

**EXAMINING THE LINK BETWEEN ECONOMIC DEVELOPMENT AND THE
ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN AFRICA: A CASE
STUDY OF SOUTH AFRICA AND NIGERIA**

**Thesis submitted in fulfilment of the requirements for the award of the
Degree of Legum Magister**



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ABSTRACT

This year marks 57 years since Organisation of African Unity (OAU) was formed on 25 May 1963 in Addis Ababa, Ethiopia. This year also marks 18 years since the African Union (AU) was formed on 9 July 2002 in Durban, South Africa. This year further marks 39 years since the adoption of the African Charter on Human and Peoples' Rights (African Charter) was adopted on 27 June 1981 in Nairobi, Kenya. This was recorded as historic step towards the protection of human rights in Africa.

There have always been calls for Africa to unite for it to prosper. The OAU and AU were and are respectively for regional integration and for economic transformation.

Intra-African trade is a call that Africa must trade more with itself towards its prosperity. It is further said that intra-African trade will enhance sustainable development and economic growth and it is important.

This research argues that there is a link between economic development and the enforcement of socio-economic rights. Further, this research examines human rights protection, in particular socio-economic protection at global level, the United Nations (UN), at the regional level, the African Union (AU), and as well as the domestic level, in particular South Africa and Nigeria.

This research argues that trade is the main factor of economic development and further argues that World Trade Organization (WTO) does not have the best interests of Africa and continues to argue that African countries must focus on intra-African trade, which will accelerate sustainable economic development and consequently the enforcement of socio-economic rights, which will in turn reduce poverty and better the lives of millions of Africans who are in dire need of socio-economic rights to be enforced due to the living conditions they are in.

Different African constitutions are examined, those that fully protect socio-economic rights, those that partially protect socio-economic rights and those that do not at all have socio-economic rights in their constitutions' Bill of Rights. However, it is as well acknowledged that there are other factors that affect the enforcement of socio-economic rights, corruption and separation of powers are identified, and the former is labelled as the biggest challenge in Africa.

DECLARATION

I, **KATLEGO ARNOLD MASHEGO**, declare that ***EXAMINING THE LINK BETWEEN ECONOMIC DEVELOPMENT AND THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN AFRICA: A CASE STUDY OF SOUTH AFRICA AND NIGERIA*** is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Signed:



Date: 18 December 2020



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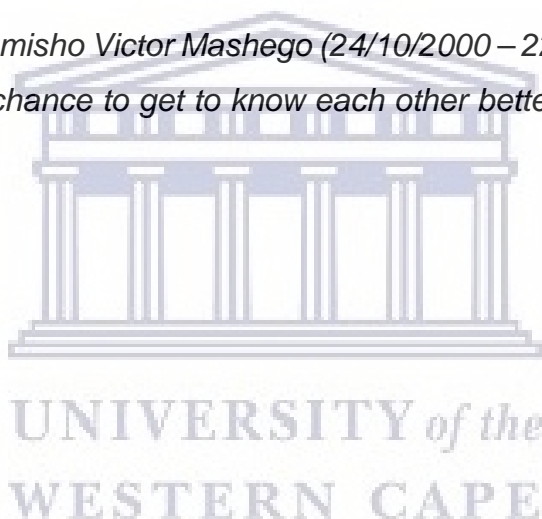
Mr Forrester Schoeman, for just being the best and making things seem okay, always, making me see good in things and forever be hopefully, for supporting me as much as he can. I sincerely thank you and I appreciate a lot.

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DEDICATION

To my uncle, Piet Dintletse Mashego (20/10/1957 – 27/06/2020) who left this world before seeing who I turn out to be, before I reach all he wished I reached, before I get where he channeled me to get. For making me see the world the way I see it, for making me to work hard, for influencing how I think, for leading me to think and be independent, for leading me to what I am.

To my young brother, Tumisho Victor Mashego (24/10/2000 – 22/01/2018) whom even today, I wish we had a chance to get to know each other better, share jokes and get to laugh hard together.



To all the people in Africa struggling to get access to the basics (housing, health care, food, clean water, education and so on):

May this contribute and give hope that we will all arrive to the decent lives we deserve;

May this spark and encourage more advocacy in this very important subject of our lives;

Let us not give up; Let us keep fighting, Let us arrive to economic liberation.

KEYWORDS

Economic development

Human rights obligations

Intra-African trade

Nigeria

Policy making

Poverty

Socio-economic rights

South Africa

United Nations

World Trade Organisation



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ABBREVIATIONS AND ACRONYMS

AfCFTA	African Continental Free Trade Agreement of 2018
African Charter	African Charter on Human and Peoples' Rights
AMU	Arab Maghreb Union
Angola Constitution	Constitution of the Republic of Angola, 2010
Art	Article
AU	African Union
AU Constitutive Act	Constitutive Act of the African Union
Cabo Verde Constitution	Constitution of the Republic of Cabo Verde, 2010
CEDAW	Elimination of All Forms of Discrimination against Women
CEMAC	Central African Economic and Monetary Community
CESCR	Committee on Economic, Social and Cultural Rights
Child Rights Act	Child Rights Act 2003
CMW	International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
COMESA	Common Market for Eastern and Southern Africa
Congo Constitution	Constitution of the Democratic Republic of the Congo
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
EAC	East African Community
ECA	Economic Commission for Africa
ECCAS	Economic Community of Central African States
ECOSOC	Economic and Social Council
ECOSOCC	Economic, Social & Cultural Council

ECOWAS	Economic Community of West African States
ECOWAS	Economic Community of West African States
ERGP	Economic Recovery and Growth Plan
EUMOA	West African Economic and Monetary Union
FAO	Food and Agriculture Organization
GDP	Gross Domestic Product
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
ILO	International Labour Organisation
IMF	International Monetary Fund
LGBTI	Lesbian, Gay, Bisexual and Transgender people, Intersex
MAR	Maximum available resources
Mozambique Constitution	Constitution of the Republic of Mozambique, 2004
MTCT	Mother-to-child transmission
NDP	National Development Plan
NGN	Nigerian Naira
NGOs	Non-governmental organisations
NHI	National Health Insurance
NHRC	National Human Rights Commission

Nigerian Constitution	Constitution of the Federal Republic of Nigeria Act 24 of 1999
OAU	Organisation of African Unity
OHCHR	Office of the High Commissioner for Human Rights
PHC	Primary health care
PRC	Permanent Representatives Committee
RSA Constitution	Constitution of the Republic of South Africa, 1996
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SARS	Special Anti-Robbery Squad
SDGs	Sustainable Development Goals
Sec	Section
SERI	Socio Economic Rights Initiative
Seychelles Constitution	Constitution of the Republic of Seychelles, 1993
STCs	Specialised Technical Committees
TFTA	Tripartite Free Trade Area
UBE Act	Universal Basic Education Act 2004
UDHR	Universal Declaration of Human Rights
UN Charter	United Nations Charter
UN	United Nations
UNESCO	UN Educational, Scientific and Cultural Organization
VAT	Value Added Tax
WHO	World Health Organisation

WTO

World Trade Organisation



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CHAPTER ONE: INTRODUCTION

1.1. Background to the study

The aim of this research is to examine the link between the economic development and the enforcement of socio-economic rights in Africa. While the research considers Africa in general, this research studies in detail South Africa and Nigeria. The discourse of this research is to make one be able to understand the link between economic development and the enforcement of socio-economic rights. One cannot speak of economic development and the enforcement of socio-economic rights in Africa without highlighting colonialism which affected Africa abominably. Colonialism has seen the colonisers deriving out of Africa socio-economic benefits for the colonial powers at the expense of the livelihoods of the colonised people, the Africans.¹ This led to Africa remaining poor while the countries of the colonisers became rich out of the resources of Africa.²

The history of socio-economic rights emanates and traces on a global scale from the Universal Declaration of Human Rights,³ of 1948, (hereinafter UDHR) which covered both socio-economic rights and civil and political rights and later divided into two covenants. On the African regional level, it is submitted that the history of socio-economic rights enforcement emanates from the African Charter on Human and Peoples' Rights⁴ (hereinafter the African Charter), which was adopted on 27 June 1981. The history of economic development in Africa can be traced from 25 May 1963 when the Organisation of African Unity (hereinafter OAU) was formed in Addis Ababa, Ethiopia. To get a better insight, one can highlight what one of the founding fathers of the OAU, Dr Kwame Nkrumah said on the 24 May 1963.

¹ Chirwa DM & Chenwi L 'The Protection of Economic, Social and Cultural Rights in Africa' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 4.

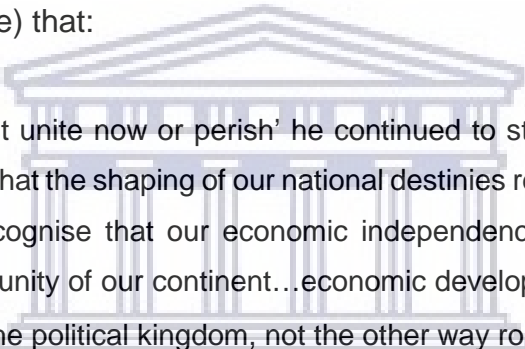
² Chirwa DM & Chenwi L 'The Protection of Economic, Social and Cultural Rights in Africa' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 4.

³ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

⁴ Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

After the OAU, the African Union (hereinafter AU),⁵ was officially launched on 9 July 2002 in Durban, South Africa, following a decision by its predecessor, the OAU. The decision to re-launch Africa's pan-African organisation was the outcome of a consensus by African leaders that in order to realise Africa's potential, there was a need to refocus attention from the fight for decolonisation and ridding the continent of apartheid, which had been the focus of the OAU, towards increased cooperation and integration of African states to drive Africa's growth and economic development.⁶

As indicated earlier, on 24 May 1963 was the day that Dr Kwame Nkrumah in his historic speech told the other African leaders of thirty-one independent states (at that time) that:



'[Africa] must unite now or perish' he continued to state that '[b]ut just as we understood that the shaping of our national destinies required of each of us...so we must recognise that our economic independence resides in our African union...The unity of our continent...economic development of Africa will come only within the political kingdom, not the other way round.'⁷

When Dr. Kwame Nkrumah was addressing regarding Africa's natural resources he stated that:

'[t]he resources are there. It is for us to marshal them in the active service of our people...[o]ur continent certainly exceeds all the others in potential hydro-electric power, which some experts assess as 42% of the world's total'. What need is there for us to remain hewers of wood and drawers of water for the industrialised areas of the world? It is said, of course, that we have no capital, no industrial skill, no communications, and no internal markets, and that we cannot even agree among ourselves how best to utilise our resources for our own social needs...Africa provides more than 60% of the world's gold. A great

⁵ The African Union was established by the Constitutive Act, adopted in Lomé, Togo on 11 July and entered into force on 26 May 2001.

⁶ AU website available at <https://au.int/en/overview> (accessed 08 June 2020).

⁷ Dr Kwame Nkrumah 'We must unite now or perish' by former and first President of Ghana Kwame Nkrumah (24 May 1963) available at <https://newafricanmagazine.com/3721/> (accessed 08 June 2020).

deal of the uranium for nuclear power, of copper for electronics, of titanium for supersonic projectiles, of iron and steel for heavy industries, of other minerals and raw materials for lighter industries – the basic economic might of the foreign powers – comes from our continent... [e]xperts have estimated that the Congo Basin alone can produce enough food crops to satisfy the requirements of nearly half the population of the whole world’.

He continued to allude that ‘[n]ot one of us working singly and individually can successfully attain the fullest development’.⁸ It is argued that this continues to be a reality as Africa continues to suffer and there is no economic development, in some parts is either slow or it is stagnating.

It against the background of economic development that it is submitted that Africa’s share in global trade has not changed. The research makes the point that intra-African trade is a key factor towards economic development. One of the factors that can augment the economic development or for Africa to develop economically, intra-African trade is needed, that is, improve the average intra-African exports and imports.⁹

El-Obaid and Appiagyei-Atua have argued that a rights discourse was an important tool of independence movements, this led to several post-colonial constitutions embodying a bill of rights.¹⁰ They continue to argue that the debate about the human-rights in Africa is a reflection of the continent’s political and legal history. They argue that any discussion of human rights in Africa must be grounded in the political and ideological history of the continent, they identified four broad periods that they deem that they must be covered, namely, the pre-colonial period, the colonial period, the post-colonial (the struggle for independence) and the contemporary period.¹¹

⁸ Dr Kwame Nkrumah ‘We must unite now or perish’ by former and first President of Ghana Kwame Nkrumah (24 May 1963) available at <https://newafricanmagazine.com/3721/> (accessed 08 June 2020).

⁹ United Nations Conference on Trade and Development (UNCTAD) Economic Development in Africa Report 2019 Made in Africa Rules of origin for enhanced intra-African trade 20.

¹⁰ El-Obaid EA and Appiagyei-Atua K ‘Human Rights in Africa – A New Perspective on Linking the Past to the Present’ (1995) 41 *McGill Law Journal* 819.

¹¹ El-Obaid EA and Appiagyei-Atua K ‘Human Rights in Africa – A New Perspective on Linking the Past to the Present’ (1995) 41 *McGill Law Journal* 821.

In addition, part of the Declaration at the 1945 pan-African Congress, for instance read:

'We are determined to be free. We want education. We want the right to earn a decent living; the right to express our thoughts and emotions, to adopt and create forms of beauty. We will fight in every way we can for freedom, democracy, and social betterment'.¹²

Further, it is submitted that the colonisers exploited Africa and that Africa is responsible for economic development in Europe and the colonies of European settlement in North America and Australasia, the economic development of the colonisers were at the expense of African economy.¹³

Moreover, it has been alluded that trade is accepted as an essential tool for growth and the overall economic well-being of a nation.¹⁴ In addition, some empirical studies show how increase in trade had resulted into faster economic growth and development.¹⁵ It is submitted that Africa has to work on a trade agreement that will focus on Africa-intra trade as a link between the volume of trade and the ease of flow of goods and service across international boundaries.¹⁶ As such the African Continental Free Trade Agreement of 2018 (hereinafter AfCFTA) must be rigorously implemented. It is unfortunate that the overall Africa's share of the global trade has not changed over the years, also the export diversification has not changed.¹⁷

¹² El-Obaid EA and Appiagyei-Atua K 'Human Rights in Africa – A New Perspective on Linking the Past to the Present' (1995) 41 *McGill Law Journal* 823.

¹³ Gareth Austin 'African Economic Development and Colonial Legacies' *International Development Policy / Revue internationale de politique de développement* Vol 1 (2010) available at <http://journals.openedition.org/poldev/78> (accessed 20 June 2020).

¹⁴ Jita B & Mousum B 'International trade offers nations services and goods that are not available within its territories and provide access to a bigger market' (2012) 3 (1) *IIMS Journal of Management Science* 48.

¹⁵ Singh T 'Does international trade cause economic growth? A survey' (2010) 33 (11) *The World Economy* 1519.

¹⁶ International Monetary Fund (IMF) 'Global trade liberalization and the developing countries' available at http://www.imf.org/external/np/exr/ib/2001/110801.htm#P37_4958 (accessed 21 June 2020).

¹⁷ United Nations Conference on Trade and Development (UNCTAD) Economic Development in Africa Report 2015 Unlocking the potential of Africa's services trade for growth and development (2015) 23.

It is observed that the challenge that Africa face amongst others is the poor infrastructure, and it is for this reason that it is argued that the said intra-African trade agreement must facilitate for African countries assisting each other, not just a mere trade agreement that does not take into account the challenges of Africa. It was submitted that the poor overall trade performance in Africa has resulted in part due to the fact that in many countries in Africa, the trade-enabling infrastructures to compete on the international markets are lacking.¹⁸

Africa is under a plague caused by weak trade institutions and infrastructure¹⁹ and a scarcity of trade facilitation instruments.²⁰ While on that, it must be noted that Africa imports numerous agricultural products which are also produced on the African continent.²¹ It is without a doubt that intra-African trade can yield good results for Africa and sectors that have the most potential to promote this are manufacturing, agriculture, tourism, and transport sectors.²²

These sectors can indeed improve Africa's economic prospects. Africa is agriculture resources-rich, has a land mass of about 30 million square kilometers, has the second largest continent.²³ About 874 million hectares, which is more than 85 per cent of sub-Saharan Africa surface area, is fertile and suitable for crop farming.²⁴

In addition, other sectors can improve Africa economic development, such as the energy sector. A sufficient power infrastructure is very important towards

¹⁸ Limão N & Tovar P 'Policy choice: theory and evidence from commitment via international trade agreements' (2011) 85 (2) *Journal of International Economics* 186.

¹⁹ Department for International Development (DFID) Annual Report and Accounts (2011) 33.

²⁰ Brenton P, Dihel N, Gillson I & Hoppe M 'Regional trade agreements in sub-Saharan Africa: supporting export diversification' 2011 Africa Trade Policy Notes Note 15 available at <http://documents.worldbank.org/curated/en/595721468211169137/pdf/600160BRI0Afri15TradePolicyREDESIGN.pdf> (accessed 21 June 2020).

²¹ Viljoen W 'The face of African agriculture trade' available at <https://www.tralac.org/discussions/article/11629-the-face-of-african-agriculture-trade.html> (accessed 21 June 2020).

²² International Monetary Fund (IMF) Tackling Challenges Together, IMF 2015 Annual Report (2015) 90.

²³ World Atlas 'The countries of Africa by size' available at <https://www.worldatlas.com/articles/is-africa-a-country.html> (accessed 21 June 2020).

²⁴ FAO 'Extending the area under sustainable land management and reliable water control systems' in New Partnership for Africa's Development (NEPAD) Comprehensive Africa Agriculture Development Programme (CAADP) (2002) 459 available at http://www.fao.org/docrep/005/y6831e/y6831e-03.htm#P442_104688 (accessed 21 June 2020).

economic growth. This is because sustainable economic development requires access to modern, reliable and efficient energy services.²⁵ Unfortunately in Africa this sector is plagued with insufficient capacity, low access, poor reliability and high costs.²⁶

This actually raises questions as to Africa's ability to meet its energy demands because even though the continent has a vast and diverse reserve of energy resources, the challenge is that these energy resources largely remain unexploited.²⁷

This research aims to examine and make a case for African states to unite and work towards intra-African trade as the current trade facilitation agreements are inadequate and do not address the challenges of Africa. This is evident as there is no increase in African countries' share of the global market. Thus, the research argues for a need to focus on intra-African trade and the establishment of the African Continental Free Trade, is a step in the right direction.

The argument made in this research is that intra-African trade will boost economic development and in that regard, the African countries will be able to enforce socio-economic rights.

1.2. Problem statement

The African Charter which could be regarded as the 'constitution' of the member states of the AU among other human rights, guarantees a list of socio-economic rights. It cannot be denied that Africa needs an urgent and robust plan on

²⁵ Castellano A, Kendall A, Nikomarov M, et al. 'Brighter Africa - the growth potential of the sub-Saharan electricity sector' 2015 8 available at https://www.mckinsey.com/~media/mckinsey/industries/retail/our%20insights/east%20africa%20the%20next%20hub%20for%20apparel%20sourcing/brighter_africa_the_growth_potential_of_the_sub%20saharan_electricity_sector.ashx (accessed 1 February 2020).

²⁶ Blimpo MP & Cosgrove-Davies M 'Electricity Access in Sub-Saharan Africa: Uptake, Reliability, and Complementary Factors for Economic Impact' (2019) *Africa Development Forum series* 71.

²⁷ Taliotis C, Shivakumar A, Ramos E, et al. 'An indicative analysis of investment opportunities in the African electricity supply sector — using Temba (the electricity model base for Africa)' (2016) 31 (Supplement C) *Energy for Sustainable Development* 51.

economic development because a number of African nation states are grappling with crippling economies.²⁸

This state of affairs is in general used as an excuse for their failure to meaningfully enforce socio-economic rights.²⁹ The flip side of the coin bears much truth: lack of economic development stifles the enhancement of the progressive realisation of socio-economic rights.³⁰

As suggested by the title of this dissertation, this research examine the link between the state of economic development and the enforcement of socio-economic rights in Africa and two of the leading economies in sub-Saharan Africa, namely South Africa and Nigeria. Further, this research focus on the following socio-economic rights: right to adequate housing, the right to health care, food, water and social security and the right to education, but other socio-economic rights receive brief attention.

This research further covers the fundamental questions which many individuals ask, which includes Chief Justice of South Africa Mogoeng Mogoeng, 'why continents like Africa are in a deplorable and stubborn state of abject poverty'.³¹ Arieff asks a similar question, namely that, how can it be that countries without resources like those that Africa has are more economically developed than Africa?³²

²⁸ Arieff I 'If Africa Is So Rich, Why Is It So Poor?' available at <https://www.passblue.com/2015/05/18/if-africa-is-so-rich-why-is-it-so-poor/> (accessed 1 February 2020).

²⁹ Agbakwa SC 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 5 *Yale Human Rights and Development Law Journal* 186.

³⁰ Agbakwa SC 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 5 *Yale Human Rights and Development Law Journal* 186.

³¹ Chief Justice Mogoeng Mogoeng Speech Titled 'From Imitation to Innovation: Comparative Perspectives on Legal Education' delivered 06 March 2018 at the University of Cape Town available at http://www.law.uct.ac.za/sites/default/files/image_tool/images/99/CJchief%20Justice%20Speech%20UCT%20060318%20Amended%20230318.pdf (accessed 16 December 2020).

