerogative orders may also entail the court asking a public body to exercise a public duty in favour of the applicant.<sup>174</sup> Finally, the court may issue an injunction. This is an order stopping a public body from acting in an unlawful manner. Injunctions may be mandatory, for example, compelling a public body to do something. Injunctions may also be interim. Interim junctions are designed to protect the position of the parties pending the outcome of the application for judicial review.

In most common law countries such as South Africa and Nigeria, damages are not given in judicial reviews.<sup>175</sup> For monetary damages to be awarded in a judicial review, there must be either a recognised private law cause of action such as negligence or breach of statutory duty. Monetary damages may also be awarded in judicial reviews for human rights violations.

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<sup>170</sup> D Brand, 'Introduction to Socio-Economic Rights in South Africa', in D Brand & C Heyns, *Socio-economic Rights in South Africa*, Pretoria University Law Press, Pretoria, 2005, Page 27

<sup>171</sup> Ibid

<sup>172</sup> Public Law Team, Law Commission, *Monetary Remedies in Public Law*, A Discussion Paper, Page 4, October 2004, retrieved 25<sup>th</sup> May, 2010, [http://www.lawcom.gov.uk/docs/monetary\\_remedies\\_disc\\_paper.pdf](http://www.lawcom.gov.uk/docs/monetary_remedies_disc_paper.pdf)

<sup>173</sup> Ibid

<sup>174</sup> Ibid

<sup>175</sup> Ibid, Page 5

For example, under section 6 United Kingdom Human Rights Act 1998; public authorities may be liable for a breach of the human rights of an individual.<sup>176</sup> Similarly, in the Nigerian case of *Candide-Johnson v Edigin*,<sup>177</sup> it was held that a claim for monetary compensation is within the ambit of Chapter 4 (Bill of Rights) of the Constitution and unless special damages are claimed the courts will award general damages.

Judicial reviews generally shift final decision making from elected institutions to judicial institutions. Theorists have advanced justifications for shifting final decision making from elected institutions such as the executive and the legislature to the judiciary.<sup>178</sup> The first justification is referred to as democracy supporting justifications. An illustration of this type of justification arises where an elected parliament passes laws, limiting the rights of the minority, such as limiting the right to vote or campaign. In these circumstances judicial institutions are needed to act as a check and to make final decisions aimed at safeguarding the preconditions for elected representative governments.<sup>179</sup> The second justification is what may be referred to as right based justifications. The rights based justifications operate on the premise that certain rights should be protected at all times, even where the majority feel otherwise. For example, a law limiting the rights of white South Africans, may not stand the test of judicial review, even where this is supported by the majority of the members of parliament. With regard to socio-economic rights, the justifications for judicial review are still relevant, even where these rights have resource implications.<sup>180</sup> This is because the way resources are allocated impact on rights that are instrumental to the right to life, such as food, water and shelter.<sup>181</sup> Bilchitz argues that this is where the equal importance of all is most at stake. He concludes that if the justification for judicial review is that it protects the rights of individuals, then where it matters most is where resources are involved.<sup>182</sup> In practice however, granting judges the power of judicial review does not mean granting them power to allocate resources. Decisions about how to allocate resources should be made by the executive. The role of judges should be limited to reviewing such decisions to ensure that they conform to the constitution and other laws applicable within the state.

In the next two sections, this study examines factors that affect protection of socio-economic rights in South Africa and Nigeria.

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<sup>176</sup> Ibid, Page 39

<sup>177</sup> (1990) 1 NWLR (Pt 129) 659 (A)

<sup>178</sup> D Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights*, Oxford University Press, USA, 2008, Page 104

<sup>179</sup> Ibid

<sup>180</sup> Ibid, Page 131

<sup>181</sup> Ibid

<sup>182</sup> Ibid

## **8. The Transformation of Constitutional Socio-Economic Claims into Enforceable Legal Rights in South Africa and Nigeria**

The process of transforming constitutional socio-economic claims into enforceable legal rights may occur through a variety of law making processes and institutions.<sup>183</sup> These institutions may include the executive, the legislature and the judiciary.<sup>184</sup> For example, the executive arm of the Nigerian government initiated the establishment of the Niger-Delta Development Commission. Its functions include formulating policies and guidelines for the development of the Niger Delta area of Nigeria, as well as tackling ecological and environmental problems that arise from the exploration of oil minerals in the Niger Delta. The Niger Delta Development Commission was established by an act of parliament. The establishment of a commission of this nature is consistent with the obligations of the Nigerian state under the Directive Principles of State Policy of the Nigerian Constitution. Programmes of this nature define the obligations of the state more precisely and make it easier to hold the state to account. Therefore, statutory measures aimed at the realisation of a socio-economic right include passing relevant legislations and creating and empowering institutions for the implementation of socio-economic rights.

The South African parliament has enacted several statutory socio-economic rights. Examples include the South African Social Assistant Act and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The South African state has also adopted a range of policies aimed at realizing the socio-economic needs of its citizens. Similarly, Nigeria has adopted laws such as the Free Universal Basic Education Act, the National Health Insurance Scheme Act and the Niger Delta Act which has the potential of giving effect to the provisions of the Charter. Nigeria has also adopted a range of policies aimed at realizing the socio-economic needs of its citizens.

Generally, courts' find it easier to impose duties where the legislature or the executive have defined duties as opposed to interpreting constitutional rights or rights contained in international treaties and defining duties on the basis of these rights.<sup>185</sup> This is because the courts are not faced with issues around separation of powers.<sup>186</sup> By enacting pro poor legislation, pro poor policies or practices, the South African and Nigerian states are merely

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<sup>183</sup> D Brand, 'Introduction to Socio-Economic Rights in South Africa', in D Brand & C Heyns, *Socio-economic Rights in South Africa*, Pretoria University Law Press, Pretoria, 2005, Page 12

<sup>184</sup> Ibid

<sup>185</sup> D Brand, 'Introduction to Socio-Economic Rights in South African Constitution', in D Brand & C Heyns (Ed) *Socio-Economic Rights in South Africa*, Pretoria University Law Press, Pretoria, 2005, Page 23

<sup>186</sup> Ibid

fulfilling their constitutional obligations as well as their obligations under international laws such as the African Charter.

The judiciary by elaborating on constitutional socio-economic rights provisions define exactly what the obligations of the state are in relation to the socio-economic right in question. In the process also, the courts develop case law. For example, in the *Grootboom*<sup>187</sup> case, the South African court constitutionalised the requirement that a reasonable government programme must cater for those in urgent need.

What the African Charter and other international human rights treaties mandate state parties to do is to enact legislation and other measures (which include policies) that ensure the realisation of the rights contained in the treaties. For example, Article 1 of the African Charter provides that the member states of the African Union, who are parties to the Charter, shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

Policy measures refer to the process of making important organizational decisions, including the identification of different alternatives such as programs or spending priorities, and choosing among them on the basis of the impact they will have. Policies can be understood as political, management, financial, and administrative mechanisms arranged to reach explicit goals. The influence of human rights can be seen in a range of legislative and policy measures adopted to give effect to the government's human rights commitments. These measures can be challenges in court if they are inconsistent with the constitution or laws within a state. A challenge of a government policy in court in order to bring about a change in policy is normally referred to as public policy litigation.

Gauri and Brinks<sup>188</sup> argue that one can decompose the life cycle of public policy litigation into four stages (a) the placing of cases on the courts' docket (They referred to this as legal mobilisation); (b) judicial decision; (c) a bureaucratic, political or private party response; and in many cases (d) some follow-up litigation. They referred to the product of this four stage process as legalization of policy in a particular policy area. They went on to define legalization as the extent to which courts and lawyers, including prosecutors, become relevant actors, and the language and categories of law and rights become relevant concepts, in the design and implementation of public policy. They hypothesized that certain features of a country's legal, institutional, and political landscape strongly affect the extent and form of

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<sup>187</sup> (2000), BCLR 1169. (CC)

<sup>188</sup> V Gauri & D Brinks, 'The Elements of Legalisation and Triangular Shape of Social and Economic Rights', in V Gauri & D Brinks, (ed), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, New York, 2008, Page 4

legalization in social and economic policy. They further argued that the courts are deeply implicated in this set of strategic interactions. Although the prevailing superstructure affects court's ruling in some ways, judges also craft their opinion with an eye on the likelihood of compliance (stage3), the political reaction and its effect on the standing of the judiciary (stage3) and the existence of a strong litigant who can engage in follow up or bring new cases (stage 1 and 4). They conclude that their definition of legalization does not depend on court making a final, all or nothing decisions, thereby usurping the functions of more representative institutions.

Similarly, Gloppen<sup>189</sup> contends that the success or failure of social rights litigation depends on (a) the ability of groups whose rights are violated to articulate their claims and voice them into the legal system – or have the rights claimed on their behalf; (b) the responsiveness of the courts at various levels towards the social claims that are voiced; (c) the capability of the judges – that is, their ability to find adequate means to give legal effect to social rights; and (d) whether the social rights judgments that are handed down have authority in the sense that they are accepted, complied with and implemented through legislation and policy. Each of the stages of litigation has factors affecting them. For example, factors affecting the litigant's voice include resources, awareness of rights, nature of the legal system such as rules on standing, perception of the judiciary, which include the judiciary's track record in deciding issues impacting on social rights as well as corruption.<sup>190</sup> Factors affecting courts responsiveness include the nature of the legal system. For example are social rights formally recognized, or are they 'directive principles' outside the scope of the courts' jurisdiction. The courts' responsiveness also depends on the legal culture and prevailing theories of interpretation.<sup>191</sup> Factors affecting judges' capabilities include independence, appointment procedure, resources, nature of the legal system, sensitization to social rights as well as the composition of the bench (their professional and social background).<sup>192</sup> Gloppen outlines factors affecting compliance as follows, courts' professionalism, independence and legitimacy. Several aspects of the political contexts are crucial for compliance with social rights judgments. These factors include the prevailing political culture; the balance of power between the parties and most important, the political will to follow up and give priority to

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<sup>189</sup> S Gloppen, *Social Rights Litigation as Transformation South African Perspectives*, 2005, Pages 3-4, retrieved 16<sup>th</sup> January, 2009, <http://www.cmi.no/publications/file/?1965=social-rights-litigation-as-transformation>

<sup>190</sup> Ibid, Page 5

<sup>191</sup> Ibid Page 6

<sup>192</sup> Ibid, Page 7

social rights issues. Lastly, implementation of court rulings also depends on the state's capacity – financial, institutional and administrative.<sup>193</sup>

Public interest litigation can be undertaken by individuals or non-governmental organisations. Given the fact that most people in South Africa and Nigeria are poor, non-governmental organisations that embark on public interest litigation, provide an opportunity for poor people to access legal representation and by extension the courts.<sup>194</sup> Dugrad, contends that any public interest matter concerns the poor, who constitute the majority of the population. Therefore, it is essential for the judiciary to do all in its power to promote public interest litigation or at the least to minimise systemic barriers<sup>195</sup>.

An illustration of public policy litigation is the *Treatment Action case*.<sup>196</sup> In this case, Treatment Action Campaign (TAC) a nongovernmental organisation challenged in court the South African government's policy that restricted the provision of anti-retroviral drugs to HIV positive pregnant women. They alleged a violation of the right to access health care services and demanded a change in policy to make the drug available throughout the country. The High Court ruled in favour of TAC. The Constitutional Court confirmed the ruling, finding that the state policy of restricting the drugs to pilot sites excluded those who could reasonably be included in the programme. The Constitutional Court ordered that the drugs should be available to health facilities throughout the country.<sup>197</sup>

In *Peter Nemi v Attorney General of Lagos state*<sup>198</sup> another public interest case, Human Rights Law Service, a non-governmental organisation based in Nigeria, brought a public interest case on behalf of prisoners in Nigeria. The issue for determination was the constitutionality of prolonged incarceration in dehumanizing conditions of death row prisoners and the rights of prisoners to humane treatment. The Nigerian Court of Appeal held that prisoners have enforceable rights as citizens and suggested that prolonged incarceration of convicted death row prisoners could constitute breach of their right to dignified and humane treatment.

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<sup>193</sup> Ibid

<sup>194</sup> J Dugard J, 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice', *South African Journal on Human Rights*, Volume. 24, No 2, 2009, Page 13

<sup>195</sup> Ibid

<sup>196</sup> (2002) 5 SA 721 (CC)

<sup>197</sup> *Analysis of Minister of Health v Treatment Action Campaign (TAC) (2002) 5 SA 721 (CC)*, (International Network for Economic, Social & Cultural Rights), retrieved 25<sup>th</sup> March, 2010,

[http://www.escriet.org/caselaw/caselaw\\_show.htm?doc\\_id=403050&country=13630](http://www.escriet.org/caselaw/caselaw_show.htm?doc_id=403050&country=13630)

<sup>198</sup> 1996 6 NWLR pt452, p.42

Dakas, concludes that policy is and should be flexible. It may be changed at any time and the executive is always free to change policies where it considers it appropriate to do so. The only constraint is that policies must be consistent with the constitution and law. Court orders concerning policy choices made by the executive should therefore not be formulated in ways that preclude the executive from making such legitimate choices.<sup>199</sup>

It should also be noted that there are several ways in which the legalization of policy can and does affect the availability and quality of social and economic goods, but only some of them involve social and economic claims.<sup>200</sup> When patients press medical malpractice cases in court or other forums or rely on common law or contractual provider relationships that are independent of constitutional rights to health or health care, these claims can significantly affect the quality of health care in a country.<sup>201</sup> Certain first generation rights such as the right to human dignity, equality and due process can also be used to protect socio-economic rights as decisions from South Africa and Nigeria indicate. These cases reinforce the notion that all rights are interdependent and interrelated. Judges can also use administrative law in the realisation of socio-economic rights.

Socio-economic rights may affect the availability and quality of social and economic goods in several ways.<sup>202</sup> However, the focus of this study is on formal socio-economic rights. A formal right is a written statement in which a normative claim regarding what one is due has been incorporated into the state's legal framework.<sup>203</sup> Formal socio-economic rights may be found in domesticated treaties, constitutional provisions, domestic statutes or judicial decisions.<sup>204</sup>

In the next section, this study examines how institutions such the judiciary and civil society influence the legalization of socio-economic rights.

## **9. Institutions and the Legalization of Socio-Economic Rights in South Africa and Nigeria**

Institutions such as the judiciary and civil society within a country affect the level, scope and form of legalization regarding socio-economic rights. For example, placing cases before courts may entail charitable or state funding as well as public interest or rights oriented

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<sup>199</sup> C.J Dakas, 'Beyond Officialdom: Fallacies and Hypocrisy in Economic, Social and Cultural Rights Discourse and Implementation in Nigeria', *African Yearbook of International Law, Volume 15*, 2007, Page 40

<sup>200</sup> V Gauri & D Brinks, 'The Elements of Legalisation and Triangular Shape of Social and Economic Rights', in V Gauri & D Brinks,(ed),*Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, New York, 2008, Page 6

<sup>201</sup> Ibid

<sup>202</sup> Ibid, Page 7

<sup>203</sup> Ibid

<sup>204</sup> Ibid

lawyers, given that the poor may not be in a position to finance extensive litigation.<sup>205</sup> Additionally, the judiciary/judges have to be supportive of socio-economic rights cases and the judicial system will need to be devoid of rules such as standing that make it difficult for litigates to bring socio-economic right cases before courts.<sup>206</sup> Another factor affecting legalization is the ability or willingness of the duty bearer to implement the decision of the court.<sup>207</sup> This depends on several factors such as resources, civil society intervention to ensure implementation and the court's ability to exercise supervisory jurisdiction. The final factor affecting the legalization process is the follow up. Gauri and Brinks, contend that, follow-up litigation is important for the level and impact of legalization. For example, Treatment Action Campaign has been involved in several public interest cases in the HIV/AIDs and health care field.<sup>208</sup> Specifically, they have been applicants in four cases and friends of the court in two. (*Amicus curiae*).<sup>209</sup> It was this organisation that brought the TAC case.<sup>210</sup> The organisation also intervened to ensure that the decision of the court was implemented by applying follow up pressure on provinces to implement the court decision that anti-retroviral drugs should be available to health facilities throughout the country.

As earlier mentioned Nigerian courts have held that locus standi is a condition precedent to the initiation of any judicial process. People seeking remediation for the violation of socio-economic rights need to establish that they have sufficient interest in the violation. This poses a challenge to socio-economic rights litigation in Nigeria. However, in practice Nigerian civil society organisations involved in the promotion and protection of socio-economic rights have circumvented the standing rule by supporting victims of socio-economic rights violations in suing in their own names. For example, Social and Economic Rights Action Centre (SERAC) supported an applicant to file the first HIV discrimination case in Nigeria. The suit was filed in the applicant's name.<sup>211</sup>

Legalization of socio-economic rights may impact directly on litigates. In some cases where the remedy is collective, it may have a wider impact, which will include non-litigates.<sup>212</sup> Legalization may also have indirect effects internal to a legal system, in which

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<sup>205</sup> Ibid, Page 15

<sup>206</sup> Ibid Page 16

<sup>207</sup> Ibid Page 18

<sup>208</sup> J Berger, 'Litigating Social Justice in Post-Apartheid South Africa', in V Gauri & D Brinks, (ed), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, New York, 2008, Page 53

<sup>209</sup> Ibid

<sup>210</sup> Minister of Health v Treatment Action Campaign (TAC) (2002) 5 SA 721 (CC)

<sup>211</sup> See Georgina Ahamefule v Imperial Medical Centre & Dr Alex Molokwu (Appeal Number: CA/I/514/2001)

<sup>212</sup> V Gauri & D Brinks, 'The Elements of Legalisation and Triangular Shape of Social and Economic Rights', in V Gauri & D Brinks, (ed), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, New York, 2008, Page 22

case they serve as precedents.<sup>213</sup> Finally legalization may have indirect effect external to the legal system; this occurs when legalization brings about legislation or policy changes either by the state or a private actor.<sup>214</sup> This effect ensures that the benefit of litigation is extended beyond the litigants. According to Gauri and Brinks judges are more likely to support claims that fall well within the mainstream of political and legal culture because they are creatures of those cultures. Judges directives are more likely to be complied with if they have the support of the political, bureaucratic, or civil society actors. While legalization is most likely to have a broad impact if it is picked up and carried forward through political decisions. Additionally, courts are more likely to be presented with numerous claims if demands are backed by well – organised and well funded litigants.<sup>215</sup> Elaborating on the assertion that judges are creatures of their political environment, Gauri and Brinks state that the appointment procedure of judges are indicative of the ideological bent of a particular bench.<sup>216</sup> For example, the views of the current judges of the Constitutional Court of South African were developed in the midst of the struggle to create a more equal South Africa. The judges were appointed by the first democratic president of South Africa, Nelson Mandela, with the consent of the African National Congress (ANC) dominated congress and input from the Judicial Service Commission.<sup>217</sup> They conclude that given this appointment process, it is not surprising that these judges take a favourable view of social and economic rights and take their mandate seriously enough to challenge the ANC government in terms of particular policies.<sup>218</sup>

On the other hand, Nigeria has had twenty-nine years of military rule, under several military regimes prior to 1999. Military governments in Nigeria have also not allowed the judiciary to be truly independent, they interfered with the appointments of judges and were known to dismiss judges who were not on their side.<sup>219</sup> In several instances, they disobeyed the orders of Nigerian courts. This culture did not pave the way for effective growth and development of the nation’s legal system.<sup>220</sup> Afe Babalola Senior Advocate of Nigeria (SAN) summed up the judicial appointment procedure in Nigeria, as follows “when appointment of men and women to the bench is premised on extraneous considerations such

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<sup>213</sup> Ibid, Page 23

<sup>214</sup> Ibid Page 24

<sup>215</sup> Ibid, Page 26

<sup>216</sup> V Gauri & D Brinks, ‘A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World’, in V Gauri & D Brinks, (ed). *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, New York, 2008, Page 316

<sup>217</sup> Ibid 315

<sup>218</sup> Ibid

<sup>219</sup> A.A Idowu, ‘Human Rights, Democracy and Development: The Nigerian Experience’, *Human Rights and Peace Centre, Makerere University*, Volume 9, N0. 2, 2003, Page 37

<sup>220</sup> Ibid

as god-fatherism, political connections, religious leanings “federal character” (without any regard for merit and competence) and monetary inducements, the ultimate victim is justice.”<sup>221</sup> The society is bound to suffer and bear the brunt of the consequences of having incompetent judges on the Bench.<sup>222</sup> Gauri and Brinks, conclude that judicial autonomy is a critical precondition for legal mobilization, and provision claims against the government fade into the background where courts are weak relative to political actors as in Nigeria.<sup>223</sup> They further conclude that unlike constitutional claims, horizontal disputes between private parties regarding socio-economic rights can always be adjudicated and enforced.

In the following section, this study focuses on the Human Rights Commissions in both countries. Although these Commissions are quasi-judicial institutions, they perform a wide range of functions, which include promotional activities, research, monitoring, documentation, advisory work and conflict resolution.<sup>224</sup>

#### **10. Institutions that complement the judiciary in administering justice in South Africa and Nigeria**

Chapter 9 of the South African Constitution provides for several institutions that support accountability and promote participation/democracy. These institutions include the Public Protector (Ombudsman); the Human Rights Commission; the Commission for the Promotion of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor General; and the Electoral Commission. On the other hand, bodies such as the Nigerian Human Rights Commission; the Public Complaints Commission (Ombudsman); and the National Commission for Women, were established by acts of parliament pursuant to the Fundamental Objectives and Directive Principles of State Policy contained in Chapter 2 of the Nigeria Constitution. However, the Independent National Electoral Commission was established in accordance with section 153(f) of the Constitution of the Federal Republic of Nigeria.

This study focuses on Human Rights Commissions in both countries because of their broad mandate that focuses on protecting and promoting all constitutionally recognised human rights as well as other national legislation dealing with human rights within the respective states.

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<sup>221</sup> A Babalola, The role of the judiciary in the sustenance of democracy Annual Silver Knights May Day lecture, 2008

<sup>222</sup> Ibid

<sup>223</sup> V Gauri & D Brinks, ‘A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World’, in V Gauri & D Brinks,(ed),*Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, New York, 2008, Page 316

<sup>224</sup> M Gomez, ‘Social Economic Rights and Human Rights Commissions,’ *Human Rights Quarterly*, Volume 17, No 1, 1995, Page 158

## 10. 1 Human Rights Commissions in South Africa and Nigeria

The functions of the South African Human Rights Commission are to promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in the Republic.<sup>225</sup> In order to exercise these functions, the constitution empowers the South African Human Rights Commission to investigate and to report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research and educate South Africans.<sup>226</sup> The Human Rights Commission is empowered by the constitution to ask 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.<sup>227</sup> The Human Rights Commission has the additional powers and functions prescribed by national legislation.<sup>228</sup> S Liebenberg stated that the Commission is well suited to gather information for monitoring and assessing the realization of socio-economic rights in South Africa. She further states that it has an important role to play in monitoring the progressive realization of the rights, identifying structural patterns of violations and drawing these to the attention of government and the public. She concludes that in this way the Commission can promote greater accountability by organs of state for the realization of socio-economic rights.<sup>229</sup>

In pursuance of its mandate to ask 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 South African Human Rights Commission has distributed questionnaires to organs of the state. The questionnaires are designed to monitor social and economic rights realisation by soliciting baseline information on the following, (a) The impact of past laws and policies on the realisation of socio-economic rights, (b) The understanding by various organs of State of their constitutional obligations relating to socio-economic rights, (c) Groups identified as vulnerable and in need of special assistance to gain access to socio-economic rights, (d) The measures taken by respective government departments to respect, protect,

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<sup>225</sup> S 184, (1), South African Constitution

<sup>226</sup> 184 (2), South African Constitution

<sup>227</sup> 184 (3), South African Constitution

<sup>228</sup> 184 (4), South African Constitution

<sup>229</sup> S Liebenberg, 'The Protection of Economic and Social Rights in Domestic Legal Systems' in A Eide, . *Economic, Social and Cultural Rights: A Textbook*. 2nd Edition, Martinus Nijhoff Publishers, Dordrecht, 2000, Page 53

promote and fulfil these rights, (e) The information-gathering systems put in place by government departments to track the progressive realisation of the rights and the existence of a coherent plan of action to achieve the progressive realisation of the rights which incorporates clear goals, benchmarks and time-frames.<sup>230</sup>

The South African Human Rights Commission also oversees surveys conducted by independent NGOs on public perception regarding the realisation of socio-economic rights in South Africa. The results of this study, supplements the information provided by organs of the State on the realisation of socio-economic rights in South Africa.<sup>231</sup> The South African Human Rights Commission also has oversight of the state organ's compliance with court orders. In the *Grootboom*<sup>232</sup> case, the Constitutional Court asked the Human Rights Commission to report to it with regard to the state's compliance with the ruling of the court. The South African Human Rights Commission also acts as *amicus curiae* in several human rights cases. Klaaren,<sup>233</sup> contends that as a result of the constitutional requirement of a reasonable state policy on a number of socio-economic rights, the content of these policies should be made known to the public. He proposes an "information promotion" model in which a strengthened national system of information sharing will make the state more accountable through the use of the Promotion of Access to Information Act<sup>234</sup>. He quotes the views of the Chairperson of the South African Human rights Commission to substantiate his conclusion as follows:

The right of information is not something that lives in the air, or something that thrives within academia, but in the day-to-day lives of citizens and in the important decisions they take around bread and butter issues. Access to credible, reliable and accurate information is so important in the kind of decisions they make. Not just decisions about the kind of government they want, but decisions about the kind of house they want, the kind of education they want for their children, the kind of accountability they are entitled to demand from local government officials and elected representatives.<sup>235</sup>

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<sup>230</sup> S Liebenberg, *Human Development and Human Rights, South African Country Study, Human Development Report 2000* Background Paper, United Nation Development Programme, retrieved 3<sup>rd</sup> January, 2009, <http://hdr.undp.org/en/reports/global/hdr2000/papers/sandra%20liebenberg.pdf>

<sup>231</sup> Ibid

<sup>232</sup> (2000), BCLR 1169. (CC)

<sup>233</sup> J.A Klaaren, 'Second Look at the South African Human Rights Commission, Access to Information and the Promotion of Socioeconomic Rights', *Human Rights Quarterly*, Volume 27 No 2, 2005, Page 539-556

<sup>234</sup> Ibid

<sup>235</sup> Ibid

In Nigeria, the Official Secrets Act prohibits public disclosure of all classified matter. Sections 1(1) and 9 of the Official Secret Act, defines a classified matter as “any information or thing which, under any system of security classification, from time to time, is used by any branch of the government, is not to be disclosed to the public and of which the disclosure to the public would be prejudicial to the security of Nigeria. Similarly, the National Security Agencies Act establishes the State Security Service (SSS), and provides that part of their mandate is to protect and preserve all non-military classified matters concerning the internal security of Nigeria.<sup>236</sup> These provisions make access to information which is essential for the protection of socio-economic right very difficult to obtain.<sup>237</sup> According to Odinkalu in practice every government record is part of a system of security classifications.<sup>238</sup> The former National Assembly passed a Freedom of Information Bill, however the former president of Nigeria refused to accent to it. The Bill lapsed at the end of the legislative term of the former National Assembly.<sup>239</sup>

In Section 5 of the Nigerian National Human Rights Act, 1995, provides that the Commission shall deal with all matters relating to the protection of human rights as guaranteed by the Constitution of the Federal Republic of Nigeria 1979, as amended, the African Charter on Human and People’s Rights, the United Nations Charter, and the Universal Declaration on Human Rights and other International Treaties on human rights to which Nigeria is a signatory; monitor and investigate all alleged cases of human rights violations in Nigeria and make appropriate recommendation to the Federal Government for the prosecution and such other actions as it may deem expedient in each circumstance; assist victims of human rights violation and seek appropriate redress and remedies on their behalf. The Nigerian National Human Commission is also empowered to undertake studies on all matters pertaining to human rights and assist the Federal Government in the formation of appropriate policies on the guarantee of human rights; publish, from time to time, reports on the state of human rights protection in Nigeria; organise local and international seminars, workshops and conferences on human rights issues for public enlightenment; liaise and co-operate with local and international organisations on human rights with the purpose of advancing the promotion and the protection of human rights; participate in all international activities relating to the promotion and protection of human rights; maintain a library, collect

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<sup>236</sup> C Odinkalu, ‘The Impact of Economic and Social Rights in Nigeria’, in V Gauri & D Brinks (Ed), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, New York, 2008, Page 198

<sup>237</sup> Ibid

<sup>238</sup> Ibid, Page 199

<sup>239</sup> Ibid

data and disseminate information and materials on human rights generally; and carry out all such other functions as are necessary or expedient for the performance of its functions under the Act.