³² Arieff I 'If Africa Is So Rich, Why Is It So Poor?' available at <https://www.passblue.com/2015/05/18/if-africa-is-so-rich-why-is-it-so-poor/> (accessed 1 February 2020).

It cannot be ignored as well that colonialism also contributed to the problems Africa is facing, as noted by Chirwa and Chenwi that colonialism has seen the colonisers deriving out of Africa socio-economic benefits for the colonial powers at the expense of the livelihoods of the colonised people, the Africans.³³

The Constitution of the Republic of South Africa, 1996³⁴ (hereinafter RSA Constitution) protects important socio-economic rights, while the Constitution of Nigeria (hereinafter Nigerian Constitution)³⁵ does not; instead, socio-economic rights in Nigeria are protected by ordinary legislation,³⁶ which domesticated the provisions of the African Charter. This means that unlike South Africa, Nigeria does not have the socio-economic rights in its constitution. It is important to note that as at 2020, 54 African states have ratified the African Charter; however, socio-economic rights enforcement is still a problem in Africa.

This research shows that it is possible for African countries to enforce socio-economic rights and it is not unreasonable to state that socio-economic rights must be fulfilled. The argument made in this research is that, currently there is no treaty in Africa that can address the challenges that Africans are facing. By problems, the researcher is referring to economic problems that lead to failure of the enforcement of socio-economic rights in Africa. The problems identified by the research are political and economic.

1.3. Aims and objectives of the research

³³ Chirwa DM & Chenwi L 'The Protection of Economic, Social and Cultural Rights in Africa' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 4.

³⁴ Constitution of the Republic of South Africa, 1996.

³⁵ Constitution of the Federal Republic of Nigeria Act 24 of 1999.

³⁶ African Charter on Human and People's Rights (Ratification and Enforcement) Act, Cap. A9, Laws of the Federation of Nigeria, 2004.

The purpose of this research is to examine the link between the state of economic development and the enforcement of socio-economic rights in Africa with specific reference to the two of the leading economies in sub-Saharan Africa, namely South Africa and Nigeria. The study focuses on realisation of the following socio-economic rights: right to adequate housing, the right to health care, food, water and social security and the right to education, however, other socio-economic rights receive brief attention.

The study aims to explore whether economic development can lead to full enforcement of socio-economic rights in Africa. The study also aims to address the obstacles which prevent the economic development and suggest possible solutions.

1.4. Research question and sub-questions

The main question of this research is:

- What is the link between economic development and enforcement of socio-economic rights in Africa?

The sub-questions of this research are:

- What is the link between economic development and enforcement of socio-economic rights in South Africa?
- What is the link between economic development and enforcement of socio-economic rights in Nigeria?
- Why a continent, like Africa, is in a deplorable and stubborn state of abject poverty?
- How can it be that countries without resources like those that Africa has are more economically developed than Africa?

1.5. Significance of research

Socio-economic rights are to be recognised, must be seen to be relevant³⁷ and are acknowledged³⁸ as opposed to in the past were civil and political rights were mostly attended to and not the socio-economic rights. However, despite the fact that Africa is a resource-rich continent,³⁹ many of Africa's citizens do not benefit from socio-economic rights due to their respective countries not having the means to enforce such rights – reports show that poverty in Africa affects close to 50 percent of the African population.⁴⁰ The researcher submits that this study is significant because it explores the link between economic development and the enforcement of socio-economic rights in Africa and it suggests possible solutions to this problem.

The research makes recommendation for the gradual enforcement of socio-economic rights which must be preceded by the enforcement of domesticated laws originating from the African Union.

1.6. Argument or answer

For the socio-economic rights to be enforced, countries in Africa need to have good economies and good economies in Africa particularly, require regional laws⁴¹ of trade that are feasible to the African States. There is an economic argument that explains why African economies are failing, it was found that the reason for failure of African economies is due to the fact that they have just been incorporated in the global economy system that is seen to be favouring industrialised countries.⁴²

³⁷ Chirwa DM & Chenwi L 'The Protection of Economic, Social and Cultural Rights in Africa' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 3.

³⁸ Chirwa DM & Chenwi L 'The Protection of Economic, Social and Cultural Rights in Africa' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 3.

³⁹ Viljoen F *International Human Rights Law in Africa* 2 ed (2012) 544.

⁴⁰ United Nations Development Programme (UNDP), MDG Report 2015: Assessing Progress in African towards the Millennium Development Goals (2015) xiii.

⁴¹ Strydom H 'International law making as an attribute of state sovereignty' in Strydom H (ed) *International Law* 3 ed (2016) 68.

⁴² El-Obaid EA and Appiagyei-Atua K 'Human Rights in Africa – A New Perspective on Linking the Past to the Present' (1995) 41 *McGill Law Journal* 852.

The above complements the argument made in this research that Africa needs to focus on trading with itself most in order to develop the African economy. Therefore, this research first, recommends the rigorous implementation of the AfCFA, which is aimed at increasing intra-trade African, if enforced. Secondly, the African countries needs to take steps to enforce all socio-economic rights and not only speak of a mere 'progressive realisation'. The researcher proceed to argue that currently the existing trade treaties need to be re-negotiated and be concluded in a way that is of beneficial for all the parties concerned and not just one or certain states due to the financial or political power.

Lastly, the researcher's argument extends to ways in which corruption can be addressed, as per the said renegotiated treaty, there must be a way to address corruption as for smooth running of different states. Reports have found that with the right infrastructure, enabling policy amongst others Africa can become a world leader in a number of businesses,⁴³ and this will add to economic development.

1.7. Originality of argument (literature survey)

Governments have four major tiers of obligations, they must, 'respect', 'protect', 'fulfil', and 'promote' human rights.⁴⁴ Human rights protection function at four levels,⁴⁵ the inner layer, forming the core of protection, is the national level, sometimes referred to as domestic or municipal, here we speak of the states themselves, for instance South Africa or Nigeria.

After this layer, is the sub-regional level, for instance a number of states working together, such as those in certain regions of the continent, for example, the

⁴³ United Nations Conference on Trade And Development (UNCTAD), Economic Development In Africa Report 2018: Migration for Structural Transformation (2018) 151.

⁴⁴ Viljoen F *International Human Rights Law in Africa* 2 ed (2012) 6.

⁴⁵ Viljoen F *International Human Rights Law in Africa* 2 ed (2012) 5.

Southern African Development Community (SADC), SACU (Southern African Customs Union), COMESA (Common Market for Eastern and Southern Africa) and the Economic Community of West African States (ECOWAS). This is then followed by the regional level comprising of states situated in a particular continent or in a hemisphere, for instance the AU or European Union. Lastly, the global level, which is under the auspices of the United Nations (hereinafter UN).

International human rights law was established as a normative beacon, beckoning states to an internationally agreed upon minimum standards of behaviour, and as a 'safety net' for individuals who are denied their rights under domestic system, or who fall through the cracks of the national legal system.⁴⁶ Any individual, for instance, in any African state who is of the view that his/her rights are being infringed and is not satisfied with the decision of his or her respective state regarding the infringement may approach for instance the African Court.⁴⁷

It is evident that socio-economic rights have short history in many countries in the world, particularly in Africa.⁴⁸ The focus was initially on civil and political rights, the so-called first-generation rights.⁴⁹ As already alluded to, this is because enforcement of socio-economic rights depends on the state of the economy, and the effective and efficient of management of the economic resources.⁵⁰

⁴⁶ Viljoen F *International Human Rights Law in Africa* 2 ed (2012) 9.

⁴⁷ African Charter on Human and People's Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986.

⁴⁸ Shehu AT 'The Enforcement Of Social And Economic Rights In Africa: The Nigerian Experience' (2013) 2 (1) *Journal of Sustainable Development Law and Policy* 105.

⁴⁹ Shehu AT 'The Enforcement Of Social And Economic Rights In Africa: The Nigerian Experience' (2013) 2 (1) *Journal of Sustainable Development Law and Policy* 101.

⁵⁰ Shehu AT 'The Enforcement Of Social And Economic Rights In Africa: The Nigerian Experience' (2013) 2 (1) *Journal of Sustainable Development Law and Policy* 101.

It must be noted that African economic performance improved with the progressive implementation of measure that promote free trade,⁵¹ and this forms the basis of the argument in this research that there has to be an African treaty or development and rigorous implementation of the AfCFTA to address the economic development and in that way socio-economic rights will be addressed. As Falk argues, 'research strongly suggests that most Third World countries possess the resources to eliminate poverty and satisfy basic human needs if their policy makers were so inclined.'⁵²

The African Commission has found Nigerian government in violation socio-economic rights that are implied in the African Charter, rights to food and housing/shelter.⁵³ In South Africa, the RSA Constitution is known for its commitment to socio-economic rights,⁵⁴ there are number of cases that address socio-economic rights in South Africa.

The *Government of the Republic of South Africa and Others v Grootboom and Others*⁵⁵ (hereinafter *Grootboom*), is one of the most relevant in terms of 'progressive realisation' of socio-economic rights, where the Constitutional Court held that section 26(2) of the RSA Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.⁵⁶ On that note, enforcement of socio-economic rights positively can be problematic and deserving collective transformation policy agenda in

⁵¹ Bah EM, Moyo JM, Verdier-Chouchane A, et al 'Assessing Africa's competitiveness: Opportunities and challenges to transforming Africa's economies' in The Africa Competitiveness Report 2015 (2015) 3.

⁵² Richard Falk, Responding to Severe Violations, in ENHANCING GLOBAL HUMAN RIGHTS 225 (Jorge I. Dominguez et al. eds., 1979).

⁵³ *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria* (Communication No. 155/96).

⁵⁴ Chenwi L 'Socio-economic Gains and Losses: The South African Constitutional Court and Social Change' (2011) *SAGE publications* 427.

⁵⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

⁵⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) para 99.

Africa.⁵⁷ For the socio-economic rights, a minimum level of economic development is necessary for effective and efficient enforcement.⁵⁸

As much as great focus is given on the state of the economy, one cannot ignore corruption, which prevails, in many if not all African states and hinders progress. Viljoen argues that corruption is a serious problem in Africa, not only hindering progress towards 'good governance', but also undermining the protection of human rights⁵⁹. Corruption is a worldwide phenomenon; hardly is there any nation in the world today without one form of corruption or the other.⁶⁰

The International Council on Human Rights Policy (ICHRP) has demonstrated how corruption is capable of impacting negatively on the enforcement of socio-economic rights, whether rights to food, through diversion of essential resources from social spending and corrupt practices in relation to the possession and use of land and natural resources⁶¹. The continent must be ready to fight corruption to the roots in order for socio-economic rights to be enforced fully.⁶²

Mbazira argues that the African Charter, in addition to the civil and political rights, protects a wide range of economic, social and cultural rights. But, in spite of this, the majority of the people in Africa live in poverty, disease and ignorance

⁵⁷ Shehu AT 'The Enforcement Of Social And Economic Rights In Africa: The Nigerian Experience' (2013) 2 (1) *Journal of Sustainable Development Law and Policy* 105.

⁵⁸ Jaconelli J 'The Protection of Economic and Social Rights' 3:1 *Third World Legal Studies*, 87 (1984).

⁵⁹ Viljoen F *International Human Rights Law in Africa* 2 ed 292.

⁶⁰ Shehu AT 'The Enforcement Of Social And Economic Rights In Africa: The Nigerian Experience' (2013) 2 (1) *Journal of Sustainable Development Law and Policy* 117.

⁶¹ International Council on Human Rights Policy 'Corruption and Human Rights: Making the Connection' 49-50 (2009) available at http://www.ichrp.org/files/reports/40/131_web.pdf (accessed 09 October 2019).

⁶² Shehu AT 'The enforcement of social and economic rights in Africa: The Nigerian experience (2013) 2(1) *Journal of Sustainable Development Law and Policy* 101.

and lack of basic necessities of life, such as, water, food, housing, clothing and health care.⁶³

While it is evident that Africa has considerable natural resources, the problem is therefore not scarcity of resources,⁶⁴ but lack of appropriate legal mechanisms that will focus on developing the African economy. It would seem that African countries have to grapple with the problem of appropriately channeling available resources in the enforcement of the socio-economic rights, for example, the Nigerian government allocated resources towards building a stadium while there was a need for certain socio-economic rights to be addressed at the time.⁶⁵

1.8. Methodology

This research utilises the qualitative research methodology and will be desktop based. The study depend on both primary and secondary sources, namely case law, international treaties, domestic legislation, books, articles, journals, and information that can be found on the internet will be explored. A critical analysis of international and regional instruments will be made to establish the scope and content of socioeconomic rights in Africa.

This research is also based on a review and analysis of literature that is relevant to the subject of study. Primary sources as international law instruments in the area of socio-economic rights are relied on for the purposes of construing the nature of the obligations that these rights engender and how these may be enforced by the courts.

⁶³ Christopher Mbazira. The enforcement of socio-economic rights in the African human rights system: Drawing inspiration from the International Covenant on Economic, Social and Cultural Rights and South Africa's evolving jurisprudence (Ph.D. Thesis, University of Western Cape, 2007).

⁶⁴ Agbakwa SC 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 5 *Yale Human Rights and Development Law Journal* 189.

⁶⁵ Agbakwa SC 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' (2002) 5 *Yale Human Rights and Development Law Journal* 180.

A study of domestic legislation including the RSA Constitution, the Nigerian Constitution and other Acts of the two countries are also be studied with the same objective in mind. Case law, not only from the African Court on Human and Peoples' Rights, but also domestic case-law of other African (and other) countries not limited to South Africa and Nigeria. Relevant case law and other material accessible on the internet are also utilised.

1.9. Limitations of the research

The research examines the issues of economic development and enforcement of socio-economic rights in Africa with particular reference to South Africa and Nigeria. The research is limited to specific socio-economic rights which are: the right to adequate housing; the right to health care, food, water and social security and the right to education. However, other socio-economic rights receive brief attention where the need arises, for example in order to draw comparisons.

1.10. Substantiating the argument (chapter outline)

This study is divided into five chapters. **Chapter One**, which is the present Chapter introduces the research topic, the background of the study, the relevance of this study, the problem statement, the research questions, the objectives of the study, the research methodology, the literature review and the chapter's outline.

In **Chapter Two**, international and regional instruments, dealing with economic development and the enforcement of socio-economic rights are examined. The Chapter focus on the United Nations, the conclusion of treaties, international treaties will be examined on the topic with more focus on regional treaties, cases related to socio-economic rights enforcement on regional and national levels will be examined.

In **Chapter Three**, the link between economic development and the enforcement of socio-economic rights in South Africa is investigated. The Chapter focuses on the South African economy, South Africa's track record regarding the enforcement of socio-economic rights, the institutions tasked with enforcing these rights, namely the courts, the South African Human Rights Commission and lastly the non-governmental organisations (NGOs). The Chapter will evaluate how the South African government 'respects', 'protects', 'fulfils', and 'promotes' socio-economic rights. The Chapter will also examine other factors affecting the enforcement of socio-economic rights, namely corruption, the doctrine of separation of powers and other factors.

In **Chapter Four**, the link between economic development and the enforcement of socio-economic rights in Nigeria is examined. The Chapter investigates the Nigeria economy, Nigeria's enforcement track record with regards to socio-economic rights, as well as the institutions tasked with enforcing human rights such as the courts, and lastly the NGOs. The research evaluates how the Nigerian government 'respects', 'protects', 'fulfils' and 'promotes' socio-economic rights. The Chapter then proceeds to investigate other factors that impact the enforcement of socio-economic rights, namely corruption, the doctrine of separation of powers and other factors.

Chapter Five serves as a conclusion to the study and makes recommendations on the findings of the research.

CHAPTER TWO: EXAMINING THE INTERNATIONAL AND REGIONAL INSTRUMENTS DEALING WITH ECONOMIC DEVELOPMENT AND THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS

2.1. Introduction

The main objective of this Chapter is to examine the international and regional instruments dealing with economic development and the enforcement of socio-economic rights. The Chapter focuses on UN, the conclusion of treaties, international instruments are examined on the topic with emphasis being placed on regional treaties and cases related to socio-economic rights enforcement at regional level.

To gain a thorough understanding of the UN treaties on the topic, the treaties and institutions related to the topic are examined. After dealing with the UN, which is at global level, the researcher then moves onto the regional level, the AU, the treaties protecting socio-economic rights as well at this level are examined. Thereafter, the researcher investigates the sub-regional level and national levels, briefly.⁶⁶

This Chapter is divided into two major sections, the first section addresses socio-economic rights at the global level and the second section deals with socio-economic rights at the regional level. The UN agencies and organs are discussed in the first part of this Chapter, with specific reference to the role that they play in socio-economic rights and economic development in Africa. The levels of global trade and intra-African trade are investigated in this chapter with reference to socio-economic rights and economic development in Africa.

Socio-economic rights are closely related to development and eradication of poverty.⁶⁷ It must be elaborated that socio-economic rights comprise of economic, social and cultural rights. Economic rights are 'essentially

⁶⁶ 1.5 of Chapter 1 explains what is meant by 'national', 'sub-regional', 'regional' and 'international' levels.

⁶⁷ Chirwa DM & Chenwi L 'The Protection of Economic, Social and Cultural Rights in Africa' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 3.

empowerments rights, they enable individuals to sustain a livelihood and achieve independence'.⁶⁸ As per the International Covenant on Economic, Social and Cultural Rights⁶⁹ (hereinafter ICESCR), such rights include the right to work,⁷⁰ the right to just and favourable conditions of work, the right to form and join trade unions,⁷¹ and the right to social security including social insurance.⁷² Social rights are 'rights whose purpose is to guarantee the basic means of subsistence, survival and development'.⁷³ Such rights include the right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions, the right to the highest attainable standard of physical and mental health and the right to family assistance.⁷⁴

Cultural rights 'essentially protect and promote participation in certain forms of activities that are crucial to one's individual or collective identity'.⁷⁵ Such rights are the right of everyone to take part in cultural life, enjoy the benefits of scientific progress and its applications and benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.⁷⁶

2.2. Socio-economic rights enforcement at the global level

At the global level, the protection of socio-economic rights lies with the UN. One of the purposes of the UN can be found in the UN Charter and it is recorded as follows: 'to achieve international co-operation in solving international problems

⁶⁸ Chirwa DM & Chenwi L 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 42.

⁶⁹ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

⁷⁰ International Covenant on Economic, Social and Cultural Rights art 6.

⁷¹ International Covenant on Economic, Social and Cultural Rights art 8.

⁷² International Covenant on Economic, Social and Cultural Rights art 9.

⁷³ Chirwa DM & Chenwi L 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 41.

⁷⁴ Alston P & Goodman R *International Human Rights* (2013) 286.

⁷⁵ Chirwa DM & Chenwi L 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 42.

⁷⁶ International Covenant on Economic, Social and Cultural Rights art 15.

of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.⁷⁷ With regards to this, it is then noted that socio-economic rights are recognised internationally or at the global level. It bears mentioning that currently, all African states, with the exception of South Sudan, are party to the UN.⁷⁸ This is significant considering the fact that the UN only had four member states⁷⁹ when it was formed in 1945, as they were at the time, the only independent states.⁸⁰

The responsibility for the protection of human rights under the UN Charter is assigned to Economic and Social Council (hereinafter ECOSOC), which has the mandate to conduct studies and make recommendations.⁸¹ The General Assembly has the responsibility of 'promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.⁸²

The formation of the UN in 1945 and the establishment of International Human Rights serves as indication the human rights are not solely the responsibility of each nation but that all nations are collectively and individually responsible for human rights.⁸³

The following UN specialized agencies and programmes play a significant role in protecting and promoting human rights in Africa, namely: (1) the Office of the High Commissioner for Human Rights (hereinafter OHCHR) – which is at the forefront of protecting and promoting human rights in the African continent; (2) the Secretariat from where the UN's human rights efforts are coordinated; (3)

⁷⁷ United Nations Charter art 1(3).

⁷⁸ United Nations UN website <http://ask.un.org/faq/22882> (accessed 08 March 2020).

⁷⁹ Egypt, Ethiopia, Liberia, and the Union of South Africa.

⁸⁰ Viljoen F *International Human Rights Law in Africa* 2 ed (2012) 45.

⁸¹ United Nations Charter art 62 (1).

⁸² United Nations Charter art 13 (1) (b).

⁸³ Chirwa DM & Chenwi L 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 33.

International Labour Organization (ILO); (4) the Food and Agriculture Organization (FAO); (5) the UN Educational, Scientific and Cultural Organization (UNESCO); and (6) the World Health Organization (WHO).⁸⁴ The above were enlisted or considered out of many UN Specialised agencies and programmes due to their 'clear 'legal' mandate with respect to human rights, either in norm-setting or norm-implementation'⁸⁵ and they all derive their existence from the UN Charter and function under the UN.