The Nigerian National Human Rights Commission employs a variety of methods in executing its protective mandate. These may use litigation; in this case the National Human Rights Commission may institute litigation on its own, assist in the prosecution, hold watching briefs in criminal cases or appear as *amicus curiae* in landmark cases.<sup>240</sup> It may also settle complaints through mediation and conciliation.<sup>241</sup> The Commission hold public hearing in different locations in the country, it may invite alleged violators within such locations to answer allegations made against them by the complainant.<sup>242</sup> The Commission is statutorily required to give advice to government and its agencies such as the Police service.<sup>243</sup>

The Nigerian National Human Commission (the Commission), has made a strong case for the upgrading of socio-economic rights. A submission to this effect was made to the Joint National Assembly and Presidential Committee on the Review of the 1999 Constitution. Since its establishment the Commission has demonstrated an expansive capacity to tackle issues of human rights through various activities, ranging from public enlightenment and education, investigation of complaints, mediation and reconciliation, conflict resolution, peace building, research advocacy and training programmes on contemporary issues in the field of human rights. For effective performance and result oriented approach to its work, the Governing Council of the Commission identified fifteen (15) main thematic areas of focus and these include: Women and Gender Matters; Children; Corruption and Good Governance; Police, Prison and Other Detention Centres; Environment and Niger-Delta; Education; Freedom of Religion and Belief; Torture, Extra-Judicial, Summary and Arbitrary Executions; Law Reform and Law Review; Independence of the Judiciary and Access to Justice; Labour; Food and Shelter; Communal Conflict and Other Related Violence; Health and Freedom of Expression and the Media.<sup>244</sup> Special Rapporteurs drawn from the Governing Council members were appointed to man the various thematic areas.<sup>245</sup> The Commission has had a large number of complaints regarding livelihood rights, such as wrongful termination of

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<sup>240</sup> Ibid, Page 216

<sup>241</sup> Ibid

<sup>242</sup> Ibid

<sup>243</sup> Ibid, Section 5 (b) of the Nigerian National Human Rights Commission Act

<sup>244</sup> Nigerian National Human Rights Commission, retrieved 7<sup>th</sup> February, 2009, <http://www.nigeriarights.gov.ng/about.html>

<sup>245</sup> Ibid

employment; non payment of entitlement/compensation; medical or right to health; right to education and seizure of land or demolition of homes.<sup>246</sup>

The next section, will now examine challenges to the realisation of socio-economic rights in Nigeria and South Africa.

### **11. Challenges to the Realisation of Socio-Economic in South Africa and Nigeria**

It is often because of a perception that socio-economic rights cases have greater implications for state resource procurement and spending that concerns about the democratic legitimacy of judicial review tend to be emphasised more in relation to socio-economic rights.<sup>247</sup> In the context of Africa, there is no doubt that limited resources and underdevelopment limits the realisation of socio-economic rights.<sup>248</sup> Professor Eze, argues that the critical issue is the nature of the political system, and the extent to which it is geared towards putting in place the requisite structures for the enjoyment of socio-economic rights.<sup>249</sup> In the context of Nigeria, corruption further limits the resources needed for the realisation of socio-economic rights. For example, according to Nuhu Ribadu, former chair of the Nigerian Economic and Financial Crimes Commission, the agency recovered within three years, ill-gotten wealth in excess of 5 billion dollars. (\$5 Billion)<sup>250</sup>

Poverty remains one of the main challenges to the protection and enforcement of human rights in Africa.<sup>251</sup> Poverty also contributes to a litigant's incapacity to meet the cost of litigations in South African and Nigerian courts of law. Litigation to enforce a person's right includes payment of solicitor's fees, transport costs and other incidental expenses that normally go with the filing of actions in courts. The challenge of poverty is further compounded by other factors such as unemployment, illiteracy, ill-conceived policies as well as pandemics such as HIV/AIDS.<sup>252</sup> Budlender argues that access to court does not only

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<sup>246</sup> C Odinkalu, 'The Impact of Economic and Social Rights in Nigeria', in V Gauri & D Brinks (Ed), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, New York, 2008, Page 217

<sup>247</sup> M Pieterse, 'Coming to Terms with Judicial Enforcement of Social and Economic Rights', *South African Journal on Human Rights*, Volume 20, Part 3, 2004, Pages 390-391

<sup>248</sup> C.J Dakas, 'Beyond Officialdom: Fallacies and Hypocrisy in Economic, Social and Cultural Rights Discourse and Implementation in Nigeria', *African Yearbook of International Law*, Volume 15, 2007, Page 35

<sup>249</sup> O Eze, 'Human Rights in Africa: Some Selected Problems' Lagos, Nigeria: Nigerian Institute of International Affairs, 1984, cited in C.J Dakas, 'Beyond Officialdom: Fallacies and Hypocrisy in Economic, Social and Cultural Rights Discourse and Implementation in Nigeria', *African Yearbook of International Law*, Volume 15, 2007, Page 36

<sup>250</sup> Economic and Financial Crime Commission, "EFCC Recovers Six Hundred and Forty Billion Naira in Money Laundering Battle", [www.efccnigeria.org](http://www.efccnigeria.org), cited in C.J Dakas, 'Beyond Officialdom: Fallacies and Hypocrisy in Economic, Social and Cultural Rights Discourse and Implementation in Nigeria', *African Yearbook of International Law*, Volume 15, 2007, Page 36

<sup>251</sup> J.C Mubangizi, 'The Protection and Enforcement of Socio-Economic Rights in Africa', *Africa Yearbook of International Law*, Volume 15, 2007, Page 103

<sup>252</sup> Ibid

mean the right to bring a case before a court. It also includes the ability to bring the case before a court.<sup>253</sup> He further argues that ability entails that the prospective litigant has knowledge of the applicable law; has some knowledge about what to do in order to achieve access; is able to identify that he/she may be able to obtain a remedy and must have the skills to initiate the case and present it in court.<sup>254</sup> Given the prevailing levels of poverty in Nigeria and South Africa, it is unlikely that the poor will have ability to access courts.<sup>255</sup> Similarly, Dugard, contends that without legal representation, the poor are further disempowered when confronted by complex legal issues and proceedings. They risk an unfair decision, particularly where the matter involves a socio-economic power imbalance and the other party has legal representation.<sup>256</sup>

Another objection to the legitimacy of the courts dealing with socio-economic rights is that judicial involvement in socio-economic rights claims will result in a violation of the separation of powers among the three branches or organs of government (the legislature, the executive and the judiciary).<sup>257</sup> This challenge shows up in two points in the process of adjudication of socio-economic rights.<sup>258</sup> First, the issue of separation of powers influences courts in the process of deciding a case, i.e whether or not to entertain certain questions.<sup>259</sup> Secondly, it constrains courts in fashioning orders to enforce its findings, where such orders are held against the state.<sup>260</sup> Several factors related to the nature of specific cases and the manner in which they are argued influence the extent to which courts feel themselves bound to these constraints. Brand, contends that an awareness of these factors would allow one calibrate the constraint that could limit the court's power in specific cases and plan litigation accordingly.<sup>261</sup> He further contends that where the legislature, the executive or the administration have themselves defined duties, courts find it easier to impose them on the state as opposed to interpreting constitutional rights and defining duties on the basis of the rights.<sup>262</sup> He concludes that it is better to argue socio-economic right litigation on the basis of

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<sup>253</sup> G Budlender, 'Access to Courts', in J Dugard "Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice", *South African Journal on Human Rights*, Volume 24 No2, 2009, Page 13

<sup>254</sup> Ibid

<sup>255</sup> Ibid

<sup>256</sup> J Dugard, 'Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice', *South African Journal on Human Rights*, Volume 24 No2, 2009, Page 13

<sup>257</sup> D Brand, 'Introduction to Socio-Economic Rights in South Africa', in D Brand & C Heyns, *Socio-economic Rights in South Africa*, Pretoria University Law Press, Pretoria, 2005 ,Page 15

<sup>258</sup> Ibid, Page 23

<sup>259</sup> Ibid

<sup>260</sup> Ibid

<sup>261</sup> Ibid

<sup>262</sup> Ibid

self-defined rather than on the basis of duties defined through interpretation of constitutional socio-economic rights.<sup>263</sup>

Internal conflicts within African states also cause gross human rights violations.<sup>264</sup> Internal conflicts lead to collapse in economic activities, destroy infrastructures and disrupt social services.<sup>265</sup> Another factor that needs to be taken into account is the tension between some aspects of customary/traditional African societies and human rights. In Nigeria and South Africa, customary laws are a major source of law affecting an overwhelming majority of people who live in rural areas.<sup>266</sup> Some traditional norms, such as rules of inheritance in parts of Africa are discriminatory to women and impede their socio-economic rights. For example in *Mojekwu v. Mojekwu*<sup>267</sup> The Court of Appeal held that the Nnewi custom of Oli-ekpe is discriminatory and any form of societal discrimination on grounds of sex is unconstitutional and against the principles of an egalitarian society. A court of law cannot invoke a customary law which is repugnant to natural justice, equity and good conscience. Similarly in the South African case of *Bhe v. Magistrate Khayelitsha & Ors*,<sup>268</sup> The Constitutional Court declared the African customary law rule of primogeniture unconstitutional and struck down the entire legislative framework regulating intestate deceased estates of black South Africans. This decision is relevant to socio-economic rights because it will help widows and children to avoid eviction from the family home upon the death of a husband or father. Under African customary law rule of primogeniture as well as section 23 of the Black Administration Act, the family house became the property of the eldest male relative of the father, in this case the grandfather. The South African Human Rights Commission (SAHRC) and the Women's Legal Centre Trust brought the above action in public interest and as a class action on behalf of all women and children in a similar situ

## 12. Conclusion:

Realisation of socio-economic rights in Nigeria has been achieved through the route of civil and political rights. Nigerian lawyers in the past have been reluctant to bring socio-economic rights cases before courts, even though Nigeria has incorporated the African Charter into its domestic laws. This was due to the erroneous notion that socio-economic

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<sup>263</sup> Ibid, Page 24

<sup>264</sup> J.C Mubangizi, 'The Protection and Enforcement of Socio-Economic Rights in Africa', *Africa Yearbook of International Law*, Volume 15, 2007, Page 104

<sup>265</sup> Ibid

<sup>266</sup> C Odinkalu, 'The Impact of Economic and Social Rights in Nigeria', in V Gauri & D Brinks (Ed) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, New York, 2008 Page 199

<sup>267</sup> [1997] 7 N.W.L.R 283

<sup>268</sup> 2005 (1) BCLR 1 (CC), 15 Oct. 2004

rights are non-justiciable in Nigeria; as a result of the provisions of Chapter 2 of the Nigerian Constitution. (Directive Principles of State Policy) Recent Supreme Court of Nigeria decisions have clarified the position, by stating that although the provisions of the Chapter 11 containing Directive Principles of State Policy are unenforceable, the National Assembly has the power to legislate on the provisions and make them enforceable against government bodies and private persons. A few cases invoking the socio-economic rights contained in the African Charter have been pronounced upon by Nigerian Courts. However, the Supreme Court of Nigeria is yet to hear any case involving socio-economic rights provisions of the African Charter.

The South African Constitutional Court has developed a substantial body of jurisprudence on both negative and positive duties imposed by constitutional socio-economic rights. The Court has also developed the “reasonableness review” concept in deciding claims which seek to enforce the positive duty to fulfil qualified socio-economic rights under the South African Constitution. The Constitutional Court laid out in a comprehensive manner elements of the reasonableness review process. The court stated that government programmes must be comprehensive, coherent and coordinated; appropriate finance as well as human resources must be made available; they must be balanced and flexible and make appropriate provision for short, medium and long-term needs; they must be reasonably conceived and implemented. Finally, they must be transparent and its contents must be made known effectively to the public. The Constitutional Court of South Africa has not provided a fundamental right to individuals to claim "positive", judicially enforceable action and services from the state.

## **CHAPTER 6: THE ROLE OF NON-GOVERNMENTAL ORGANISATIONS IN THE PROMOTION OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA AND NIGERIA.**

### **1. Introduction:**

This chapter aims to illustrate analytically methods that non-governmental organisations in South Africa and Nigeria adopt in promoting socio-economic rights as well as reducing poverty. These non-governmental organisations tend to represent stake holders in African communities who are often poor. Therefore, identification and evaluation of methods that have been successfully employed by these organisations for the realisation of socio-economic rights and poverty reduction, will aid the identification of best practises in the area. Similarly, non-governmental organisations (NGOs) participation in poverty reduction ensures that stakeholders in the community shape and participate in the control of policy reduction efforts. In this way members of African communities acting through NGOs are given a voice regarding poverty reduction policies that affect them.

The chapter begins by examining the vague concepts of NGOs and Civil Society and the nature and scope of civil society organisations operating in both countries as well as the regulatory environment for civil society organisations in both countries. It further examines the need for partnerships between states and civil society in efforts to reduce poverty and ensure the realisation of socio-economic rights. The chapter also examines the role of civil society in economic development and poverty alleviation. Finally, it examines the role of civil society in supporting the work of the African Commission, in the context of drawing the Commission's attention to massive violations of socio-economic rights and bringing complaints regarding violations of socio-economic rights before the African Commission.

### **2. Nature and Scope of Non-Governmental Organisations:**

What methods do non-governmental organisations in South African and Nigeria adopt to promote and protect socio-economic rights? In answering this question, it is pertinent to determine what non-governmental organizations (NGOs) are. Streeten, defines an NGO as follows:

“NGOs or private voluntary organizations [...] are non-profit seeking organizations; some religious, others secular; some indigenous, others foreign; some professional, other lay. Their principal aim is to contribute to the reduction of human suffering and to development in poor countries. They include community associations, cooperatives, church groups, trade unions, environmental groups, consumer

associations, women's groups, credit unions, and peasant leagues, as well as large international organizations like Amnesty International, OXFAM, and Friends of the Earth. They are part of the national and global civil society.”<sup>1</sup>

Large international organisations such as Amnesty International, OXFAM and Friends of the Earth, working across several countries, are usually described as International Non-governmental Organisations. (INGOs). The World Bank's operational directive on NGOs, defines them as “groups and institutions that are entirely/largely independent of government and characterised primarily by humanitarian or cooperative rather than commercial objectives and also as private organisations that pursue activities to relieve suffering, promote the interests of the poor, protect the environment or undertake community development.”<sup>2</sup>

According to Jamali, the term NGOs embraces a wide range of voluntary, public service as well as peoples' organisations.<sup>3</sup> He further states that the 1980s saw a growing disillusionment with the myth that government is the sole legitimate agent for development and a new approach to development that ensured, among other things, the role of NGOs in dealing with the development crisis, particularly in the South.<sup>4</sup> NGOs are part of civil society and in many cases play an important role in activating citizen participation in socio-economic development and politics as well as shaping or influencing policies.<sup>5</sup>

Civil society is a broader concept to NGOs and it encompasses all organisations and associations that exist outside the state and market. The definition of civil society is not very different from the definition of an NGO. Civil society has been defined as “the sphere of social interactions between the household and the state which is manifest in the norms of community cooperatives, structures of voluntary associations and networks of public communications.”<sup>6</sup> Global civil society has also become prominent, civil society organisations have transcended national boundaries and now confront issues (once perceived in the past as local) at a global level.<sup>7</sup> There are civil society networks drawn from different countries, working on issues of global concern, such as climate change. The Centre for Civil Society, at the London School of Economics (2004), defines civil society as “the arena of

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<sup>1</sup> P Streeten, 'Non-governmental Organisations and Development', *Annals of the American Academy of Political and Social Sciences*, Volume 554, 1997, Page 194

<sup>2</sup> D Jamali, 'NGOs in Development: Opportunities and Challenges', *Labour and Management in Development Journal*, Volume 4 No 2, 2003, Page 4

<sup>3</sup> Ibid, Page 3

<sup>4</sup> Ibid

<sup>5</sup> A Ghaus-Pasha, *Role of Civil Society Organisations in Governance*, 2004, Page 3, retrieved 5<sup>th</sup> March, 2009, <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan019594.pdf>

<sup>6</sup> N Noyoo, *Civil Society and Poverty Reduction in South Africa*, 2006, Pages 14, retrieved 5<sup>th</sup> March, 2009, [http://www.sarpn.org.za/documents/d0002086/Civil-society\\_PR\\_SA\\_Noyoo.pdf](http://www.sarpn.org.za/documents/d0002086/Civil-society_PR_SA_Noyoo.pdf)

<sup>7</sup> Ibid

uncoerced collective action around shared interests, purposes and values.<sup>8</sup> Civil societies include organisations such as registered charities, development non-governmental organisations, community groups, women's organisations, faith-based organisations, professional associations, trade unions, self-help groups, social movements, business associations, coalitions and advocacy group.<sup>9</sup> The main theme arising from these definitions is that NGOs or civil society organisations have two main elements. The first is that they are non-profit making and the second is that they are independent of government; although NGOs may receive funding from the government. This chapter uses the term NGO, civil society organisations and Non-Profit organisations (NPOs) to describe organisations that are non-profit making and independent of government.

### **3. Why NGOs Participation in Poverty Reduction is Important:**

Jamali, contends that the comparative strengths of NGOs enable them to make distinctive contributions to the poverty reduction process.<sup>10</sup> He further contends that these comparative strengths of NGOs include their ability to empower or mobilise grass root and community groups through self-help, mutual aid and the promotion of various sorts of social participation.<sup>11</sup> NGOs are able to identify issues relevant to development and bring them to public attention as well as mobilise resources to ensure the realisation of the task of development.<sup>12</sup> They mediate and act as liaison among community groups and across political boundaries, thereby reducing the divisions that often impede effective action.<sup>13</sup> NGOs also promote change, they are able exert pressure outside the political system in order to produce change in public/private policies; they also monitor policy implementation to ensure effective implementation of public policies.

NGOs participation in poverty reduction is equally important because they facilitate leadership development. This in turn promotes opportunities for meaningful engagement in public issues to large numbers of community leaders, which ensures participation and alternative perspectives on important issues.<sup>14</sup> Therefore, NGOs help to secure popular support for needed policies and promote active participation of various social groups in poverty reduction activities, thereby minimising the dangers of exclusion.<sup>15</sup> As mentioned in

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<sup>8</sup> Ibid, Pages 13-14

<sup>9</sup> Ibid

<sup>10</sup> D Jamali, 'NGOs in Development: Opportunities and Challenges', *Labour and Management in Development Journal*, Volume 4, No. 2, 2003, Page 5

<sup>11</sup> Ibid

<sup>12</sup> Ibid

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> Ibid Pages 5-7

the Chapter one, civil society organisations like other organisations involved in poverty reduction and development should incorporate human rights principles in the planning and implementation of the programmes and policies. The following paragraph illustrates how Action Aid applies rights based approaches to its work.

Action Aid is an international anti-poverty non-governmental agency working in several African countries, including South Africa and Nigeria. Action Aid in its briefing paper outlines how it approaches to poverty reduction and development using rights based approaches.<sup>16</sup> Action Aid uses international human rights instruments as well as constitutional and national laws consistent with international human rights laws to frame the rights they work to realise. The first step the organisation takes after identifying an issue, is to raise awareness of the issue. This may be done through popular education and practical support. This first step empowers the poor to assess their situation and understand their rights. Strategies such as economic literacy, participatory budget analysis are some of the participatory strategies adopted by Action Aid.<sup>17</sup> While they are claiming their rights, Action Aid addresses their pressing needs. This may entail providing short term services such as food to meet basic need for survival. Action Aid also ensures that the poor in communities they work in, participate in decision making through formal spaces such as peoples' commissions and social forums.<sup>18</sup>

Finally, Action Aid in working with right holders, assesses the constitutional, legal and regulatory framework within the state. This helps identify, which rights are provided for and where there are gaps in relation to international human rights treaties. This enables Action Aid to demand that rights beneficial to the poor and excluded that are yet to be recognised in national law and constitutions, such as socio-economic rights are enacted. It also enables Action Aid to analyse how existing rights are unfulfilled or are violated by the state or non-state actors. The above analysis enables Action Aid to open discussions with the state on how existing human rights laws may be fulfilled. They may also hold the state or non state actors to account through litigation or other international mechanism for the violation of human rights.<sup>19</sup>

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<sup>16</sup> Action Aid, Human Rights based Approach to Poverty Reduction and Development, 2008, Page 5, retrieved 23rd July, 2010, <http://www.actionaid.org/assets/pdf/RBA%20paper%20FINAL.pdf>

<sup>17</sup> Ibid

<sup>18</sup> Ibid, Page 6

<sup>19</sup> Ibid, Page 8

#### 4. Civil Society in South Africa and Nigeria: An Overview:

The South African Non-Profit Organisation (NPO) Act refers to civil society organisations as Non Profit Organisations (NPO). The Act defines a non-profit organisation as “A trust, company or other association of persons established for a public purpose and the income and property of which are not distributable to its members or office-bearers except as reasonable compensation for services rendered.”<sup>20</sup> There were 98, 920 NPOs in South Africa in 1999.<sup>21</sup> No less than 53 per cent of the NPOs in South Africa can be classified as less formalised, community-based NPOs in that they are not formally structured as Section 21 non-profit companies, trusts, religious institutions, trade unions, or co-operatives.<sup>22</sup> In South African legal terms, some are classifiable as voluntary associations. The total of the operating expenditures of all South Africa’s NPOs was R9.3 billion in 1998, representing 1.2 per cent of the 1998 gross domestic product and the non-profit sector employed the equivalent of 645 316 workers (made up of full-time, part-time, and volunteer workers).<sup>23</sup>

On the other hand, the actual number of registered NGOs working in Nigeria is hard to establish. This is as a result of the fact that researchers face difficulties in trying to extract information from the Nigerian Corporate Affairs Commission, the body responsible for registration of NGOs and the cumbersome processes of registration.<sup>24</sup> As a result, NGOs carry on unregistered while waiting for registration, which may take up to five years to complete.<sup>25</sup> What is clearly not in doubt is that there has been an increase in NGO activity in Nigeria, apparently because foreign funders are taking advantage of the space created by democracy to work in Nigeria.<sup>26</sup> In Nigeria, there are community based organisations (CBOs), friendly societies, social clubs, women's groups, youth clubs, religious organisations, cultural associations, professional associations, trade unions, political parties, cooperative societies and specialised professionally-run NGOs which work in various thematic areas.<sup>27</sup> There is an increasing number of professionally-run NGOs in various subject areas.<sup>28</sup> These organisations may be membership or non-membership and are usually run by full time staff headed by an Executive Director and assisted by volunteers. These

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<sup>20</sup> Section 1 (x) of the NPO Act, South Africa

<sup>21</sup> M Swilling & B Russell, *The size and scope of the non-profit sector in South Africa*, Centre for Civil Society, University of Natal Press, Durban, 2002, Page 21

<sup>22</sup> Ibid

<sup>23</sup> Ibid

<sup>24</sup> E Iheme, *Country Report for Nigeria NGO Laws and Regulations*, Page 3, 2005, retrieved 2<sup>nd</sup> March, 2009, <http://www.usig.org/countryinfo/laws/International%20Reporter%20-%20NIGERIA.pdf>

<sup>25</sup> Ibid

<sup>26</sup> Ibid

<sup>27</sup> Ibid

<sup>28</sup> Ibid, Page 4

organisations arguably represent the cream of the NGO sector in Nigeria and although they are smaller in number than the other types, they are much more prominent. Okafor,<sup>29</sup> contends that most professionally run NGOs in Nigeria fit within a four pronged topology. Some are civil and political rights oriented and a few focus on socio-economic rights.<sup>30</sup> While some others are gender based, others focus on minority/environmental rights.<sup>31</sup> He further contends that there was an upsurge in human rights NGO activism between 1985 and 1998 as a result of repressive military regimes during that period.<sup>32</sup> Similarly, Ibhawoh notes that in the 1990s, there was a significant growth in the number of human rights NGOs in Nigeria and in their scope of operation.<sup>33</sup> Human rights NGOs began to emerge with mandates focused on specific agenda such as socio-economic rights, media rights, minority rights, issues of law enforcement and gender rights.<sup>34</sup>

Richard Stacey contends that the non-profit sector serves two primary goals in South African society. Firstly, NPOs are involved in the direct delivery of services to meet immediate lacunae in welfare priorities such as health care, food and shelter and secondly, NPOs help strengthen democracy and participatory government by acting as intermediaries between the grassroot levels of society and the processes of policy formation.<sup>35</sup> The value of NPO's to democratic participation is recognised and promoted through the South African Local Government: Municipal Systems Act (no. 32 of 2000) which requires local metropolitan councils to draw up integrated development plans through consultation with communities and NPO's.<sup>36</sup>

Civil Society organisations both in South Africa and Nigeria need not be registered before they can be recognised in law as existing, even if not as bodies corporate. The South African and Nigerian Constitutions both make provision for freedom of association, for lawful purposes. Therefore an organisation may lawfully exist, without being a legal entity. For example, in *The Registered Trustees of Igbo Community in Oyo state V C. Akabueze & Others*, the issues for determination before the Nigerian High Court was whether the unregistered Igbo Community Development Association is obligated to seek incorporation before it can operate as an umbrella body for the promotion of the interest of the Igbos in Oyo

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<sup>29</sup> O Okafor, *Legitimizing human rights NGOs*, Africa World Press, New Jersey, 2006, Page 42

<sup>30</sup> Ibid

<sup>31</sup> Ibid

<sup>32</sup> Ibid

<sup>33</sup> B Ibhawoh, *Human Rights Organisations in Nigeria*, Danish Centre for Human Rights, Copenhagen, 2001, Page 38

<sup>34</sup> Ibid

<sup>35</sup> R Stacey, *An Enabling Environment: The Legal and Policy Framework Required for a Vibrant NPO Sector*, 2003, Page 2, retrieved 27<sup>th</sup> February, 2009, [www.npc.org.za/resources/reports/downloads/Background%20Enabling.doc](http://www.npc.org.za/resources/reports/downloads/Background%20Enabling.doc)

<sup>36</sup> Ibid

state and whether by being unregistered, the Igbo Community Development Association is a legal and lawful body. The court held that an unincorporated association of persons is a constitutionally legitimate body and it is not illegal merely by non-registration under applicable laws. The court stated that incorporation does not confer on an association pre-eminence and authority of leadership over unincorporated associations, and no rights of an incorporated association is violated by an unincorporated association engaging in the pursuit of objectives similar to that of the incorporated body. The court further stated that the association which the defendants represent is not a legal association because it has not been registered under the appropriate law and therefore has no legal personality to sue and be sued except through its appointed representative or trustees. But this same association is nonetheless a lawful association duly recognised by the Constitution, the supreme law of the country and the Company and Allied Matters Act as well as Rules of the Court (Order 11 Rule (8)). Order 11 Rule (8), states that persons with joint interest may sue or defend actions on behalf of others interested).

## **5. Regulation of Civil Society in South Africa and Nigeria:**

The success and longevity of the civil society sector depends also on its ability to deliver and meet expectations of its constituency, and retain credibility in the eyes of that constituency.<sup>37</sup> The enabling environment should construct the formal and procedural elements of the non-profit sector in a way that leads to the entrenchment of these substantive elements.<sup>38</sup> In Nigeria, except for some very loose regulations or understandings introduced by some NGO networks and coalitions, no clear set of regulations or code of ethics has been introduced by the NGOs for themselves.<sup>39</sup> A possible explanation for this is that the most active and articulate part of the NGO sector, the human rights groups, had up to the restoration of constitutional governance in May 1999 largely operated underground and had to contend with much more compelling tasks.<sup>40</sup> The Transition Monitoring Group, the largest NGO coalition in Nigeria, is currently leading an initiative aimed at introducing, after wide consultation with other stakeholders (especially donors and the media), a Code of Standard Practice for NGOs.<sup>41</sup>

Registration of NGOs in Nigeria, may be obtained through one of two options - either as a company limited by guarantee (which confers the status of a body corporate on the NGO

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<sup>37</sup> Ibid

<sup>38</sup> Ibid, Page 3

<sup>39</sup> E Iheme, *Country Report for Nigeria NGO Laws and Regulations*, Page 1, 2005, retrieved 2<sup>nd</sup> March, 2009, <http://www.usig.org/countryinfo/laws/International%20Reporter%20-%20NIGERIA.pdf>

<sup>40</sup> Ibid

<sup>41</sup> Ibid

itself) or the incorporation of trustees (by which the trustees or trustees of the NGO, rather than the NGO itself, obtain(s) the status of a body corporate).<sup>42</sup> Both are regulated by the Companies and Allied Matters Act 1990 (CAMA) and registration is with the Corporate Affairs Commission, Abuja, Nigeria. Section 26(1) of CAMA provides:

“Where a company is to be formed for promoting commerce, art, science, religion, sports, culture, education, research, charity or other similar objects, and the income and property of the company are to be applied solely towards the promotion of its objects and no portion thereof is to be paid or transferred directly or indirectly to the members of the company except as permitted by this Act, the company shall not be registered as a company limited by shares, but may be registered as a company limited by guarantee.”

Government funding of NGO activities in Nigeria is not regulated by statutory enactments but policy decisions adopted by government.<sup>43</sup> Up till the 1970s, various states within the Nigerian Federation, provided grants or grants-in-aid to organisations, such as missionaries, who ran schools, hospitals and social welfare institutions.<sup>44</sup> Most of these institutions were taken over by the state governments in the 1970s, bringing to an end to such funding.<sup>45</sup> Presently, various state governments from time to time in their absolute discretion provide funds for organisations such as the Boys Scouts, the Girls Guides and the Legions.<sup>46</sup> These donations are usually solicited and are not given pursuant to contracts with the organisations.<sup>47</sup> Registered NGOs are exempt from tax and unregistered NGOs do not enjoy this exemption.<sup>48</sup>

The position regarding regulation of NGOs in South Africa is different. The regulatory and accountability mechanisms for NGOs in South Africa are provided for under the Non Profit Organisations Act (no. 71 of 1997). The Act provides for the establishment of a Directorate for Non-profit Organisations.<sup>49</sup> Its function are (a) facilitating the process for developing and implementing policy; (b) determining and implementing programs, including programs (i) to support non-profit organisations in their endeavour to register; and (ii) to ensure that the standard of governance within non-profit organisations is maintained and improved; (c) liaising with other organs of state and interested parties; and (d) facilitating the

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<sup>42</sup> Ibid

<sup>43</sup> Ibid, Page 16

<sup>44</sup> Ibid

<sup>45</sup> Ibid

<sup>46</sup> Ibid

<sup>47</sup> Ibid

<sup>48</sup> Ibid, Page 13

<sup>49</sup> Section 4 of the South African Non Profit Organisations Act (no. 71 of 1997)

development and implementation of multi-sectoral and multi-disciplinary programmes. The Act enjoins the Directorate for NPOs to prepare model constitutions and other model documents, and codes of good practice to assist Non Profit Organisations (NPOs) in erecting organisational structures (s. 6) and it directs NPOs to keep accounting records of a standard generally acceptable to accounting practice, and to prepare annual financial statements, all of which are to be made available to the Director for scrutiny on request (ss. 17-18).

The Act also provides a voluntary registration facility for NPOs and encourages NPOs to be accountable to the public, by allowing existing voluntary associations, trusts, Section 21 companies and other non-profit associations to register with the NPO Directorate of the Department of Welfare if they want to and if the organisation meets certain minimum establishment and other ongoing reporting requirements, such as filing annual narrative and financial reports. The aim of registration and the ongoing reporting requirements under the Act is intended to improve standards of governance and increase accountability and transparency, which will increase public and donor confidence in NPOs (and, in turn, encourage organisations to register). NPOs benefit from tax exemption in South Africa; for example, the Taxation Laws Amendment Act (no. 30 of 2000) increases the cash pool of the sector by exempting NPO's from income tax and exempting donors from donations tax.

The South African National Development Agency's (NDA) purpose is to provide support to non-profit organisations to ensure that they are able to meet the development needs of the organisations they work with.<sup>50</sup> In 2006, NDA approved commitment of R25 million to 20 non-governmental organisations (NGOs) working in partnership with universities and accredited service providers throughout the country to strengthen the institutional capacity of grass root organisations to deliver quality service and programmes to alleviate poverty.<sup>51</sup> Habib and Taylor argue that the existing literature of the non-profit sector suggest that NGOs are institutions that service the interests of the poor and marginalized.<sup>52</sup> However, NGOs have become commercially oriented and dependent on the resources of donors and the government.<sup>53</sup> Given this fact, can one really claim that they are community driven or answerable to marginalized sectors of South African society?<sup>54</sup> Many organisations have for a

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<sup>50</sup>D Husy, *Assessment of NPO ACT*, 2005, Page 107, retrieved 5th March, 2009.  
[http://www.dsd.gov.za/index2.php?option=com\\_docman&task=doc\\_view&gid=25&Itemid=39](http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=25&Itemid=39)

<sup>51</sup> Ibid

<sup>52</sup> A Habib & R Taylor, 'South Africa: Anti-apartheid NGOs', *Voluntas: International Journal of Voluntary and Non-profit Organizations*, Volume 10, No. 1, 1999, Pages 73-82

<sup>53</sup> Ibid

<sup>54</sup> Ibid

number of reasons lost their political and intellectual initiatives/edge, and are now caught up in the demands of donors and government driven “development” agendas.<sup>55</sup>

## **6. Need for Partnership between Civil Society and State to Fight Poverty and ensure the Realisation of Socio-economic Rights.**

The South African Human Development Report (UNDP, 2003) shows that about 48.5 per cent of the South African population (21.9 million people) falls below the national poverty line. Similarly, the 2007/2008 UNDP Human development report for Nigeria estimated that the life expectancy in the country is about 50 and that the human development index is 0.470, which ranks Nigeria as number 158 out of 177 countries in the world. The situation has been aggravated during the last decade by attempts to restructure the economy. Consequently, about 40% of the population is estimated to be living in absolute poverty with about 80% of them living in the rural areas.<sup>56</sup> In the context of South Africa, landlessness compounds poverty, because it prevents communities, especially in the rural areas, to have recourse to a source of livelihood through farming.<sup>57</sup> It limits poor people’s ability to use land as a productive asset. Landlessness amongst majority of South Africans can be traced back to the Natives Land Act of 1913 that legitimised the dispossession of land from the indigenous people by a settler European population.<sup>58</sup> According to Hargreaves, the South Africa constitution has established the legal framework under which land reform would occur in South Africa. However, the constitution gives effect to a racially skewed pattern of land ownership, established during the colonial and apartheid era. This has left the poor landless and it perpetuates racially based discrimination and oppression.<sup>59</sup>

The South African government alone cannot fight poverty; NPOs play a role in poverty reduction. The interest in partnerships for delivery is motivated by various reasons which include a perception of the limitations of the state as a vehicle for social change due to its unwillingness to be accountable to society.<sup>60</sup> It is also important to recognise the comparative advantage of NGOs in service delivery at local level, due to their more consultative approach,

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<sup>55</sup> Ibid

<sup>56</sup> United Nation Development Programme, *2007/2008 Human Development Report*, retrieved 15<sup>th</sup> February, 2009, <http://hdr.undp.org/en/reports/global/hdr2007-2008/>

<sup>57</sup> N Noyoo, *Civil Society and Poverty Reduction in South Africa*, 2006, Pages 5, retrieved 5<sup>th</sup> March, 2009, [http://www.sarpn.org.za/documents/d0002086/Civil-society\\_PR\\_SA\\_Noyoo.pdf](http://www.sarpn.org.za/documents/d0002086/Civil-society_PR_SA_Noyoo.pdf)

<sup>58</sup> Ibid, Page 5

<sup>59</sup> S Hargreaves, Poverty, Gender and Landlessness in South Africa in Noyoo, N., (2006) *Civil Society and Poverty Reduction in South Africa*, 2006, Pages 5-6, retrieved 5<sup>th</sup> March, 2009, [http://www.sarpn.org.za/documents/d0002086/Civil-society\\_PR\\_SA\\_Noyoo.pdf](http://www.sarpn.org.za/documents/d0002086/Civil-society_PR_SA_Noyoo.pdf)

<sup>60</sup> D Husy, *Assessment of N P O A C T*, 2005, Page 46, retrieved 5<sup>th</sup> March, 2009, [http://www.dsd.gov.za/index2.php?option=com\\_docman&task=doc\\_view&gid=25&Itemid=39](http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=25&Itemid=39)

focus on community empowerment, and ability to respond more directly and immediately than government to community needs.<sup>61</sup> There are serious concerns over the economic inefficiencies of state delivery mechanisms. NPOs do not represent a recurrent cost for the state, and they frequently manage to raise funds to match state contribution.<sup>62</sup> In South Africa, Community-based organisations, dominate the non-profit sector numerically, and are generally engaged service delivery at local level. Most of the community based organisations go about their activities without needing or seeking partnerships with government. However, the larger formal NGOs are in a better position to get involved directly in policy and implementation strategies, and to benefit from new funding opportunities.<sup>63</sup>

Similarly, the Nigerian government needs the support of Nigerian civil society organisations to fight poverty. However, until recently, NGOs in Nigeria were not focused on any form of partnership with the state. As noted earlier, the boom in the number of civil society organisations in Nigeria, in the late nineteen eighties and early nineties was as a result of campaign against the military regime and demand for democracy.<sup>64</sup> Another factor that contributed to the boom in civil society activities was the awareness of environmental issues affecting the Niger Delta region and intensive campaigns mounted by the late Ken Saro Wiwa, founder of the Movement for the Survival of Ogoni People (MOSOP).<sup>65</sup> At that time, civil society groups were treated as outsiders and enemies of military governments in Nigeria.<sup>66</sup> There was no prospect of partnerships between the government and civil society groups. The transition to democratic rule in 1999 meant that many civil society organisations campaigning for an end to military rule have to change direction. For example, in 2004, the Nigerian government inaugurated a multi-stakeholder working group known as the National Stake Holders' Working Group (NSWG).<sup>67</sup> The NSWG became the first platform where civil society and government were seen to sit publicly around the same table to discuss day to day matters of policy. This dialogue resulted in the enactment of the Nigerian Extractive Industries Transparency Initiative (EITI), Act.<sup>68</sup>

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<sup>61</sup> Ibid

<sup>62</sup> Ibid

<sup>63</sup> Ibid

<sup>64</sup> U Igwe *Moving from Skepticism to Partnership Government civil society Partnership in Nigeria*, 2005, Page 3, retrieved 7<sup>th</sup> March, 2009, [www.intrac.org/docs.php/3340/Igwe%20Uche](http://www.intrac.org/docs.php/3340/Igwe%20Uche)

<sup>65</sup> Ibid, Page 4

<sup>66</sup> Ibid

<sup>67</sup> Ibid

<sup>68</sup> Ibid

In a study in 2000, Alan Fowler<sup>69</sup> gives examples of partnerships between states and civil society organisations. He states that partnerships may include support by the state to civil society organisations through grants or subsidies, seconding staff from the state to non-state schools or clinics, and paying subsidies to welfare organisations by the Department of Social Development for providing welfare services on behalf of the state. In some instances the state may offer contract to organisations to do work for it. According to Bruce Moore,<sup>70</sup> the history of poverty reduction strategies indicate that both government-led development without the participation of civil society, and civil society led development initiatives without the support of government, have both failed. The participation of communities in the planning and implementation of poverty reduction policies and programmes is an essential prerequisite for sustainable human development and poverty reduction.<sup>71</sup> Sustainable human development or poverty reduction efforts require the empowerment of people as agents of their own development.<sup>72</sup> This makes it important for states and civil society organisations to work together. However, to make civil society and state partnerships effective, a clear definition of the proposed role of each partner must be established.<sup>73</sup>

The realisation of socio-economic rights depends on several factors, which includes a commitment by the state to prioritise socio-economic rights and the state's capability to support and promote socio-economic rights policies and programmes. Realisation of socio-economic rights also depends on civil society mobilisation and its ability to influence state policies. Furthermore, the realisation of socio-economic rights may involve litigation in courts or other institutions. Civil society organisations need to support these institutions and the parties bringing complaints to ensure the realisation of socio-economic rights. Finally, an integrated and community based approach to working for the realisation of socio-economic rights will need to be adopted by civil society organisations. This approach requires civil society organisations to work with the state and its agencies.

## **7. Civil Society Organisations Involvement in Policy Formulation**

Civil Society Organisations (CSOs) are increasingly becoming involved in the policy formulation process and they can play a major role in the implementation of the policies that

<sup>69</sup> A Fowler, *Civil Society, NGOs and Social Development: Changing the Rules of the Game*. Occasional Paper No. 1, 2000, Page 23, retrieved 9<sup>th</sup> March, 2009,

[http://www.unrisd.org/unrisd/website/document.nsf/0/f553495f06f98dce80256b5e005c9ddc/\\$FILE/fowler.pdf](http://www.unrisd.org/unrisd/website/document.nsf/0/f553495f06f98dce80256b5e005c9ddc/$FILE/fowler.pdf)

<sup>70</sup> B Moore, Using Assets and Partnerships to Address Rural Poverty, in Edmonds, C and Medina, S., (Ed) *Defining an Agenda for Poverty Reduction*, Asian Development Bank, Mandaluyong City, Philippines, 2002, Page 176

<sup>71</sup> Ibid

<sup>72</sup> Ibid

<sup>73</sup> R Greenstein, S Kola, D Lopes, *Civil Society in South Africa: Opportunities and Challenges in the Transition Process*, The Community Agency for Social Enquiry (C A S E), Johannesburg, 2004, Page 27, retrieved 27<sup>th</sup> March 2009, <http://www.ukzn.ac.za/CCS/files/USAid%20Final%20Report.pdf>

are formulated by the government, especially those that deal with sustainable development and poverty alleviation.<sup>74</sup> CSOs can also play a role in policy formulation by providing information that is vital for the development of policies that are appropriate to the community the policy is meant to serve.<sup>75</sup> They do this by helping to promote participation, or securing the active participation of various community groups in poverty reduction activities, thereby reducing the dangers of exclusion of community or vulnerable groups.<sup>76</sup> CSOs lobby governments to ensure that appropriate policies are enacted and implemented. They also monitor the enactment and application of laws and where appropriate, design programmes that complement government policies.<sup>77</sup> For example, African Network for Environmental and Economic Justice (ANEEJ) was part of a coalition of civil society organisations that worked with the Nigerian Federal Government as stakeholders to draw up the Nigerian Extractive Industries Transparency Initiative (EITI).<sup>78</sup> This resulted in the enactment of the Nigerian Extractive Industries Transparency Initiative (EITI) Act. This organization is also actively involved in the “Publish What You Pay campaign” (an international civil society initiative) which seeks to ensure transparency in extractive industries as a precondition for reversing the trend where decades of exploitation of natural resources has deepened, rather than reduced poverty, conflict and economic instability in resource rich African countries such as Nigeria.<sup>79</sup> Similarly, the South African National Civil Organisation (SANCO) has worked with the South African government on a campaign/programme to persuade residents to pay their electricity bills.<sup>80</sup> However, SANCO has also consistently opposed credit control measures that do not take into account the economic circumstances of residents living in urban centres.<sup>81</sup>

According to Ghaus-Pasha, CSOs use five strategies to influence national policy formulation. These strategies are education, persuasion, collaboration, litigation and confrontation.<sup>82</sup> The education strategy is one where the CSOs attempt to give the

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<sup>74</sup> A Ghaus-Pasha, *Role of Civil Society Organisations in Governance*, 2004, Page 18, retrieved 5<sup>th</sup> March, 2009, <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan019594.pdf>

<sup>75</sup> Ibid

<sup>76</sup> D Jamali, ‘NGOs in Development: Opportunities and Challenges’, *Labour and Management in Development Journal*, Volume 4, No. 2, 2003, Page 5

<sup>77</sup> A Ghaus-Pasha, *Role of Civil Society Organisations in Governance*, 2004, Page 19, retrieved 5<sup>th</sup> March, 2009, <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan019594.pdf>

<sup>78</sup> Publish What You Pay, *Promoting Transparency in the Oil and Gas Sector: Challenges and Opportunities for Civil Society Organisations*, CSOs, 2005, Pages 2-3, retrieved 25<sup>th</sup> July, 2010, <http://www.neiti.org.ng/publications/PWYP%20PRESENTATION.pdf>

<sup>79</sup> Ibid

<sup>80</sup> K Ranchod, ‘State-Civil Relations in South Africa: Some Lessons from Engagement’, *Policy: issues and actors*, Volume 20, No 7, 2007, Page 17

<sup>81</sup> Ibid, Page 16

<sup>82</sup> Ibid

government a lot of information, analysis and policy alternatives.<sup>83</sup> In adopting persuasion as a strategy, CSOs act like a pressure group to press for policy changes and demonstrate that it has public support.<sup>84</sup> The collaboration strategy is one where a CSOs work as partners with the government.<sup>85</sup> In the litigation strategy, the CSOs use the courts to implement policy change.<sup>86</sup> Lastly, confrontation involves protesting in various forms for policy issues.<sup>87</sup>

## **8. Civil Society Organisations' Role in Economic Development and Poverty Reduction**

Ghaus-Pasha, contends that with the support of the state, CSOs, can potentially contribute to local economic development and respond to the growing problem of poverty in a number of ways. She concludes that intervention by CSOs include the following: improve the local business investment climate; encourage new enterprises and livelihood programmes; deliver social services and contribute to relief and rehabilitation.

### **8.1 Improve the Local Business/Investment Climate:**

Infrastructure bottlenecks, regulatory uncertainty and poor governance are among the main obstacles to the growth of local business and investment. Civil society can contribute to the improvement of the local business environment, by providing and maintaining crucial economic and social infrastructure and by advocating for improved policy and governance; investment promotion and marketing, as well as networking to improve flows of information to enhance opportunities.<sup>88</sup> Fate Foundation based in Nigeria and Fin Mark Trust based in South Africa discussed in the next section are examples of civil society organisations actively involved in advocacy aimed at improving the local business environment for the poor.

### **8.2 Encourage New Enterprises and Livelihood Programmes:**

Civil Society organisations can provide advice, technical support, information and resources to help individuals set up their own businesses in the form of sole entrepreneurs, partnerships, cooperatives or community enterprises in various agricultural, industrial or trading fields.<sup>89</sup> For example, FATE Foundation seeks to transform the Nigerian business landscape by sharing its world-class training materials, publications and training procedures with microcredit and entrepreneurial development organizations in Nigeria.<sup>90</sup> Similarly, Fin Mark Trust a non-profit independent trust, based in Southern Africa and funded primarily by

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<sup>83</sup> Ibid

<sup>84</sup> Ibid

<sup>85</sup> Ibid

<sup>86</sup> Ibid

<sup>87</sup> Ibid

<sup>88</sup> Ibid, Page 11

<sup>89</sup> Ibid Page 13

<sup>90</sup> FATE Foundation, *What make FATE unique*, retrieved 2<sup>nd</sup> August, 2010, <http://www.fatefoundation.com/aboutUnique.htm>

the UK's Department for International Development (DFID), aims to make financial markets work for the poor. This organisation aims to make markets work for the poor by conducting research to identify systemic constraints that prevent financial markets from reaching out to these consumers and by advocating for change on the basis of research findings.<sup>91</sup>

### **8.3 Delivery of Social Services:**

Civil society organisations in many parts of the world are sub-contracted to deliver services to communities or certain categories of citizens (e.g., poor, parents). These organisations are increasingly complementing or replacing local and central governments in delivering services that depend on strong community knowledge, flexibility, and personal commitment.<sup>92</sup> This is the case for programs that involve outreach to specific groups such as disabled or marginalized groups.<sup>93</sup> The political accountability for delivery remains with government, while the social accountability must be shared with the civil society organisation delivering the service.<sup>94</sup>

Efforts by states to sustain economic development and reduce poverty are unlikely to succeed in the long run unless there is greater investment in human capital, particularly of the poor. Evidence exists that indicate that improvements in education, health and nutrition not only directly attack some of the most important causes of poverty but also ensures sustained supply of productive labour, which is an important factor of production and contributes to economic growth.<sup>95</sup> Several non-governmental organisation delivering social services in South Africa and Nigeria are not sub-contracted by the state to deliver services. These organisations raise funds through a host of sources and deliver social services to communities consistent with their objectives. For example, Access to Justice a Nigerian based NGO provides legal aid for poor and vulnerable people whose human rights are violated.<sup>96</sup> This organisation is funded by the Ford Foundation.<sup>97</sup> Similarly, in South Africa, Treatment Action Campaign (TAC) embarks on voluntary home visits to HIV positive people to advise

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<sup>91</sup> FinMark Trust, *About Us*, retrieved 2<sup>nd</sup> August, 2010, <http://www.finmark.org.za/new/contact/contact-us.aspx?RandomID=6108ddf0-41bb-481c-87db-52bd0d773629&linkPath=MenuContainer&IID=12>

<sup>92</sup> World Bank, *Social Service Delivery*, 2008, retrieved 11st March, 2009 <http://go.worldbank.org/Y8PAGC261D0>

<sup>93</sup> Ibid

<sup>94</sup> R Greenstein, S Kola, D Lopes, *Civil Society in South Africa: Opportunities and Challenges in the Transition Process*, The Community Agency for Social Enquiry (C A S E), Johannesburg, 2004, Page 27, retrieved 27<sup>th</sup> March 2009, <http://www.ukzn.ac.za/CCS/files/USAid%20Final%20Report.pdf>

<sup>95</sup> Ibid

<sup>96</sup> Access to Justice, Nigeria, *About Us*, retrieved 8<sup>th</sup> June 2010, <http://accesstojustice-ng.org/aboutus.php>

<sup>97</sup> Ibid

them about nutrition, opportunistic infections and stigma.<sup>98</sup> TAC is funded through individual donations and does not accept money from the South African government.<sup>99</sup>

#### **8.4 Relief and Rehabilitation:**

International civil Society organizations such as CARE International provide relief and rehabilitation, particularly in complex emergencies where the state does not have adequate and immediate capacity to provide vulnerable populations with services related to food production, nutrition and food security.<sup>100</sup>

In the context of poverty alleviation policies, it may take a long time for some of the poor to fully participate and benefit from poverty alleviation policies. For example, the very old or severely disabled may never be able to do so.<sup>101</sup> There will always be people who remain acutely vulnerable to adverse events, such groups of people can best be helped through a system of social safety nets – including income transfers, food distribution, some form of income insurances/relief or protection through short term stress and calamities etc.<sup>102</sup>

#### **9. Methods adopted by Civil Society in Promoting and Protecting Socio-Economic Rights in South Africa and Nigeria.**

One of the main challenges faced by civil organisations working on socio-economic rights is how to promote and protect the socio-economic rights of disadvantaged and vulnerable people within the state. Having identified the roles civil society can play in poverty alleviation, it is worthwhile to note that the respect for human rights is a sine qua non for socio-economic outcomes.<sup>103</sup> It should be noted that the notion of participation is at the centre of a human rights-based approach to poverty reduction. Therefore, the poor must be considered as the principal actors of development; they can no longer be seen as passive recipients, but rather as strategic partners rather than target groups.<sup>104</sup> Socio-economic rights change in a fundamental way the relationship between service providers and service recipients, and between claim-holders and duty-bearers.<sup>105</sup> It is therefore, necessary to

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<sup>98</sup> K Ranchod, 'State-Civil Relations in South Africa: Some Lessons from Engagement', *Policy: issues and actors*, Volume 20, No 7, 2007, Page 12

<sup>99</sup> Treatment Action Campaign, *Overview of TAC*, retrieved 20<sup>th</sup> August, 2010, <http://www.tac.org.za/community/about>

<sup>100</sup> Food & Agricultural Organisation, *Cooperation with Civil Society*, retrieved 11<sup>st</sup> March, 2009, [http://www.fao.org/tc/NGO/fieldwork\\_en.asp](http://www.fao.org/tc/NGO/fieldwork_en.asp)

<sup>101</sup> A Ghaus-Pasha, *Role of Civil Society Organisations in Governance*, 2004, Page 19, retrieved 5<sup>th</sup> March, 2009, <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan019594.pdf>

<sup>102</sup> Ibid

<sup>103</sup> United Nations Development Programme, *Poverty Reduction and Human Rights: A Practice Note*, retrieved 12<sup>th</sup> March, 2009, Page 2, [http://www.undp.org/governance/docs/HRPN\\_\(poverty\)En.pdf](http://www.undp.org/governance/docs/HRPN_(poverty)En.pdf)

<sup>104</sup> Ibid

<sup>105</sup> Ibid

examine methods civil society in South Africa and Nigeria, have used in the promotion and protection of socio-economic rights.