The OHCHR is the leading UN entity on human rights, it is entrusted with a unique mandate to promote and protect all human rights for all people. The OHCHR provides assistance in the form of technical expertise and capacity-development in order to support the implementation of international human rights standards on the ground.⁸⁶

2.2.1. The structure of the UN

The UN has six main organs which are the General Assembly,⁸⁷ the Security Council,⁸⁸ the Economic and Social Council,⁸⁹ the Trusteeship Council,⁹⁰ the International Court of Justice⁹¹ and the Secretariat.⁹²

2.2.2. The United Nations Treaties

The adoption of the UDHR in 1948 marked a turning point in the global recognition and protection of human rights.⁹³ As noted,⁹⁴ the UDHR does not

⁸⁴ Viljoen *F International Human Rights Law in Africa* 2 ed (2012) 47.

⁸⁵ Viljoen *F International Human Rights Law in Africa* 2 ed (2012) 47.

⁸⁶ The Office of the High Commissioner for Human Rights <https://www.ohchr.org/EN/AboutUs/Pages/WhatWeDo.aspx> (accessed 15 March 2020).

⁸⁷ United Nations website <https://outreach.un.org/mun/content/general-assembly> (accessed 15 March 2020).

⁸⁸ United Nations website <https://outreach.un.org/mun/content/security-council> (accessed 15 March 2020).

⁸⁹ United Nations website <https://outreach.un.org/mun/content/economic-and-social-council> (accessed 15 March 2020).

⁹⁰ United Nations website <https://outreach.un.org/mun/content/trusteeship-council> (accessed 15 March 2020).

⁹¹ United Nations website <https://outreach.un.org/mun/content/international-court-justice> (accessed 15 March 2020).

⁹² United Nations website <https://outreach.un.org/mun/content/secretariat-0> (accessed 15 March 2020).

⁹³ Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) xvii.

⁹⁴ See 1.1 of Chapter 1.

show distinction between the rights, it is combination of civil and political rights, as well as economic, social and cultural rights. However, there is a distinction between the two, which was shown in the adoption of International Covenant on Civil and Political Rights⁹⁵ (hereinafter ICCPR) and ICESCR by the UN. The rights contained in the ICCPR were appropriate to be implemented by courts, while the rights contained in the ICESCR were not.⁹⁶ The enforcement or monitoring of implementation of the rights did not apply equally, the ICCPR received much attention while ICESCR did not, and in fact the ICCPR could be enforced via complaint procedures while ICESCR did not, until very recently, and it is believed that bifurcation of the UDHR contributed to this problem.⁹⁷

In addition, the Committee on Economic, Social and Cultural Rights (hereinafter CESCR) was only established very recently, this Committee is the one that monitors the implementation of ICESCR.⁹⁸ The marginalisation of economic, social and cultural rights can be easily seen at the level of national constitutions, which regards these rights as not being justiciable.⁹⁹

It is important to know how international law views the legal obligations that arise from treaties. The Vienna Convention on the Law of Treaties¹⁰⁰ in article 11, termed '[m]eans of expressing consent to be bound by a treaty' states that '[t]he consent of a State to be bound by a treaty may be expressed by signature,

⁹⁵ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

⁹⁶ Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) xvii.

⁹⁷ Chirwa DM & Chenwi L 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 33.

⁹⁸ Chirwa DM & Chenwi L 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 34.

⁹⁹ Chirwa DM & Chenwi L 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 34.

¹⁰⁰ Vienna Convention on the Law of Treaties, Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331.

exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.’¹⁰¹

a) The International Covenant on Economic, Social and Cultural Rights

The ICESCR is the international treaty that protects socio-economic rights of all people. At the moment, almost all African states have ratified this treaty, with the exception of Botswana, Mozambique and South Sudan.¹⁰²

The Preamble of the ICESCR stipulates that:

‘[I]n 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 are created whereby everyone may enjoy his economic, social and cultural rights.....the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.....that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant’.¹⁰³

The ICESCR protects a number of rights which include the right to an adequate standard of living, including adequate food, clothing and housing,¹⁰⁴ the right to enjoy the ‘highest attainable standard’ of physical and mental health,¹⁰⁵ the right of everyone to education,¹⁰⁶ including free and compulsory primary education,¹⁰⁷ and the right to take part in cultural life.¹⁰⁸

¹⁰¹ Vienna Convention on the Law of Treaties.

¹⁰² United Nations website <https://indicators.ohchr.org/> (accessed 28 March 2020).

¹⁰³ International Covenant on Economic, Social and Cultural Rights Preamble.

¹⁰⁴ International Covenant on Economic, Social and Cultural Rights art 11.

¹⁰⁵ International Covenant on Economic, Social and Cultural Rights art 12.

¹⁰⁶ International Covenant on Economic, Social and Cultural Rights art 13.

¹⁰⁷ International Covenant on Economic, Social and Cultural Rights art 14.

¹⁰⁸ International Covenant on Economic, Social and Cultural Rights art 15.

In addition, the ICESCR 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 recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’.¹⁰⁹

Article 2(1) of the ICESCR indicates 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 recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’¹¹⁰

States cannot rely on this article to delay the goal of progressive realisation of the socio-economic rights, the states need to take immediate action, in the form of deliberate, concrete, and targeted steps.¹¹¹ The poverty, illiteracy and general underdevelopment proves that African states are failing to secure very important socio-economic rights for its nationals,¹¹² and unfortunately most of Africa’s population desperately need these rights to be enforced, as their living conditions are not adequate.¹¹³

¹⁰⁹ International Covenant on Economic, Social and Cultural Rights art 2(1).

¹¹⁰ International Covenant on Economic, Social and Cultural Rights art 2(1).

¹¹¹ CESCR General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) para 2.

¹¹² Viljoen F International Human Rights Law in Africa 2 ed (2012) 119.

¹¹³ Chirwa DM & Chenwi L ‘Direct Protection of Economic, Social and Cultural Rights in International Law’ in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 43.

b) Special UN treaties

The UN makes provision for special instruments for certain category of people or themes.¹¹⁴ These treaties are directed at individuals vulnerable to human rights violations.¹¹⁵ It is a known fact that UN makes provision for number of special instruments and/or treaties, however, this research will only examine those treaties that the researcher deems necessary and are aligned to this research. The special UN treaties are outlined below.

i. The International Convention on the Elimination of All Forms of Racial Discrimination

In terms of the International Convention on the Elimination of All Forms of Racial Discrimination¹¹⁶ (hereinafter ICERD): 'all Member States have pledged.....for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion'.¹¹⁷ Out of 182 State Parties to the treaty, all African countries have ratified, to the exclusion of South Sudan.¹¹⁸

This treaty amongst other rights, protect socio-economic rights,¹¹⁹ such as , the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration,¹²⁰ the right to form and join trade unions,¹²¹ the right to housing,¹²² the right to public health, medical care, social security

¹¹⁴ Chirwa DM & Chenwi L 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 43.

¹¹⁵ Chirwa DM & Chenwi L 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 48.

¹¹⁶ Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19.

¹¹⁷ International Convention on the Elimination of All Forms of Racial Discrimination Preamble.

¹¹⁸ United Nations website <https://indicators.ohchr.org/> (accessed 28 March 2020).

¹¹⁹ International Convention on the Elimination of All Forms of Racial Discrimination art 5(e).

¹²⁰ International Convention on the Elimination of All Forms of Racial Discrimination art 5(e)(i)

¹²¹ International Convention on the Elimination of All Forms of Racial Discrimination art 5(e)(ii)

¹²² International Convention on the Elimination of All Forms of Racial Discrimination art 5(e)(iii)

and social services,¹²³ the right to education and training,¹²⁴ and the right to equal participation in cultural activities.¹²⁵

ii. The Convention on the Elimination of All Forms of Discrimination against Women

In terms of the Convention on the Elimination of All Forms of Discrimination against Women¹²⁶ (hereinafter CEDAW): 'all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex.....Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights'.¹²⁷

Out of 189 State Parties to the treaty, all African countries have ratified, to with the exception of Somalia and Sudan.¹²⁸ This treaty amongst other rights, protects socio-economic rights,¹²⁹ such as the right to education,¹³⁰ right to employment,¹³¹ right to health care,¹³² and other rights.¹³³

iii. The Convention on the Rights of the Child

In terms of the Convention on the Rights of the Child¹³⁴ (hereinafter CRC) 'everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or

¹²³ International Convention on the Elimination of All Forms of Racial Discrimination art 5(e)(iv)

¹²⁴ International Convention on the Elimination of All Forms of Racial Discrimination art 5(e)(v)

¹²⁵ International Convention on the Elimination of All Forms of Racial Discrimination art 5(e)(vi)

¹²⁶ Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with article 27(1).

¹²⁷ Convention on the Elimination of All Forms of Discrimination against Women Preamble.

¹²⁸ United Nations website <https://indicators.ohchr.org/> (accessed 28 March 2020).

¹²⁹ Convention on the Elimination of All Forms of Discrimination against Women Part III.

¹³⁰ Convention on the Elimination of All Forms of Discrimination against Women art 10.

¹³¹ Convention on the Elimination of All Forms of Discrimination against Women art 11.

¹³² Convention on the Elimination of All Forms of Discrimination against Women art 12.

¹³³ Convention on the Elimination of All Forms of Discrimination against Women art 13 and 14.

¹³⁴ The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990, in accordance with article 49.

other opinion, national or social origin, property, birth or other status....childhood is entitled to special care and assistance.’¹³⁵

Out of 189 State Parties to the treaty, all African countries have ratified the treaty. In fact, all State Parties have ratified this treaty with the exception of the United States of America.¹³⁶ The treaty, amongst other rights, protects socio-economic rights.¹³⁷ These rights include, the right to health,¹³⁸ right to social security,¹³⁹ and right to adequate standard of living (including nutrition, clothing and housing,¹⁴⁰ education¹⁴¹ and culture¹⁴²).

iv. The Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities¹⁴³ (hereinafter CRPD) emphasises ‘the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms’¹⁴⁴.

Out of 181 State Parties to the treaty, all African countries have ratified the Treaty, with the exception of Botswana, Equatorial Guinea, Eritrea and South Sudan.¹⁴⁵ This treaty, amongst other rights, protects socio-economic rights. These rights include, right to education,¹⁴⁶ right to health,¹⁴⁷ right to work and

¹³⁵ Convention on the Rights of the Child Preamble.

¹³⁶ United Nations website <https://indicators.ohchr.org/> (accessed 28 March 2020).

¹³⁷ Convention on the Rights of the Child art 4.

¹³⁸ Convention on the Rights of the Child art 24.

¹³⁹ Convention on the Rights of the Child art 26.

¹⁴⁰ Convention on the Rights of the Child art 27.

¹⁴¹ Convention on the Rights of the Child art 28 and 29.

¹⁴² Convention on the Rights of the Child art 30 and 31.

¹⁴³ Adopted by the General Assembly by its Resolution 61/106, at its 76th plenary meeting on 13 December 2006. In accordance with its article 42, the Convention is open for signature by all States and by regional integration organizations at United Nations Headquarters in New York as of 30 March 2007.

¹⁴⁴ Convention on the Rights of Persons with Disabilities Preamble.

¹⁴⁵ United Nations website <https://indicators.ohchr.org/> (accessed 28 March 2020).

¹⁴⁶ Convention on the Rights of Persons with Disabilities art 24.

¹⁴⁷ Convention on the Rights of Persons with Disabilities art 25.

enjoyment,¹⁴⁸ the right to an adequate standard of living,¹⁴⁹ the right to social protection,¹⁵⁰ and the right to participation in cultural life.¹⁵¹

v. The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families

In terms of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families¹⁵² (hereinafter CMW): ‘due regard shall be paid not only to labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families involved’.¹⁵³

Out of 55 State Parties to the treaty, only a handful of African countries have ratified this treaty¹⁵⁴ and as such, the enforcement of this treaty is only on few countries. This treaty amongst other rights, protect socio-economic rights, such as right to education.¹⁵⁵

2.2.3. Trade at the global level

There is general consensus that trade is an essential tool for growth and overall economic well-being of a country.¹⁵⁶ However, overall, Africa’s share in global trade has not changed, hanging at three per cent,¹⁵⁷ compared to when most African countries became members to the World Trade Organisation (hereinafter WTO). This supports the argument, stated above,¹⁵⁸ that there is a

¹⁴⁸ Convention on the Rights of Persons with Disabilities art 27.

¹⁴⁹ Convention on the Rights of Persons with Disabilities art 9.

¹⁵⁰ Convention on the Rights of Persons with Disabilities art 28(2).

¹⁵¹ Convention on the Rights of Persons with Disabilities art 30.

¹⁵² Adopted by General Assembly resolution 45/158 of 18 December 1990.

¹⁵³ International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families art 64.

¹⁵⁴ United Nations website <https://indicators.ohchr.org/> (accessed 28 March 2020).

¹⁵⁵ International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families art 43(1)(a).

¹⁵⁶ Jita B & Mousum B ‘International trade offers nations services and goods that are not available within its territories and provide access to bigger market’ (2012) 3 (1) *IIMA Journal of Management Science* 48.

¹⁵⁷ United Nations Conference on Trade and Development (UNCTAD) ‘Unlocking the potential of Africa’s services trade for growth and development’ 2015 Economic Development in Africa Report (2015) 23.

¹⁵⁸ See 1.3 of Chapter one.

need for a trade treaty that specifically addresses Africa. If Africa's economies are not growing, it will be difficult for socio-economic rights to be addressed. Intra-African trade in 2015 was recorded to be at 13 per cent,¹⁵⁹ this could be seen as very low as compared to 70 per cent intra-Europe trade.¹⁶⁰

In addition, for socio-economic rights to be enforced, the researcher argues that there must be policies and laws that will specifically address the challenges confronting African states. Looking at the levels of poverty in Africa, there must be concerted efforts to ensure that Africans realise their socio-economic rights. Chirwa and Chenwi argue that economic, social and cultural rights are closely related to development and eradication of poverty.¹⁶¹ Even though the World Bank, International Monetary Fund (IMF) and WTO do not make reference to human rights, particularly as part of their mandate, the way they operate naturally concern socio-economic rights, amongst other rights.¹⁶² The WTO is discussed below.

a) **The World Trade Organisation**

The aim of the WTO is to foster international trade relations, and provide a forum where member states can negotiate trade agreements and mechanisms through which these agreements may be implemented.¹⁶³ As of 2020, 42 African countries were members of the WTO.¹⁶⁴ Despite the fact that large number of African countries have opened their economies and markets,¹⁶⁵ Africa's share in trade in goods had, by early 2000s dropped by four per cent since 1980.

¹⁵⁹ United Nations Economic Commission for Africa (UNECA) 'Annual Report 2015' 34.

¹⁶⁰ United Nations Conference on Trade and Development (UNCTAD) 'Economic development in Africa report 2013: Intra-African trade: Unlocking private sector dynamism' 2013 Economic Development in Africa Report 2.

¹⁶¹ Chirwa DM & Chenwi L 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 43.

¹⁶² Viljoen F *International Human Rights Law in Africa* 2 ed (2012) 77.

¹⁶³ Viljoen F *International Human Rights Law in Africa* 2 ed (2012) 83.

¹⁶⁴ World Trade Organization website www.wto.org (accessed 14 March 2020).

¹⁶⁵ Hammouda HB et al 'Africa's (Mis)fortunes in Global Trade and the Country's Diversification Regimes' (2006) 7 *The Journal of World Investment and Trade* 588.

In addition, Viljoen argues that equality in trade is undermined by Western hypocrisy, exemplified by advocacy for trade liberalisation in some sectors (in which Western countries are net exporters) and the opposition to free trade in others (in which developing economies stood a chance of competing with local products).¹⁶⁶ He continues to argue that 'subsidies, in particular, have become a bone of contention. African's trade has been influenced negatively, especially by the agricultural subsidies in developed countries'.¹⁶⁷ These subsidies that is given to farmers in developed countries is an unfair advantage when they export globally including to the African-markets, as exemplified by the subsidies to cotton farmers in the United States.¹⁶⁸

In 2001, the WTO launched the Doha Round of negotiations under the theme 'the Doha Development Agenda'. The negotiations in this Round were centred on establishing a global trade regime that is fairer for developing countries (including Africa).¹⁶⁹ The AU expressed 'deep concern on the limited progress made.....in the negotiations on issues of major interest to African countries'.¹⁷⁰

The AU emphasised that 'any failure to incorporate Africa's needs, interests and concerns within the outcome of the Doha Round will not only undermine Africa's already limited trade opportunities, but also erode the autonomy and ability to pursue trade policies that would serve key developmental objectives such as employment, industrialization, food security, rural development and sustained economic growth in Africa'.¹⁷¹ Further, 'that the outcome of the Doha Round will be judged by the extent to which it takes into account the needs, interests and concerns of our countries'.¹⁷²

¹⁶⁶ Viljoen F *International Human Rights Law in Africa* 2 ed (2012) 83.

¹⁶⁷ Viljoen F *International Human Rights Law in Africa* 2 ed (2012) 83.

¹⁶⁸ Oloka-Onyango J 'Who's Watching "Big Brother"? Globalization and Protection of Cultural Rights in Present Day Africa' (2005) 27(4) *Human Rights Quarterly* 1259.

¹⁶⁹ Viljoen F *International Human Rights Law in Africa* 2 ed (2012) 83.

¹⁷⁰ Decision on WTO Negotiations Doc. EX.CL/283 (IX) Assembly/AU/Dec.119 (VII).

¹⁷¹ Decision on WTO Negotiations Doc. EX.CL/283 (IX) Assembly/AU/Dec.119 (VII).

¹⁷² Decision on WTO Negotiations Doc. EX.CL/283 (IX) Assembly/AU/Dec.119 (VII).

This research acknowledges that the WTO does actually have substantive rules that give special treatment to least-developed and developing countries, which include Africa. These rules are contained in the so-called 'special and differential treatment provisions', which are an attempt to incorporate the needs of least-developed and developing countries when it comes to these countries complying with their WTO obligations.¹⁷³ These provisions, which are incorporated in the WTO's trade agreements, include: measures aimed at increasing the trade opportunities of developing country Members; measures to safeguard the interests of developing country Members; flexibility of commitments, of action, and use of policy instruments; transitional time-periods in the implementation of WTO obligations; technical assistance; and measures specifically for least-developed countries.¹⁷⁴ However, it is submitted that these special and differential treatment provisions are not enough and have not been helpful to Africa in light of the continent's low participation levels in global trade and the general sentiment that the WTO framework has failed to adequately address the needs of the developing world.¹⁷⁵

2.3. Socio-economic rights enforcement at the regional level

The AU is made up of 55 Member States, which represent all the countries on the African continent.¹⁷⁶ It was on 11 July 2000 in Lome, Togo, where the AU was born out of the OAU. It was during the first Pan-African Congress in 1919 that human rights, particularly, socio-economic rights were recognised 'be the right of every native child to learn to read and write his own language, and the language of the trustee nation at public expense'.¹⁷⁷

¹⁷³ World Trade Organization website, available at https://www.wto.org/english/tratop_e/devel_e/devel_e.htm (accessed 16 December 2020).

¹⁷⁴ Decision on WTO Negotiations Doc. EX.CL/283 (IX) Assembly/AU/Dec.119 (VII).

¹⁷⁵ Special and Differential Treatment Provisions in WTO Agreements and Decisions WT/COMTD/W/239 (2018).

¹⁷⁶ African union website https://au.int/en/member_states/countryprofiles2 (accessed 14 March 2020).

¹⁷⁷ Du Bois WEB 'The Pan-African movement' in Padmore G (ed) *Colonial and Coloured Unity – A Programme of Action* (1963) 16.

In 1981 when the attention was being shifted from colonialism and independence, *inter alia*, the OAU adopted a treaty,¹⁷⁸ the African Charter. The African Charter covers (1) civil and political rights, (2) social, economic and cultural rights & (3) group rights and all three are subject to same mechanisms of enforcement.¹⁷⁹

At the regional level, the AU,¹⁸⁰ has several objectives which include, as per the Constitutive Act,¹⁸¹ the acceleration of socio-economic integration of the continent¹⁸² and the promotion of sustainable development at the economic, social and cultural levels as well as the integration of African economies.¹⁸³ These objectives provide motivation for African countries to promote the integration of African economies. Further, the AU Constitutive Act gives a central mandate to promote and protect human rights, which includes socio-economic rights. The AU is guided by its vision of 'an Integrated, Prosperous and Peaceful Africa, driven by its own citizens and representing a dynamic force in the global arena'.¹⁸⁴

The work of the AU is implemented through several principal decision-making organs namely: the Assembly of Heads of State and Government; the Executive Council; the Permanent Representatives Committee (PRC); Specialised Technical Committees (STCs); the Peace and Security Council; and the African Union Commission. The AU structure promotes participation of African citizens and civil society through the Pan-African Parliament and the Economic, Social & Cultural Council (ECOSOCC).¹⁸⁵

¹⁷⁸ Chirwa DM & Chenwi L 'The Protection of Economic, Social and Cultural Rights in Africa' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 5.

¹⁷⁹ Chirwa DM & Chenwi L 'The Protection of Economic, Social and Cultural Rights in Africa' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 6.

¹⁸⁰ Adopted by the Organization of African Unity (OAU), Constitutive Act of the African Union, 1 July 2000.

¹⁸¹ Constitutive Act of the African Union, adopted on 11 July 2000, OAU Doc. CAB/LEG/23.15, entered into force 26 May 2001.

¹⁸² Constitutive Act of the African Union art 3(c).