Litigation is one strategy that civil society organisations engaged in the advancement of socio-economic rights/programmes in both South Africa and Nigeria use. However there are other strategies, such as lobbying and advocacy of public institutions, monitoring the realisation of rights and awareness campaigns.<sup>106</sup> To achieve maximum effect, socio-economic rights litigation should be strategically located within a broader campaign of social mobilisation around socio-economic rights. The strategic use of socio-economic rights litigation by the Treatment Action Campaign (TAC) is an important case study in this regard.<sup>107</sup> TAC successfully used litigation to ensure that the state provided anti-retroviral drugs to HIV pregnant women. This case proves that human rights litigation can be an effective tool to advance access to medicines, particularly in democracies whose constitutions recognize access to health care as a human right. TAC ensured extensive participation. It had over 16,000 members and 267 offices around South Africa.<sup>108</sup> In addition, it mobilized a network of supporting organizations including the unions, religious groups and an NGO coalition.<sup>109</sup> Litigation was only one of many strategies that TAC used to make HIV medicines available to HIV pregnant women, other strategies adopted by TAC included education/raising public awareness, campaign/advocacy, monitoring the implementation of court decisions and lobbying government officials.

TAC empowered people through their campaign by raising public awareness about HIV/AIDS treatment and providing education to poor people regarding their right to access treatment. This awareness was spread through public protests, presentations to parliament, regular media coverage, community mobilization and networking. TAC successfully put the issue of HIV treatment squarely on the public agenda.<sup>110</sup> TAC used different campaign/advocacy tools for its campaign. TAC identified its campaign objective - affordable treatment for all. TAC also identified supporters (HIV+ people, NGOs, unions) as well as opponents (government and the pharmaceutical companies), their campaign worked to win all groups over.<sup>111</sup> The implementation of the court's decision needed to be carefully monitored and any breach of the judgment brought to the attention of the court and other

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<sup>106</sup> Ibid

<sup>107</sup> S Liebenberg, 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty', *Law, Democracy and Development*, Volume 6, No 2, 2002, Page 159

<sup>108</sup> Treatment Action Campaign, *Overview of TAC*, retrieved 20<sup>th</sup> August, 2010, <http://www.tac.org.za/community/about>

<sup>109</sup> Treatment Action Campaign, *Mother-to-child transmission prevention: Government must improve the programme*, retrieved 20th August, 2010, <http://www.tac.org.za/community/node/2146>

<sup>110</sup> Ibid

<sup>111</sup> Ibid

relevant bodies. A team of TAC activists worked with the legal team to ensure the judgment was implemented. TAC reacted to the government's non-implementation of the judgment in some districts with a complaint to the Human Rights Commission.<sup>112</sup> In addition TAC made presentations to Parliament and collaborated with and lobbied senior government officials.<sup>113</sup>

Similarly, the Socio-Economic Rights Actions Centre (SERAC), a non-governmental organization based Nigeria, has used litigation, education and advocacy to protect and promote socio-economic rights and reduce poverty within Nigerian Communities. SERAC was the organization that brought a complaint before the African Commission against the Nigerian government on behalf of the Ogoni Community in Nigeria.<sup>114</sup> This organization has been actively involved in advocacy for the protection of socio-economic rights in Nigeria. For example, as part of its advocacy programme, Social and Economic Rights Action Centre (SERAC) collaborated with the Nigerian Union of Journalist (NUJ) (Lagos Chapter) to organise a one-day workshop in Lagos on The Role of the Media in the Advancement of Economic, Social and Cultural Rights in Nigeria.

The workshop aimed to critically examine the role of the media in the realization of economic, social and cultural rights in Nigeria. It also aimed to encourage professionalism and specialized reporting on these rights; explore various options for deepening collaborations between the media and human rights and advocacy organizations; and expand lines of communication between the media and members of local communities, women's groups and other vulnerable groups who are often disproportionately affected by human rights abuses.<sup>115</sup> Similarly, SERAC's Nigeria Social Housing Initiative aims to improve housing conditions as well as social, economic and environmental functioning of slums.<sup>116</sup> Specifically, under its pilot scheme, the initiative is constructing new houses for 500 families out of the 7500 families from the Moroko slum in Lagos, Nigeria.<sup>117</sup> These families are yet to be compensated for forced eviction by the Nigerian Lagos State military government in 1990. Similarly, as a result of renewed threats to evict residents of poor and informal settlements in Rivers State Nigeria, under the state government's urban renewal programs,<sup>118</sup> SERAC is currently organizing outreach programs to increase the capacity of these communities to

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<sup>112</sup> Ibid

<sup>113</sup> Ibid

<sup>114</sup> Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v. Nigeria, Cited as: Communication No. 155/96

<sup>115</sup> Socio-Economic Rights Action Centre, *Media Sensitization*, retrieved 18<sup>th</sup> July, 2010, <http://www.serac.org>

<sup>116</sup> Socio-Economic Rights Action Centre, *SERAC at Work*, January-April Newsletter 2010, Page 3, retrieved 18<sup>th</sup> July, 2010, <http://www.serac.org/Publications/Jan-April,%202010%202.pdf>

<sup>117</sup> Ibid

<sup>118</sup> Ibid, Page 9

assert their rights and demand accountability from institutions of the state government.<sup>119</sup> SERAC is also providing human rights education within these communities and is helping them to organize themselves in order to strengthen their capacity to engage various institutions of the state government on issues affecting them.<sup>120</sup>

Civil society organisations in South Africa have also worked with the South African Human Rights Commission in the protection and promotion of socio-economic rights. The South African Human Rights Commission has the mandate to monitor and assess the observance of the socio-economic rights provisions of the Constitution. This mandate is contained in Section 184 (3) which states that “Each year, the South African 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.” This mandate is achieved through a reporting mechanism which involves sending out protocols or questionnaires. South African Civil Society organisations such as the Centre for Human Rights, the Community Law Centre and the Community Agency for Social Inquiry (CASE), have worked with the South African Human Rights Commission to develop these protocols/questionnaires.<sup>121</sup>

Other initiatives, in which civil society organisations have supported the South African Human Rights Commission, include a survey of public perception relating to the realisation of socio-economic rights in South Africa, the National Speak out on Poverty hearing organised by the South African Human Rights Commission in collaboration with the Commission for gender Equality and the South African National NGO Coalition (SANGOCO).<sup>122</sup> The aim of the hearing was to obtain testimony of ordinary South Africans regarding their experiences of poverty as well as the barriers they face in gaining access to socio-economic rights.<sup>123</sup> Shirley Mabusela, former deputy chairperson of the South African Human Rights Commission, has emphasized the need for citizen participation in the work of the Commission; she stated that people in communities need to engage with the Human Rights Commission and inform them of the situation in their communities. Community

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<sup>119</sup> Ibid

<sup>120</sup> Ibid

<sup>121</sup> J Kollapen, ‘Monitoring Socio-economic Rights,: What the South African Human Rights Commission has done’, *Economic and Social Review*, Volume 1 No4, 1999, Page 31

<sup>122</sup> Ibid, Page 32

<sup>123</sup> Ibid

members need to take part in monitoring the realisation of socio-economic rights and where necessary hold the state to account.<sup>124</sup>

The Nigerian National Human Rights Commission works with civil society organisations in promoting socio-economic rights. For example, the National Human Rights Commission organised a seminar on "Economic Rights, Woman and National Development", held in collaboration with the Family Economic Advancement Programme (FEAP) aimed at analyzing all poverty alleviation programmes of the Federal Government and the upliftment of women. In collaboration with human rights organisations in Nigeria, the National Human Rights Commission has developed a National Action Plan (NAP) for the Promotion and Protection of Human Rights in Nigeria. The NAP will become a benchmark upon which Nigeria Human Rights Records can be measured or judged.

Nigerian NGOs have been quite effective in using litigation in protecting civil and political rights in the country, although the same cannot be said of socio-economic rights. Historically, socio-economic rights issues have received relatively less attention in the campaign and educational activities of human rights NGOs in Nigeria.<sup>125</sup> However, socio-economic rights have begun to attract more attentions within the NGO community. For example, Shelter Rights Initiative (SRI) and Social and Economic Rights Action Centre (SERAC) have undertaken campaign projects in collaboration with other civil society groups such as the labour unions and local community groups specifically to promote socio-economic rights issues.<sup>126</sup> On the other hand, NGOs in South Africa, have been active in using litigation to protect socio-economic rights. Organisations such as the Community Law Centre, Legal Resource Centre and the Treatment Action Group are active at using the law to protect the socio-economic rights of vulnerable, marginalised and poor people in South Africa.

Many NGOs in Nigeria have developed new and innovative programmes aimed at legislative advocacy, influencing state policies and consolidating the gains of democracy.<sup>127</sup> For example, Media Rights Agenda (MRA) has been involved in lobbying the National Assembly for the introduction of a legislation on the freedom of information and the Community Action for Popular Participation (CAPP) has been working for a review of the law establishing the Public Complaints Commission, which is Nigeria's ombudsman institution.<sup>128</sup>

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<sup>124</sup> C Heyns, 'Update on the South African Human Rights Commission', *Economic and Social Review*, Volume 1 No2, 1998, Page 21

<sup>125</sup> B Ibhawoh, *Human Rights Organisations in Nigeria*, Danish Centre for Human Rights, Copenhagen, 2001, Page 54

<sup>126</sup> Ibid, Page 56

<sup>127</sup> Ibid, Page 67

<sup>128</sup> Ibid

Civil society organisations may engage in several projects for the realisation of socio-economic rights. For example, under the right to education, they may monitor attendance at public schools and the effect of school fees on access to basic education; under the rights to social security, campaign to ensure pensioners get their pensions as well as developing codes of good practise around socio-economic rights with active grass root involvement.<sup>129</sup>

International non-governmental organisations operating in both countries only recently started developing socio-economic rights promotion and protection programmes. Koth argues that the methods that human rights International non-governmental organisations employ to promote civil and political rights are inadequate for socio-economic rights.<sup>130</sup> In his view, the most productive way for international human rights organisations to address socio-economic rights is by building on the power of our methodology. The essence of the said methodology is not the ability to mobilize people in the streets, to engage in litigation, or to press for broad national plans or to provide technical assistance. Rather, the core of our methodology is our ability to investigate, expose and shame.<sup>131</sup> He further argues that those that criticize human rights INGOs for not doing enough to promote socio-economic rights have little appreciation of the challenges involved in promoting socio-economic rights. He articulates these challenges as the resource implication of enforcing socio-economic rights, given that INGOs are outsiders and can only play a limited role. Secondly there are difficulties in applying the human rights movement's time tested methodologies of investigating, exposing and shaming and finally, the fuzziness over the mechanism of implementing socio-economic rights.<sup>132</sup>

The methods human rights INGOs have traditionally used to promote civil and political rights may not be adequate for the promotion of socio-economic rights. Clearly, the way forward would be for INGOs to adopt new methods, such as education and mass mobilisation.<sup>133</sup> This method has been used by several civil society organisations in the developing world such as the Treatment Action Group in South Africa. INGOs may partner with domestic non-governmental organisation in promoting socio-economic rights. Ibhawoh, contends that one of the main constraints that INGOs face in promoting socio-economic rights is the lack of clarity as to the nature and orientation of socio-economic rights

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<sup>129</sup> Panel Discussion: Role of Independent Commissions and Civil Society, *Economic Social Review*, Volume 1 No4, Page 33

<sup>130</sup> B Ibhawoh, 'Beyond Naming and Shaming: Methodological Imperatives of Economic, Social and Cultural Rights Advocacy', *African Yearbook of International Law*, Volume 15, 2007, Page 49

<sup>131</sup> Ibid Page 50

<sup>132</sup> Ibid

<sup>133</sup> Ibid, Page 58

litigation.<sup>134</sup> He concludes that clarity is beginning to emerge and some progress has come from countries, like South Africa.<sup>135</sup>

## **10. Civil Society Participation in Implementing Programmes at the African Union**

The African Union Commission has noted that the decision to establish the African Parliament and the Economic, Social and Cultural Council (ECOSOCC), and organise Pan-African integration associations, particularly women's and youth associations, was as a result of African Heads of State commitment to giving concrete meaning to participation and partnership, and to make the African Union a tool to build a new equilibrium between state and non-state actors.<sup>136</sup> One of the objectives of the Economic, Social and Cultural Council (ECOSOCC) of the African Union; is to Promote the participation of African civil society in the implementation of the policies and programmes of the Union.<sup>137</sup> ECOSOCC statute, further states that ECOSOCC shall be an advisory organ of the African Union composed of different social and professional groups of the Member States of the African Union. Through ECOSOCC, civil society can begin to influence policy changes favourable to the realisation of socio-economic rights, within the AU by engaging other organs of the African Union.

NGOs participation in the policy and decision making processes of the AU play an important role in the promotion and protection of human rights and freedoms in the African continent. Civil society organisations were not consulted in the formulation of NEPAD. As a response to these criticisms, the NEPAD Secretariat organised a number of forums with civil society and NGOs. This subsequent interaction between NEPAD and civil society show that there will be potential cooperation between the two in the future. There has been four forums between civil society and NEPAD, two in Ghana, one in Senegal and one in Mozambique.<sup>138</sup>

Non-governmental organisations and trade union take part in the African Peer Review Mechanism (APRM) process. For example the guidelines on the completion of APRM questionnaire states that it is expected that each participating country will draw up a list of the stakeholders (government, private sector, civil society) that would participate in responding to the questionnaire. It would then distribute the entire questionnaire to all stakeholders through their representatives in the Focal Point.<sup>139</sup> Under the memorandum of understanding

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<sup>134</sup> Ibid

<sup>135</sup> Ibid

<sup>136</sup> African Union, *Vision of the African Union and Missions of the African Union Commission*, Final Draft, March 2004, Page, 31, retrieved 15<sup>th</sup> March, 2009, [http://www.africaunion.org/News\\_Events/Calendar\\_of\\_%20Events/visionandmission/VISION%20ET%20MISSIONen.pdf](http://www.africaunion.org/News_Events/Calendar_of_%20Events/visionandmission/VISION%20ET%20MISSIONen.pdf)

<sup>137</sup> Article 2(3) ECOSOCC Statute

<sup>138</sup> New Partnership for African Development, *Civil Society Forum*, retrieved 15<sup>th</sup> March, 2009,

<http://www.nepad.org/2005/files/civilsociety.php>

<sup>139</sup> African Peer Review Mechanism, *Country Self-Assessment for the African Peer Review Mechanism*, retrieved 15<sup>th</sup> March, 2007, <http://www.aprm.org.za/docs/questionnaire.pdf>

that countries sign to accede to the mechanism, they are required to ensure the participation of all stakeholders, including trade unions, women, youth, civil society, private sector, rural communities and professional associations, in the development of a national Programme of Action (PoA).<sup>140</sup>

### 10.1 The Role of Civil Society at the African Commission

State parties to the African Charter make a bi-annual report to the African Commission on the legislative and other measures that they have taken to give effect to the rights contained in the Charter.<sup>141</sup> The African Commission has issued “*Guidelines for National Period Reports*.” The guidelines set out the reporting obligations of states in detail, Part 11 of the Guidelines, deals with socio-economic rights. It stipulates, for example that states must report on measures they have taken to achieve the full realisation of the right to compulsory and free primary education.<sup>142</sup> NGOs play a key role in advancing the promotional and protective mandate of the African Commission. NGOs play these roles by participating actively in the consideration of state reports during sessions, bringing complaints to the Commission on behalf of individuals and groups; collaborating with the African Commission in holding events such as workshops and seminars; participation in special measures, such as the work of special rapporteurs and working groups and drawing the attention of the Commission to urgent cases regarding human rights violations. Mbelle states that arguably the effectiveness and visibility of the African Commission are owed to the active participation of non-state actors, such as NGOs.<sup>143</sup>

The primary purpose of domestic NGOs engaging with regional and international institutions is to draw their attention to violations of human rights within the state or across several states, with a view to seeking redress.<sup>144</sup> In the context of socio-economic rights, civil society organisations in South Africa and Nigeria can draw the Commission’s attention to massive violations of socio-economic rights in the respective countries and bringing complaints regarding violations of socio-economic rights before the African Commission, after exhausting domestic remedies.

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<sup>140</sup> E Opoku, *Effective Stakeholder Participation in the APRM Process for the Promotion of Democratic Governance :A Case Study of Ghana*, 2006, Page 7, retrieved 15<sup>th</sup> March, 2009, [http://www.undp.org/oslocentre/docs07/eric\\_opoku\\_final.pdf](http://www.undp.org/oslocentre/docs07/eric_opoku_final.pdf)

<sup>141</sup> D Brand & F Viljoen, ‘A Review of Recent Cases and International Developments’, *Economic and Social Review*, Volume 1 No2, 1998, Page 25

<sup>142</sup> Ibid

<sup>143</sup> N Mbelle, ‘The Role of Non-governmental Organisations and National Human Rights Institutions at the African Commission’, in M Evans & R Murray (Ed) *The African Charter on Human and Peoples' Rights: The System in Practise, 1986-2006* . Cambridge University Press, Cambridge, 2008, Page 289

<sup>144</sup> Ibid, Page 290

## 10.2 Observer Status at the African Commission

Representatives of non-governmental organisations whether or not they have observer status at ACHPR; may attend sessions of the African Commission on Human and Peoples' Rights. (The Commission) Observer status is open to both national and international NGOs. This presents a great opportunity for INGOs to work with the African Commission and advance the realisation of socio-economic rights, by supporting domestic NGOs in drawing the Commission's attention to massive violations of socio-economic rights and bringing complaints regarding violations of socio-economic rights before the African Commission, after exhausting domestic remedies.

In order for a non-governmental organisation to have observer status with the Commission, the organisation must meet certain criteria laid out in the Resolution on the Criteria for granting and enjoying observer status to non-governmental organisations. The resolution states that all organisations applying for observer status with the African Commission shall consequently: have objectives and activities in consonance with the fundamental principles and objectives enunciated in the AU Charter and in the African Charter on Human and Peoples' Rights, be organisations working in the field of human rights and declare their financial resources.<sup>145</sup>

In order to establish the above requirements the non-governmental organisation seeking observer status will be requested to provide: a written application addressed to the Secretariat stating its intentions at least three months prior to the Ordinary Session of the Commission which shall decide on the application. This will give the Secretariat sufficient time in which to process the said application. The application will contain the organisation's statutes, proof of its legal existence, a list of its members, its constituent organs, its sources of funding, its last financial statement, as well as a statement on its activities. The statement of activities shall cover the past and present activities of the Organisation, its plan of action and any other information that may help to determine the identity of the organisation, its purpose and objectives, as well as its field of activities. The non-governmental organisation will first of all put an application for observer status with the secretariat, which then passes it to the Commission and the Commission's Bureau will then designate a rapporteur to examine the dossiers. The Commission's decision shall be notified without delay to the applicant NGO.<sup>146</sup>

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<sup>145</sup> African Commission on Human and Peoples' Rights, *Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations Working in the Field of Human Rights with the African Commission on Human and Peoples' Rights*, retrieved 16<sup>th</sup> March 2009, [http://www.achpr.org/english/\\_info/observer\\_en.html](http://www.achpr.org/english/_info/observer_en.html)

<sup>146</sup> Ibid

Clearly the requirement of this process will have the effect of excluding many non-professional NGOs from the activities of the Commission. As noted earlier informal NGOs make up the majority of civil society in both South Africa and Nigeria. Repressive governments in Africa may not grant non-governmental organisations they perceive to be against them registration status, which is a requirement for observer status.

Non-governmental organisations granted observer status may relate with the Commission in a number of ways; which include engaging in regular consultations with it on all matters of common interest; presenting their activity reports to the Commission every two years and making administrative arrangements, whenever necessary to determine the modalities of this co-operation.

### **10.3 Consideration of State Reports:**

An NGO's forum takes place over a three day period ahead of the African Commission's sessions. These forums aim to provide an opportunity for NGOs to engage with the African Commission on human rights issues.<sup>147</sup> It also provides an opportunity for NGOs to become familiar with the work of the Commission. In practice, the Commission holds its sessions in public. The Commission first exams the situation of human rights in Africa, the state reports, normally two or three in a session. During the session the commissioners also examine reports sent in by NGOs from states making their reports. Based on the two reports the commissioners may pose questions to the representative of the state. The Commission then draws up a report showing the Commissioners observations and recommendations in respect of protection and promotion of human rights in the country under study. The report is not published and the recommendations are not binding. Thereafter, the Commission's rapporteurs and working groups' present reports on their activities. After the rapporteurs presentations, representatives of NGOs with observer status are allowed to make an oral statement for three minutes on the situation of human rights defenders in their specific countries.<sup>148</sup>

The Commission then holds a closed, private session at which it examines and adopts the mission reports (fact-finding and promotional missions); examines the communications; examines administrative and financial issues; adopts resolutions, decisions and recommendations (made public at the end of the sessions); sets the dates and venue for the

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<sup>147</sup> Ibid, Page 294

<sup>148</sup> International Federation for Human Rights, *The Role of NGOs during sessions of the African Commission for Human and Peoples' Rights and the pre-session NGO Forum*, retrieved 16<sup>th</sup> March, 2009, [http://www.fidh.org/IMG/pdf/2008tuto\\_CADHHP\\_en.pdf](http://www.fidh.org/IMG/pdf/2008tuto_CADHHP_en.pdf)

next session.<sup>149</sup> Finally it holds a press conference. It has been suggested that the decisions of the Commission can be made more effective if in partnership with non-governmental organisations an internal monitoring mechanism is established and at each session the monitoring group reports on the progress made in implementing the Commission's decisions on communications.<sup>150</sup>

#### **10.4 Other Avenues for Engagement:**

In addition to pre-session events, NGOs in collaboration with the Commission have organised seminars and conferences on specific themes.<sup>151</sup> NGOs may initiate holding of extraordinary sessions aimed at alerting the African Commission about urgent human rights violations. This was the case, when provisional measures were invoked by the Commission in an attempt to halt the imposition of death penalty imposed on environmental rights activist Ken Saro Wiwa.<sup>152</sup> NGOs have also participated in the special mechanism for promoting human rights set up by the African Commission, such as special rapporteurs and working groups. According to Mbelle, NGOs have played a role in the work of special rapporteurs and working groups in two regards (1) actively supporting the mechanism materially and administratively, and (2) furnishing the African Commission with relevant information pertaining to specialist areas.<sup>153</sup>

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<sup>149</sup> Ibid

<sup>150</sup> Ibid

<sup>151</sup> Ibid, Page 295

<sup>152</sup> Ibid, Page 298

<sup>153</sup> Ibid, Page 301

## **11. Conclusion**

Government institutions are primarily responsible for respecting, protecting and promoting human rights. They are not the only ones involved in socio-economic rights and sustainable human development. Other civil organizations such as human rights NGO's, community organizations, schools, indigenous people's organizations, women's advocacy groups and the media, also play a crucial role in monitoring, protecting and promoting human rights. Civil society organizations can monitor human rights even under extreme or authoritarian political conditions. The civil society sector is instrumental in promoting local economic development, alleviating poverty, advocating policy change, contributing to good governance and campaigning for the Millennium Declaration goals.

Their contribution, however, needs to be strengthened. The contribution can be strengthened through partnerships with the state and through capacity building. There are different types of socio-society organisations. However their most important attribute is that they represent citizens and to a large extent ensure citizen participation in governance. There are several strategies adopted by civil society organisation engaged in the advancement of socio-economic rights/programmes in both South Africa and Nigeria. These strategies include lobbying, litigation and advocacy of public institutions as well as monitoring the realisation of socio-economic rights. The present structure of the AU demonstrates that the AU is committed to civil society participation. The African Union is becoming a union of the African people and not merely a Union of States and Governments. Civil society engagement with the African Commission, presents a great opportunity for civil society organisations across Africa to hold states to account for human rights violations.

## **CHAPTER 7**

### **Summary and Conclusion**

#### **Introduction**

This study started on the premise of a relationship between poverty and socio-economic rights. This study asserts that the nature of socio-economic rights makes their violation central to key poverty issues in Africa, such as hunger, high maternal and infant mortality rates. Therefore, policies providing for poverty reduction practises should make the link between socio-economic rights and poverty. These policies should adopt human right based approaches in planning and implementation. As part of the literature review, this study reviewed the benefits of right based approaches to poverty reduction and its impact on the realisation of socio-economic rights. This summary and conclusion is structured around four themes. These themes are promotion and protection of socio-economic rights under the African Charter; the concept of justiciability; promotion and protection of socio-economic rights in South Africa and Nigeria and the methods adopted by non-governmental organisations in South Africa and Nigeria in promoting socio-economic rights and reducing poverty. The themes correspond with the four objectives of this study.

#### **Promotion and Protection of Socio-Economic Rights under the African Charter**

This study examined arrangements for promotion and protection of socio-economic rights under the African Charter. This examination outlined and highlighted challenges and prospects to the realisation of socio-economic rights provided under the African Charter. This study also examined how the prospects support the realisation of socio-economic rights and poverty reduction using rights based approaches to poverty reduction. This study found several challenges to the realisation of socio-economic rights under the African Charter. These challenges may be broadly groups into three categories namely non-justiciability, enforceability and limited resources/poverty. The main factor affecting the justiciability of socio-economic rights under the Charter is the lack of clarity regarding the scope/detail of socio-economic rights contained in the Charter. The lack of clarity in the scope/clarity of socio-economic rights contained in the Charter stem from the fact that the Charter fails to outline the extent and nature of the obligations that it imposes on state parties.<sup>1</sup> For example, Article 17 (1) of the Charter states that “Every individual shall have a right to education.” Equally, the Charter does not outline the programs or laws that must be implemented for the

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<sup>1</sup>M Brennan, To Adjudicate and Enforce Socio-Economic Rights: South Africa Proves That Domestic Courts are a Viable Option, *Queensland University of Technology Law and Justice Journal*, Volume 9, Number 1, 2009, Page 70

realisation of the right. The implication of this is that states parties have a wide discretion in determining the standards to be applied for the realisation of the right. Therefore, one of the main challenges to the justiciability of socio-economic rights under the Charter is the challenge of measuring and determining whether a state has satisfied its obligations under the Charter.<sup>2</sup>

Lack of clarity regarding the scope/detail of socio-economic rights provided under the African Charter may be rectified through amending relevant provisions of the Charter. Alternatively, it can be rectified by the African Commission or the African Court elaborating on socio-economic rights provisions contained in the African Charter through their decisions or in the case of the African Commission also through its declarations/resolutions. The African Commission has elaborated on several socio-economic rights contained in the African Charter through its decisions and resolutions. For example, the Pretoria Declaration (adopted as a resolution by the African Commission) elaborated upon, broadened the scope and bridged the gaps in the vagueness of the rights to property, work, health, education and culture guaranteed under the African Charter. Challenges such as implementing the decisions of the African Commission or submitting state reports require political will on the part of state parties to overcome.

It is worth noting that none of the national constitutions examined in this study, nor the African Charter or International Covenant on Economic, Social and Cultural Rights spell out the full scope or detail of every socio-economic right provided for or in the case of Nigeria, the full scope/detail of every principle in the Directive Principles of State Policy.<sup>3</sup> There are two aspects of the scope or detail of socio-economic rights that should be addressed. The first is (1) A right to what and the second (2) What should be done to achieve the right.<sup>4</sup>

With regard to the first aspect, several bodies such as the Committee on Economic, Social and Cultural Rights, African Commission and national courts have elaborated on what constitutes a socio-economic right, normally in terms of availability, accessibility, appropriateness and acceptability.<sup>5</sup> The second aspect, what should be done to achieve the right is a much more challenging question. It would seem that the drafters try to find the balance between including the core elements of a socio-economic right, while at the same time allowing the executive/parliament a wide discretion to determine how the realisation of

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<sup>2</sup> S. Kalantry, J. Getgen & S. Arrigg Kon, Enhancing Enforcement of Economic, Social and Cultural Rights using indicators: A focus on the Right to Education in the ICESCR, Volume 32, *Human Rights Quarterly*, 2010, Page 256

<sup>3</sup> United Nations Development Programme, *The MDGs through Socio-Economic Rights: Constitution making and Implementation Hand Book*, United Nations Millennium Campaign, Bangkok, 2009, Page 27

<sup>4</sup> Ibid

<sup>5</sup> Ibid, Page 28

the socio-economic right may be achieved.<sup>6</sup> In deciding on socio-economic rights cases, as seen from the cases examined, both the African Commission and domestic courts have faced the same challenges with the drafters.<sup>7</sup>

The African Commission like most other international quasi-judicial institutions lacks an enforcement mechanism. The African Commission has granted both substantive and declaratory reliefs in its decisions. In cases where state parties have implemented the decision of the African Commission, it has had a very positive impact on the realisation of socio-economic rights and poverty reduction. For example, as a result of the decision in *Purohit and Moore v The Gambia*,<sup>8</sup> renovations have been made at the Royal Victoria Hospital where the psychiatric patients on whose behalf the case was brought were held, as recommended by the African Commission.<sup>9</sup> Similarly, as recommended by the African Commission, the Gambian government has enacted a new legislative regime for mental health in The Gambia compatible with the African Charter on Human and Peoples' Rights and the International Standards and Norms for the protection of mentally ill and disabled people.<sup>10</sup> This intervention has ensured the promotion and protection of the right to access health care of all people with mental health disability in the Gambia. Therefore, the benefits of this decision go beyond the applicants.

However, state parties have not always implemented the decisions of the African Commission. That said, the main contribution of the decisions of the African Commission in the area of socio-economic rights has been to elaborate on the contents of the socio-economic rights contained in the African Charter. The African Commission has defined the entitlements and obligations attached to several socio-economic rights contained in the Charter. This has contributed to the development of jurisprudence on socio-economic rights. The decisions also serve as reference for national and international courts and tribunals to refer to in deciding similar cases. In this way, the principles developed and affirmed by these decisions will still contribute to the realisation of socio-economic rights and poverty reduction.

Some of the decisions of the African Commission have also upheld principles of the rights based approach to poverty reduction such as non-discrimination,<sup>11</sup> participation of the poor in

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<sup>6</sup> Ibid

<sup>7</sup> Ibid

<sup>8</sup> Communication No. 241/2001

<sup>9</sup> Analysis of *Purohit and Moore v. The Gambia*, retrieved 6<sup>th</sup> December 2008, <http://www.escri-net.org/caselaw/caselaw>

<sup>10</sup> Ibid

<sup>11</sup> *Malawi African Association and others v Mauritania*, Communication. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000)

decision making,<sup>12</sup> attention to vulnerable groups of people<sup>13</sup> and accountability.<sup>14</sup> Clearly, these decisions of the African Commission has impacted favourably on the realisation socio-economic rights and the application of the principles of rights based approaches to poverty reduction even where the decisions do not provide a fundamental right to individuals to claim "positive", judicially enforceable action and services from the state.

Another prospect this study found is the fact that in recent years more complaints regarding socio-economic rights have come before the African Commission. Similarly, the adoption of an African Court of Human Rights; the adoption of the New Partnership for Africa's Development (NEPAD) as well as the African Peer Review Mechanism (APRM) though not products of the African Charter will facilitate the realisation of the socio-economic rights contained in the African Charter. NEPAD adopts the voluntary African Peer Review Mechanism (APRM) to ensure that African states adopt policies and practices that will ensure political stability, economic growth, sustainable development and continental economic integration. However, the impact of the APRM process is limited to only 24 African states, as only 24 African Countries out of 53 member states of the African Union have signed up to it.

Although civil society organizations across Africa were not involved in the formulation of NEPAD, the current efforts of NEPAD's secretariat to engage with civil society organizations across Africa will ensure civil society participation in the NEPAD process. Similarly, the APRM process makes extensive provisions for civil society participation. Civil society participation in NEPAD projects and in the APRM process will ensure that people are connected with projects, policies and programs aimed at reducing poverty and enhancing economic growth.

### **The Concept of Justiciability**

This study went on to examine the concept of justiciability. It found that the justiciability of socio-economic rights ensures that duty bearers can be held accountable to rights holders for the violations of socio-economic rights. Evidence from the analyses of socio-economic rights cases decided by the African Commission, South African courts and Nigerian courts demonstrate that socio-economic rights have justiciable elements as well as freedoms and entitlements. This study asserts that justiciability should be understood to include all reviews by both judicial and quasi judicial bodies. This is because there is clear evidence that several quasi judicial bodies such as the Africa Commission have effectively elaborated on socio-

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<sup>12</sup> SERAC v Nigera, Communication No. 55 of 1996

<sup>13</sup> Purohit and Moore v. The Gambia, Communication No. 241/2001

<sup>14</sup> SERAC v Nigeria, Communication No. 55 of 1996

economic rights. Even where justiciable, court decisions on socio-economic rights may still be unenforceable, because of limited resources. However, not all socio-economic rights have resource implications. For example, the negative obligations imposed upon government by socio-economic rights may all not give rise to significant resource implications.

### **Promotion and Protection of Socio-Economic Rights in South Africa and Nigeria**

The poor legal and institutional socio-economic framework in most African countries compounds the challenges associated with poverty reduction and the realisation of socio-economic rights. This is evidenced by the fact that only the South African Constitution provides extensively for the enforcement of socio-economic rights in Africa. This study examined the promotion and protection of socio-economic rights in South Africa and Nigeria. It found in Nigeria, objectives/principles similar to socio-economic rights are provided in the Constitution as non-justiciable Directive Principles of State Policy. Both constitutionally recognised justiciable and non-justiciable socio-economic rights serve as blueprints for the state's manifold activities that proactively guide and shape legislative action, policy formulation and executive and administrative decision making. If these constitutional provisions are used effectively, it will aid the realisation of socio-economic rights as well as poverty reduction. Realising socio-economic rights depends on policy choices and the allocation of resources. However, constitutionally recognised justiciable socio-economic rights such as the socio-economic rights contained in the South African Constitution has the added advantage of creating an avenue to hold the state to account and redress violations, through complaints that the state or its agencies have failed in their constitutional duties regarding socio-economic rights. This study therefore, focused on the avenues of redress.

The cases analysed in this study indicate that the enforcement of socio-economic rights through litigation, has been an effective tool in fighting poverty and enshrining the principles of the rights based approaches to poverty reduction. For example, in the midst of a HIV/AIDS epidemic, South Africa had more than 6 million people infected.<sup>15</sup> The infections of newborns were in the range of 80,000 per year.<sup>16</sup> Anti-retroviral drug Nevirapine offered the potential of preventing the infection of 30 – 40,000 children per year.<sup>17</sup> Although this drug was offered to the Government for free for five years, the South African Government announced it would introduce Mother-To-Child-Transmission (MTCT) only in certain pilot

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<sup>15</sup> Analysis of Minister of Health v Treatment Action Campaign (TAC) (2002) 5 SA 721 (CC), (International Network for Economic, Social & Cultural Rights), retrieved 25<sup>th</sup> March, 2010, [http://www.esrnet.org/caselaw/caselaw\\_show.htm?doc\\_id=403050&country=13630](http://www.esrnet.org/caselaw/caselaw_show.htm?doc_id=403050&country=13630)

<sup>16</sup> Ibid

<sup>17</sup> Ibid

sites. Additionally, it would delay setting these sites for up to a year, thereby denying most HIV positive mothers access to treatment.<sup>18</sup> The Treatment Action Campaign (TAC) challenged this policy in court, alleging a violation of the right of access to health care services and demanding a program to make the drug available throughout the country.<sup>19</sup> The judgement ordering the provision of medication to HIV positive women and ordering that the limitations or exclusions be removed is estimated to have saved thousands of lives.<sup>20</sup>

The *TAC case*<sup>21</sup> further demonstrates that litigation reinforced by empowerment, social mobilisation and participation of vulnerable groups further ensures that the poor realise the benefits of successful socio-economic rights litigation. In *TAC case*,<sup>22</sup> litigation was a part of a broad participatory campaign to bring about social change. This involved mobilising people and empowering them to claim their rights. Treatment Action Campaign (NGO) empowered HIV positive mothers to claim their rights and supported them in realising their capacity to aspire; this helped them overcome patterns of inequality and realise the right of access to healthcare guaranteed under the South African Constitution.<sup>23</sup>

Several World Bank studies indicate that citizens are more likely to be economically well off, where their governments uphold the rule of law.<sup>24</sup> Almost all rich countries score well on the rule of law indicators, while poor countries do not.<sup>25</sup> However, China is one country, where extensive growth has occurred, despite not scoring well on rule of law indicators.<sup>26</sup> Similarly, Sen argues that political freedoms play an important role in addressing economic needs.<sup>27</sup> However, guaranteeing political freedoms, without ensuring that the poor participate in it, will not adequately address their economic needs. As noted in the introductory chapter, the method adopted for the practical implementation of the rights based approaches depends on the mission and objectives of the state or non-state organisation. However, it would seem that in the context of Africa, that participation and empowerment is essential for all successful poverty reduction interventions. This is because in most sub-Saharan African countries such as South Africa and Nigeria, the opportunity to participate in policy formulation and implementation is limited. This is due to the fact that there is poor

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<sup>18</sup> Ibid

<sup>19</sup> Ibid

<sup>20</sup> Ibid

<sup>21</sup> 2002 (5) SA 703 (CC)

<sup>22</sup> Ibid

<sup>23</sup> L Arbour, *Using Human Rights to Reduce Poverty*, World Bank Institute, Washington, 2001, Page 4

<sup>24</sup> D Banik, Rights, legal empowerment and poverty: an overview of the issues, in D Banik (Ed), *Rights and Legal Empowerment of the Poor*, Ashgate Publishing Ltd, London, 2008, Page 12

<sup>25</sup> Ibid

<sup>26</sup> Ibid

<sup>27</sup> A Sen, *Development as Freedom*, Oxford University Press, Oxford, 1999, Page 53

information sharing between national governments and citizens at local levels.<sup>28</sup> Many rural Africans do not have access to newspapers, television and radio sets and are therefore excluded from information.<sup>29</sup> Therefore, civil society organisations in sub-Saharan Africa, should work to ensure that the poor are empowered and participate in policy formulation and implementation.

This study also found that most poor people in South Africa and Nigeria do not have access to courts, due to several factors such as poverty and a lack of understanding of legal processes. They are therefore part of the informal sector and lack effective legal protection and recognition of their rights and assets.<sup>30</sup> In most rural communities in South Africa and Nigeria, disputes are settled informally.<sup>31</sup> Most national and international agencies place a lot of emphasis on strengthening the formal judicial systems in Africa and ignore informal methods of dispute resolution.<sup>32</sup> The rights based approach in many African countries has not always achieved the desired result, because most state and donor/state interventions begin at the wrong end of the development spectrum.<sup>33</sup> They tend to target formal duty bearers such as parliaments, Human Rights Commissions and the Judiciary without providing adequate support for the right holders. As a result, the poor are not empowered to claim their rights.<sup>34</sup> Similarly, as a result of non empowerment, they are unable to participate effectively in decision making.

The ability of civil society organisations to mobilise community groups, empower people and promote social participation in these states make them relevant in ensuring that the poor realise the benefits of the socio-economic rights and/or poverty reduction initiatives. Similarly, given the fact that the poor in most African states may not be able to initiate socio-economic rights cases, civil society organisations play an important role in ensuring that socio-economic rights cases are brought before relevant national and regional bodies. The vast majority of the socio-economic rights cases examined in this study, were initiated by civil society organisations on behalf of the aggrieved parties.

The litigation strategies emerging from South Africa in relation to socio-economic rights litigation are the administrative review model and express reliance on constitutional socio-economic rights provisions. On the other hand, the litigation strategy emanating from Nigeria

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<sup>28</sup> D. Banik, *Implementing Human Rights based approach: Some preliminary evidence from Malawi*, 2007, Page 12, retrieved 20<sup>th</sup> August, 2010, [http://www2.ohchr.org/english/issues/poverty/expert/docs/Dan\\_Banik.pdf](http://www2.ohchr.org/english/issues/poverty/expert/docs/Dan_Banik.pdf)

<sup>29</sup> Ibid

<sup>30</sup> Ibid, Page 7

<sup>31</sup> Ibid

<sup>32</sup> Ibid

<sup>33</sup> Ibid, Page 15

<sup>34</sup> Ibid

in respect to socio-economic rights cases is a strategy that relies on constitutionally recognised civil and political provisions to protect socio-economic rights. However, a few cases have relied on the express provisions of African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990. The development of jurisprudence in the area of socio-economic rights has been very slow in Nigeria, considering the fact that Nigeria incorporated the African Charter into its national laws in 1983. The reason for the slow development of jurisprudence on socio-economic rights in Nigeria may be due to the erroneous notion that socio-economic rights are non-justiciable in Nigeria; as a result of the provisions of Chapter 2 of the Nigerian Constitution. (Directive Principles of State Policy) However, recent Supreme Court decisions in Nigeria have clarified the position, by stating that even though the provisions of the Chapter containing Directive Principles of State Policy are unenforceable, the National Assembly has the power to legislate on the provisions and make them enforceable against government bodies and private persons. Therefore, an Act of Parliament incorporating a treaty such as the African Charter amounts to National Assembly legislation. Although a few cases invoking the socio-economic rights contained in the African Charter have been pronounced upon by Nigerian Courts, the Supreme Court of Nigeria is yet to hear any case invoking the socio-economic rights provisions of the African Charter (African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990).

The South African Constitutional Court has developed a substantial body of jurisprudence on both negative and positive duties imposed by constitutionally recognised socio-economic rights. The Court has also developed the "reasonableness review" in claims which seek to enforce the positive duty to fulfil qualified socio-economic rights, under the South African Constitution. This review is similar to an administrative review. The Constitutional Court of South Africa seems to have adopted this approach in order not to encroach on the policy making functions of the executive and legislature. This assertion is supported by the fact that most decisions of the Constitutional Court of South Africa on socio-economic rights have tended not to provide substantive relief to the applicants. The South African Constitutional Court seems reluctant to grant substantive reliefs in respect of socio-economic rights cases. Nigerian courts have not adopted the reasonableness review in relation to socio-economic rights cases. However, the few cases invoking the socio-economic provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990, have also tended not to grant substantive relief to applicants.

The principles reached in these judgements impact positively on the realisation of the socio-economic right in question and reduced poverty. For example, the decision in *Grootboom*,<sup>35</sup> (constitutionalising the requirement that that government policies pay attention to those in urgent need) or the decision in *Occupiers of 51 Olivia Road*,<sup>36</sup> (constitutionalising a novel 'engagement' that ensures participation and requires government entities to consult with residents affected by policy decisions that may involve eviction) are beneficial to the realisation of the housing rights of many poor South Africans, even though it brought no immediate tangible benefits to the applicants. An example, from Nigeria is the decision in *Odafe*,<sup>37</sup> where the principle reached in the case has had the effect of ensuring access to health care to all prisoners in Nigeria.

The fact that none of these decisions have not granted a fundamental right to individuals to claim positive judicially enforceable action and services from the state, has not precluded the principles established by these decisions from being beneficial to the litigants and/or to a larger number of vulnerable people within the state. These findings confirm the hypothesis that judicial and quasi-judicial decisions on socio-economic rights may impact favourably on the realisation socio-economic rights and the application of the principles of rights based approaches to poverty reduction even where the decision do not provide a fundamental right to individuals to claim "positive", judicially enforceable action and services from the state. Therefore, socio-economic rights litigation should aim to ensure conformity with socio-economic rights provisions and maintain separation of powers.

Several decisions of the Constitutional Court of South Africa reinforce the principles advanced by the rights based approaches to poverty reduction. Examples include ordering that the limitations or exclusions be stopped;<sup>38</sup> constitutionalising requirement that government policies pay attention to those in urgent need;<sup>39</sup> constitutionalising the inclusion of permanent residents in social assistance programmes;<sup>40</sup> and constitutionalising a novel 'engagement' that ensures participation and requiring government entities to consult with residents affected by policy decisions that may involve eviction.<sup>41</sup> Similarly, decisions from

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<sup>35</sup> Constitutionalised the requirement that that government policies pay attention to those in urgent need.

<sup>36</sup> Constitutionalised a novel 'engagement' that ensures participation and requires government entities to consult with residents affected by policy decisions that may involve eviction.

<sup>37</sup> The state has a responsibility to all prison inmates, regardless of the offences they have allegedly committed to provide medical treatment.

<sup>38</sup> 2002 (5) SA 703 (CC)

<sup>39</sup> 2000 (11) BCLR 1169 (CC)

<sup>40</sup> 2004 (6) BCLR 569 (CC)

<sup>41</sup> Case CCT 24/07 [2008]

Nigeria have upheld the principles of non-discrimination<sup>42</sup> and attention to vulnerable groups of people.<sup>43</sup>

The African Court of Human Rights, the African Commission, national courts and other institutions involved in implementing socio-economic rights in Africa should adopt reviews similar to administrative or reasonableness reviews in socio-economic rights litigation. In this way they can make pronouncements on the validity of state action and ensure the realisation of socio-economic rights. At the same time, they leave the state a wide margin of discretion to make policy choices. However, it should be noted that declaratory judgements depend on the legislative and executive branches of the state to remedy the wrong done. The legislative and executive branches of the state may be unwilling or due to resources, unable to remedy the wrong.

Although the courts provide an avenue for accountability in South Africa and Nigeria, there are other avenues of accountability in both countries, such as the Human Rights Commissions. This study found that the Human Rights Commissions in both South Africa and Nigeria in partnership with civil society can form a powerful information-gathering tool for monitoring and assessing the realization of socio-economic rights. Through this mechanism the Commissions can play a valuable complementary role to the judicial enforcement of socio-economic rights. Human Rights Commissions have an important role to play in monitoring the progressive realization of the socio-economic rights, identifying structural patterns of violations and drawing these to the attention of government and the public. In this way it can promote greater accountability by organs of state for the realization of socio-economic rights. Socio-economic rights monitoring in Nigeria, would be further enhanced if, like South Africa they adopt a Freedom of Information Act.

### **Methods adopted by non-governmental organisations in South Africa and Nigeria in promoting socio-economic rights and reducing poverty**

Poor quality social service in Africa has led to the development of alternatives either in terms of security, improvement/maintenance of roads, water facilities etc. These alternatives come either as private provision or community based provision. The emergence of associations and community groups such as trade unions, professional groups, women groups, religious organizations, social clubs, kindred groups, age-groups and village associations, all emerged to fill the vacuum created by Africa's governance system. In both South Africa and Nigeria, community-based organisations, dominate the non-profit sector

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<sup>42</sup> 1996 8 NWLR 203, at Page 225

<sup>43</sup> FHC/PH/CS/680/2003

numerically, and are generally engaged in service delivery at local level. Litigation is one strategy that civil society organisation engaged in the advancement of socio-economic rights/programmes in both South Africa and Nigeria may use. However there are other strategies, such as lobbying and advocacy of public institutions, monitoring the realisation of socio-economic rights as well as awareness campaigns.

The Constitutive Act of the African Union advocates partnership between governments and all segments of civil society. The interest in partnerships between civil society and the state for delivery of social services, is motivated by various reasons which include, a perception of the limitations of the state as a vehicle for social change due to its unwillingness to be accountable to society; a recognition of the comparative advantage of NGOs in service delivery at local level, due to their consultative approach; a focus on community empowerment, and ability to respond more directly and immediately than government to community needs and serious concerns over the economic inefficiencies of state delivery mechanisms. Finally, civil society organisations do not represent a recurrent cost for the state, and they frequently manage to raise funds to match state contribution.