¹⁸³ Constitutive Act of the African Union art 3(j).

¹⁸⁴ AU website <https://au.int/en/about/vision#:~:text=The%20vision%20of%20the%20African,dynamic%20force%20in%20global%20arena.%E2%80%9D> (accessed 19 March 2020).

¹⁸⁵ AU website <https://au.int/en/overview> (accessed 19 March 2020).

2.3.1. The structure and organs of the African Union

The structure and organs of the AU consist of the Assembly of Heads of State and Government,¹⁸⁶ the Executive Council,¹⁸⁷ the Permanent Representatives Committee,¹⁸⁸ the Peace and Security Council,¹⁸⁹ Specialised Technical Committees,¹⁹⁰ the African Union Commission,¹⁹¹ the New Partnership for Africa's Development,¹⁹² the AU Foundation,¹⁹³ the Financial Institutions,¹⁹⁴ the judicial, human rights and legal organs,¹⁹⁵ the Pan-African Parliament,¹⁹⁶ the Economic, Social & Cultural Council,¹⁹⁷ the African Peer Review Mechanism,¹⁹⁸ the regional economic communities,¹⁹⁹ and Specialised agencies and institutions.²⁰⁰

2.3.2. The African Union treaties

The preceding discussion has examined the relevant treaties at the international level.²⁰¹ Within the African context, it is important to also consider the relevant treaties that deal with economic, social and cultural rights.

a) The African Charter on Human and Peoples' Rights

The African Charter states that:

¹⁸⁶ African Union website <https://au.int/en/assembly> (accessed 19 March 2020).

¹⁸⁷ African Union website <https://au.int/en/executivecouncil> (accessed 19 March 2020).

¹⁸⁸ African Union website <https://au.int/en/prc> (accessed 19 March 2020).

¹⁸⁹ African Union website <https://au.int/en/psc> (accessed 19 March 2020).

¹⁹⁰ African Union website <https://au.int/en/stc> (accessed 19 March 2020).

¹⁹¹ African Union website <https://au.int/en/commission> (accessed 19 March 2020).

¹⁹² African Union website <https://au.int/en/nepad> (accessed 19 March 2020).

¹⁹³ African Union website <https://au.int/en/auf> (accessed 19 March 2020).

¹⁹⁴ African Union website <https://au.int/en/financial-institutions> (accessed 19 March 2020).

¹⁹⁵ African Union website <https://au.int/en/legal-organs> (accessed 19 March 2020).

¹⁹⁶ African Union website <https://au.int/en/pap> (accessed 19 March 2020).

¹⁹⁷ African Union website <https://au.int/en/about/ecosocc> (accessed 19 March 2020).

¹⁹⁸ African Union website <https://au.int/en/aprm> (accessed 19 March 2020).

¹⁹⁹ African Union website <https://au.int/en/recs> (accessed 19 March 2020).

²⁰⁰ African Union website <https://au.int/en/specialised-agencies-institutions> (accessed 19 March 2020).

²⁰¹ See 2.2.2 of Chapter 2.

'[E]njoyment of rights and freedoms also implies the performance of duties on the part of everyone.....it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'.²⁰²

The African Charter covers, without drawing a line, three 'generation' of rights. First generation (civil and political) rights include, the right to equality before the law,²⁰³ the right to have one's case heard,²⁰⁴ and the right to freely associate.²⁰⁵ Second generation (socio-economic) rights include the right to property,²⁰⁶ the right to work under equitable and satisfactory conditions,²⁰⁷ the right to enjoy the best attainable state of physical and mental health,²⁰⁸ the right to education,²⁰⁹ and the protection of the family and cultural rights.²¹⁰ Third generation (people or group) rights include, the right to generally satisfactory environment,²¹¹ and the right to international peace and security.²¹²

The African Charter only covers a limited number of socio-economic rights due to a 'minimalist' approach that was adopted during the drafting of the African Charter, which is generally about sparing young states from numerous but important obligations.²¹³ The rights that were omitted in the final African Charter during the drafting and which are important²¹⁴ are the right to social security,²¹⁵ the right to an adequate standard of living, including 'adequate food, clothing

²⁰² African Charter on Human and Peoples' Rights Preamble.

²⁰³ African Charter on Human and Peoples' Rights art 3.

²⁰⁴ African Charter on Human and Peoples' Rights art 7.

²⁰⁵ African Charter on Human and Peoples' Rights art 10.

²⁰⁶ African Charter on Human and Peoples' Rights art 14.

²⁰⁷ African Charter on Human and Peoples' Rights art 15.

²⁰⁸ African Charter on Human and Peoples' Rights art 16(1).

²⁰⁹ African Charter on Human and Peoples' Rights art 17(1).

²¹⁰ African Charter on Human and Peoples' Rights art 17(2) and (3), 18(1) and (2) and 61.

²¹¹ African Charter on Human and Peoples' Rights art 24.

²¹² African Charter on Human and Peoples' Rights art 23(1).

²¹³ Rapporteur's Report on the Draft African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/Draft Raot.Rpt.(II) Rev.4, para 13.

²¹⁴ Viljoen F *International Human Rights Law in Africa* 2 ed (2012) 215.

²¹⁵ M'Baye Draft African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/1, prepared for the Meeting of Experts, Dakar, Senegal, 28 November to 8 December 1979 ('M'Baye Proposal) art 7.

and housing, and the right to the continuous improvement of living conditions'.²¹⁶

Despite the fact that the African Charter only covers limited number of rights, explicitly, other socio-economic rights are covered as well.²¹⁷ Other socio-economic rights which are not explicitly covered in the African Charter are, the right to an adequate standard of living, the right to adequate food and clothing, rights to water and sanitation, the right to housing, the right to social security, the right to rest and leisure and the right to form and join trade unions.²¹⁸ This is to ensure the realisation of the African Charter's objective which is to 'promote and protect human and peoples' rights and freedoms'.²¹⁹ It could be argued that the vagueness of the African Charter on certain rights is actually to allow interpreters and those who apply the African Charter some 'flexibility'.²²⁰ Even though the African Charter is strongly protecting socio-economic rights, realisation of these rights is poor.²²¹

The African Charter established²²² the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights was later established in terms of its Protocol,²²³ and together they are responsible for interpretation and application of the rights contained in the African Charter and other relevant human rights instruments. Both the African Commission and the African Court have interpreted and applied the African Charter and other

²¹⁶ M'Baye Draft African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/1, prepared for the Meeting of Experts, Dakar, Senegal, 28 November to 8 December 1979 ('M'Baye Proposal), art 10.

²¹⁷ Ssenyonjo M 'The Protection of Economic, Social and Cultural Rights in under the African Charter' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 94.

²¹⁸ Ssenyonjo M 'The Protection of Economic, Social and Cultural Rights in under the African Charter' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 94.

²¹⁹ African Charter on Human and Peoples' Rights Preamble.

²²⁰ Rapporteur's Report on the Draft African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/Draft Raot.Rpt.(II) Rev.4, para 13.

²²¹ Ssenyonjo M 'The Protection of Economic, Social and Cultural Rights in under the African Charter' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 92.

²²² African Charter on Human and Peoples' Rights art 30.

²²³ Protocol To The African Charter On Human And Peoples` Rights On The Establishment Of An African Court On Human And Peoples` Rights.

relevant human rights treaties and out of that developed valuable and unique African human rights jurisprudence.

For example in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*²²⁴ (hereinafter *SERAC* case), the African Commission on Human and Peoples' Rights dealt with the right to health, amongst other rights, and the Commission indicated that governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties. This duty calls for positive action on the part of governments in fulfilling their obligation under human rights instruments.²²⁵ The Commission found that Nigerian government has violated the right to health, amongst other rights.

The right to health and the right to education was addressed in *Free Legal Assistance Group and Others v. Zaire*²²⁶ (hereinafter *Free Legal Assistance Group* case). The African Commission on Human and Peoples' Rights referred to article 16 of the African Charter, which states that every individual shall have the right to enjoy the best attainable state of physical and mental health, and that States Parties should take the necessary measures to protect the health of their people.²²⁷ Further, the commission ruled that the failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine constitutes a violation of article 16 of the African Charter.²²⁸

Additionally, the Commission ruled that article 17 of the African Charter guarantees the right to education, that the closures of universities and secondary schools constitutes a violation of article 17 of the African Charter.²²⁹

²²⁴ Communication No. 155/96, (2001) 15th Activity Report, Annex V; (2001) AHRLR 60 (ACHR 2001).

²²⁵ *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* para 57.

²²⁶ Communication No. 25/89, 47/90, 56/91 and 100/93, (1996) 9th Annual Report; (2000) AHRLR 74 (ACHPR 1995).

²²⁷ *Free Legal Assistance Group and Others v. Zaire* para 47.

²²⁸ *Free Legal Assistance Group and Others v. Zaire* para 47.

²²⁹ *Free Legal Assistance Group and Others v. Zaire* para 47.

With the said reasons, the commission held that the facts constituted serious and massive violations of the African Charter.

b) Special African Union Treaties

Within the AU context, special treaties have been adopted to address the rights of vulnerable groups of society.²³⁰ In addition, these treaties address those socio-economic rights not included in the African Charter.²³¹ The said rights include, the right to adequate standards of living, the right to adequate food and clothing, the rights to water and sanitation, the right to housing, the right to social security, the right to rest and leisure, and the right to form and join trade unions.²³² Also, just like with the UN, AU makes provision for number of special instruments and/or treaties, however, this research will only examine those treaties that the researcher deems necessary and are aligned to this research.

i. The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child²³³ covers among others, socio-economic rights, in particular, right to education,²³⁴ leisure, recreation and cultural activities,²³⁵ right to health²³⁶ and protection from harmful social and cultural practices.²³⁷ To date, 41 states signed and ratified the treaty, while 9 states only signed and have not yet ratified and 5 states have neither signed nor ratified the treaty.²³⁸

²³⁰ Ssenyonjo M 'The Protection of Economic, Social and Cultural Rights in under the African Charter' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 95.

²³¹ Ssenyonjo M 'The Protection of Economic, Social and Cultural Rights in under the African Charter' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 94.

²³² Ssenyonjo M 'The Protection of Economic, Social and Cultural Rights in under the African Charter' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 94.

²³³ OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

²³⁴ African Charter on the Rights and Welfare of the Child art 11.

²³⁵ African Charter on the Rights and Welfare of the Child art 12.

²³⁶ African Charter on the Rights and Welfare of the Child art 14.

²³⁷ African Charter on the Rights and Welfare of the Child art 2 1.

²³⁸ ACHPR website <https://www.achpr.org/legalinstruments/detail?id=46> (accessed 30 March 2020).

ii. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa²³⁹ covers among others, socio-economic rights of women, in particular, the right to education and training,²⁴⁰ economic and social welfare rights,²⁴¹ the right to health and reproductive rights,²⁴² the right to food security,²⁴³ the right to adequate housing²⁴⁴ and the right to positive cultural context.²⁴⁵ To date only Algeria has signed (although it has not yet ratified the treaty).²⁴⁶

iii. The African Youth Charter

The African Youth Charter²⁴⁷ makes provision for socio-economic rights, in particular, right to property,²⁴⁸ right to education,²⁴⁹ right to employment,²⁵⁰ right to health²⁵¹ and the right to participate freely in culture.²⁵² To date, 28 states have ratified the treaty, while 39 have signed this treaty.²⁵³

iv. The Convention for the Protection and Assistance of Internally Displaced Persons

²³⁹ Adopted by the Second Ordinary Session of the AU Assembly, Maputo, 11 July 2003, entered into force 25 November 2005.

²⁴⁰ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art 12.

²⁴¹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art 13.

²⁴² Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art 14.

²⁴³ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art 14.

²⁴⁴ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art 16.

²⁴⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art 17.

²⁴⁶ ACHPR website <https://www.achpr.org/legalinstruments/detail?id=37> (accessed 30 March 2020).

²⁴⁷ Adopted by the AU Assembly in July 2006, entered into force 8 August 2009.

²⁴⁸ African Youth Charter art 9.

²⁴⁹ African Youth Charter art 13.

²⁵⁰ African Youth Charter art 15.

²⁵¹ African Youth Charter art 16.

²⁵² African Youth Charter art 20 and 25.

²⁵³ United Nations Educational, Scientific and Cultural Organization website <http://www.unesco.org/new/en/member-states/single-view/news/the-african-youth-charter-is-the-first-legal-framework-in-f/> (accessed 30 March 2020).

The Convention for the Protection and Assistance of Internally Displaced Persons²⁵⁴ provides for, socio-economic rights for internally displaced persons. In particular, it requires states to 'prevent political, social, cultural and economic exclusions and marginalisation, which are likely to cause displacement of populations and persons by virtue of their social identity, religion or political opinion'.²⁵⁵ Presently, 29 states have ratified the treaty, and 40 states are signatories.²⁵⁶

2.3.3. Trade in Africa

With regards to economic development and trade in Africa, it is important to consider the Economic Commission for Africa (hereinafter ECA) and as well as sub-regional economic communities, which includes the North, East, West and Southern Economic Communities. As it has been noted,²⁵⁷ trade is an essential tool for growth and overall economic well-being of a country.²⁵⁸ Overall, Africa's share in global trade has not changed, hanging at three per cent.²⁵⁹

This proves, as stated above,²⁶⁰ that there is a need for a treaty that addresses African challenges and brings solutions that will be an actual solution for African states. It is submitted that if Africa is not doing well economically or there is no economic development, it will be difficult for socio-economic rights to be enforced. Africa needs to trade with itself more, for instance, as has already

²⁵⁴ Adopted by the Special Summit of the AU held in Kampala, 22 October 2009, entered into force 6 December 2012.

²⁵⁵ The Convention for the Protection and Assistance of Internally Displaced Persons art 3(b).

²⁵⁶ AU website <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa> (accessed 30 March 2020).

²⁵⁷ See Chapter 1, 1.1.

²⁵⁸ Jita B & Mousum B 'International trade offers nations services and goods that are not available within its territories and provide access to bigger market' (2012) 3 (1) *IJMA Journal of Management Science* 48.

²⁵⁹ United Nations Conference on Trade and Development (UNCTAD) 'Unlocking the potential of Africa's services trade for growth and development' 2015 Economic Development in Africa Report (2015) 23.

²⁶⁰ See 1.3 of Chapter 1.

been mentioned, intra-African trade in 2015 was recorded at 13 per cent,²⁶¹ a low percentage when compared to 70 per cent intra- Europe trade.²⁶²

The Preamble to the WTO Agreement includes in its mission statement the 'need for positive efforts designed to ensure that developing countries, and especially the least developed, secure a share in the growth in international trade commensurate with the needs of their economic development'.²⁶³ This will immediately suggest that developing countries in Africa will receive positive efforts from WTO, however, the important trade issues that are of interest for developing countries such as easier access to the developed economies market, the increase of investments in manufacturing and infrastructures are actually not attended to.²⁶⁴

In addition the diversification of exports is not achieved at all.²⁶⁵ Intra-African trade is significantly low as compared to other regions in the world, and in in Sub-Saharan Africa this has been attributed to inadequate modern trade infrastructure.²⁶⁶ In 2015 it stood at 13 per cent.²⁶⁷ This is in comparison with Asia at 50 per cent, Latin America at 21 per cent and Europe 70 per cent.²⁶⁸ However, amid these challenges, Africa continues to search for policy approaches to facilitate and accelerate the achievement of key targets and create prosperity for all.²⁶⁹

²⁶¹ United Nations Economic Commission for Africa (UNECA) 'Annual Report 2015' 34.

²⁶² United Nations Conference on Trade and Development (UNCTAD) 'Economic development in Africa report 2013: Intra-African trade: Unlocking private sector dynamism' 2013 Economic Development in Africa Report 2.

²⁶³ WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

²⁶⁴ Armijo L 'The BRICS countries as analytical category: Insight or mirage?' (2007) 31 (4) Asian Perspective.

²⁶⁵ United Nations World Economic Situation and Prospects Report (2020) 121.

²⁶⁶ Conde C, Heinrigs P & O'Sullivan A 'Tapping the Potential of Global Value Chains for Africa' (2015) available at http://www3.weforum.org/docs/WEF_ACR_2015/ACR_Chapter2.3_2015.pdf (accessed 15 March 2020).

²⁶⁷ United Nations Economic Commission for Africa (UNECA) 'Annual Report 2015' 34.

²⁶⁸ United Nations Conference on Trade and Development (UNCTAD) 'Economic development in Africa report 2013: Intra-African trade: Unlocking private sector dynamism' 2013 Economic Development in Africa Report 2.

²⁶⁹ United Nations World Economic Situation and Prospects Report (2020) 126.

The argument has been made that economic diversification must be a priority for Africa and that global value chains tend to bypass Africa as it mostly exports raw or minimally processed goods.²⁷⁰ For socio-economic rights to be enforced, the researcher argues that there must be policies and laws that will accommodate African states. Considering the levels of poverty in Africa, most of Africa's population currently does not enjoy socio-economic rights. Chirwa and Chenwi argue that economic, social and cultural rights are closely related to development and eradication of poverty.²⁷¹

2.3.3.1. Economic Commission for Africa

The ECA was established in 1958 by the UN's ECOSOC as one of the five regional commissions²⁷² noted above.²⁷³ Even though ECOSOC is part of UN, the ECA is however, regarded as part of the regional institutional landscape as the focus of its mandate is on the AU and the sub regional economic communities in Africa.²⁷⁴

In line with its 2030 Agenda and Agenda 2063, the Commission's three core duties, are: its convening function (providing dedicated regional intergovernmental and multi-stakeholder platforms with strong ownership by member States, regional bodies and development banks that result in agreed development policy frameworks, standards and action plans that reinforce multilateralism at the regional and sub-regional levels); its function as a think tank (conducting multisectoral research and analysis that nurture the integration of the three pillars of sustainable development, and promote peer learning, innovative thinking and the advocacy of public policies while fostering intersectoral linkages and synergies); and its operational

²⁷⁰ United Nations World Economic Situation and Prospects Report (2020) 129.

²⁷¹ Chirwa DM & Chenwi L 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 43.

²⁷² UN Economic Commission for Africa website <https://www.uneca.org/pages/overview> (accessed 15 March 2020).

²⁷³ See this Chapter on 2.2.

²⁷⁴ Viljoen F *International Human Rights Law in Africa* 2 ed (2012) 56.

function(provision of policy advice at the country level through direct demand-based support to member States in areas related to its normative and analytical work and in collaboration with the United Nations system at the country level).²⁷⁵

2.3.3.2. Africa's Sub-Regional Communities

The AU recognises several regional trade blocs, namely: North Africa's Arab Maghreb Union (AMU);²⁷⁶ the Central African Economic and Monetary Community (CEMAC);²⁷⁷ the Common Market for Eastern and Southern Africa (COMESA);²⁷⁸ the East African Community (EAC);²⁷⁹ the Economic Community of Central African States (ECCAS);²⁸⁰ the Economic Community of West African States (ECOWAS);²⁸¹ the West African Economic and Monetary Union (EUMOA);²⁸² the Southern African Customs Union (SACU);²⁸³ and the Southern African Development Community (SADC).²⁸⁴

²⁷⁵ UN Economic Commission for Africa website <https://www.uneca.org/pages/overview> (accessed 15 March 2020).

²⁷⁶ Algeria, Libya, Mauritania, Morocco, and Tunisia.

²⁷⁷ Cameroon, Central African Republic, Chad, Republic of Congo, Equatorial Guinea, and Gabon website <http://www.internationaldemocracywatch.org/index.php/central-african-economic-and-monetary-community> (accessed 10 December 2020).

²⁷⁸ Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Ethiopia, Eritrea, Kenya, Libya, Seychelles, the Kingdom of Eswatini, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Uganda, Zambia, and Zimbabwe website <http://www.comesa.int/> (accessed 10 December 2020).

²⁷⁹ Burundi, Kenya, Rwanda, Tanzania and Uganda website <http://www.eac.int/> (accessed 10 December 2020).

²⁸⁰ Angola, Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, and Sao Tome and Principe website <http://www.uneca.org/oria/pages/eccas-economic-community-central-african-states-0> (accessed 10 December 2020).

²⁸¹ Benin, Burkina Faso, Cabo Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togolese website <http://www.ecowas.int/> (accessed 10 December 2020).

²⁸² Burkina Faso, Cote d'Ivoire, Guinea Bissau, Mali, Niger, Senegal, and Togo website <http://www.uemoa.int/Pages/Home.aspx> (accessed 10 December 2020).

²⁸³ Botswana, Lesotho, Namibia, South Africa, and the Kingdom of Eswatini website <http://www.sacu.int/> (accessed 10 December 2020).

²⁸⁴ Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, the Kingdom of Eswatini, Tanzania, Zambia, and Zimbabwe website <http://www.sadc.int/> (accessed 10 December 2020).