## BIBIOGRAPHY

### Books

- Alston, P and Robinson M., (Ed), *Human Rights and Development: Towards Mutual Reinforcement*, Oxford University Press, New York, 2005
- Alston, P, *Non-State Actors and Human Rights*, Oxford University Press, Oxford, 2005
- Alston, P, *United Nations and Human Rights (A Critical Appraisal)*, Clarendon University Press, Oxford, 1992
- Andersen, E, and Hans-Otto, *Human Rights Indicators at Programme and Project Level Guidelines for Defining Indicators, Monitoring and Evaluation*, The Danish Institute for Human Rights, Copenhagen, 2006
- André Andersen E and Sano H, *Human Rights Indicators at Programme and Project Level Guidelines for Defining Indicators, Monitoring and Evaluation*, The Danish Institute for Human Rights Copenhagen, Copenhagen, 2006,
- Andreassen B & Eide, A, (Ed), *Human Rights in Developing Countries 1987/88: A Yearbook on Human Rights in Countries Receiving Nordic Aid*, Akademisk Forlag, Copenhagen, 1988
- Andreassen, B, and Stephen P., (Ed), *Development as a Human Right: Legal, Political and Economic Dimensions*, Harvard University Press, Harvard, 2006
- Andreassen, B. and Eide, A, *Human Rights in Developing Countries*, Akademisk Forlag, Copenhagen, 1988
- Andrews, P and Ellmann, S, (Ed), *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, Witwatersrand University Press, Johannesburg, 2001
- An-Na'im, A.,(ed), *Human rights under African constitution: Realising the promise for ourselves*, University of Pennsylvania Press, Pennsylvania, 2002
- An-Naim, A., (Ed), *Human Rights under African Constitutions: Realising the Promise for Ourselves*, University of Pennsylvania Press, Pennsylvania, 2003
- Arambulo, K, *Strengthening the Supervision of Economic, Social and Cultural Rights: Theoretical and Procedural Aspects*, Harts Publishing, Oxford, 1999
- Baderin , M and McCorquodale, R. (Ed). *Economic, Social and Cultural Rights in Action*, Oxford University Press, Oxford, 2007
- Banik, D, (Ed), *Rights and Legal Empowerment of the Poor*, Ashgate Publishing Ltd, London, 2008
- Bilchitz D, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights*, Oxford University Press, New York, 2008

- Bilchitz, D, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*, Oxford University Press, USA, 2008
- Booth, A and Mosley, P, (Ed), *The New Poverty Strategies: What Have They Achieved? What Have We Learned?*, Palgrave Macmillan, London, 2003
- Brand, D and Heyns, C, *Socio-economic Rights in South Africa*, Pretoria University Law Press, Pretoria, 2005
- Brand, D. and Russell, S., (Ed), *Exploring the core content of Socio-Economic rights: South African and International Perspectives*, Protea Book House, Pretoria, 2002
- Brownlie, I and Goodwin-Gill, G, (Ed), 5<sup>th</sup> edition, *Basic Documents on Human Rights*, Oxford University Press, New York, 2006
- Burca, G & Witte, B, *Social Rights in Europe*, Oxford University Press, Oxford, 2005
- Chapman, A and Sage R (Ed) *Core Obligations: Building a Framework for Economic, Social and Cultural Right*, Transnational Publishers, New York 2005
- Clapham, A, *Human Rights in the Private Sphere*, Oxford University Press, New York, 1994
- Clapham, A, *Human Rights Obligations of Non-State Actors*, Oxford University Press, New York, 2006
- Coomans, A.P.M., and Van Hoof, (Ed) *The Right to Complain about Economic, Social and Cultural Rights*, Netherlands Institute of Human Rights (SIM), Utrecht, 1995
- Craven, M, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Oxford University Press, Oxford, 1998
- De Than, C and Short, E, (Ed), *Public Law and Human Rights*, Sweet and Maxwell, London, 2003
- De Villiers, B., *The protection of social and economic rights International perspectives*, Occasional Paper 9, Centre for Human Rights, University of Pretoria, Pretoria, 1996
- Donnelly, J, *University Human Rights in Theory and Practise*, Cornell University Press, New York 1993
- Dugard J & Roux, T, The Record of the South African Constitutional Court in Providing an Institutional Voice for the Poor:1990-2004, in R Gargarella, P Domingo & T Roux T, *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?*, Ashgate Publishers, Hampshire, 2006
- Dunne, T. and Wheeler, N, (Ed), *Human Rights in Global Politics*, Cambridge University Press, Cambridge, 1999
- Eide, A, *Economic, Social and Cultural Rights*, 2<sup>nd</sup> edition, Kluwer Law International, Netherlands, 2001

- Eide, A, *Universal Declaration of Human Rights (A Commentary)*, Oxford University Press, Oxford, 1992
- Evans, M (Ed), *International Law*, Oxford University Press, Oxford, 2003
- Evans, M, and Murray, R., (Ed), *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006*, 2<sup>nd</sup> Edition, Cambridge University Press, Cambridge, 2008
- Eze, O, *Human Rights in Africa: Some Selected Problems*, Nigerian Institute of International Affairs, Lagos, Nigeria, 1984
- Falola, T, *Economic Reforms and Modernization in Nigeria, 1945-1965*, Kent State University Press, Kent, 2004
- Gauri, V and Brinks, D, (ed) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, Cambridge, 2008
- George, S, *A Fate Worse Than Debt*, Grove/Atlantic Publishers, New York, 1990
- Ghai, Y. and Cottrell, J, *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights*, INTERIGHTS, London, 2004
- Goldewijk, B. K, Contreras, B and Cesar P, *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights*, Transnational Publishers, New York, 2002
- Gomien, D. Harris, D & Zwack, L., (1996) *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Council of European Publishers, Brussels, 1996
- Hannum, H., (Ed), *Guide to International Human Rights Law and Practise*, Transnational Publishers, New York, 1999
- Harris, D., and Livingstone, S., (Ed) *The Inter-American System of Human Rights*, Clarendon Press, London, 1998
- Hart, H, *The Concept of Law*, 2<sup>nd</sup> edition, Clarendon Press, London, 1994
- Hellinger, S & O'Regan, K, *Aid for Just Development: Report on the Future of Foreign Assistance*, Lynne-Rienner, Publishers, Boulder and London, 1988
- Hohfeld, W.N, *Fundamental Legal Concepts as Applied In Judicial Reasoning and Other Essays*, Yale University Press, New Haven, 1923
- Holmes, S., and Sunstein, C, *The Cost of Rights: Why Liberty Depends on Taxes*, W. W Norton, New York, 1999

- Ibhawoh, *Human Rights Organisations in Nigeria*, Danish Centre for Human Rights, Copenhagen, 2001
- Janis, M., Kay, R., Bradley, A, *European Human Rights Law*, Clarendon Press, London, 1995
- Joyner, C, (Ed), *The United Nations and Human Rights*, Cambridge University Press, Cambridge, 1999
- Kallen, E, *Social Inequality and Social Justice: A Human Rights Perspective*, Palgrave Macmillan Publishers, London, 2004
- Kirsten, H., (Ed), *Human Rights on Common Grounds: The Quest for Universality*, Kluwer Law International, Hague, 2001
- Kohen M, *Promoting Justice, Human Rights and Conflict Resolution through International Law*, Martinus Nijhoff ,Leiden, 2007
- Lamarche, L, *Beyond the Rhetoric of Social Rights for the Poor, the Need to Promote a Methodology at Reinforcing International and national Institutions*, (Paper prepared for UNESCO), UNESCO Poverty Project: Ethical and Human Rights Dimensions of Poverty: Towards a new Paradigm in the fight against Poverty, 2004
- Leary, V., “Lessons from the Experience of the I.L.O” In Alston (Ed) *United Nations and Human Rights*, Clarendon Press, London, 1992
- Leckie, S, “The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform” in Alston and Crawford, (Ed), *The Future of United Nations Human Rights Treaty Monitoring*, Cambridge University Press, Cambridge, 2000
- Liebenberg, S & Pillay, K (eds) *Socio-economic rights in South Africa*, Community Law Centre, University of Western Cape, Cape Town, 2000
- Mayss A , *Principles of Conflict of Laws*, Cavendish Publishing Limited, London, 1999
- Mbazira C , *Strategies for Effective Implementation of Court Orders in South Africa, Socio-Economic Right Project*, Community Law Centre, University of the Western Cape, Cape Town, 2008
- McChesney, A, *Promoting and Defending Economic, Social and Cultural Rights: A Handbook*, Huridocs and AAAS, Washington, 2000
- McGoldrick, D, *The Human Rights Committee its role in the Development of the International Covenant on Civil and Political Rights*, Clarendon Press, London, 1994
- Mckay A & Vizard P, Rights and Economic Growth: Inevitable Conflict or Common Ground in T O’Neil (ed) *Human Rights and Poverty Reduction: Realities, Controversies and Strategies*, Overseas Development Institute (ODI), London, 2006

Moore, B, Using Assets and Partnerships to Address Rural Poverty, in Edmonds, C and Medina, S., (Ed) *Defining an Agenda for Poverty Reduction*, Asian Development Bank, Mandaluyong City, Philippines, 2002

Murray, R, *Human Rights in Africa: From the OAU to the African Union*, Cambridge University Press, Cambridge, 2004

Murray, R, *The African Commission on Human and Peoples' Rights and international law*, Hart Publishing, Oxford, 2000

Okafor, O, *Legitimizing human rights NGOs*, Africa World Press, Trenton, New Jersey, 2006

Oloka-Onyango, J, Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons? Human Development Report Office (HDRO), United Nations Development Programme (UNDP), Human Development Occasional Papers (1992-2007) , No HDOCPA-2000-18

Orucu, E, *Judicial Comparativism in Human Rights Cases*, National Committee of Comparative Law, BIICL Publishers, London, 2003

Ouguerouz F., *The African Charter on Human and People's Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, Martinus Nijhoff , Leiden, 2003

Paton, G.W, *A Textbook of Jurisprudence*, Clarendon Press, Oxford, 1972

Piron, L H, Human Rights and Poverty Reduction: The Role of Human Rights in *Promoting Donor Accountability*, Overseas Development Institute (ODI), London, 2005

Pogge, T, *World Poverty and Human Rights*, Polity Press, London, 2002

Rehman, J, *International Human Rights: A Practical Approach*, Pearson Education Limited, London, 2003

Rendel, M, *Whose Human Rights*, Trentham Book Limited, London, 2007

Rodson, P., and Kjonstad, A, *Poverty and the Law*, Hart Publishing, Oxford, 2001

Sands. P, *Principles of International Environmental Law*, Manchester University Press, Manchester, 1995

Sen, A, *Development as Freedom*, Oxford University Press, Oxford, 1999

Sen, A, *Development as Freedom*, Oxford University Press, Oxford, 1999

Shelton, D, *Remedies in International Human Rights Law*, Oxford University Press, Oxford, 2000

- Shue, H, *Basic Rights-Subsistence, Affluence and the U.S Foreign Policy*, Princeton University Press, Princeton, 1996
- Smith, R., *International Human Rights*, Oxford University Press, Oxford, 2003
- Steiner, H., & Alston, P, *International Human Rights Law in Context: Law, Politics, Morals*, Oxford University Press, Oxford, 2000
- Sunstein, C., *Free Markets and Social Justice*, Oxford University Press, Oxford, 1997
- Swilling, M & Russell, B, *The size and scope of the non-profit sector in South Africa*, Centre for Civil Society, University of Natal, Durban, 2002
- Symonides, J., (Ed), *Human Rights Concepts and Standards*, Ashgate Publishing Co, London, 1997
- Tamasevski, K Strengthening pro-poor law: Legal Enforcement of Economic and Social Rights, T O'Neil (ed) *Human Rights and Poverty Reduction: Realities, Controversies and Strategies*, Overseas Development Institute (ODI), London, 2006
- Toebes, B., *The Right to Health as a Human Right in International Law*, Hart Publishing, London, 1999
- Tomasevski, K., *Education Denied: Cost and Remedies*, Zed Books Ltd, London, 2003
- Tomuschat, C., *Human Rights between Idealism and Realism*, Oxford University Press, London, 2003
- Tuck R, *Natural Rights Theories: Their Origin and Development*, Cambridge University Press, Cambridge, 1979
- Umozurike, O., *The African Charter on Human and Peoples' Rights*, Nijhoff, The Hague, 1997
- Vasek, K. and Alston P., (Ed), *International Dimension of Human Rights*, Connecticut Wood Green Press, West Port, 1982
- Viljoen, F, *International human rights law in Africa*, Oxford University Press, New York, 2007
- Viljoen, F, *International Human Rights Law in Africa: National and International Protection*, Oxford University Press, Oxford, 2007
- Vizard, P, *Poverty and Human Rights: Sen's 'Capability Perspective' Explored*, Oxford University Press, , New York, 2006
- Vizard, P, *Poverty and Human Rights: Sen's 'Capability Perspective' Explored*, Oxford University Press, Oxford, 2006
- Waldron, J, *The Right to Private Property*, Clarendon Press, Oxford, 1990

Wallace, R, *International Human Rights*, Sweet and Maxwell, London, 2001

Wilson, R, *Human Rights Culture and Content*, Pluto Press, London, 1997

### **Journals/Articles**

Acheampong, K, Reforming the substance of the African Charter on Human and Peoples' Rights: Civil and political rights and socio-economic rights, *African Human Rights Journal*, Volume 1, No 2, 2001, Pages 185-204

Agbakwa, S.C., Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights, *Yale Human Rights & Development Law Journal*, Volume 5, 2004, Pages 177-216

Aguirre, D., "Corporate social responsibility and human rights law in Africa", *African Human Rights Law Journal*, Volume 5, No 2, 2005, Pages 239- 265

Algan, B., "Rethinking "Third Generation Human Rights", *Ankara Law Review*, Volume1, No.1 , 2004, Pages 121-155

Anashri, P, Enforcing Social and Economic Constitutional Guarantees Before the Courts: The South African and Indian Experiences, *African Yearbook of International Law*, Volume 15, 2007, Pages 143-161

Andreassen B & Banik D , Human Rights and Extreme Poverty: African Dimensions, Editorial Introduction, *International Journal of Human Rights*, Volume 14, No 1, 2010, Pages 4-12

Appiagyei-Atua, K, "A rights-centred critique of African philosophy in the context of development", *African Human Rights Law Journal*, Volume 5, No 2, 2005, Pages 335-357

Bhagwati, P.N., "Fundamental Rights in their Economic, Social and Cultural Context" in *Developing Human Rights Jurisprudence*, Volume 2, Commonwealth Secretariat, 1988, Pages 19-22

Bilchitz, B., Judicial remedies and socio-economic rights: A response to Christopher Mbazira, C., *Economic and Social Rights Review Volume 9, No 1, 2008*, Pages 9-12

Brand, D and Viljoen, F, A Review of Recent Cases and International Developments, *Economic and Social Review*, Volume 1 No2, 1998, Pages 22-27

Brennan, M, 'To Adjudicate and Enforce Socio-Economic Rights: South Africa Proves That Domestic Courts are a Viable Option', *Queensland University of Technology Law and Justice Journal*, Volume 9, Number 1, 2009, Pages 64-84

Chirwa, D, A fresh Commitment to Implementing Economic, Social and Cultural Rights In Africa *Economic and Social Review*, Volume 3, No. 2, 2002, Page 24-27

Chirwa, D, Non-state actors' responsibility for socio-economic rights: The Nature of Their Obligations under the South African Constitution, *Economic and Social Review*, Volume 3, No 3, 2002, Pages 1-7

Churchill R & Khalia U, The Collective Complaint System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights? *European Journal of International Law*, Volume 15, No 3, 2004, Pages 417-456

Dakas, C.J, Beyond Officialdom: Fallacies and Hypocrisy in Economic, Social and Cultural Rights Discourse and Implementation in Nigeria, *African Yearbook of International Law*, Volume 15, 2007, Pages 29-47

De Vos. Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution, *South Africa Journal of Human Rights*, 1997, Pages 67-101

Dersso, S, The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights, *African Human Rights Law Journal*, Volume 6, No 2, 2006, Pages 358-381

Dugard, J (April 2010) "Can Human Rights Transcend the Commercialization of Water in South Africa? Soweto's Legal Fight for an Equitable Water Policy", *Review of Radical Political Economics*, Volume 42, 2010, Page 175

Dugard, J, Court of First Instance?: Towards a Pro-Poor Jurisdiction for the South African Constitutional Court, *South African Journal on Human Rights*, Volume. 22, No 2, 2006, Pages 261-282

Dugard, J, Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice", *South African Journal on Human Rights*, Volume 24 No 2, 2009, Pages 214-238

Dugard, J, "Rights, Regulation and Resistance: The Phiri Water Rights Campaign", *South African Journal on Human Rights*, Volume 24, No 3, 2009, Pages, 593-611

Eide, A., "Realization of Social and Economic Rights and the Minimum Threshold Approach", *Human Rights Law Journal*, Volume 10, 1989, Pages 35-47

Ellmann, S, A Constitutional Confluence: American 'State Action' Law and the Application of South Africa's Socioeconomic Rights Guarantees to Private Actors, *New York Law School Review*, Volume 45, 2001, Pages 21-75

Fagbongbe, M, Regional Protection of Women's Economic, Social and Cultural Rights in Africa: The Women's Protocol and the African Union, *African Yearbook of International Law*, Volume 15, 2007, Pages 163-185

Ghai. Y., "An Approach to Implementation of Economic and Social Rights", a paper prepared for the INTERIGHTS Advisory Council meeting, 7-9 July, 2000

Gomez, M, Social Economic Rights and Human Rights Commissions, *Human Rights Quarterly*, Volume 17, No 1, 1995, Pages 155-169

- Gwam, C., (2007), Toxic Waste Dumping and the Enjoyment of Economic, Social and Cultural Rights in Africa, *African Yearbook of International Law*, Volume 15, Pages 237-254
- Habib, A. and R. Taylor, "South Africa: anti-apartheid NGOs in transition." *Voluntas: International Journal of Voluntary and Non-profit Organizations*, Volume 10, No 1, 1999, Pages 73-82
- Heyns, C., The African regional human rights system: In need of reform? *African Human Rights Journal*, Volume 1 No 2, 2001, Pages 155-174
- Heyns, C., The African regional human rights system: In need of reform? *African Human Rights Journal*, Volume 1 No 2, 2001, Pages 155-174
- Heyns, C., Update on the South African Human Rights Commission, *Economic and Social Review*, Volume 1 No 2, 1998, Pages 19-22
- Hirschl, R., "Negative" Rights v "Positive" Rights Entitlements: A Comparative Study of Judicial Interpretation of Rights in an Emerging Neo-Liberal Economic order", *Human Rights Quarterly*, Volume 22, 2000, Pages 1060-1098
- Hopkins, K., The Effect of an African Court on the Domestic Legal Order of African States, *African Human Rights Law Journal*, Volume 2 No 2, 2002, Pages 234-251
- Ibe, S., "Beyond justiciability: Realising the promise of socio-economic rights in Nigeria", *African Human Rights Law Journal*, Volume 7, No 1, 2007, Pages 225-248
- Ibhawoh, B., Beyond Naming and Shaming: Methodological Imperatives of Economic, Social and Cultural Rights Advocacy, *African Yearbook of International Law*, Volume 15, 2007, Pages 49-57
- Ida-Eline E., "Developing capacity to realise socio-economic rights: The example of HIV/Aids and the right to food in South Africa" *Economic and Social Review* Volume 5 No3, 2004, Pages 2-6
- Ingrid R., The capability approach: a theoretical survey, *The Journal of Human Development*, Vol. 6, No. 1, 2005, Pages 115-133
- Jamali, D., NGOs in Development: Opportunities and Challenges, *Labour and Management in Development Journal*, Volume 4 No 2, 2003, Pages 2-18
- Jochnick, C., Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights, *Human Rights Quarterly*, Volume 21, Number 1, 1999, Pages 56-79
- Kalantry, S, Getgen, J, & Arrigg Kon, S, 'Enhancing Enforcement of Economic, Social and Cultural Rights using indicators: A focus on the Right to Education in the ICESCR', Volume 32, *Human Rights Quarterly*, 2010, Page 253-310

Kapindu, R., Poverty reduction strategies and the right to health and housing: The Malawian and Ugandan experiences, *African Human Rights Law Journal*, Volume 6 No 2, 2006, Pages 493-523

Khoza S, "Promoting economic, social and cultural rights in Africa: The African Commission holds a seminar in Pretoria", *African Human Rights Law Journal*, Volume 4, 2004, Pages 334-343

Khoza, S., (2002) "The Link between development, social and economic rights: Are Socio-Economic Rights Development Rights"? *Unpublished paper prepared for the NADEL conference entitled: 'Equality and Justice: Gains and Challenges', September 2002, Cape Town*

Klaaren, J, A Second Look at the South African Human Rights Commission, Access to Information and the Promotion of Socioeconomic Rights, *Human Rights Quarterly*, Volume 27, Number 2, 2005, Pages 539-561

Koch, I., "The Justiciability of Indivisible Rights", *Nordic Journal of International Law*, Volume 72, No. 1, 2003, Pages 3-39

Kollapen, J, Monitoring Socio-economic Rights: What the South African Human Rights Commission has done, *Economic and Social Review*, Volume 1 No4, 1999, Pages 30-33

Liebenberg S, *Beyond Civil and Political Rights: Protecting Social, Economic and Cultural Rights under Bills of Rights – The South African Experience*, Paper prepared for conference: Protecting Human Rights, Centre for Comparative Constitutional Studies, Melbourne Law School, 25 September 2007

Liebenberg, S, (1999), (Editorial) *Economic and Social Review*, Volume 1 No4, 1999, Pages 2-3

Liebenberg, S, "South Africa's Evolving Jurisprudence on Socio: Economic Rights: An effective tool in Challenging Poverty?" *Law and Development*, Volume 6, No 2, 2002, Pages 159-192

Liebenberg, S., "Basic Rights Claims: How responsive is reasonable review?" *Economic and Social Review*, Volume 5, No 5, 2004, Pages 7-11

Liebenberg, S., "Developing the Capacity to Realize Socio-Economic Rights" *Economic and Social Review*, Volume 5, No. 3, 2004, Pages 2-4

Liebenberg, S., "Judicial and Civil Society Initiatives in the Development of Economic and Social Rights in the Commonwealth" Background research paper prepared for the Commonwealth Human Rights Initiative's Millennium Report, Human Rights and Poverty Eradication: A Talisman for the Commonwealth (CHRI, New Delhi), 2001

Makinen, A., "Rights, reviews, and spending: Policy outcomes with judicially enforceable rights", *European Journal of Political Research*, Volume 39, 2001, Pages 23-52

Mapulanga-Hulston, K., "Examining the Justiciability of Economic, Social and Cultural Rights", *The International Journal of Human Rights*, Volume. 6, No. 4, 2002, Pages 29-48

Mbazira C, Enforcing socio-economic rights as individual rights; The role of corrective and distributive forms of justice in determining "appropriate relief", *Economic and Social Rights Review* Volume 9 No 1, 2008, Pages 4-9

Mbazira, C, "Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides", *African Human Rights Law Journal*, Volume 6, No 2, Pages 333-357

Mbazira, C., "Reading the right to food into the Africa Charter on Human and People's Rights" *Economic and Social Review*, Volume 5 No. 1, 2004, Pages 5-6

Mbazira, C., "The New Partnership for Africa's Development: Implications for the realisation of socio-economic rights in Africa" *Economic and Social Review*, Volume 5 No 2, 2004, Pages 2-8

Melish, T, Rethinking the "Less or More" Thesis: Supra national Litigation of Economic, Social and Cultural Rights in the America, *New York University Journal of International Law & Politics*, Volume 39, No 1, 2007, Pages 173-339

Mubangizi, J, Prospects and Challenges in the Protection and Enforcement of Socio-Economic Rights: Lessons from the South African Experience, *African Yearbook of International Law*, Volume 15, 2007, Pages 86-106

Mubangizi, J, The Constitutional Protection of Socio-Economic Rights in selected African Countries: A Comparative Evaluation, *African Journal of Legal Studies*, Volume 1, No 2, 2006, Page1- 19

Mubangizi JC & Mubangizi, BC Poverty, human rights law and socio-economic realities in South Africa , *Development Southern Africa*, 1470-3637, Volume 22, Issue 2, 2005, Pages 277 – 290

Muchlinski P,, Social and Human Rights Implications of TNC activities in the Extractive industries, *Transnational Corporations*, Volume 18 No 1, 2009, Page 125-136

Mugwanya, G., Examination of state reports by the African Commission: A critical Appraisal, *African Human Rights Journal*, Volume 1 No 2, 2001, Pages 268-284

Murray, R, "The African Charter on Human Rights and Peoples' Rights 1987 - 2000: An overview of its progress and problems", *African Human Rights Law Journal*, Volume 1, No 1, 2001, Pages 1-17

Murray, R., and Wheatley, S., Groups and the African Charter on Human and People's Rights, *Human Rights Quarterly*, Volume 25, No1, 2003, Pages 213-236

- Musila G, Rights to Effective Remedies under the African Charter on Human and Peoples' Rights, *African Human Rights Law Journal*, Volume 6 No 2 2006, Pages 442-463
- Naldi, G, "Interim measures of protection in the African system for the protection of human and peoples' rights" *African Human Rights Law Journal*, Volume 2, No 1, 2002, Pages 1-10
- Nnamuchi, O, Kleptocracy and Its Many Faces : the Challenges of Justiciability of the Right to Health Care in Nigeria, *Journal of African Law*, Volume 51 , Issue 2, 2007, Pages 1-42
- Nweze, C, Justifiability or Judicialization: Circumventing Armageddon through the Enforcement of Socio-Economic Rights, *African Yearbook of International Law*, Volume 15, 2007, Pages 107-127
- O'Regan, K., "Introducing Socio-Economic Rights", *Economic and Social Review*, Volume 1, No 4, 1999, Pages 1-7
- Obijiofor A, The Rights to "The Highest Attainable Standard of Health": Trade Agreements and the Rights to Health in Africa, *African Yearbook of International Law*, Volume 15, 2007, Pages 223-235
- Ocheje, P, Neo-Liberal Economic Reforms and the Realisation of Social and Economic Rights in Africa, *African Yearbook of International Law*, Volume 15, 2007, Pages 187-205
- Oder, J, Litigating the Right to Health before the African Commission on Human and Peoples' Rights: The Record so Far, *African Yearbook of International Law*, Volume 15, 2007, Pages 129-142
- Odinkalu, A "The role of case and complaints procedures in the reform of the African regional human rights system", *African Human Rights Law Journal*, Volume 1, No 2, 2001, Pages 225-246
- Odinkalu, A., "Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and People's Rights" *Human Rights Quarterly*, 23, 2001, Pages 327-369
- Okere, O, Protection of Human Rights in Africa and the African Charter on Human and People's Rights: A Comparative Analysis with the European and American Systems, *Human Right Quarterly*, Volume 6, Number 2, 1984, Pages 141-159
- Olivier M, "Constitutional Perspectives on the Enforcement of Socio-Economic Rights: Recent South African Experiences" *Victoria University of Wellington Law Review*, Volume 1, No 33, Pages 117-151
- Oloka-Onyango, J., "Beyond the Rhetoric: Reinvigorating the Struggle for Economic, Social and Cultural Rights in Africa", *California Western International Law Journal*, Volume 26, No 1, 1995, Pages 20-29

Olusola, O & Amadu, S, O.A.U and Human Rights: Prospects for the 1980s and Beyond, *Human Right Quarterly*, Volume 8, Issue 1, 1986, Pages 89-103

Pieterse, M., 'Coming to Terms with Judicial Enforcement of Social and economic Rights', *South African Journal on Human Rights*, Volume 20, 2004, Pages 383-417

Pieterse, M., "Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience", *Human Rights Quarterly* 26, 2004, Pages 882-905

Pityana N.B "Reflections on the African Charter on Human and Peoples' Rights", *African Human Rights Law Journal*, Volume 4, 2004, Pages 121-129

Quashigah, K, "The African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism", *African Human Rights Law Journal*, Volume 2, No 2,

Ranchod, K, State-Civil Relations in South Africa: Some Lessons from Engagement, *Policy: issues and actors*, Volume 20, No 7, 2007, Page 1-26

Robeyns I, The Capability Approach: A Theoretical Survey, *Journal of Human Development and Capabilities*, Volume 6, Issue 1, 2005 , Pages 93 – 117

Robinson, M, "Advancing Economic, Social and Cultural Rights: The Way Forward", *Human Rights Quarterly*, Volume 26, No 4, 2004, Pages 867-871

Roth, K., "Defending Economic, Social and Cult Rights: Practical Issues Faced by an International Human Rights Organisation, *Human Rights Quarterly*, Volume 26, No 1, 2004, Pages 63-73

Sajo, A., Socio-Economic Rights and the new International Economic Order, *New York University Journal of International Law & Politics*, Volume 35, No 1, 2005, Pages 221-262

Semalulu, M., A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women", *African Human Rights Law Journal*, Volume 1, No 1, 2001, Pages 40-63

Sob, P, The Implementation Gap in the Economic, Social, and Cultural Rights Field: A Critical Cross-Examination of the Agenda of the United Nations, *African Yearbook of International Law*, Volume 15, 2007, Pages 11-27

Stals C, "The African Peer Review Mechanism as an integral part of the New Partnership for Africa's Development", *African Human Rights Law Journal*, Volume 4, No 1, 2004, Pages 130-138

Stemmet, A., A future African Court for Human and Peoples Rights and domestic human rights norms, Volume 23, *South African Yearbook of International Law*, 1998, Pages 233-246

Thiele, B., 'Litigating Against Forced Evictions under the American Convention on Human Rights', *Netherlands Quarterly of Human Rights*, Volume 21, No 3, 2003, Pages 463-477

Tsanga, A, Moving Beyond Rights in the Realisation of Economic, Social and Cultural Rights: Challenges in Contemporary Africa, *African Yearbook of International Law*, Volume 15, 2007, Pages 69-86

Tushnet, M., "Enforcing socio-economic rights, Lessons from South Africa" *Economic and Social Review*, Volume 6, No. 3, 2005, Pages 2-6

United Nations Development Programme, *The MDGs through Socio-Economic Rights: Constitution making and Implementation Hand Book*, United Nations Millennium Campaign, Bangkok

Vierdag, E.G., "The Legal Nature of the Rights granted by the International Covenant on Economic, Social and Cultural Rights", *Netherlands Yearbook of, International Law*, Volume 9, 1978, Pages 69-103

Viljoen, F, "National legislation as a source of Justiciable Socio-Economic Rights" *Economic and Social Review* Volume 6, No. 3, 2005, Pages 6-9

Viljoen, F, Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa, *Journal of African Law*, Volume 43, No. 1, 1999, Pages 1-17

Wachira, G, and Ayinla, A., Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy, *African Human Rights Journal*, Volume 6, No 2 2006, Pages 465-492

Wimtrengove, T, Judicial Remedies for Violations of Socio-Economic Rights, *Economic and Social Review* Volume 1, No 4, 1999, Pages 13-18

Woods, J, Impunity or Accountability in the Extractive Industries: Regulation, Reform, or Resistance? *African Yearbook of International Law*, Volume 15, 2007, Pages 207-221

Wundeh Eno R "The jurisdiction of the African Court on Human and Peoples' Rights," *African Human Rights Law Journal*, Volume 2, No 2, 2002, Pages 223-233

## **International Documents**

### **United Nations**

Universal Declaration of Human Rights,

G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

International Covenant on Economic, Social and Cultural Rights,

G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49,

U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. res. 63/117 (2008).