In 2018 all the sub-regions reported growth. East Africa remained the fastest growing sub-region in Africa, with growth rising from 6.1 per cent in 2017 to 6.2 per cent in 2018.²⁸⁵ West Africa grew from 2.4 per cent in 2017 to 3.2 per cent in 2018.²⁸⁶ Central Africa grew from an economic slump of 0.2 per cent in 2017 to 2.3 per cent in 2018.²⁸⁷ North Africa declined from 5.3 per cent in 2017 to 3.7 per cent in 2018.²⁸⁸ Southern Africa also declined from an already low 1.5 per cent in 2017 to 1.2 per cent in 2018.²⁸⁹

Generally, the levels of economic development in Africa remain a serious challenge, however, in some sub-regions of Africa the prospects are quite impressive.²⁹⁰ According to the UN World Economic Situation and Prospects 2020 Report, the economic conditions for East and North Africa are improving, while Central and Southern Africa have not experienced growth.²⁹¹ Africa's GDP growth is projected to increase moderately from 2.9 per cent in 2019 to 3.2 per cent in 2020 and up again to 3.5 per cent in 2021, contingent on the implementation of effective reforms and subject to large downside risks.²⁹²

The UN World Economic Situation and Prospects Report of 2020 shows that:

'Africa continues to face difficulties in achieving the more robust and sustained growth path that is needed to enhance living standards across the continent. GDP per capita growth is unlikely to reach much above 1 per cent in the near term. More broadly, this decade is ending with average GDP per capita growth

²⁸⁵ Economic Report on Africa 2019 'Fiscal Policy for Financing Sustainable Development in Africa' 6.

²⁸⁶ Economic Report on Africa 2019 'Fiscal Policy for Financing Sustainable Development in Africa' 6.

²⁸⁷ Economic Report on Africa 2019 'Fiscal Policy for Financing Sustainable Development in Africa' 6.

²⁸⁸ Economic Report on Africa 2019 'Fiscal Policy for Financing Sustainable Development in Africa' 7.

²⁸⁹ Economic Report on Africa 2019 'Fiscal Policy for Financing Sustainable Development in Africa' 7.

²⁹⁰ United Nations World Economic Situation and Prospects Report (2020) 121.

²⁹¹ United Nations World Economic Situation and Prospects Report (2020) 121.

²⁹² United Nations World Economic Situation and Prospects Report (2020) 121.

of only 0.5 per cent—well below the average growth of the previous decade and only marginally higher than average per capita growth in the 1980s and 1990s. A step change in the rate of economic growth is needed if the region hopes to make meaningful progress towards achieving the Sustainable Development Goals.²⁹³

Government revenue can be increased by about 20 per cent if African countries adopt a policy framework to strengthen revenue mobilization.²⁹⁴ Due to rapid population increase, recent UN Department of Economic and Social Affairs estimates indicate that Africa's poverty levels will continue to rise in the next decade.²⁹⁵ For Africa to deal with poverty, there has to be economic development which is linked with job creation, however job creation is a major problem in Africa.²⁹⁶

2.3.3.3. The African Continental Free Trade Area

Due to the economic and trade challenges Africa is facing, regional integration can play an important role.²⁹⁷ With the adoption of the Agreement Establishing the African Continental Free Trade Area (hereinafter AfCFTA) in 2018 it is expected that it will promote regional trade, as well as investment integration.²⁹⁸ It is anticipated that the AfCFTA will also address issues faced by the African continent, such as the diversification of exports markets.

The AfCFTA must not be confused with the Tripartite Free Trade Area (hereinafter TFTA). The TFTA comprises of three trade blocs, which are COMESA, EAC and SADC and with a total of 26 countries.²⁹⁹ On the other

²⁹³ United Nations World Economic Situation and Prospects Report (2020) 121.

²⁹⁴ Economic Report on Africa 2019 'Fiscal Policy for Financing Sustainable Development in Africa' page xix.

²⁹⁵ United Nations World Economic Situation and Prospects Report (2020) 128.

²⁹⁶ United Nations World Economic Situation and Prospects Report (2020) 128.

²⁹⁷ Economic Report on Africa 2019 'Fiscal Policy for Financing Sustainable Development in Africa' 13.

²⁹⁸ United Nations World Economic Situation and Prospects Report (2020) 129.

²⁹⁹ Southern African Development Community website, available at <https://www.sadc.int/about-sadc/continental-interregional-integration/tripartite-cooperation/> (accessed 16 December 2020).

hand the AfCFTA is much broader and comprises a total of 54 countries (all African countries have ratified, with the exclusion of Eritrea).³⁰⁰ The AfCFTA consists of eight trade blocs, which are ECCAS, ECOWAS, EAC, SADC, COMESA, AMU, CEN-SAD and IGAD.³⁰¹

There is also anticipation that through the AfCFTA, Africa will experience growth and structural transformation and that African countries will benefit from trade expansion following removal of tariff and non-tariff barriers within Africa, and the least developed countries would gain more through expansion of industrial exports.³⁰² It is expected that the AfCFTA will promote industrialization and the creation of higher-paying productive jobs, especially in the manufacturing sector.

Amongst others infant industries, foreign direct investment (FDI), innovation, science and technology, and labour markets must be addressed by much broader and more strategic set of policies.³⁰³ While some may criticise the AfCFTA on the basis that it will reduce tariff revenue, it must be noted that it is expected to stimulate GDP growth by as much as 1–6 per cent, which would increase the broader tax base and boost revenue collection from other sources.³⁰⁴

2.3.4. The protection of socio-economic rights at the ‘domestic level’

The domestication of the socio-economic rights depends on the state concerned,³⁰⁵ and countries must continuously improve conditions conducive

³⁰⁰ Tralac website, available at <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html#:~:text=The%2032%20countries%20that%20have,Ethiopia%2C%20The%20Gambia%2C%20Sierra%20Leone> (accessed 16 December 2020).

³⁰¹ A Tralac guide ‘The African Continental Free Trade Area’ 6 ed (2019) 2.

³⁰² Economic Report on Africa 2019 ‘Fiscal Policy for Financing Sustainable Development in Africa’ 13.

³⁰³ United Nations World Economic Situation and Prospects Report (2020) 129.

³⁰⁴ Economic Report on Africa 2019 ‘Fiscal Policy for Financing Sustainable Development in Africa’ 14.

³⁰⁵ Chirwa DM & Chenwi L ‘Direct Protection of Economic, Social and Cultural Rights in International Law’ in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 49.

to the realisation of socio-economic rights, countries must make it a point that as their resources increase, and so should the budget for socio-economic rights.³⁰⁶ Viljoen argues that Africa is a rich continent in terms of natural resources and it is capable of enforcing socio-economic rights.³⁰⁷

After the adoption of the OAU Charter, the new independent states began to view human rights as hindrance to the governments as their main focus was rapid development.³⁰⁸ Prempeh argues that human rights were sceptically cast aside by using anti-colonialism rhetoric to claim that they were an imposition of the departing colonial masters on the newly established independent states.³⁰⁹ With respect to protecting socio-economic rights, African countries' constitutions reveal three broad constitutional models.³¹⁰

First, the direct constitutional protection model, this model entails the express inclusion of socio-economic rights in a bill of rights of the respective countries, and such countries include Angola, Burundi, Cabo Verde, Chad, the Democratic Republic of Congo (hereinafter Congo), Co'te d'Ivoire, Equatorial Guinea, Gabon, The Gambia, Guinea, Kenya, Madagascar, Mali, Mozambique, Niger, Rwanda, Sao' Tome' and Pri'ncipe, Senegal, Seychelles, South Africa and Togo.

The second model does not include the protection of socio-economic rights in a bill of rights, thus the rights are not given 'not constitutional protection'. With this approach, some constitutions recognise some aspects of socio-economic

³⁰⁶ Office of the United Nations High Commissioner for Human Rights (OHCHR) 'Realizing Human Rights Through Government Budgets' 97.

³⁰⁷ Viljoen F *International Human Rights Law in Africa* 2 ed (2012) 544.

³⁰⁸ Chirwa DM & Chenwi L 'The Protection of Economic, Social and Cultural Rights in Africa' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 4.

³⁰⁹ Prempeh HK 'Africa's constitutionalism revival: New dawn or false start' (2007) 5(3) *International Journal of Constitutional Law* 473.

³¹⁰ Chirwa DM & Chenwi L 'The Protection of Economic, Social and Cultural Rights in Africa' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 8.

rights as directive principle of state policies, while others make general commitment of socio-economic rights in their Preamble.³¹¹ Countries which follow this model include Botswana, Cameroon, Comoros, Djibouti, Lesotho, Liberia, Mauritania, Mauritius, Nigeria, Sierra Leone, Sudan and Zambia.

The third model is the hybrid model, whereby some socio-economic rights are recognised in the bill of rights, while others are under directive principles of state policy.³¹² Countries that utilise this approach include Eritrea, Ethiopia, Ghana, Malawi, Namibia, Swaziland, Tanzania, Uganda and Zimbabwe.

2.4. Conclusion

This Chapter has brought to light the structure of UN, its organs and agencies. It also did the same with AU. Further the Chapter demonstrated how socio-economic rights are protected at various levels, from the global level, the regional level and the domestic level (the discussion on the domestic level will be expanded in chapters to follow where South Africa and Nigeria will be examined respectively). It was shown in this Chapter how socio-economic rights are protected extensively at the international level, judging from the ICESCR, as well special instruments that protect the vulnerable groups in our societies, such as the children, women and so on.

At the regional level, the Chapter has shown that the socio-economic rights are well protected also, judging from the African Charter and the special instruments protecting vulnerable groups such as the children and women. Even though this Chapter have shown that the African Charter covers only limited socio-economic rights, it was shown that other rights are as well

³¹¹ Chirwa DM & Chenwi L 'The Protection of Economic, Social and Cultural Rights in Africa' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 9.

³¹² Chirwa DM & Chenwi L 'The Protection of Economic, Social and Cultural Rights in Africa' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 9.

protected implicitly as the African Commission and the African Court interpret the African Charter.

This Chapter considered the treaties which the majority of African countries, if not all, have ratified. The reason for this being that only treaties ratified by the African countries are applicable to the African country in question. Other treaties as well without majority ratification by African countries are included in this Chapter because of the way they protect the socio-economic rights, or for instance, special treaties for vulnerable groups.

This Chapter further examined trade, as it is a key factor in economic development. Looking at it from global level and regional level. Trade under the auspices of the WTO have not been helpful to Africa, so is the measures put in place by the WTO.³¹³ This Chapter submits that the AfCFTA is expected to promote regional trade, as well as investment integration in Africa.

Despite all the protections, both at the global and regional levels, the enforcement of socio-economic rights in Africa still remain protected theoretically, but not practically. The reason for this, as per the researcher's argument is the economic situation in Africa. As it can be observed, the various trade reform policies and measures so far implemented by African states have not yielded the expected developmental benefits for Africa and Africans.

As indicated in various reports discussed in this Chapter, such as the United Nations World Economic Situation and Prospects Report 2020, Africa's share in the global trade is still very low. As such, the growth of African economy to be fully able to enforce socio-economic rights is far-reaching and can remain just a dream. Unless the African countries decide on a treaty or develop existing treaty that will see African countries working together to see each other up, loaning each other money, sharing resources and so, to facilitate intra-African trade that will be beneficial not to only certain nations somewhere in the world, but benefiting African nations and as such, as African economies grow, so will

³¹³ See this Chapter on 2.2.3(a).

the African states be able to enforce or fully enforce socio-economic rights and her people will live adequate life.



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CHAPTER THREE: EXAMINING THE LINK BETWEEN ECONOMIC DEVELOPMENT AND THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA

3.1. Introduction

The main objective of this Chapter is to examine the link between economic development and the enforcement of socio-economic rights in South Africa. The Chapter focuses on South Africa's track record regarding the enforcement of socio-economic rights and the institutions tasked with enforcing these rights, namely the courts, the South African Human Rights Commission (hereinafter SAHRC) and lastly the non-governmental organisations (hereinafter NGOs).

The Chapter evaluates how the South African government 'respects', 'protects', 'fulfils', and 'promotes' socio-economic rights. The Chapter also evaluates the status of the South African economy and the country's economic development as factors that hinder the full enforcement of socio-economic rights. Further, the Chapter examines other factors affecting the enforcement of socio-economic rights, namely corruption and the doctrine of separation of powers.

As alluded to in Chapter 2,³¹⁴ socio-economic rights are closely related to development and the eradication of poverty.³¹⁵ As indicated previously,³¹⁶ socio-economic rights are comprised of economic, social and cultural rights. Economic rights are 'essential empowerment rights, they enable individuals to sustain a livelihood and achieve independence'.³¹⁷ Such rights include the right to work, the right to just and favourable conditions of work, the right to form and join trade unions, and the right to social security including social insurance.

³¹⁴ See 2.1 of Chapter 2.

³¹⁵ Chirwa DM & Chenwi L 'The Protection of Economic, Social and Cultural Rights in Africa' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 3.

³¹⁶ See 2.1 of Chapter 2.

³¹⁷ Chirwa DM & Chenwi L 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 42.

Social rights are 'rights whose purpose is to guarantee the basic means of subsistence, survival and development'.³¹⁸ Such rights include the right to an adequate standard of living including adequate food, clothing and housing, continuous improvement of living conditions, the right to the highest attainable standard of physical and mental health along with the right to family assistance.³¹⁹

Cultural rights 'essentially protect and promote participation in certain forms of activities that are crucial to one's individual or collective identity', and they were discussed in the preceding chapter in detail.³²⁰

Though South Africa has ratified the ICESCR, the government has not ratified³²¹ the OP-ICESCR, which means that the complaint procedure is judiciary unenforceable for South Africans. In a case where domestic remedies have been exhausted South Africans will not be able to access remedies provided by the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (hereinafter OP-ICESCR) for violations of the rights enshrined in the ICESCR.³²²

This Chapter is divided into three main segments, namely: the enforcement of socio-economic rights in South Africa; economic development as a factor that impacts the enforcement of socio-economic rights; two factors affecting the enforcement of socio-economic rights, which are corruption and separation of powers.

³¹⁸ Chirwa DM & Chenwi L 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 41.

³¹⁹ Chirwa DM & Chenwi L 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 41.

³²⁰ See 2.1 of Chapter 2.

³²¹ United Nations website <https://indicators.ohchr.org/> (accessed 27 April 2020).

³²² Viljoen F & Orago N 'An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the light of its Importance and Implications' (2014) 17.

3.2. The enforcement of socio-economic rights in South Africa

In South Africa, the RSA Constitution is the supreme law of the land.³²³ The RSA Constitution undertakes the improvement of the 'quality of life of all citizens and freeing the potential of each person' as one of its objectives.³²⁴ Thus, the RSA Constitution guarantees the progressive realisation³²⁵ of socio-economic rights, such as the rights to housing,³²⁶ health care, food, water, social security³²⁷ and education,³²⁸ within the State's available resources.³²⁹ The RSA Constitution has been lauded as the 'world's best constitution' for the manner that it addresses issues of governance and human rights.³³⁰ United States Supreme Court Justice Ginsburg described it as 'a great piece of work',³³¹ and American jurist Sunstein characterised it as 'the world's leading example of a transformative constitution.'³³²

In the preceding Chapter,³³³ the researcher elaborated on number of international treaties that protect socio-economic rights. In terms of the RSA Constitution, section 231, which addresses international agreements, states as follows:

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

³²³ Constitution of the Republic of South Africa, 1996 sec 2.

³²⁴ Constitution of the Republic of South Africa, 1996 Preamble.

³²⁵ Constitution of the Republic of South Africa, 1996 sec 26(2).

³²⁶ Constitution of the Republic of South Africa, 1996 sec 26.

³²⁷ Constitution of the Republic of South Africa, 1996 sec 27.

³²⁸ Constitution of the Republic of South Africa, 1996 sec 29.

³²⁹ Constitution of the Republic of South Africa, 1996 sec 27(2).

³³⁰ Eighteen years of the world's best Constitution available at <https://www.brandsouthafrica.com/people-culture/history-heritage/eighteen-years-of-the-world-s-best-constitution> (accessed 18 December 2020).

³³¹ Ginsburg RB 'Advocating the elimination of gender-based discrimination: The 1970s new look at the equity principle' University of Cape Town, 10 February 2006 https://www.supremecourt.gov/publicinfo/speeches/viewsspeech/sp_02-10-06 (accessed 18 December 2020).

³³² Sunstein CR 'Social and Economic Rights- Lessons from South Africa New Development in World Constitutionalism' *Constitutional Forum* (1999) 125.

³³³ See 2.2.2 & 2.3.2 of Chapter 2.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted 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.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.³³⁴

Section 231 simply put, regulates the application of the international treaties. Customary international law is only considered to be law in South Africa if it is not inconsistent with the RSA Constitution or legislation.³³⁵

Section 233, which specifically deals with the application of international law states 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.'³³⁶

To reaffirm the protection of socio-economic rights, in 1995, before the adoption of the Final RSA Constitution of 1996, the South African government signed the

³³⁴ Constitution of the Republic of South Africa, 1996 sec 231.

³³⁵ Constitution of the Republic of South Africa, 1996 sec 232.

³³⁶ Constitution of the Republic of South Africa, 1996 sec 233.

ICESCR. However, it was only twenty years later, in 2015, that South Africa ratified the ICESCR.³³⁷ The ratification then provided further obligations to South Africa, in addition to the obligations given by the RSA Constitution, which include the progressive realisation of socio-economic rights to the maximum of its available resources.³³⁸

The ICESCR imposes an obligation on governments to move as expeditiously and effectively as possible towards the goal of realising socio-economic rights.³³⁹ However, despite the numerous provisions that protect socio-economic rights, the South African government has claimed that it does not have sufficient resources to meet its legal obligations in terms of enforcing socio-economic rights as required in terms of the RSA Constitution and international treaties which South Africa has ratified.³⁴⁰

The RSA Constitution covers a number of socio-economic rights, which are discussed in detail below. The purpose of explicitly including socio-economic rights in the Bill of Rights is meant to address the prejudices of the past.³⁴¹ The RSA Constitution is considered as a tool for transforming a society, from one with significant socio-economic challenges to one where resources are equally accessible to its people.³⁴² The most critical factor in the attainment of socio-economic equality was the inclusion of fully justiciable socio-economic rights which are equal to other rights in the RSA Constitution.

³³⁷ Studies in Poverty and Inequality Institution (2016) *'Budget Analysis for Advancing Socio-Economic Rights'* 1.

³³⁸ International Covenant on Economic, Social and Cultural Rights art 2.

³³⁹ CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) para 9.

³⁴⁰ Studies in Poverty and Inequality Institution (2016) *'Budget Analysis for Advancing Socio-Economic Rights'* 1.

³⁴¹ Christiansen E 'Adjudicating Non-Justifiable Rights: Socioeconomic Rights and the South African Constitutional Court' (2007) 38 *Columbia Human Rights Law Review* 321 45 - 6.

³⁴² Pieterse E & van Donk M 'Incomplete Ruptures: The Political Economy of Realising Socioeconomic Rights in South Africa' (2002) 6 *Law, Democracy and Development* 209 - 211.

Further, the National Development Plan (NDP) offers a long-term goal of eliminating poverty and reducing inequality by 2030 and also includes the enforcement of socio-economic rights.³⁴³

In addition, the number of international instruments protecting socio-economic rights, both at the global level (UN) and the regional level (AU) have been ratified by South Africa, which include, as noted above,³⁴⁴ International Covenant on Economic, Social and Cultural rights,³⁴⁵ the African Charter on Human and Peoples' Rights³⁴⁶ and other special treaties which include the Convention on the Rights of the Child,³⁴⁷ the African Charter on the Rights and Welfare of the Child,³⁴⁸ among others.

During the drafting of the RSA Constitution, those who were not in agreement of the inclusion of socio-economic rights in the Bill of Rights argued that it would be equally erosive to the legitimacy of the RSA Constitution if unachievable commitments were made.³⁴⁹ They further argued that rights imposed corresponding duties and the RSA Constitution would lose its credibility if it communicated that people had certain rights in respect of which the government could not deliver, due to the lack of resources.³⁵⁰

It is submitted that this line of argument clearly did not have the best interests of those who live in extreme poverty and solely rely on the enforcement of socio-economic rights for survival.³⁵¹ Further, this line of argument did not take into

³⁴³ South African ICESCR State Report (2017) para 8.

³⁴⁴ See 2.2.2. & 2.3.2 of Chapter 2.

³⁴⁵ See 2.2.2. (a) of Chapter 2.

³⁴⁶ See 2.3.2. (a) of Chapter 2.

³⁴⁷ See 2.2.2. (b) (iii) of Chapter 2.

³⁴⁸ See 2.3.2. (b) (i) of Chapter 2.

³⁴⁹ Heyns C & Brand D 'Introduction to socio-economic rights in the South African Constitution' (1998) 9 *Law, Democracy & Development* 154.

³⁵⁰ Heyns C & Brand D 'Introduction to socio-economic rights in the South African Constitution' (1998) 9 *Law, Democracy & Development* 154.

³⁵¹ Encyclopædia Britannica <https://www.britannica.com/place/South-Africa> (accessed 30 April 2020).

account the fact that South Africa has considerable resources.³⁵² Therefore with commendable policies and treaties, South Africa has the ability to enforce socio-economic rights of all its people.