International Covenant on Civil and Political Rights,

G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

Optional Protocol to the International Covenant on Civil and Political Rights,

G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976.

Vienna Convention on the Law of Treaties,

1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force January 27, 1980.

Declaration on the Right to Development, G.A. res. 41/128, annex, 41 U.N. GAOR Supp. (No. 53) at 186, U.N. Doc. A/41/53 (1986).

Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991)

Committee on Economic, Social and Cultural Rights, General Comment No. 5, Persons with disabilities (Eleventh session, 1994), U.N. Doc E/1995/22 at 19 (1995)

Committee on Economic, Social and Cultural Rights, General Comment 8, The relationship between economic sanctions and respect for economic, social and cultural rights (Seventeenth session, 1997), U.N. Doc. E/C.12/1997/8 (1997),

Human Rights Committee, General Comment 3, Article 2 Implementation at the national level (Thirteenth session, 1981), U.N. Doc. HRI/GEN/1/Rev.1 at 4

Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991)

Committee on Economic, Social and Cultural Rights, General Comment 9, The domestic application of the Covenant (Nineteenth session, 1998), U.N. Doc.

E/C.12/1998/24 (1998)

Human Rights Committee, General Comment 14, Article 6 (Twenty-third session, 1984), U.N. Doc. HRI/GEN/1/Rev.1 at 18

Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000)

Committee on Economic, Social and Cultural Rights, General Comment 13, The right to education (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999)

Committee on Economic, Social and Cultural Rights, General Comment 11, Plans of action for primary education (Twentieth session, 1999), U.N. Doc. E/C.12/1999/4 (1999)

Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

Committee on Economic, Social and Cultural Rights, General Comment 12, Right to adequate food (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999),

Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12 (2003).

Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2002/13 at 15-21 (2002).

## **Regional Documents**

### **African Union**

African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986

Rules of Procedure of the African Commission on Human and Peoples' Rights, Adopted on 6 October 1995

African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999

Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 9, 1998, OAU Doc.

OAU/LEG/EXP/AFCHPR/PROT (III)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts. L.J. 40, entered into force Nov. 25, 2005

Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, entered into force June 20, 1974

Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the field of Human and Peoples' Rights, ACHPR /Res.33(XXV),99, 1999

Resolution on the Co-operation between the African Commission on Human and Peoples' Rights and NGOs Having Observer Status with the Commission, 1998

Charter of the Organization of African Unity, 479 U.N.T.S. 39, entered into force Sept. 13, 1963

Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, entered into force May 26, 2001

The New Partnership for Africa's Development (NEPAD), 2001

Southern African Development Community (SADC), Treaty, 1992

The Economic Community of West African States (ECOWAS), Treaty 1975

Memorandum of Understanding (MOU) on the African Peer Review Mechanism (APRM) [NEPAD/HSGIC/03-2003/APRM/MOU]; 2003

Declaration on Democracy, Political, Economic and Corporate Governance [AHG/235(XXXVIII) Annex I] 2003

African Peer Review Mechanism, Organisation and Processes [NEPAD/HSGIC/03-2003/APRM/Guideline/O&P]; 2003

Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism, [NEPAD/HSGIC/03-2003/APRM/Guideline/OSCI] 2003

Statutes of the Economic, Social and Cultural Council of the African Union (ECOSSOC), adopted by the Assembly of the African Union, 3<sup>rd</sup> Ordinary Session, 6-8 July, 2004, Addis Ababa, Ethiopia, Assembly/AU/Dec.42 (111)

Kigali Declaration, MIN/CONF/HRA/Decl.1 (I), 2003

Resolution on Economic, Social and Cultural Rights in Africa, 2004, Adopting the Pretoria Declaration, ACHPR /Res.73 (XXXVI) 04

### **Activity Reports/Ordinary Sessions**

20th Annual Activity Report of the African Commission, January to June 2006, EX.CL/279 (IX)

22nd Annual Activity Report of the African Commission on Human and Peoples' Rights 2007, EX.CL/364 (XI)

21st Annual Activity Report of the African Commission on Human and Peoples' Rights  
2007, EX.CL/322 (X)

### **Council of Europe**

European Convention for the Protection of Human Rights and Fundamental Freedoms,  
213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5,  
8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1  
January 1990, and 1 November 1998 respectively

European Convention for the Prevention of Torture and Inhuman or Degrading  
Treatment or Punishment, E.T.S. 126, entered into force Feb. 1, 1989.

European Social Charter, 529 U.N.T.S. 89, entered into force Feb. 26, 1965

Additional Protocol to the European Social Charter, (ETS No. 128), Strasbourg,  
5.V.1988

Additional Protocol to the European Social Charter providing for a System of Collective  
Complaints, (ETS No. 158), entered into force January 7, 1998

### **Organisation of American States**

American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by  
the Ninth International Conference of American States (1948)

American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S.  
123, entered into force July 18, 1978

Additional Protocol to the American Convention on Human Rights in the Area of  
Economic, Social and Cultural Rights, "Protocol of San Salvador," O.A.S. Treaty Series  
No. 69 (1988), entered into force November 16, 1999

### **National Documents**

#### **India**

The Indian Constitution, 1950

#### **United Kingdom**

Human Rights Act, 1998

The Slave Trade Act (citation *47 Geo III Sess. 1 c. 36*), 1807

#### **Nigeria:**

African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act  
Cap. 10 Laws of the Federation of Nigeria 1990

Anti Corruption Bill, 2003

Federal Environmental Protection Agency Act, 1988

Free Universal Basic Education Act, 2004

National Health Insurance Scheme Act, 1999  
National Security Agencies Act, Chapter N74, Laws of the Federation of Nigeria, 2004  
Niger-Delta Development Commission (Establishment, etc.) Act ), 2000  
Nigerian National Human Rights Act, 1995  
Official Secrets Act Cap.O3, Laws of the Federation of Nigeria, (2004).  
The Nigerian Constitution, 1999

### **South Africa**

The South African Constitution, 1996  
South African Native Land Act of 1913  
South African Social Assistant Act 2000  
Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000  
Promotion of Access to Information Act, 2000  
Promotion of Administrative Justice Act, 2000

### **Table of Cases**

#### **Indian Cases**

Olga Tellis v Bombay Municipal Corporation, (AIR 1986 SC 180)  
Francis Coralie v Union Territory of Delhi, (AIR 1981 SC 746)  
Minerva Mills v Union of India (AIR 1980 SC 1789 at 1846)  
Consumer Education & Research Centre v Union of India, (1995) 3 SCC 42

#### **Pakistan**

Shehla Zia vs. WAPDA, PLD 1994 SC 693

#### **United Kingdom**

Higgs & Anor. V. Minister of National Security & Ors, (2000) 2 AC 228

#### **Nigerian Cases**

A.G Lagos State v A.G Federation, (2003) 6SC (pt 1) 24  
Abaribe v Abia State House of Assembly Speaker, (2000) CAPH/83m/2000  
Adamu v Attorney General of Borno State (Nigeria), (1996) 8 NWLR 203, at page 225  
Archbishop Okogie & others v Attorney –General of Lagos State, (1981) 2 NCLR 337  
Attorney General of Ondo State v Attorney General of the Federation and 35 Others,  
[2002] 6 SC (pt 1) at 1.  
Esiaba vs. University of Calabar, (2004) ALL F.W.L.R (Pt. 206) 381  
Fawehinmi vs. Abacha (1996) 9 NWLR (Pt. 475)  
Garba v University of Maiduguri, (1986) 1 NWLR (Pt. 18) 550  
Gbemre v Shell, (Unreported), (2005) Suit no: FHC/B/CS/53/05

Georgina Ahamefule v Imperial Medical Centre & Dr Alex Molokwu , (2000) ID/1627/2000

Mojekwu v Ejikeme, (1999) CA/E/7/99

Mojekwu v. Mojekwu, [1997] 7 N.W.L.R 283

Odafe and Others v Attorney-General and Others, (2003) FHC/PH/CS/680/2003

Olaniyan v University of Lagos, (1985) 1 NWLR (Part 9) 599

Oronto Douglas v Shell Petroleum Development Company Limited, (1999) 2 NWLR (Pt 591) 466

Peter Nemi v Attorney General of Lagos state, 1996 6 NWLR pt452, p.42

Peterside v I.M.B, [2000] 6 NWLR (pt 278) 712

The Registered Trustees of Igbo Community in Oyo state V C. Akabueze & Others, (2001) 1CHR

Ubani v Director SSS, (1999) 11 NWLR Pt. 625 129

Ukeja v Ukeja, Unreported, No. OA/I.174/93

Uzoukwu v Ezeonu, (1991) 6 NWLR pt 2000 P 708 at 761

#### **South African Cases:**

Bhe v. Magistrate Khayelitsha & Ors, (2005) (1) BCLR 1 (CC), 15 Oct.

Carmichele v Minister of Safety and Security and another, (2000) Case CCT 48/00

Despatch Municipality v Sunridge Estate and Development Corporation Ltd, (1997) (8) BCLR 1023

First Certificate Judgement, (1996) 4 SA 744 (CC)

Fose v Minister for Safety and Security, (1997) 3 SA 786

Government of South Africa v Grootboom & Ors, (2000) (11) BCLR 1169. (CC)

Jaftha , Van Rooyen v Stoltz and Other,(2003) Case CCT 74/03

Khosa v Minister of Social Development, (2004) (6) BCLR 569 (CC)

Mahlaule v Minister of Social Development, (2004) (6) BCLR 569 (CC)

Mazibuko & Others v City of Johannesburg & Others, CCT 39/09, [2009] ZACC 28

Minister for Health & Ors v Treatment Action Group, (2002) (5) SA 703 (CC)

Minister of Public Works & Ors V. Kyalami Ridge Environmental Association & Ors, [2002] 1 LRC 139; (2002) 3 CHRLD 313

Minister of Safety and Security v Hamilton, (2001) (3) SA 50 (SCA)

Nkonkobe Municipality v Water Services South Africa (PTY) Ltd and others, (2001) Case No. 1277/2001 (unreported)

Occupiers of 51 Olivia Road & Others v City of Johannesburg, [2008] Case CCT 24/07

Port Elizabeth Municipality v Various Occupiers, (2004) (12) BCLR 1268 (CC)

President of the Republic of South Africa v Modderklip Boerdery ( Pty) Ltd, (2005) (8) BCLR 786 (CC)

President of the Republic of South Africa v South African Rugby Football Union, (1998) Case CCT 16/98

Qozoleni v Minister of Law and Order and Another, (1994) (1) BCLR 75 E at 86C

Residents of Bon Vista Mansions v SMLC, (2002) (6) BCLR 625 (W)

Soobramoney v Minister of Health, (1997) (12) BCLR 1696 CC

### **Cases decided by the African Commission on Human and People Rights**

Abubakar v Ghana, Communication No. 103/93 (1996).

Avocats Sans Frontières (on behalf of Bwampamye) v Burundi, Communication No 231/99, (2000)

Civil Liberties Organization v Nigeria, Communication No. 129/94, (1995)

Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria, Communications 140/94, 141/94 and 145/95, (1999)

Free Legal Assistance Group v Zaire, Communication No 25/89, (1995)

International Pen and Others (on behalf of Saro-Wiwa) v Nigeria, Communication No 137/94 (1998)

International Pen and Others (on behalf of Saro-Wiwa) v Nigeria, Communication No 137/94, (1999)

Legal Resources Foundation v. Zambia, Communication No. 211/98, (2001)

Malawi African Association and others v Mauritania, Communication Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000).

Media Rights Agenda, Constitutional Rights project and Civil Liberties Organisation v. Nigeria, Communication Nos. 105/93, 128/94, 130/94 and 152/96 (1998)

Purohit and Moore v The Gambia, Communication No. 241/2001, (2003)

SERAC and Centre for Economic and Social Rights v Nigeria, Communication No. 155/96 of (1996)

### **Cases decided by the African Court on Human and People Rights**

Michelot Yogogombaye v the Republic of Senegal, application No. 001/2008

### **Cases decided by the Social Committee of the European Social Charter**

Confederation Francaise de l'Encadrement CFE-CGC V France, Complaint No 16, 2003

European Committee on Social Right in European Roma Rights Centre v Greece, Complaint No. 15, 2003

European Roma Right Centre v Bulgaria, Complaint, Complaint No 48/2008

International Centre for the Legal Protection of Human Rights v Croatia, Complaint No 45, 2007

Syndicat National des Professions du Tourisme v France, Complaint No 6, 1999

### **Cases decided by the Human Rights Committee**

Lopez V Uruguay, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 at 88 (1984).

S.W.M. Broeks v. The Netherlands , Communication No. 172/1984, U.N. Doc. CCPR/C/OP/2 at 196 (1990).

Leo Hertzberg *et al.* v. Finland, Communication No. 61/1979, U.N. Doc. CCPR/C/OP/1 at 124 (1985)

### **Internet Sources:**

10th ordinary session 25-26 January 2007 in Addis Ababa,  
[http://www.issafrica.org/dynamic/administration/file\\_manager/file\\_links/AUECDECJA\\_N07.PDF](http://www.issafrica.org/dynamic/administration/file_manager/file_links/AUECDECJA_N07.PDF)

2007/2008 Human Development Report, <http://hdr.undp.org/en/reports/global/hdr2007-2008/>

Access to Justice, Nigeria, About Us, <http://accesstojustice-ng.org/aboutus.php>

Action Aid, Human Rights based Approach to Poverty Reduction and Development, 2008, Page 5, retrieved 23rd July, 2010,  
<http://www.actionaid.org/assets/pdf/RBA%20paper%20FINAL.pdf>

African Human Rights Complaints Handling Mechanisms A Descriptive Analysis, Danish Institute for Human Rights 2008,  
[http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/Dokumenter%20til%20Nyhedsarkiv/African\\_HR\\_Complaints\\_Handling\\_Mechanisms.pdf](http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/Dokumenter%20til%20Nyhedsarkiv/African_HR_Complaints_Handling_Mechanisms.pdf)

African Peer Review Mechanism, Country Self-Assessment for the African Peer Review Mechanism, <http://www.aprm.org.za/docs/questionnaire.pdf>

African Union, Vision of the African Union and Missions of the African Union Commission, Final Draft, March 2004,  
[http://www.africaunion.org/News\\_Events/Calendar\\_of\\_%20Events/visionandmission/VISION%20ET%20MISSIONen.pdf](http://www.africaunion.org/News_Events/Calendar_of_%20Events/visionandmission/VISION%20ET%20MISSIONen.pdf)

Alkire, S., Choosing dimensions: the capability approach and multidimensional poverty, CPRC Working Paper 88, 2007, <http://www.chronicpoverty.org/pdfs/88Alkire.pdf>

Analysis of Purohit and Moore v. The Gambia <http://www.escr-net.org/caselaw/caselaw>

Asian Development Bank, Policy on Education,  
<http://www.adb.org/Documents/Policies/Education>

Awasom, F., NEPAD AND AU: Prospects of Strengthening the Synergies,  
<http://www.codesria.org/Links/conferences/dpmf/awasom.pdf>

Banik, D., Implementing Human Rights based approach: Some preliminary evidence from Malawi, 2007,  
[http://www2.ohchr.org/english/issues/poverty/expert/docs/Dan\\_Banik.pdf](http://www2.ohchr.org/english/issues/poverty/expert/docs/Dan_Banik.pdf)

Bowring, Bill, Forbidden Relations? The UK's Discourse of Human Rights and the Struggle for Social Justice, 2002.  
[http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2002\\_1/bowring](http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2002_1/bowring)

Chene, M., African Peer Review Mechanism, 2009,  
<http://www.u4.no/helpdesk/helpdesk/query.cfm?id=204>

Civil Society Forum, <http://www.nepad.org/2005/files/civilsociety.php>

Coomans, F., Reviewing Implementation of Social and Economic Rights: An Assessment of the “Reasonableness” Test as Developed by the South African Constitutional Court, 2005, [http://www.zaoerv.de/65\\_2005/65\\_2005\\_1\\_a\\_167\\_196.pdf](http://www.zaoerv.de/65_2005/65_2005_1_a_167_196.pdf)

Coomans, F., The Ogoni Case before the African Commission on Human and Peoples’ Rights, <http://www.righttoenvironment.org/ip/uploads/downloads/OgoniCaseProf.Coomans.pdf>

Cooperation with Civil Society, [http://www.fao.org/tc/NGO/fieldwork\\_en.asp](http://www.fao.org/tc/NGO/fieldwork_en.asp)

Corporate Accountability Working Group, Collective Report on Business and Human Rights Submission to the 8<sup>th</sup> Session of the United Nations Human Rights Council, 2008, [http://www.escr-net.org/usr\\_doc/BHRCollectiveReport\\_ESCR-Net.pdf](http://www.escr-net.org/usr_doc/BHRCollectiveReport_ESCR-Net.pdf)

Country Self-Assessment for the African Peer Review Mechanism,  
<http://www.aprm.org.za/docs/questionnaire.pdf>

Danish Institute for Human Rights, African Human Rights Complaints Handling Mechanisms A Descriptive Analysis, 2008,  
[http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/Dokumenter%20til%20Nyhedsarkiv/African\\_HR\\_Complaints\\_Handling\\_Mechanisms.pdf](http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/Dokumenter%20til%20Nyhedsarkiv/African_HR_Complaints_Handling_Mechanisms.pdf)

Department for International Affairs and Co-operation, Republic Of South Africa, An overview of NEPAD, [www.dfa.gov.za/au.nepad/nepad\\_overview.htm](http://www.dfa.gov.za/au.nepad/nepad_overview.htm)

Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies (Paragraph 3) <http://www.unhchr.ch/development/povertyfinal.html>

Duties sans frontières: Human rights and global social justice (2003), International Human Rights Council on Human Rights Policy,  
[http://www.ichrp.org/files/reports/43/108\\_report\\_en.pdf](http://www.ichrp.org/files/reports/43/108_report_en.pdf)

Economic and Financial Crime Commission, EFCC Recovers Six Hundred and Forty Billion Naira in Money Laundering Battle, [www.efccnigeria.org](http://www.efccnigeria.org)

Ellis, F & Mduo, N, *Livelihood and Rural Poverty in Tanzania*, in Mwangi E & Markelova, H, *Collective Action and Property Rights for Poverty Reduction*, 2008, <http://www.capri.cgiar.org/pdf/capriwp82.pdf>

Fagbongbe, M., *Operationalizing the African Court of Human and Peoples' Rights*, 18 May 2007, <http://www.thecourt.ca/2007/05/18/operationalizing-the-african-court-of-human-and-peoples%E2%80%99-rights>

FATE Foundation, *What make FATE unique*, <http://www.fatefoundation.com/aboutUnique.htm>

FinMark Trust, *About Us*, <http://www.finmark.org.za/new/contact/contact-us.aspx?RandomID=6108ddf0-41bb-481c-87db-52bd0d773629&linkPath=MenuContainer&IID=12>

Food & Agricultural Organisation, *Cooperation with Civil Society*, 2009, [http://www.fao.org/tc/NGO/fieldwork\\_en.asp](http://www.fao.org/tc/NGO/fieldwork_en.asp)

Fowler, A., *Civil Society, NGOs and Social Development: Changing the Rules of the Game*, Geneva, 2000, Occasional Paper No.1, [http://www.unrisd.org/unrisd/website/document.nsf/0/f553495f06f98dce80256b5e005c9ddc/\\$FILE/fowler.pdf](http://www.unrisd.org/unrisd/website/document.nsf/0/f553495f06f98dce80256b5e005c9ddc/$FILE/fowler.pdf)

Gawanas, B, *The African Union: Concepts and Implementation Mechanisms relating to Human Rights*, 2008, [www.kas.de/upload/gawanas/pdf](http://www.kas.de/upload/gawanas/pdf)

Ghaus-Pasha, A., *Role of Civil Society Organisations in Governance*, 2004, <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan019594.pdf>

Gloppen, S., *Social Rights Litigation as Transformation South African Perspectives*, Pages 3-4, 2005, <http://www.cmi.no/publications/file/?1965=social-rights-litigation-as-transformation>

Greenstein, Ran; Kola, Soraya, Lopes, Daniel, *Civil Society in South Africa: Opportunities and Challenges in the Transition Process*, The Community Agency for Social Enquiry (C A S E), 2004, <http://www.ukzn.ac.za/CCS/files/USAid%20Final%20Report.pdf>

Haug, R & Ruan, E., *Integrating poverty reduction and the right to food in Africa*, 2002, <http://www.nlh.no/noragric/publications/reports/NoragricRep2B.pdf>

Housing for the Poor, [http://www.sahrc.org.za/housing\\_for\\_the\\_poor.htm](http://www.sahrc.org.za/housing_for_the_poor.htm)

Howse, R., & Mutua, M., *Int'l Ctr. for Human Rights & Democratic Dev., Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization*, 2000, <http://www.ichrdd.ca/english/commndoc/publications/globalization/wtoRightsGlob.html>.