According to Liebenberg, the socio-economic rights in the RSA Constitution have been categorised into three.³⁵³ Liebenberg states that the socio-economic rights found in the RSA Constitution, Bill of Rights in particular, follow three main drafting styles, namely, qualified socio-economic rights, unqualified socio-economic rights, and prohibition socio-economic rights.

a) Qualified socio-economic rights

Liebenberg³⁵⁴ elaborates that this category establishes the right of 'everyone' to 'have access to' those rights that are 'in respect of which the positive obligation imposed on the state are expressly limited' and such rights include the rights to have access to, 'adequate housing',³⁵⁵ 'health care services, including reproductive health care',³⁵⁶ 'sufficient food and water', and 'social security,³⁵⁷ including, if they are unable to support themselves and their dependants, appropriate social assistance'.³⁵⁸

These rights are limited by the fact that the state is required to take only 'reasonable legislative and other measures, within its available resources to achieve 'progressive realisation' of each of those rights.³⁵⁹

³⁵² Encyclopædia Britannica <https://www.britannica.com/place/South-Africa> (accessed 30 April 2020).

³⁵³ The interpretation of socio-economic rights' in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (2013) 33 - 5.

³⁵⁴ The interpretation of socio-economic rights' in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (2013) 33 - 5.

³⁵⁵ Constitution of the Republic of South Africa, 1996 sec 26(1).

³⁵⁶ Constitution of the Republic of South Africa, 1996 sec 27(1) (a).

³⁵⁷ Constitution of the Republic of South Africa, 1996 sec 27(1) (b).

³⁵⁸ Constitution of the Republic of South Africa, 1996 sec 27(1) (c).

³⁵⁹ Constitution of the Republic of South Africa, 1996 sec 25(8), 26(2) & 27(2).

b) Unqualified socio-economic rights

Liebenberg³⁶⁰ explains that this category of rights establishes a set of 'basic' rights and is for those rights 'without internal limitations' and such rights include, the right of every child to 'basic nutrition, shelter, basic health care services and social services'³⁶¹ and 'to be protected from maltreatment, neglect, abuse or degradation';³⁶² the right to basic education, including adult basic education';³⁶³ and the right of detained persons to 'conditions of detention that are consistent with human dignity, including at least exercise and provision at the state expense, of adequate accommodation, nutrition, reading material and medical treatment'.³⁶⁴

c) Prohibiting socio-economic rights

According to Liebenberg, this category is for those rights that are in the form of a prohibition against certain conduct by the State and private parties, arguably. These rights include the prohibition on evictions and demolitions without a court order made after considering all the relevant circumstances, and prohibition of arbitrary evictions,³⁶⁵ the prohibition on refusal of emergency medical treatment,³⁶⁶ and prohibition of activities that have harmful consequences for health and well-being.³⁶⁷

3.2.1. Institutions working towards enforcement of socio-economic rights

The institutions that play a major role in the enforcement of socio-economic rights are, the courts, SAHRC and NGOs.

³⁶⁰ The interpretation of socio-economic rights' in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (2013) 33 - 5.

³⁶¹ Constitution of the Republic of South Africa, 1996 sec 28(1) (c).

³⁶² Constitution of the Republic of South Africa, 1996 sec 28(1) (d).

³⁶³ Constitution of the Republic of South Africa, 1996 sec 29(1) (a).

³⁶⁴ Constitution of the Republic of South Africa, 1996 sec 35(2) (e).

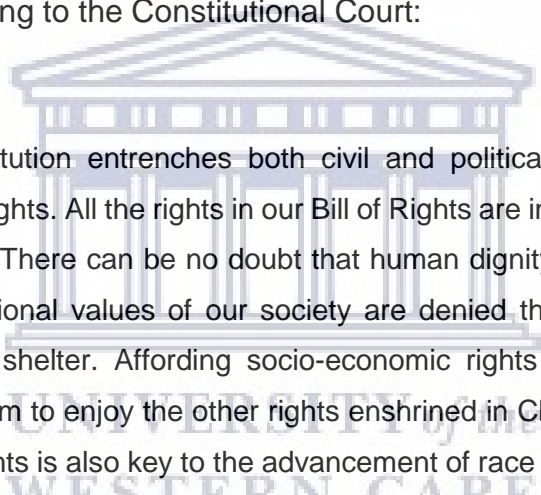
³⁶⁵ Constitution of the Republic of South Africa, 1996 sec 26(3).

³⁶⁶ Constitution of the Republic of South Africa, 1996 sec 27(3).

³⁶⁷ Constitution of the Republic of South Africa, 1996 sec 24.

3.2.1.1. The role of the courts in the enforcement of socio-economic rights

As provided for by the RSA Constitution, the courts are an impartial forum,³⁶⁸ in which socio-economic rights can be adjudicated. The presiding officers in the courts act independently when applying the law and without fear or favour.³⁶⁹ The courts play a major role in that they are tasked with the interpretation and application of the RSA Constitution and other laws. Some of the prominent judgments that have contributed to South Africa's jurisprudence in the area of socio-economic rights include the *Grootboom* case and *Soobramoney v Minister of Health* (hereinafter *Soobramoney*).³⁷⁰ *S v Makwanyane and Another* (hereinafter *Makwanyane*)³⁷¹ is another leading case, albeit dealing with civil and political rights, specifically the right to life. According to the Constitutional Court:



'Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential'.³⁷²

This confirms the immense contributions by the courts in the enforcement of socio-economic rights.

³⁶⁸ Constitution of the Republic of South Africa, 1996 sec 165(2).

³⁶⁹ *South African ICESCR State Report* (2017) para 29.

³⁷⁰ *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997).

³⁷¹ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

³⁷² *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) para 23.

3.2.1.2. The role South African Human Rights Commission in the enforcement of socio-economic rights

The SAHRC plays a major role in the enforcement of socio-economic rights, it is tasked by the RSA Constitution to monitor, among other rights, socio-economic rights, and is one of the Chapter 9 institutions. The SAHRC was established by the RSA Constitution to monitor, assess, investigate and report on the observance of human rights.

In addition, the SAHRC is given powers by the RSA Constitution to monitor and report on socio-economic rights implementation.³⁷³

'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.'³⁷⁴

Against this background, the SAHRC has drafted a number of reports,³⁷⁵ in which it analysed efforts taken by the government in implementing socio-economic rights, considered whether the relevant laws, policies and programmes were reasonable, whether the budgets were sufficient, whether progress had been achieved and on the basis of this made recommendations to government.³⁷⁶

As per the RSA Constitution,³⁷⁷ each year SAHRC must require relevant organs of state to provide it with information on the measures taken towards the realisation of the rights in the Bill of Rights, in particular housing, health

³⁷³ Khoza S (ed) *'Socio-economic rights in South Africa'* (2007) 24.

³⁷⁴ Constitution of the Republic of South Africa, 1996 sec 184(3).

³⁷⁵ Could you please cite some of these reports in your footnotes?

³⁷⁶ Khoza S (ed) *'Socio-economic rights in South Africa'* (2007) 25.

³⁷⁷ Constitution of the Republic of South Africa, 1996 184 (3).

care, food, water, social security, education and the environment. Further, the SAHRC presents annual reports to parliament regarding their focus areas.³⁷⁸ Even the courts recognise the SAHR's role as noted in the *Grootboom* case where the court order that the SAHCR was to monitor and report compliance with the court's judgement.³⁷⁹

Besides the RSA Constitution, the SAHRC also operates under the South African Human Rights Commission Act³⁸⁰ which provides that the Commission must monitor the implementation of, and compliance with, international and regional conventions and treaties, international and regional covenants and international and regional charters relating to the objects of the Commission.³⁸¹

In the 'SAHRC Report declaring the government's programmes unreasonable and unconstitutional', the SAHRC stated that:

'That the Government has taken steps towards the progressive realisation of the right to have access to adequate housing is beyond dispute. What is apparent, however, is that as demonstrated in this critique section, the steps adopted by the government cannot be said to be reasonable, as they cannot pass a constitutional muster. It is regrettable to note that this is so despite the landmark decision of the Constitutional Court in *Grootboom* as millions of people are still living in peril and the programme adopted is not comprehensive as it neglects significant members of the society'.³⁸²

³⁷⁸ *South African ICESCR State Report (2017)* para 36.

³⁷⁹ *Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)* para 97.

³⁸⁰ South African Human Rights Commission Act, Act No.40 of 2013.

³⁸¹ *South African ICESCR State Report (2017)* para 37.

³⁸² South African Human Rights Commission *4th Economic and Social Rights 2000–2002 Report: Housing* (2002) 62.

3.2.1.3. The role of non-government organisations in the enforcement of socio-economic rights

The NGOs play a major role in the enforcement of socio-economic rights. The majority of their work involves socio-economic rights campaigns and litigating socio-economic rights before the courts. In addition, NGOs engage in so-called 'public exposure' activities which involve monitoring, advocacy, education, public awareness, social mobilisation, research and training to promote and advance socio-economic rights. NGOs also typically give legal and paralegal assistance to those that may need it.³⁸³

Moreover, there are number of NGOs³⁸⁴ that are investing immensely in socio-economic rights enforcement, and they include: Black Sash; the Dullah Omar Institute for Constitutional Law, Governance and Human Rights (DOI); the People's Health Movement of South Africa (PHM-SA); the Socio-Economic Rights Institute of South Africa (SERI); and the Studies in Poverty and Inequality Institute (SPII).

Black Sash's, main focus is on social security and social protections for the most vulnerable South Africans particularly women and children and as well as working towards exploring options to significantly reduce poverty and inequality.³⁸⁵

The DOI, is involved in promoting the realisation of socio-economic rights through multi-disciplinary research and human rights education, and conducting campaigns around key social justice issues through teaching and advocacy.³⁸⁶

³⁸³ Khoza S (ed) 'Socio-economic rights in South Africa' (2007) 69.

³⁸⁴ Joint Submission to the United Nations Committee on Economic, Social and Cultural Rights, 64th Session, 24 September - 12 October 2018 Economic, Social and Cultural Rights in South Africa 15 August 2018 1.

³⁸⁵ BlackSash website <https://www.blacksash.org.za/> (accessed 27 April 2020).

³⁸⁶ Dulla Homar Institute website <https://dullahomarinstitute.org.za/> (accessed 27 April 2020).

The PHM-SA is the South African Chapter of the People's Health Movement (PHM), a global network of grassroots activists, civil society and academics.³⁸⁷ It focuses on the enforcement of socio-economic rights, in particular, the right to health care.³⁸⁸

The SERI is involved in the enforcement of socio-economic rights, with its main focus on protecting and fulfilling the right of access to adequate housing, challenging forced evictions, defending and promoting access to basic services, protecting the right to work for those in vulnerable employment and protecting political space for peaceful organisation, expression, civil participation and protest.³⁸⁹

Lastly, the SPII is an independent research think tank, which works towards the enforcement of socio-economic rights through generating new knowledge, information and analysis in the field of poverty and inequality studies, policy and budget reviews.³⁹⁰

3.2.2. Some of the socio-economic rights in the RSA Constitution

It is the researcher's argument that those without access to socio-economic rights and who desperately need access to those rights, those without food, clothing and/or shelter, are equally being denied the democratic values enshrined in the RSA Constitution namely, human dignity, freedom and equality.³⁹¹ Despite the numerous rights that the RSA Constitution protects the scope of this chapter is be limited to the right of access to adequate housing, the right to health, right to food, water and social security and the right to education.³⁹²

³⁸⁷ People's Health Movement of South Africa website <http://phm-sa.org/> (accessed 27 April 2020).

³⁸⁸ People's Health Movement of South Africa website <http://phm-sa.org/> (accessed 27 April 2020).

³⁸⁹ Socio-Economic Rights Institute of South Africa website <https://www.seri-sa.org> (accessed 27 April 2020).

³⁹⁰ Studies in Poverty and Inequality Institute website <http://www.spii.org.za/> (accessed 27 April 2020).

³⁹¹ Studies in Poverty and Inequality Institution (2016) 'Budget Analysis for Advancing Socio-Economic Rights' 1.

³⁹² See 1.3 of Chapter 1.

In addition to the discussions of the rights as outlined above a comparison is made with regards to RSA Constitution's socio-economic rights with other African countries. As outlined in Chapter 2,³⁹³ it can be observed that African countries reveal three broad constitutional models. Some of the countries that have 'direct constitutional protection' model have socio-economic rights in their respective constitutions, fully protected others partially protected.

Five countries with direct constitutional protection from across Africa are selected by the researcher, which are Angola, Cabo Verde, Congo, Mozambique and Seychelles. The countries were chosen based on their constitutional protection of the socio-economic rights and the fact that they are from different regions of Africa.

In Angola, socio-economic rights are protected and can be found in Chapter III of the Constitution (hereinafter Angola Constitution),³⁹⁴ termed 'Economic, Social and Cultural Rights and Duties'. With Cabo Verde, socio-economic rights are protected and can be found in Part II, 'Fundamental Rights and Duties' under Title III 'Economic, Social and Cultural Rights and Duties, of the Cabo Verde Constitution (hereinafter Cabo Verde Constitution).³⁹⁵

In Congo, the Constitution (hereinafter Congo Constitution),³⁹⁶ in Title II termed 'Human Rights, Fundamental Liberties and the Duties of the Citizen and the

³⁹³ See 2.3.4 of Chapter 2.

³⁹⁴ Constitution of the Republic of Angola, 2010, available at https://www.constituteproject.org/constitution/Angola_2010.pdf (accessed 31 October 2020).

³⁹⁵ Constitution of the Republic of Cabo Verde, 2010, available at https://constitutions.unwomen.org/en/countries/africa/~/_media/983cd3b8346a4d53b9e116676bff7363.ashx (accessed 31 October 2020).

³⁹⁶ The Constitution of the Democratic Republic of the Congo, 2005, available at https://www.constituteproject.org/constitution/Democratic_Republic_of_the_Congo_2011.pdf?lang=en (accessed 31 October 2020).

State' under 'Chapter 2: Of Economic, Social and Cultural Rights' guarantees socio-economic rights.

In Mozambique, the Constitution (hereinafter Mozambique Constitution),³⁹⁷ protect socio-economic rights and can be found in 'Chapter V: Economic, Social and Cultural Rights and Duties' which is under 'Title III: Fundamental Rights, Duties and Freedoms'.

In Seychelles, the Constitution (hereinafter Seychelles Constitution),³⁹⁸ protect this right and can be found in Chapter III, Part I, Seychellois Charter of Fundamental Human Rights and Freedoms.

Furthermore, it is interesting to detect that most of the African countries constitutions also protect the rights for the vulnerable people, such as the children, the disabled, the women and the elderly. This shows commitment by Africa countries to socio-economic rights protection for all groups of people without any discrimination.

3.2.2.1. The right of access to adequate housing

The right of access to adequate housing is protected in the RSA Constitution.³⁹⁹ Section 26(1) states that '[e]veryone has the right to have access to adequate housing.'

In engaging the term 'access' to adequate housing, one can observe that this right is not an unqualified obligation or duty on the state to provide

³⁹⁷ Constitution of the Republic of Mozambique, 2004, available at https://www.constituteproject.org/constitution/Mozambique_2007.pdf?lang=en [accessed 31 October 2020].

³⁹⁸ Constitution of the Republic of Seychelles, 1993, available at https://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Seychelles_Constitution_1993%20amended%202010_en.pdf (accessed 31 October 2020).

³⁹⁹ Constitution of the Republic of South Africa, 1996 sec 26.

adequate housing on demand,⁴⁰⁰ that is, the state is not obliged to provide adequate housing when there are individuals who need adequate housing. Liebenberg categorises this right as qualified socio-economic right.⁴⁰¹

Furthermore, the Constitutional Court noted that there is difference between 'right to have access to adequate housing'⁴⁰² as found in the RSA Constitution and the 'right to adequate housing'⁴⁰³ as found in the ICESCR. In elaborating on this difference, it held in *Grootboom* that:

'The right delineated in section 26(1) is a right of "access to adequate housing" as distinct from the right to adequate housing encapsulated in the Covenant [ICESCR]. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.'

Moreover, a comparison is made with regards to RSA Constitution's right of access to adequate housing with other African countries' Constitutions,

⁴⁰⁰ Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) 584.

⁴⁰¹ See 3.2. (a) of Chapter 3.

⁴⁰² Constitution of the Republic of South Africa, 1996 sec 26(1).

⁴⁰³ International Covenant on Economic, Social and Cultural Rights art 11.

which protect this right or similar right in their respective, fully protected others partially protected.

In Angola, this right is protected and can be found in chapter III of the Angola Constitution, termed 'Economic, Social and Cultural Rights and Duties'. In terms of the Constitution, 'Every citizen shall have the right to housing and quality of life.'⁴⁰⁴ Similarly in Cabo Verde, this right is protected and can be found in Part II, 'Fundamental Rights and Duties' under Title III 'Economic, Social and Cultural Rights and Duties, of the Cabo Verde Constitution, which states that '[a]ll citizens shall have the right to proper housing.'⁴⁰⁵

Additionally, the Congo's Constitution, in Title II termed 'Human Rights, Fundamental Liberties and the Duties of the Citizen and the State' under 'Chapter 2: Of Economic, Social and Cultural Rights' guarantees this right, the constitution guarantees '[t]he right to decent housing...'.⁴⁰⁶ Also, in Mozambique, the Constitution, protects this right in 'Chapter V: Economic, Social and Cultural Rights and Duties' which is under 'Title III: Fundamental Rights, Duties and Freedoms' and it is stated as follows:

'All citizens shall have the right to a suitable home, and it shall be the duty of the State, in accordance with national economic development, to create the appropriate institutional, normative and infra-structural conditions.'⁴⁰⁷

The Seychelles Constitution, protect this right and can be found in Chapter III, Part I, Seychellois Charter of Fundamental Human Rights and Freedoms, which reads as follows:

⁴⁰⁴ Constitution of the Republic of Angola, 2010 art 85.

⁴⁰⁵ Constitution of the Republic of Cabo Verde, 2010 art 72(1).

⁴⁰⁶ Constitution of the Democratic Republic of the Congo, 2005 art 48.

⁴⁰⁷ Constitution of the Republic of Mozambique, 2004 art 91(1).

'The State recognises the right of every citizen to adequate and decent shelter conducive to health and well-being and undertakes either directly or through or with the co-operation of public or private organizations to facilitate the effective realization of this right.'⁴⁰⁸

The effect of the constitutionalisation of this right is that the government must enforce this right progressively. However, it is the researcher's argument that the government is not doing enough at all. For instance, reference can be given to the *Grootboom* case. When Irene Grootboom died in 2008, she was still living in a shack despite the Constitutional Court handing down its judgment in 2000.⁴⁰⁹ The successes can be noted as that some people benefited and others continue to benefit from the adequate housing provided by the government, however, many people still struggle to get access to this adequate housing, which is a big challenge as people need the adequate housing. The government continues to have backlogs in terms of providing adequate housing.⁴¹⁰ Despite the known fact that this is not an immediate right, it is the researcher's argument that the 'progressive realisation' of this right is not progressive enough.

Moreover, in terms of section 26, the 'state is obliged 'to take reasonable legislative and other measures' to realise the rights' was developed in relation to right to housing and as well in generally addressing socio-economic rights. The *Grootboom* case was about access to housing, in particular, access to 'adequate housing'. As per the facts of the case, a group of adults and children moved onto private land from an informal settlement because of the uninhabitable conditions in which they lived.

⁴⁰⁸ Constitution of the Republic of Seychelles, 1993 art 34.

⁴⁰⁹ News24 website, available at <https://www.news24.com/news24/housing-activist-dies-in-shack-20080805> (accessed 13 December 2020).

⁴¹⁰ Statistics South Africa (Stats SA), General Household Survey (2018) ix.

These group of individuals were evicted and their building materials were destroyed from the private land they occupied. Consequently, they applied to the High Court for an order granting temporary shelter or housing until such time that they get permanent accommodation, the order was against the three spheres of government. Their arguments were based on section 26(1) and section 28(1)(c) of the RSA Constitution, right of access to adequate housing and the right of children to shelter, respectively.

The Cape High Court, the court of first instance, found that there was only a violation of the right of children to shelter and not the right to adequate housing.⁴¹¹ The matter was taken on appeal to the Constitutional Court which disagreed with the High Court's interpretation of children's right to shelter. However, the Constitutional Court decided that the Government's housing programme did not comply with the obligation to take reasonable steps.⁴¹² In this regard, the Constitutional Court developed a standard of reasonableness as a guide to decide if the Government's programme meets constitutional requirements.

The court indicated that, first, the programme must be comprehensive, coherent and coordinated.⁴¹³ Secondly, that the programme must be capable of "facilitating the realisation of the right".⁴¹⁴ Thirdly, that it must be balanced and flexible, and appropriately provide for short, medium and long-term needs.⁴¹⁵ Fourthly, the programme must clearly allocate responsibilities and tasks to the different spheres of government, and ensure that financial and human resources are available.⁴¹⁶ Fifthly, that the

⁴¹¹ *Grootboom and Others v Oostenberg Municipality and Others* (6826/99) [1999] ZAWCHC 1 (17 December 1999).

⁴¹² Constitution of the Republic of South Africa, 1996 sec 26(2).

⁴¹³ *Grootboom and Others v Oostenberg Municipality and Others* (6826/99) [1999] ZAWCHC 1 (17 December 1999) para 40.

⁴¹⁴ *Grootboom and Others v Oostenberg Municipality and Others* (6826/99) [1999] ZAWCHC 1 (17 December 1999) para 41.

⁴¹⁵ *Grootboom and Others v Oostenberg Municipality and Others* (6826/99) [1999] ZAWCHC 1 (17 December 1999) para 43.

⁴¹⁶ *Grootboom and Others v Oostenberg Municipality and Others* (6826/99) [1999] ZAWCHC 1 (17 December 1999) para 39.

programme must be reasonably formulated and implemented.⁴¹⁷ Lastly, that the programme must provide for the needs of those most desperate by providing relief for people who have no access to land, no roof over their heads, and who are living in intolerable or crisis situations.⁴¹⁸

In a recent case, in *Sarrahwitz v Maritz N.O. and Another*,⁴¹⁹ the facts were Ms Sarrahwitz, the applicant, after unsuccessful attempts to have the trustee of the seller from whom she bought the property (a home she resided in) authorise the transfer of the house, the applicant launched an application in the Eastern Cape High Court, Port Elizabeth in 2012. She sought an order directing the trustee to give effect to the provisions of the deed of sale and have the house registered in her name in terms of sections 21 and 22 of the Land Act. The High Court held that it is the common law and not the Land Act that regulates the transfer of that property. Also, that, in terms of the common law, a purchaser who had paid the full purchase price for a residential property does not have a right to have it transferred to her. The property vests in the seller's insolvent estate. The Court could not fault the trustee's decision not to transfer the house to her in terms of his common law powers. As a result, the Court dismissed her application with costs.⁴²⁰

Aggrieved by this outcome, Ms Sarrahwitz launched an application for leave to appeal to the Full Court, alternatively the Supreme Court of Appeal. She, for the first time, relied on constitutional grounds to challenge the validity of the relevant common law principle.⁴²¹

⁴¹⁷ *Grootboom and Others v Oostenberg Municipality and Others* (6826/99) [1999] ZAWCHC 1 (17 December 1999) para 42.

⁴¹⁸ *Grootboom and Others v Oostenberg Municipality and Others* (6826/99) [1999] ZAWCHC 1 (17 December 1999) para 44.

⁴¹⁹ *Sarrahwitz v Maritz N.O. and Another* [2015] ZACC.

⁴²⁰ *Sarrahwitz v Maritz N.O. and Another* [2015] ZACC 14 para 9.

⁴²¹ *Sarrahwitz v Maritz N.O. and Another* [2015] ZACC 14 para 10.

Her failure to do so in the main application denied the trustee the opportunity to deal with that issue properly at that stage. Raising that issue for the first time when leave to appeal was sought, denied the High Court and the Supreme Court of Appeal the opportunity to consider the development of the common law. The Court held that prospects of success were minimal and leave was refused. Ms Sarrahwitz unsuccessfully petitioned the Supreme Court of Appeal, hence her application to Constitutional Court.⁴²²

The Constitutional Court held that section 26 of the RSA Constitution was meant to put a permanent end to this indignity. According to the Constitutional court, the Constitution not only provides for access to adequate housing but also imposes an obligation on the State to take all reasonable measures to achieve the progressive realisation of the right of access to adequate housing.⁴²³ While large number of South Africans, particularly the poor, do not have access to home loans from commercial banks.⁴²⁴

The *Sarrahwitz* case was about homelessness and vulnerability. One of the many painful and demeaning experiences that the overwhelming majority of South African citizens had to contend with during the apartheid era was not having a place they could truly call home, and their vulnerability to the system's ever-abiding readiness to evict arbitrarily. Significant progress has since been made. Consequently, many previously homeless people have acquired residential property and eviction may no longer be carried out summarily but only in terms of a court order.⁴²⁵

'Our Constitution bears a transformative purpose in the terrain of socio-economic rights. It evinces a deep concern for the material inequality closely

⁴²² *Sarrahwitz v Maritz N.O. and Another* [2015] ZACC 14 para 11.

⁴²³ *Sarrahwitz v Maritz N.O. and Another* [2015] ZACC 14 para 41.

⁴²⁴ Pillay and Naudé 'Financing Low-Income Housing in South Africa: Borrower Experiences and Perceptions of Banks' (2006) 30 *Habitat International* 872.

⁴²⁵ *Sarrahwitz v Maritz N.O. and Another* [2015] ZACC 14 para 1.

associated with past exclusion and poverty that are manifested by lack of proper housing. That explains why section 26(1) of the Constitution provides in express terms that everyone has the right to have access to adequate housing. The State is required to take reasonable measures within its available resources to provide everyone with access to adequate housing. Section 26(3) in particular, creates an important shield to anyone who may be subject to eviction from their home or to have their home demolished. The Constitution makes judicial intervention mandatory by requiring that eviction from or demolition of a home must occur through a court order made after considering all relevant circumstances.⁴²⁶

This reveals that the local, provincial and national governments have immensely failed to deliver social housing, as required by the RSA Constitution.⁴²⁷

According to a 2017 report,⁴²⁸ the government stated that it is committed to providing sustainable human settlements to improve the quality of life for the poor and further stated that such provisions entail access to quality accommodation, basic services, secure tenure and affordable mortgage finance. It further stated that formal housing has grown by 50% since the attainment of democracy in 1994.⁴²⁹

The researcher submits that more still needs to be done. The economy of South Africa must develop and through the intra-African trade South Africa can see rapid growth and consequently the government can be able to provide to as many South Africans as possible, adequate housing.

⁴²⁶ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC) para 142.

⁴²⁷ The conversation 'Promise of right to housing remains elusive in democratic South Africa' available at <https://theconversation.com/promise-of-right-to-housing-remains-elusive-in-democratic-south-africa-105706#:~:text=South%20Africa's%20Constitution%20protects%20everyone's%20right%20to%20access%20ad%20adequate%20housing.&text=Tens%20of%20thousands%20of%20South,emergency%20housing%20for%20displaced%20people>. (accessed 08 November 2020).

⁴²⁸ *South African ICESCR State Report* (2017).

⁴²⁹ *South African ICESCR State Report* (2017) para 99.

3.2.2.2. The right to health

The right to health is guaranteed by the RSA Constitution. Section 27(1)(a) states that '[e]veryone has the right to have access to health care services, including reproductive health care'.⁴³⁰ In addition, s27(3) states that '[n]o one may be refused emergency medical treatment'.⁴³¹

Similarly, with the previous discussed right. The Constitution, with regards to this right, indicates 'access', and this entails that the nature of the obligation is similar to that that is found in the rights of access to adequate housing.⁴³² Also, Liebenberg categories this right as qualified socio-economic right.⁴³³ Once more, while this right may not be infringed by retrogressive measures directly, reasonable legislative and implementation measures to the achievement of this right are required.⁴³⁴

An examination of similar rights in other African countries' Constitutions is important. The Angola Constitution protects this right in Chapter III of the Angola Constitution, termed 'Economic, Social and Cultural Rights and Duties'. In terms of the Angola Constitution, '[t]he state shall promote and guarantee the measures needed to ensure the universal right to medical and health care, as well as the right to child care and maternity care, care in illness, disability, old age and in situations in which they are unable to work, in accordance with the law.'⁴³⁵

Similarly, the Cabo Verde Constitution protects this right is protected and can be found in Part II, 'Fundamental Rights and Duties' under Title III

⁴³⁰ Constitution of the Republic of South Africa, 1996 sec 27(1)(a).

⁴³¹ Constitution of the Republic of South Africa, 1996 sec 27(3).

⁴³² See Chapter 3, 3.2.2.1.

⁴³³ See 3.2. (a) of Chapter 3.

⁴³⁴ Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) 591.

⁴³⁵ Constitution of the Republic of Angola, 2010 art 77(1).

‘Economic, Social and Cultural Rights and Duties,’ which states that ‘[e]veryone shall have the right to health and the duty to defend and promote it, irrespective of his or her economic condition.’⁴³⁶

The Congo Constitution, in Title II termed ‘Human Rights, Fundamental Liberties and the Duties of the Citizen and the State’ under ‘Chapter 2: Of Economic, Social and Cultural Rights’ guarantees ‘[t]he right to health ... is guaranteed.’⁴³⁷ The Mozambique Constitution, protects this right in ‘Chapter V: Economic, Social and Cultural Rights and Duties’ under ‘Title III: Fundamental Rights, Duties and Freedoms’ and provides that ‘[a]ll citizens shall have the right to medical and health care, within the terms of the law, and shall have the duty to promote and protect public health.’⁴³⁸

The Seychelles Constitution protects this right in Chapter III, Part I, Seychellois Charter of Fundamental Human Rights and Freedoms, which states that ‘[t]he State recognises the right of every citizen to protection of health and to the enjoyment of attainable standard of physical and mental health...’.⁴³⁹

In South Africa, the nature of the obligations imposed by this right is the same as the obligations imposed by the right of access to adequate housing, again, progressive realisation of this right is required.⁴⁴⁰ The effect of the constitutionalisation of this right is that the government must have progressive realisation of this right, the government must have reasonable legislative and implementation measures to realise this right progressively.

⁴³⁶ Constitution of the Republic of Cabo Verde, 2010 art 71(1).

⁴³⁷ Constitution of the Democratic Republic of the Congo, 2005 art 47.

⁴³⁸ Constitution of the Republic of Mozambique, 2004 art 89.

⁴³⁹ Constitution of the Republic of Seychelles, 1993 art 29(1).

⁴⁴⁰ Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) 591.

As much as this is not an immediate right, realisation of this right is of paramount importance because health care is one of the important aspects of a human being. The challenges with regards to this right are mostly that health care in public institutions is of poor standard when compared to private institutions, the researcher argues. In 2015/16, private institutions healthcare expenditure was 4.4% of GDP, whereas public healthcare expenditure amounted to 4.1% of GDP, these can be seen as an almost equal contribution, however, it must be noted that, the public sector services approximately 84% of the population while the private sector services a mere 16%.⁴⁴¹

In *Soobramoney v Minister of Health, Kwazulu-Natal* (hereinafter *Soobramoney*) the Court dealt with the right of access to health care.⁴⁴² The applicant was an unemployed man who had chronic kidney failure. As per the facts, the applicant asked the court to direct the provincial hospital to provide him with ongoing dialysis treatment and to prevent the provincial Minister of Health from refusing him admission to the renal (kidney) unit of the provincial hospital. Without this treatment, the applicant argued, he would die and his life could only be prolonged by regular renal dialysis which was denied by the hospital.

The applicant based his argument on two constitutionally protected rights, namely that 'no one may be refused emergency medical treatment'⁴⁴³ and 'everyone has the right to life'.⁴⁴⁴ The respondents argued that their capacity to provide the applicant and other patients in his position with dialysis treatment was constrained by resources. The respondents had only a few machines which could not serve all the patients. They had decided to admit

⁴⁴¹ Gordon T, Booysen F & Mbonigaba J 'Socio-economic inequalities in the multiple dimensions of access to healthcare: the case of South Africa' *BMC Public Health* 20, 289 (2020), available at <https://bmcpublikealth.biomedcentral.com/articles/10.1186/s12889-020-8368-7#citeas> (accessed 16 December 2020).

⁴⁴² *Soobramoney v Minister of Health, Kwazulu-Natal* 1997 (12) BCLR 1696 (CC).

⁴⁴³ Constitution of the Republic of South Africa, 1996 sec 27(3).

⁴⁴⁴ Constitution of the Republic of South Africa, 1996 sec 11.

only those patients who had chances of recovery, and not patients like the applicant whose condition was irreversible.

The Constitutional Court drew parallels with sections 26 and 27 in regard to access to housing, healthcare, food, water and social security, access to which is dependent upon available resources, and that the rights are themselves limited by the lack of resources.⁴⁴⁵ The Court decided that the case did not fall within the provisions of section 27(3) based on the fact that the applicant's condition was not an emergency circumstance which called for immediate remedial treatment, instead, it was an ongoing chronic condition resulting from deterioration of the renal function which was incurable.⁴⁴⁶ The Court found that by managing the inadequate resources the way the hospital did, treating only those patients with a prospect of cure, more patients would benefit, but less would if patients like the applicant got treatment.⁴⁴⁷

In reaching this ruling the Court applied the rationality test. It considered whether in making its decision the hospital has acted rationally. That '[a] court would be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'.⁴⁴⁸ The intervention would only occur where the decision is irrational. The Court did not however give adequate guidance on the test of the standard of 'irrationality' to be applied and the nature of the circumstances in which the Court would be prepared to intervene.⁴⁴⁹

Another prominent case is *Minister of Health and Others v Treatment Action Campaign and Others* (hereinafter *TAC case*) which involved the right of

⁴⁴⁵ *Soobramoney v Minister of Health, Kwazulu-Natal* 1997 (12) BCLR 1696 (CC) para 11.

⁴⁴⁶ *Soobramoney v Minister of Health, Kwazulu-Natal* 1997 (12) BCLR 1696 (CC) para 21.

⁴⁴⁷ *Soobramoney v Minister of Health, Kwazulu-Natal* 1997 (12) BCLR 1696 (CC) para 25.

⁴⁴⁸ *Soobramoney v Minister of Health, Kwazulu-Natal* 1997 (12) BCLR 1696 (CC) para 29.

⁴⁴⁹ Liebenberg S 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' (2002) (2)6 *Law, Democracy & Development* 167.

access to health care, in particular, access to measures introduced to prevent mother-to-child transmission (hereinafter MTCT) of Human Immunodeficiency Virus (hereinafter HIV).⁴⁵⁰ The Treatment Action Campaign (hereinafter TAC) challenged the limited nature of this measures, as the government introduced. Their argument was two-fold, namely that the Government unreasonably prohibited administering the antiretroviral medication at public hospitals and clinics, except for a limited number of pilot sites,⁴⁵¹ and that the Government had not produced and implemented a comprehensive national programme for the prevention of MTCT of HIV.⁴⁵²

TAC challenged this policy and argued that it was unreasonable and violated the right of access to health care services⁴⁵³ and the rights of newborn children to basic health care.⁴⁵⁴ The reasoning in *Grootboom*⁴⁵⁵ was applied in this case. The Court found that the restriction of the drug to research sites was unreasonable. It based this decision on the notion that the policy and/or restriction failed to address the needs of mothers and their newborns who did not have access to those sites.⁴⁵⁶

Commenting on the *TAC* case, Bilchitz raised the following:

‘Indeed the judgment is notable for the virtual absence of any analysis of what the right to have access to health care services involves. What are the services to which one is entitled to claim access? Do these services involve preventative medicine, such as immunization, or treatment for existing diseases, or both?’

⁴⁵⁰ *Minister of Health & others v Treatment Action Campaign & others* (1) 2002 (10) BCLR 1033.

⁴⁵¹ *Minister of Health & others v Treatment Action Campaign & others* (1) 2002 (10) BCLR 1033 para 4.

⁴⁵² *Minister of Health & others v Treatment Action Campaign & others* (1) 2002 (10) BCLR 1033 para 5.

⁴⁵³ Constitution of the Republic of South Africa, 1996 sec 27(1).

⁴⁵⁴ Constitution of the Republic of South Africa, 1996 sec 28(1)(c).

⁴⁵⁵ As discussed in this 3.2.2.1 of this Chapter.

⁴⁵⁶ *Minister of Health & others v Treatment Action Campaign & others* (1) 2002 (10) BCLR 1033 para 67.

Does the right entitle one to primary, secondary or tertiary health care services, or all of these?'⁴⁵⁷

Bilchitz gives two arguments, first, that 'there is a need to supplement the Court's approach based on reasonableness with an analysis of the obligations imposed upon the government by socio-economic rights'.⁴⁵⁸ Bilchitz further continues to argue that, 'an analysis of the obligations placed upon the government by socio-economic rights should include what has been termed a minimum core obligation to realise without delay the most urgent survival interests protected by the right. Despite recent pronouncements by the Court, there is a way in which the minimum core approach can be rehabilitated'.⁴⁵⁹

The rulings in the above cases were criticised. First, that while the Court's construction of section 27(3) of the RSA Constitution, namely the restriction that there must be a genuine medical emergency is understandable, however, the construction of the provision from the angle of a negative obligation confines it to existing services and facilities providing emergency medical treatment.⁴⁶⁰

In *Oppelt*,⁴⁶¹ another case relating to right to health care, the case concerned a delictual claim arising from delayed medical treatment after the applicant sustained spinal cord injuries that left him paralysed. The High Court held that Mr Oppelt's claim against the Head of the Western Cape Provincial Department of Health must succeed, while the Supreme Court of

⁴⁵⁷ Bilchitz D 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 6.

⁴⁵⁸ Bilchitz D 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* page abstract.

⁴⁵⁹ Bilchitz D 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* abstract.

⁴⁶⁰ Liebenberg S 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?' (2002) (2) 6 *Law Democracy and Development* 165.

⁴⁶¹ *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* [2015] ZACC 33.

Appeal found that the causal link between the harm Mr Oppelt suffered and the conduct of the Department had not been established and that no delictual liability could be found. The latter decision is the subject matter of this application.⁴⁶²

The applicant instituted an action against the Head of the Western Cape Provincial Department of Health in the High Court for the failure of the three hospitals to provide him with prompt and appropriate medical treatment. The applicant claimed damages for negligence arising from the injury.⁴⁶³

The Constitutional Court in its decision, found the judgment in favour of the applicant. The applicant's claim against the respondent succeeded and the the Head of the Western Cape Provincial Department of Health was declared liable to pay delictual damages as the applicant may prove to have suffered as a result of the neck injury sustained in the rugby match.⁴⁶⁴

One of the other arguments that the present research raises is that public health institutions and facilities do not treat people in a way that they can be free to access right to health. For instance in relation to victims of gender based violence that in instances where health assistance is provided, health workers, do not have specialised skills to fully assist, and are allegedly insensitive, judgmental and abusive towards the victims.⁴⁶⁵

The SAHRC has raised concerns regarding the subtle or explicit homo-prejudiced or hetero-normative attitudes towards Lesbian, Gay, Bisexual

⁴⁶² *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* [2015] ZACC 33 para 1.

⁴⁶³ *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* [2015] ZACC 33 para 86.

⁴⁶⁴ *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* [2015] ZACC 33 para 86.

⁴⁶⁵ Bannister T 'Equal Access to Health Care Services for Survivors of Gender-Based Violence: A South African Perspective' (2014) 12 *The Equal Rights Review* 69.

and Transgender people, Intersex (LGBTI) people, and this has resulted in such victims fearing and/or refusing medical treatment by health care workers.⁴⁶⁶ Another major issue is the issue of termination of pregnancy, even though this is legal to do, due to a lack of access to facilities, long waiting periods and fear of ill-treatment or stigma, many women tend to resort to illegal abortions,⁴⁶⁷ which are a health risk, and these illegal abortions facilities advertise their services in shopping malls, schools and other areas.

Another issue is unavailability of medications, which is a serious health risk and it is mainly due to a shortage of pharmacists, protracted labour disputes, poor management, corruption, and poor communication between suppliers, depots and facilities.⁴⁶⁸ One of the other pressing issues is the lack of information on the transparency around the pricing of essential drugs which prohibits access to essential drugs either in original or generic form, to those most in need.⁴⁶⁹

Interestingly, section 35(2)(e) of the RSA Constitution contains right to 'adequate medical treatment' for prisoners, this right is not subject to progressive realisation.

With regards to the provision of healthcare, the South African government is currently working on the proposed National Health Insurance (hereinafter NHI), a health financing system that can be regarded as the government's approach towards the enforcement of the right to health care, and it is

⁴⁶⁶ South African Human Rights Commission Public Inquiry: Access to Health Care Services (2008) <https://www.sahrc.org.za/home/21/files/Health%20Report.pdf> (accessed 30 April 2020).

⁴⁶⁷ Jacobs R & Hornsby N 'Why Aren't Women getting Safe Abortions?' (2014) 104 South African Medical Journal http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-95742014001200014 (accessed 30 April 2020).

⁴⁶⁸ Bateman C 'Drug Stock-outs: Inept Supply-chain Management and Corruption' (2013) 103 South African Medical Journal <http://samj.org.za/index.php/samj/article/view/7332/5356> (accessed 30 April 2020).

⁴⁶⁹ FXB Centre for Health and Human Rights 'How Access to Medicines is a Human Rights Issue' (2017) Harvard University <https://www.hhrguide.org/2017/06/09/access-to-medicines-and-human-rights/> (accessed 30 April 2020).

designed to provide to all South Africans access to quality affordable personal health with disregard of their socio-economic status.⁴⁷⁰ Some have viewed the government's approach towards the enforcement of the right to health care through the NHI as unfortunate, since more tax revenue will be directed towards the implementation of the NHI.⁴⁷¹ It has been reported that large number of individuals expressed negativity towards the NHI.⁴⁷²

With regards to the way forward, this research submits that the government must learn from private institutions, with regards to standard of service given to clients in private institutions. Additionally, the government must invest more to improve health facilities and give more training to staff workers. The above is what must be done, which leads to the main argument of this research, that economic development is needed in order for socio-economic rights, in particular, right to health to be enforced fully.

3.2.2.3. The right to food, water and social security

This right is protected under the RSA Constitution, which states as follows:

- '(1) Everyone has the right to have access to—
- (a) ...
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.'
- ⁴⁷³

⁴⁷⁰ South African Government website, available at <https://www.gov.za/about-government/government-programmes/national-health-insurance-0> (accessed 16 December 2020).