Husy, D., (2005) Assessment of NPO Act,  
[http://www.dsd.gov.za/index2.php?option=com\\_docman&task=doc\\_view&gid=25&Itemid=39](http://www.dsd.gov.za/index2.php?option=com_docman&task=doc_view&gid=25&Itemid=39)

Igwe U, Moving from Skepticism to Partnership Government –civil society Partnership in Nigeria, 2005, [www.intrac.org/docs.php/3340/Igwe%20Uche](http://www.intrac.org/docs.php/3340/Igwe%20Uche)

Iheme, E., Country Report for Nigeria NGO Laws and Regulations,  
<http://www.usig.org/countryinfo/laws/International%20Reporter%20-%20NIGERIA.pdf>

International Federation for Human Rights, The Role of NGOs during sessions of the African Commission for Human and Peoples' Rights and the pre-session NGO Forum, retrieved 16<sup>th</sup> March, 2009, [http://www.fidh.org/IMG/pdf/2008tuto\\_CADHP\\_en.pdf](http://www.fidh.org/IMG/pdf/2008tuto_CADHP_en.pdf)

Jaichand, V, The Implementation and Enforcement of Economic and Social Rights in South Africa, 2006, [http://www.ihrc.ie/\\_fileupload/banners/ECSVinodhJaichand.doc](http://www.ihrc.ie/_fileupload/banners/ECSVinodhJaichand.doc)

Khoza, S., “The Link between development, social and economic rights: Are socio-economic rights development rights?” Unpublished paper prepared for the NADEL conference entitled: 'Equality and Justice: Gains and Challenges', September 2002, Cape Town, [www.communitylawcentre.org.za/ser/research.php](http://www.communitylawcentre.org.za/ser/research.php)

Liebenberg, S., Human Development and Human Rights: South African Country Study, 2000, [http://hdr.undp.org/docs/publications/background\\_papers/Liebenberg2000.html](http://hdr.undp.org/docs/publications/background_papers/Liebenberg2000.html)

Liebenberg, S., Beyond Civil and Political Rights: Protecting Social, Economic and Cultural Rights under Bills of Rights – The South African Experience. Paper prepared for conference: Protecting Human Rights, Centre for Comparative Constitutional Studies, Melbourne Law School, 25 September 2007, <http://acthra.anu.edu.au/articles/Liebenberg.pdf>

M Fagbongbe, Operationalizing the African Court of Human and Peoples' Rights, 18 May 2007, <http://www.thecourt.ca/2007/05/18/operationalizing-the-african-court-of-human-and-peoples%E2%80%99-rights>

Millennium Development Goals, [www.un.org/millenniumgoals](http://www.un.org/millenniumgoals)

Module 9: Obligations of States and Nonstate Actors,  
<http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module9.htm>

Moore, B., Using Assets and Partnerships to Address Rural Poverty, in Edmonds, C and Medina, S., (Ed) Defining an Agenda for Poverty Reduction, Published by the Asian Development Bank,  
[http://www.adb.org/Documents/Books/Defining\\_Agenda\\_Poverty\\_Reduction/Vol\\_1/pr elims.pdf](http://www.adb.org/Documents/Books/Defining_Agenda_Poverty_Reduction/Vol_1/pr elims.pdf)

Mutua, M., The African Human Rights System: A Critical Evaluation, 2000, [hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf](http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf)

NEPAD Overview, [www.dfa.gov.za/au.nepad/nepad\\_overview.htm](http://www.dfa.gov.za/au.nepad/nepad_overview.htm)

NEPAD, <http://www.nepad.org>

New Partnership for African Development, Civil Society Forum, 2005,  
<http://www.nepad.org/2005/files/civilsociety.php>

Nigeria, [www.ng.undp.org](http://www.ng.undp.org)

Nolan, A., Porter, B., and Langford, M., Justiciability of Social and Economic Right:  
An Updated Appraisal, 2007,  
<http://www.chrgj.org/publications/docs/wp/NolanPorterLangford.pdf>

Noyoo, N., Civil Society and Poverty Reduction in South Africa, 2006,  
[http://www.sarpn.org.za/documents/d0002086/Civil-society\\_PR\\_SA\\_Noyoo.pdf](http://www.sarpn.org.za/documents/d0002086/Civil-society_PR_SA_Noyoo.pdf)

Organization for Economic Co-operation and Development, *DAC Guidelines and  
Reference Series, Poverty and Health*, (OECD), 2003,  
<http://bookshop.blackwell.co.uk/jsp/preview2.jsp;jsessionid>

Oloka-Onyango, J., Human Rights and Sustainable Development in Contemporary  
Africa: A New Dawn, or Retreating Horizons? Human Development Report 2000  
Background Paper:  
<http://hdr.undp.org/en/reports/global/hdr2000/papers/joseph%20oloka-onyango1.pdf>

Opoku, E., Effective Stakeholder Participation in the APRM Process for the Promotion  
of Democratic Governance: A Case Study of Ghana, 2006,  
[http://www.undp.org/oslocentre/docs07/eric\\_opoku\\_final.pdf](http://www.undp.org/oslocentre/docs07/eric_opoku_final.pdf)

Pieterse, M., Rethinking the boundaries of social rights litigation: The private-law  
impact of justiciable socio-economic rights, 2007,  
<http://www.enelsyn.gr/papers/w13/Paper%20by%20Marius%20Pieterse.pdf>

Pogge T., Poverty and Human Rights,  
[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)

Pogge, T., Severe Poverty as a Human Rights Violation, 2003,  
[www.etikk.no/globaljustice/papers/GJ2003](http://www.etikk.no/globaljustice/papers/GJ2003)

Poverty Reduction and Human Rights: A Practice Note, 2003,  
[http://www.undp.org/governance/docs/HRPN\\_\(poverty\)En.pdf](http://www.undp.org/governance/docs/HRPN_(poverty)En.pdf)

Public Law Team, Law Commission, Monetary Remedies in Public Law, A Discussion  
Paper, , October 2004,  
[http://www.lawcom.gov.uk/docs/monetary\\_remedies\\_disc\\_paper.pdf](http://www.lawcom.gov.uk/docs/monetary_remedies_disc_paper.pdf)

Publish What You Pay, Promoting Transparency in the Oil and Gas Sector: Challenges  
and Opportunities for Civil Society Organisations, 2005,  
<http://www.neiti.org.ng/publications/PWYP%20PRESENTATION.pdf>

Scappucci, G, The European Social Charter Collective Complaints Procedure and its  
relevance for Roma and Travellers, Presentation,  
[www.coe.int/.../The\\_European\\_social\\_charter\\_collective\\_complaints\\_procedure\\_and\\_its\\_relevance\\_for](http://www.coe.int/.../The_European_social_charter_collective_complaints_procedure_and_its_relevance_for)

Sengupta, A., Poverty Eradication and Human Rights, 2008,  
<http://www.esocialsciences.com/data/articles/Document12662008320.5880396.pdf>

Shell Environmental Devastation in Nigeria, Oil Spills,  
<http://wiwavshell.org/shell%E2%80%99s-environmental-devastation-in-nigeria>

Social Service Delivery, <http://go.worldbank.org/Y8PAGC26D0>

Socio-Economic Rights Action Centre, SERAC@Work, January-April Newsletter 2010, <http://www.serac.org/Publications/Jan-April,%202010%202.pdf>

Socio-Economic Rights,  
<http://www.constitutionalcourt.org.za/site/yourrights/chapter5.pdf>

Stacey, R., An Enabling Environment: The Legal and Policy Framework Required for a Vibrant NPO Sector, 2003, [www.npc.org.za/resources/reports/downloads/Background%20Enabling.doc](http://www.npc.org.za/resources/reports/downloads/Background%20Enabling.doc)

Statement on globalization and its impact on the enjoyment of economic and social rights,  
<http://www.unhchr.ch/tbs/doc.nsf/0/0fad637e6f7a89d580256738003eef9a?Opendocument>

Summary of the Draft Guidelines on a human rights approach to poverty reduction  
[www.unhchr.ch/development/SwissSummary1.doc](http://www.unhchr.ch/development/SwissSummary1.doc)

The African Union Treaties Database: <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>

The content of the right to development, <http://www.unhchr.ch/development>

The Joint United Nations Programme on HIV/AIDS, (UNAIDS), What Constitutes a Rights-based Approach? Definitions, Methods, and Practices, Page 2, 2004, retrieved 20th March 2010, [http://data.unaids.org/Topics/Human-Rights/hrissuepaper\\_rbadefinitions\\_en.pdf](http://data.unaids.org/Topics/Human-Rights/hrissuepaper_rbadefinitions_en.pdf)

Treatment Action Campaign, Overview of TAC,  
<http://www.tac.org.za/community/about>

Udombana, N., The African Human Rights Court, Modelling Its Structure of Procedure, Danish Centre for Human Rights, 2002  
[http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/udombana\\_african\\_human\\_rights\\_court.pdf](http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/udombana_african_human_rights_court.pdf)

Udombana, N., An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?, 2004,  
[http://www.brooklaw.edu/students/journals/bjil/bjil28iii\\_udombana.pdf](http://www.brooklaw.edu/students/journals/bjil/bjil28iii_udombana.pdf)

United Nations Development Programme, Poverty Reduction and Human Rights: A Practice Note, 2003, [http://www.undp.org/governance/docs/HRPN\\_\(poverty\)En.pdf](http://www.undp.org/governance/docs/HRPN_(poverty)En.pdf)

United Nations Development Programme (UNDP), Indicators for Policy Management: A Guide for Enhancing the Statistical Capacity of Policy-makers for Effective Monitoring of the MDGs at the Country Level, 2005, [content.undp.org/go/cms-service/download/publication/?version=live](http://content.undp.org/go/cms-service/download/publication/?version=live)

United Nations, Legal Empowerment of the Poor and Eradication of Poverty, UN/Doc A/64/133, July 2009, [www.un.org/esaa/socdev/documents/legalempowerment](http://www.un.org/esaa/socdev/documents/legalempowerment)

Villiers, B., Protection of Social and Economic Rights: International Perspectives, (Paper 9), 1996, [http://www.chr.up.ac.za/centre\\_publications/occ\\_papers/occ9.html](http://www.chr.up.ac.za/centre_publications/occ_papers/occ9.html)

Vision of the African Union and Missions of the African Union Commission, Final Draft, March 2004, [http://www.africaunion.org/News\\_Events/Calendar\\_of\\_%20Events/visionandmission/VISION%20ET%20MISSIONen.pdf](http://www.africaunion.org/News_Events/Calendar_of_%20Events/visionandmission/VISION%20ET%20MISSIONen.pdf)

Vizard, P., Sen v Pogge on global poverty and human rights, 2006, <http://ethiqueeconomique.neuf.fr/VIZARD2.pdf>

World Bank Global Monitoring Report (GMR), 2010, <http://siteresources.worldbank.org/INTGLOMONREP2010/Resources/6911301-1271698910928/GMR2010WEB.pdf>

World Bank, Country Papers, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPRS/0,,contentMDK:20195487~pagePK:210058~piPK:210062~theSitePK:384201,00.html>

World Bank, Social Service Delivery, <http://go.worldbank.org/Y8PAGC26D0>

## **ANNEX 1**

UN Office of the High Commissioner for Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, 10 September 2002, available at: <http://www.unhcr.org/refworld/docid/3f8298544.html>

### **Guideline 7: Right to Health**

#### **A. Importance of the right to health**

112. Ill health causes and contributes to poverty by destroying livelihoods, reducing worker productivity, lowering educational achievement and limiting opportunities. Because poverty may lead to diminished access to medical care, increased exposure to environmental risks, and malnutrition, ill health is also often a consequence of poverty. Accordingly, ill health is both a cause and a consequence of poverty: sick people are more likely to become poor and the poor are more vulnerable to disease and disability.

113. Good health is central to creating and sustaining the capabilities that poor people need to escape from poverty. A key asset of the poor, good health contributes to their greater economic security. Good health is not just an outcome of development: it is a way of achieving development.

114. Ill health is constitutive of poverty if lack of command over economic resources plays a role in its causation. Thus, the right to health has a crucial role to play in relation to PRS. Further, enjoyment of the right to health is instrumental in securing other rights such as education and work.

115. Health targets are prominent among the MDGs to be achieved worldwide by 2015: for example to reduce under-five child mortality by two thirds and maternal mortality by three quarters, to halve the proportion of people without sustainable access to safe drinking water, and to reverse the spread of HIV/AIDS, and the incidence of malaria and other major diseases. The Millennium Declaration also highlights other crucial health issues such as increasing the availability of affordable essential drugs to all who need them in developing countries. The prominence accorded to health targets and issues in the Millennium Declaration underlines the importance of the right to health in relation to poverty reduction.

#### **B. Scope of the right to health**

116. The right to health is not to be understood as the right to be healthy: the state cannot provide protection against every possible cause of ill health. It is the right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health. The right includes both health care and the underlying determinants of health, including access to potable water, adequate and safe food, adequate sanitation and housing, healthy occupational and environmental conditions, and access to health-related information and education.

117. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's body, including reproductive health, and the right to be free from interference, such as freedom from torture and non-consensual medical treatment.

118. The entitlements include a system of health care and protection that is available, accessible, acceptable and of good quality. Thus, the right to health implies that functioning public health and health care facilities, goods and services are available in sufficient quantity within a state. It also means that they are accessible to everyone without discrimination. Accessibility has a number of dimensions, including physical, information and economic accessibility. Thus, 'information accessibility' includes the right to seek, receive and impart information concerning health issues, subject to the right to have personal health data treated with confidentiality. 'Economic accessibility' means that health facilities, goods and services must be affordable for all. Further, all health

facilities, goods and services must be acceptable ie respectful of medical ethics and culturally appropriate, and of good quality.

119. According to international human rights law, the generic right to health encompasses a number of more specific health rights including: the right to maternal, child and reproductive health; the right to healthy natural and workplace environments; the right to prevention, treatment and control of diseases; and the right to health facilities, goods and services.

**Box 2: The right to health**

**" ICESCR, art. 12:**

"1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

**" General comment No. 14 adopted by the CESCR (E/C.12/2000/4).**

**" See also CRC (arts. 6 and 24); CEDAW (arts. 10(h), 11(f), 12(1), 14(b) and General Recommendation No. 24); CERD (art. 5(e)(iv)).**

**" World Conferences:** United Nations General Assembly Special Session (UNGASS) on AIDS (2001): Declaration of Commitment on HIV/AIDS "Global Crisis - Global Action"; World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban (2001): Durban Declaration and Programme of Action; Second World Assembly on Ageing (2002): Political Declaration and Madrid International Programme of Action on Ageing.

**" Millennium Development Goals 4 (Reduce child mortality), 5 (Improve maternal health) and 6 (Combat HIV/AIDS, malaria and other diseases).**

**" International guidelines on HIV/AIDS and human rights.**

**C. Key targets and indicators**

**Target 1: All people to have access to adequate and affordable primary health care**

Indicators:

- Life expectancy at birth
- Proportion of public expenditure on primary health care
- Proportion of the poor population not covered by any kind of pre-payment mechanisms, by non-discretionary interventions (e.g. exemption schemes, cash subsidies, vouchers) in relation to health user fees, or by privately funded health insurance
- Number of primary health care units per thousand population
- Number of doctors per thousand population
- Proportion of the poor population with access to affordable essential drugs

**Target 2: To eliminate avoidable child mortality**

Indicators:

- Under-five mortality rate
- Infant mortality rate
- Proportion of under-five children immunized against communicable diseases

**Target 3: To eliminate avoidable maternal mortality**

Indicators:

- Maternal mortality ratio
- Proportion of births attended by skilled health personnel
- Proportion of mothers with access to pre- and post-natal medical care facilities

**Target 4: All men and women of reproductive age to have access to safe and effective methods of contraception**

- The rate of use of safe and effective methods of contraception among poor couples of reproductive age who wish to use contraceptives

**Target 5: To eliminate HIV/AIDS**

Indicators:

- HIV prevalence among pregnant women
- Condom use rate
- Number of children orphaned by HIV/AIDS

**Target 6: To eliminate the incidence of other communicable diseases**

Indicators:

- Prevalence and mortality rate associated with communicable diseases
- Proportion of people with access to clean, safe drinking water
- Proportion of people with access to adequate sanitation
- Proportion of people immunized against communicable diseases

**Target 7: To eliminate gender inequality in access to health care**

Indicators:

- Sex ratio (overall, birth and juvenile)
- Disability-adjusted life years lost for men and women
- Ratio of women and men treated in medical institutions

**D. Key features of a strategy for realizing the right to health**

120. States should improve the supply of personal health services and make them more accessible to the poor by:

- Targeting delivery to poor people by providing tailor-made services for vulnerable groups, such as women, the elderly, children, indigenous peoples, minorities, slum-dwellers, labour migrants and remote rural communities, via outreach clinics;
- Ensuring that resource allocation favours the poorer geographical regions;
- Ensuring that resource allocation favours the lower tiers of service delivery, i.e. primary care;
- Prioritizing reproductive, maternal (pre-natal as well as post-natal) and child health care;
- Identifying diseases and medical conditions, such as malaria, tuberculosis and HIV/AIDS, that have a particular impact on the poor and, by way of response, introducing immunization and other programmes that are specifically designed to have a particular impact upon the poor;
- Ensuring that all services are respectful of the culture of all individuals, groups, minorities and peoples, and are sensitive to gender and of good quality;
- Providing essential drugs as defined by the WHO Action Programme on Essential Drugs.

121. States should improve the supply and effectiveness of public health interventions to the poor by:

- Introducing and implementing basic environmental controls, especially regarding waste disposal in areas populated by the poor;
- Ensuring the provision of clean, safe and accessible drinking water;
- Regulating health service provision, for example with a view to eliminating the marketing of unsafe drugs and reducing professional malpractice;
- Providing education and information about the main health problems in local communities, including methods of prevention and control.

122. States must reduce the financial burden of health care and health protection on the poor, for example by reducing and eliminating user fees for the poor. This can be done either by moving away from user fees and introducing other pre-payment mechanisms (e.g. national insurance or general taxation) or by keeping user fees and introducing non-discretionary, equitable and non-stigmatizing interventions for the poor (e.g. exemption schemes, direct cash subsidies and vouchers).

123. States should promote policies in other sectors that bear positively on the underlying determinants of health, entailing particular benefits for the poor, for example by supporting agricultural policies that have positive health outcomes for the poor (e.g. food security); identifying measures that address the negative impact of agricultural policies on the poor (e.g. health and safety risks to agricultural labourers); and generally promoting income-generating activities for the poor.

124. States must ensure that persons living in poverty are treated with equality and respect by all those involved in health care and health protection. Accordingly, States should provide all relevant health staff with anti-discrimination training in relation to disability and health status, including HIV/AIDS.

**Guideline 8: Right to Education**

**A. The importance of the right to education**

125. Education is the primary vehicle by which poor children and adults can lift themselves out of poverty. The exercise of the right to education is instrumental for the enjoyment of many other human rights, such as the rights to work, health and political participation. Lack of education, as manifested by high illiteracy rates and low primary school enrolment ratios, itself constitutes a dimension of poverty. The relevance to poverty of the right to education is underlined by the fact that universal primary education is a Millennium Development Goal to be achieved worldwide by 2015. Thus, all poverty reduction strategies should give close attention to progressive realization of the right to education and ensure that the poor are the first to benefit from improved access to education.

**B. The scope of the right to education**

126. International human rights treaties define the right to education in a comparatively precise manner. In addition to providing free and compulsory primary education for all children, States have an obligation progressively to introduce free and equal secondary education (including vocational training) for all and equal access to free higher education on the basis of capacity. They also have an obligation to intensify fundamental (basic) education, leading above all to the elimination of illiteracy, for adults who have not satisfied their basic learning needs. Equality and non-discrimination are important aspects of the right to education, and States should give priority to equal access for the girl child and particularly vulnerable groups, such as children with disabilities and minority and refugee children.

127. The quality of education should be directed to the development of the child's personality, talents and abilities to their fullest potential, and to preparation of the child for responsible life in a free society, in a spirit of tolerance and respect for human rights, the natural environment, the child's parents and cultural identity, and civilizations different from his or her own. School discipline shall be administered in a manner consistent with the child's human dignity.

128. In principle, States can provide these rights in the context of both private and public educational institutions. Since private schools usually do not guarantee free primary education for all children, States are under an obligation to establish a sufficient number of public schools, hire the required number of qualified teachers and provide for the quality of education as laid down in international human rights law. As a first step, all States parties to the International Covenant on Economic, Social and Cultural Rights should work out and adopt, within two years after ratification, a detailed plan of action for the progressive implementation of the principle of compulsory primary education free of charge for all.

129. In addition to these positive obligations to fulfil the right to education, States have an obligation to respect the liberty of parents to establish and direct their own educational institutions, to choose private schools for their children and to ensure the religious and moral education of their children in conformity with their own convictions.

**Box 3: The right to education**

**– ICESCR, art. 13:**

“1. The States Parties to the present Covenant recognize the right of everyone to education. They agree (...) that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole

period	of	their	primary	education;
<p>(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.</p> <p>3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.</p> <p>4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State."</p> <p>" <b>ICESCR, art. 14:</b></p> <p>"Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all."</p> <p>" <b>General Comment No. 11 adopted by the CESCR (E/C.12/1999/4)</b></p> <p>" <b>General Comment No. 13 adopted by the CESCR (E/C.12/1999/10)</b></p> <p>" See also <b>CRC (arts. 28 and 29 and General Comment No. 1); CERD (art. 5(e)(v)); CEDAW (art. 10)</b></p> <p>" <b>World Conferences: World Declaration on Education for All (Jomtien, 1990); Education for All Summit. The Delhi Declaration and Framework for Action (1993); Education for All: Dakar Framework for Action (2000).</b></p> <p>" <b>Millennium Development Goal 2: Achieve universal primary education.</b></p>				

### C. Key targets and indicators

**Target 1: To ensure universal primary education for boys and girls as soon as possible, but no later than 2015**

#### Indicators:

- Net enrolment ratio in primary education
- Proportion of pupils starting grade 1 who reach grade 5
- Literacy rate in the age group 15-24
- Drop-out and attendance rates in primary schools
- Share of public expenditure on primary education

**Target 2: To make free primary education available to all children**

#### Indicators:

- Proportion of primary school pupils in State schools not paying school fees
- Average fees paid by primary school pupils in State schools

**Target 3: To implement compulsory primary education**

#### Indicator:

- Number of years' schooling made compulsory

**Target 4: To eradicate illiteracy**

#### Indicators:

- Overall adult literacy rate
- Literacy rate in the age group 15-24

**Target 5: To ensure equal access for all to secondary education**

#### Indicators:

- Net enrolment ratio in secondary education, disaggregated for poor and non-poor
- Share of public expenditure on secondary education
- Ratio of girls to boys in secondary education
- Drop-out and attendance rates in secondary education
- Proportion of children with disabilities attending secondary education

**Target 6: To make free secondary education available to all children**

#### Indicators:

- Proportion of secondary school pupils in State schools not paying school fees, disaggregated for poor and non-poor
- Average fees paid by secondary school pupils in State schools

**Target 7: To eliminate gender disparity in primary and secondary education**

Indicators:

- Ratio of girls to boys in primary education
- Ratio of girls to boys in secondary education
- Ratio of literate females to males in the age-group 15-24

**Target 8: To improve the quality of primary and secondary education**

Indicators:

- Pupil-teacher ratio
- Teacher-classroom ratio
- Proportion of primary/secondary school pupils receiving textbooks free of charge

**D. Key features of a strategy for realizing the right to education**

130. Any human-rights based pro-poor education policy should ensure that the most vulnerable and marginalized groups in society have access, free of charge, to the most fundamental types of education, such as primary education, vocational training, literacy programmes and other forms of basic adult education. As a first step, States should formulate and adopt a detailed plan of action for the progressive implementation of the principle of compulsory primary education free of charge for all.

131. As a priority, States should ensure access to primary education for the most vulnerable and marginal, including girls, children with disabilities, minority and refugee children, and those living in remote areas and slums. According to the MDGs, gender disparity in primary education shall should be eliminated, preferably by the year 2005.

132. States should establish a sufficient number of educational institutions for adults that are targeted at the poorest groups in society and accessible to them free of charge. Vocational training shall should play an important role in the programmes of such institutions.

133. In addition to providing free and equal access to these types of education, Governments should ensure that the poor are not discriminated against when receiving education and that their drop-out rates are not significantly higher than those for other groups in society. Special support programmes should enable the poor to have access also to secondary and higher education. For example, poor children should be financially supported by scholarships and provided with transport to school, adequate textbooks, school meals and other services free of charge.

134. School discipline should be administrated in a manner consistent with human dignity. In particular, corporal punishment should be eliminated without delay.

135. Education should be directed to the full development of the human personality and strengthen respect for human dignity, tolerance, human rights and fundamental freedoms. Human rights should have an important place in all school curricula.

## **Annex 2:**

Resolution on Economic, Social and Cultural Rights in Africa, 2004, Adopting the Pretoria Declaration, ACHPR /Res.73 (XXXVI) 04

The resolution states:

1. The right to property in Article 14 of the Charter relating to land and housing entails among other things the following:
  - Protection from arbitrary deprivation of property;
  - Equitable and non-discriminatory access, acquisition, ownership, inheritance and control of land and housing, especially by women;
  - Adequate compensation for public acquisition, nationalization or expropriation;
  - Equitable and non-discriminatory access to affordable loans for the acquisition of property;
  - Equitable redistribution of land through due process of law to redress historical and gender injustices;
  - Recognition and protection of lands belonging to indigenous communities;
  - Peaceful enjoyment of property and protection from arbitrary eviction;
  - Equal access to housing and to acceptable living conditions in a healthy environment.
2. The right to work in Article 15 of the Charter entails among other things the following:
  1. Equality of opportunity of access to gainful work, including access for refugees, disabled and other disadvantaged persons;
  2. Conducive investment environment for the private sector to participate in creating gainful work;
  3. Effective and enhanced protections for women in the workplace including parental leave;
  4. Fair remuneration, a minimum living wage for labour, and equal remuneration for work of equal value;
  5. Equitable and satisfactory conditions of work, including effective and accessible remedies for work place-related injuries, hazards and accidents;
  6. Creation of enabling conditions and taking measures to promote the rights and opportunities of those in the informal sector, including in subsistence agriculture and in small scale enterprises activities;
  7. Promotion and protection of equitable and satisfactory conditions of work of women engaged in household labour;
  8. The right to freedom of association, including the rights to collective bargaining, strike and other related trade union rights;
  9. Prohibition against forced labour and economic exploitation of children, and other vulnerable persons;
  10. The right to rest and leisure, including reasonable limitation of working hours, periodic holidays with pay and remuneration for public holidays.
3. The right to health in Article 16 of the Charter entails among other things the following:
  - Availability of accessible and affordable health facilities, goods and services of reasonable quality for all;

- Access to the minimum essential food which is nutritionally adequate and safe to ensure freedom from hunger to everyone and to prevent malnutrition;
- Access to basic shelter, housing and sanitation and adequate supply of safe and potable water;
- Access to reproductive, maternal and child health care based on the life cycle approach to health;
- Immunization against major infectious diseases;
- Education, prevention and treatment of HIV/AIDS, malaria, tuberculosis and other major killer diseases;
- Education and access to information concerning the main health problems in the community including methods of preventing and controlling them;
- Training for health personnel including education on health and human rights;
- Access to humane and dignified care of the elderly and for persons with mental and physical disabilities;

4. The right to education in Article 17 of the African Charter entails among other things the following:

- Provision of free and compulsory basic education that will also include a programme in psycho-social education for orphans and vulnerable children;
- Provision of special schools and facilities for physically and mentally disabled children;
- Access to affordable secondary and higher education;
- Accessible and affordable vocational training and adult education;
- Addressing social, economic and cultural practices and attitudes that hinder access to education by girl children;
- Availability of educational institutions that are physically and economically accessible to everyone;
- Development of curricula that address diverse social, economic and cultural settings and which inculcate human rights norms and values for responsible citizens;
- Liberty of parents and guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down by the State, and to ensure the religious and moral education of their children in conformity with their own convictions;
- Continued education for teachers and instructors including education on human rights and the continuous improvement of the conditions of work of teaching staff;
- Education for development that links school curricula to the labour market and society's demands for technology and self-reliance.

5. The right to culture in Articles 17 and 18 of the African Charter entail among other things the following:

- Positive African values consistent with international human rights realities and standards;
- Eradication of harmful traditional practices that negatively affect human rights;
- Participation at all levels in the determination of cultural policies and in cultural and artistic activities;
- Measures for safeguarding, protecting and building awareness of tangible and intangible cultural heritage, including traditional knowledge systems;
- Recognition and respect of the diverse cultures existing in Africa;