⁴⁷¹ Jacaranda FM website, available at <https://www.jacarandafm.com/news/news/additional-tax-fund-nhi/> (accessed 16 December 2020).

⁴⁷² Department of Health website, available at <http://www.health.gov.za/wp-content/uploads/2020/11/media-analysis-report-on-nhi-bill-1.pdf> (accessed 16 December 2020).

⁴⁷³ Constitution of the Republic of South Africa, 1996 sec 27.

Liebenberg categories this right as qualified socio-economic right.⁴⁷⁴ With regards to right to food, the South African government has put in place food security, agricultural policies and support programmes to ensure that communities are given agricultural opportunities that will enable them to meet their basic food needs and to reduce food insecurity in the country.⁴⁷⁵ In addressing malnutrition and stunting amongst children, school feeding was also introduced.⁴⁷⁶

Nkrumah concede to the fact that there is lack of case law on the right to food in South Africa.⁴⁷⁷ In *My Vote Counts NPC v Speaker of the National Assembly and Others*,⁴⁷⁸ the Court stated that the state is required to fulfil a range of constitutional obligations, either by passing legislation or by other means. That the Bill of Rights requires the state to take reasonable legislative and other measures to fulfil a range of social and economic rights. Which included to achieve the progressive realisation of the rights to sufficient food and water, amongst other rights.⁴⁷⁹

Regarding the right to water and sanitation, the government has put in place a system that governs the allocation and equitable access to water without discrimination of any kind.⁴⁸⁰ This right to access to water is given statutory recognition in the Water Services Act, 1997⁴⁸¹ and the National Water Act, 1998.⁴⁸² Both statutes protect and facilitate the free exercise of the right to access and dispose of water resources in an equitable, environmentally-

⁴⁷⁴ See 3.2. (a) of Chapter 3.

⁴⁷⁵ South African ICESCR State Report (2017) para 105.

⁴⁷⁶ South African ICESCR State Report (2017) para 106.

⁴⁷⁷ Nkrumah B 'Opening Pandora's box: a legal analysis of the right to food in South Africa' 2019 *De Jure Law Journal* 60.

⁴⁷⁸ *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31.

⁴⁷⁹ *My Vote Counts NPC v Speaker of the National Assembly and Others* para 26.

⁴⁸⁰ South African ICESCR State Report (2017) para 107.

⁴⁸¹ Water Services Act 108 of 1997.

⁴⁸² National Water Act 36 of 1998.

responsible and sustainable manner. In addition, the Water Services Act guarantees that everyone is entitled to basic water supply.⁴⁸³

With regards to the right to social security, it bears mentioning that nearly a third of the nation's population relies on some form of social assistance through social grants.⁴⁸⁴ During the State of the Nation Address on 16 February 2018, South African President Cyril Ramaphosa highlighted the importance of social assistance and he said, '[s]ocial grants remain a vital lifeline for millions of our people living in poverty'.⁴⁸⁵ Although, the government's efforts are commendable in providing social grants, the amount of the grants are not enough to cover and sustain beneficiaries' basic living needs.

For instance, the current Child Support Grant of R400,⁴⁸⁶ falls below the food poverty or extreme poverty line.⁴⁸⁷ The food poverty line refers to the amount of money that an individual will need to afford the minimum required daily energy intake and it is commonly referred to as the 'extreme' poverty line.⁴⁸⁸ Currently the food poverty line is at R585 per person per month.⁴⁸⁹

Statistics released in 2015 show that '61,3% of poor households [were] supported by child support grants'.⁴⁹⁰ Applying the definition of the poverty line, this means that, these households 'are unable to purchase or consume enough food to supply them with the minimum per-capita-per-day energy

⁴⁸³ Water Services Act sec 4.

⁴⁸⁴ Cyril Ramaphosa, 'State of the Nation Address by President of the Republic of South Africa, Mr Cyril Ramaphosa' (16 February 2018) <http://www.thepresidency.gov.za/speeches/state-nation-address-president-republic-south-africa%2C-mr-cyril-ramaphosa> (accessed 30 April 2020).

⁴⁸⁵ Cyril Ramaphosa, 'State of the Nation Address by President of the Republic of South Africa, Mr Cyril Ramaphosa' (16 February 2018) <http://www.thepresidency.gov.za/speeches/state-nation-address-president-republic-south-africa%2C-mr-cyril-ramaphosa> (accessed 30 April 2020).

⁴⁸⁶ Budget Speech by Tito Titus Mboweni, Minister of Finance (26 February 2020) 15.

⁴⁸⁷ Statistics South Africa (Stats SA), National Poverty Lines (2020) 3.

⁴⁸⁸ Statistics South Africa (Stats SA), National Poverty Lines (2020) 3.

⁴⁸⁹ Statistics South Africa (Stats SA), National Poverty Lines (2020) 3.

⁴⁹⁰ Statistics South Africa (Stats SA), Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015 (2017) 37.

requirement for adequate health'.⁴⁹¹ It is evident that there is a need for the grant to be increased as a matter of urgency and as the research argues, government must take decisive action to ensure the fully realisation of socio-economic rights. The government must work on intra-African trade as it is argued that it will develop the economy and as such, the government will be able to, amongst others, increase this grant.

In *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*⁴⁹² (hereinafter *Khosa & Mahlaule*), the Court dealt with the right of access to social assistance,⁴⁹³ in particular the restrictions and exclusions. As per the facts, a group of permanent residents challenged the constitutionality of some provisions of the Social Assistance Act (as amended)⁴⁹⁴ and the Welfare Laws Amendment Act.⁴⁹⁵

The provisions that they challenged were namely, the restricted access to social assistance to South African citizens only, the exclusion of permanent residents, elderly people and children, who would otherwise have qualified for social grants if there was no requirement of citizenship, and the exclusion of primary caregivers from accessing the Child Support Grant for children in their care, especially where these children are South African citizens (while children of non-citizens would have to be removed from their families to join a foster family in order to benefit from the Child Support Grant).⁴⁹⁶

⁴⁹¹ Statistics South Africa (Stats SA), National Poverty Lines (2020) 3.

⁴⁹² *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004).

⁴⁹³ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* case para 1.

⁴⁹⁴ Social Assistance Act 59 of 1992.

⁴⁹⁵ Welfare Laws Amendment Act 106 of 1997.

⁴⁹⁶ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* case para 5.

The Constitutional Court decided that permanent residents are a vulnerable group, that the laws that exclude them from access to the benefit of social assistance treat them as inferior to citizens, that the costs of including permanent residents in the social security scheme would be small, that excluding permanent residents from access to a social security scheme was not consistent with section 27 of the Constitution and excluding children from access to these grants was unfair discrimination on the basis of their parents' nationality and violated their right to social security under section 28(1)(c).⁴⁹⁷

Other African countries offer similar protection in their Constitutions while do not explicitly recognise these rights at all. The Angola Constitution is silent with regards to protecting these rights. Similarly, the Constitution of Mozambique, is silent with regards to these rights. The Constitution Cabo Verde, protects this right in Part II, 'Fundamental Rights and Duties' under Title III 'Economic, Social and Cultural Rights and Duties, of the Cabo Verde constitution, which states that '[e]veryone shall have the right to social security for his or her protection in unemployment, illness, disability, old age, orphanhood, widow(er)hood and in all situations of lack or decrease in his or her means of subsistence or in his or her capacity to work.'⁴⁹⁸

Similarly, the Congo Constitution recognizes this right in Title II termed 'Human Rights, Fundamental Liberties and the Duties of the Citizen and the State' under 'Chapter 2: Of Economic, Social and Cultural Rights' which guarantees '[t]he right to ... [a] secure food supply is guaranteed.'⁴⁹⁹

⁴⁹⁷ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* case para 74.

⁴⁹⁸ Constitution of the Republic of Cabo Verde, 2010 art 70(1).

⁴⁹⁹ Constitution of the Democratic Republic of the Congo, 2005 art 47.

The Constitution of Seychelles protects this right. In Chapter III, Part I, the Seychellois Charter of Fundamental Human Rights and Freedoms, provides that '[t]he State recognises the right of every citizen to a decent and dignified existence and with a view to ensuring that its citizens are not left unprovided for by reason of incapacity to work or involuntary unemployment undertakes to maintain a system of social security.'⁵⁰⁰

3.2.2.4. The right to education

The right to education is another of the socio-economic rights protected by the RSA Constitution.

Everyone has the right—

- (a) to a basic education, including adult basic education; and
- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.⁵⁰¹

Liebenberg categorises this right as unqualified socio-economic right,⁵⁰² however, only basic education. The implications of the wording used is that with regards to basic education there are reservations. Whereas, with regards to further education, the state must act progressively.

The South African government, through the National Development Plan emphasises that young people in particular deserve better educational and economic opportunities.⁵⁰³ Further, through National School Nutrition Programme, daily meals are provided to learners at schools. The aims are to 'foster better quality education by enhancing children's active learning capacity', 'alleviating short-term hunger', 'providing an incentive for children

⁵⁰⁰ Constitution of the Republic of Seychelles, 1993 art 37.

⁵⁰¹ Constitution of the Republic of South Africa, 1996 sec 29(1).

⁵⁰² See 3.2. (b) of Chapter 3.

⁵⁰³ National Development Plan 24.

to attend school regularly' and 'punctually addressing certain micro-nutrient deficiencies'.⁵⁰⁴

Even though the government has recorded high enrolment rates, concerns regarding the quality of basic education have been raised. The Annual National Assessment (ANA) for 2013, statistics indicates that only 3 percent of Grade 9 reached the 50 percent mathematics threshold while only 48 percent reached 50 percent on the home language examination threshold.⁵⁰⁵ In addition, South Africa's performance in the Southern and East African Consortium for Monitoring Educational Quality (SACMEQ) tests and the Trends in International Mathematics and Science Study (TIMSS) Assessments were also reportedly poor.⁵⁰⁶

The SAHRC has acknowledged the efforts by the Department of Basic Education to retain learners in the education system,⁵⁰⁷ however, the SAHRC has indicated that the retention strategies not fully active, as evidenced by the 2014 drop-out rate for learners between 14 to 18 years, with female learners making 10.1 percent of the total drop-out.⁵⁰⁸ It is also evident that there was not much attention given to right to education at tertiary level,⁵⁰⁹ until the government declared free higher education in late December 2017.⁵¹⁰

⁵⁰⁴ South African ICESCR State Report (2017) paras 106.

⁵⁰⁵ Franklin S & McLaren D (Studies in Poverty and Inequality Institute) Realising the Right to Basic Education in South Africa: An Analysis of the Content, Policy Effort, Resource Allocation and Enjoyment of the Constitutional Right to Basic Education (2015).

⁵⁰⁶ Franklin S & McLaren D (Studies in Poverty and Inequality Institute) Realising the Right to Basic Education in South Africa: An Analysis of the Content, Policy Effort, Resource Allocation and Enjoyment of the Constitutional Right to Basic Education (2015).

⁵⁰⁷ South African ICESCR State Report (2017) para 155.

⁵⁰⁸ South African ICESCR State Report (2017) para 157.

⁵⁰⁹ SAHRC NHRI Report to the CESCR re. List of Issues, August 2017 para 72.

⁵¹⁰ Muller SM 'Free higher education in South Africa: Cutting through the lies and statistics' (25 Jan 2018), available at <https://mq.co.za/article/2018-01-25-free-higher-education-in-south-africa-cutting-through-the-lies-and-statistics/> (accessed 30 April 2020).

In *Minister of Basic Education v Basic Education for All*⁵¹¹ (hereinafter *BEFA*), the court dealt with the right to education in terms of s 29(1)(a) of the Constitution. As per the facts of the case, during 2012 the Department of Education (hereinafter DBE) formulated and adopted a new national education curriculum, Curriculum and Assessment Policy Statements (hereinafter CAPS). The CAPS revised the content and learning material of each learning area. As a result, new textbooks were prescribed and it was necessary to see to it that they were available for use in time for the ensuing academic year.⁵¹²

Still in 2012, with half of the academic year already completed, textbooks in respect of the introduction of the first phase of the CAPS for Grades 1, 2, 3 and 10, had not been delivered to schools in Limpopo.⁵¹³ This matter was widely referred to as the 'Limpopo textbook saga'.⁵¹⁴

In its judgement, the Court declared that s 29(1)(a) of the Constitution entitles every learner at public schools to be provided with every textbook prescribed for his or her grade before commencement of the teaching of the course for which the textbook is prescribed.⁵¹⁵ Also, the Court declared that it is the duty of the State, in terms of s 7(2) of the Constitution, to fulfil the s 29(1)(a) right of every learner by providing him or her with every textbook prescribed for his or her grade before commencement of the teaching of the course for which the textbook is prescribed.⁵¹⁶

⁵¹¹ *Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198; [2016] 1 All SA 369 (SCA); 2016 (4) SA 63 (SCA) (2 December 2015).

⁵¹² *Minister of Basic Education v Basic Education for All* para 8.

⁵¹³ *Minister of Basic Education v Basic Education for All* para 13.

⁵¹⁴ Veriava F 'The Limpopo textbook litigation: a case study into the possibilities of a transformative constitutionalism', available at https://repository.up.ac.za/bitstream/handle/2263/61140/Veriava_Limpopo_2016.pdf?sequence=3&isAllowed=y (accessed 16 December 2020).

⁵¹⁵ *Minister of Basic Education v Basic Education for All* para 53(3)(1).

⁵¹⁶ *Minister of Basic Education v Basic Education for All* para 53(3)(2).

Other African countries' Constitutions recognise the right to education. The Angola Constitution, in Chapter III, termed 'Economic, Social and Cultural Rights and Duties' provides that '[t]he state shall promote access for all to literacy, education, culture and sport, encouraging various private agents to become involved in their implementation, under the terms of the law.'⁵¹⁷

Similarly, the Cabo Verde Constitution in Part II, 'Fundamental Rights and Duties' under Title III 'Economic, Social and Cultural Rights and Duties', states that '[e]veryone shall have the right to education.'⁵¹⁸

The Congo Constitution, in Title II termed 'Human Rights, Fundamental Liberties and the Duties of the Citizen and the State' under 'Chapter 2: Of Economic, Social and Cultural Rights' guarantees this right, guarantees '[a]ll persons have access to establishments of national education, without discrimination of place of origin, of race, of religion, of sex, of political or philosophical opinions, of their physical, mental or sensorial state in accordance with their capacities.'⁵¹⁹

The Mozambique Constitution, protects the right to education in 'Chapter V: Economic, Social and Cultural Rights and Duties' under 'Title III: Fundamental Rights, Duties and Freedoms' which provides that '[i]n the Republic of Mozambique, education shall be a right and a duty of all citizens.'⁵²⁰

In Seychelles, the Constitution, protects this right to education in Chapter III, Part I, Seychellois Charter of Fundamental Human Rights and

⁵¹⁷ Constitution of the Republic of Angola, 2010 art 79(1).

⁵¹⁸ Constitution of the Republic of Cabo Verde, 2010 art 78(1).

⁵¹⁹ Constitution of the Democratic Republic of the Congo, 2005 art 47.

⁵²⁰ Constitution of the Republic of Mozambique, 2004 art 88(1).

Freedoms, which states that '[t]he State recognises the right of every citizen to education...'.⁵²¹

In addition, the following treaties protect the right to compulsory basic education, namely: the African Charter on the Rights and Welfare of the Child;⁵²² International Covenant on Economic, Social and Cultural Rights;⁵²³ the Convention on the Rights of the Child;⁵²⁴ and the Universal Declaration of Human Rights.⁵²⁵

Education plays a crucial in improving the lives of a people, because:

'Literacy is a bridge from misery to hope. It is a tool for daily life in modern society. It is a bulwark against poverty and a building block of development, an essential complement to investments in roads, dams, clinics and factories. Literacy is a platform for democratisation, and a vehicle for the promotion of cultural and national identity. Especially for girls and women, it is an agent of family health and nutrition. For everyone, everywhere, literacy is, along with education in general, a basic human right.'⁵²⁶

3.2.3. South African government's duties to 'respect', 'protect', 'promote' and 'fulfil' socio economic rights

The RSA Constitution stipulates that '[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights'.⁵²⁷ First, in terms of the 'duty to respect'

⁵²¹ Constitution of the Republic of Seychelles, 1993 art 33.

⁵²² African Children Charter art 11(3).

⁵²³ International Covenant on Economic, Social and Cultural Rights art 13(2).

⁵²⁴ Convention on the Rights of the Child art 28.

⁵²⁵ Universal Declaration of Human Rights art 26(1).

⁵²⁶ Kofi Annan's speech delivered on International Literacy Day 1997, available at <https://www.un.org/press/en/1997/19970904.SGSM6316.html> (accessed 31 October 2020).

⁵²⁷ Constitution of the Republic of South Africa, 1996 sec 7(2).

the state is required not to interfere with people's enjoyment of socio-economic rights, either directly or indirectly.⁵²⁸

For example, unlawful evictions. Secondly, the 'duty to protect' places a duty on the state to take legislative and other measures, including the provision of effective remedies, to protect vulnerable groups against violations of their rights by more powerful private parties for example, landlords abusing their tenants in a form of unlawful eviction. The obligation to protect means that for instance, the deficient implementation, application, and enforcement of effective anti-corruption measures essentially constitute an omission by the government, as human rights give rise to the above-mentioned obligations to become active, omissions may violate human rights.⁵²⁹ Thirdly, the 'duty to promote' is about creating awareness and educational measures concerning the socio-economic rights.⁵³⁰ Lastly, the duty 'to fulfill' requires the state to take positive measures to ensure that those who currently lack access to the socio-economic rights gain get access.⁵³¹

3.3. Economic development as a factor that impacts the enforcement of socio-economic rights

According to SAHRC Commissioner Mohamed Ameerma:

'Unfortunately, as we approach twenty years since the Constitution was signed into law at Sharpeville by President Nelson Mandela, a huge disjuncture between human rights rhetoric and human rights reality, continues to exist in our society. It is a sad reality that our country is ranked as one of the most unequal societies in the world....the obligation of the government to respect,

⁵²⁸ The interpretation of socio-economic rights' in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (2013) 33 - 6.

⁵²⁹ Peters A 'Corruption as a violation of international human rights' (2019) 29 (4) *The European Journal of International Law* 1259.

⁵³⁰ The interpretation of socio-economic rights' in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (2013) 33 - 6.

⁵³¹ The interpretation of socio-economic rights' in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (2013) 33 - 6.

protect, promote and fulfil the rights contained in the Bill of Rights calls on the State to devise sound macroeconomic, fiscal and monetary policies so as to maximise the revenue pool earmarked for socio-economic rights, and to manage public finances in an efficient and accountable manner...'.⁵³²

The above statements are a summation of how economic development affects the enforcement of socio-economic rights.

The 2019 Budget Review⁵³³ projected real economic growth of 1.5 per cent in for that year, however, South Africa only achieved 0.3 per cent growth. The 2019 Budget Review also projected 1.7 per cent growth in 2020, but unfortunately the economy only experienced a 0.9 per cent growth.⁵³⁴ The economic situation in South Africa is dire, in the second half of 2019 the unemployment rate was at 29.1 per cent, real GDP is expected to grow at 0.9 per cent in 2020, 1.3 per cent in 2021 and 1.6 per cent in 2022.⁵³⁵

These figures prove that South Africa's current economic trajectory is unsustainable, that the economic growth has stagnated, unemployment is rising, and inequality remains high. The National Treasury's Economic Policy urges that the government urgently implement a series of reforms that can boost South Africa's growth in the short term, while also creating the conditions for higher long-term sustainable growth.⁵³⁶ Further, the 2020 Budget Review, showed that South Africa's key trading partners have weakened in recent months despite the global outlook having been marginally improved.⁵³⁷ This was the case before the Covid-19 pandemic which resulted in the national lockdown.

⁵³² Opening Address, SAHRC / SPII Roundtable: Budget Analysis for Advancing Socio-Economic Rights, 17 November 2016.

⁵³³ National Treasury 'Budget Review 2019'.

⁵³⁴ National Treasury 'Budget Review 2020' 1.

⁵³⁵ National Treasury 'Budget Review 2020' iii.

⁵³⁶ Economic Policy, National Treasury 'Economic transformation, inclusive growth, and competitiveness: Towards an Economic Strategy for South Africa' 3.

⁵³⁷ National Treasury 'Budget Review 2020' page iii.

Policy interventions are very important and, in the long-run, the National Treasury 'estimates that the policy interventions could raise average GDP growth by 2.3 percentage points over ten years and create just over one million jobs compared with a scenario without the policy interventions'.⁵³⁸ In order for the socio-economic rights to be fully enforced and to eliminate poverty and reduce inequality, the economy must grow, and benefit all South Africans.⁵³⁹

Close cooperation among African countries, firms and people would deepen economic and social integration, contributing to higher rates of growth and development in the African continent.⁵⁴⁰ Studies have indicated that a huge number of people in South Africa have suffered and continue to suffer from poverty and socio-economic deprivation and exclusion and the human rights situation in the country is deteriorating, as seen from the increasing poverty rate.⁵⁴¹ For example, in 2015 over 30.4 million South Africans were living in poverty.⁵⁴²

a) **Progressive realisation**

The concept of 'progressive realisation' means that the realisation of socio-economic rights by the state occurs over time.⁵⁴³ Chirwa and Chenwi argue

⁵³⁸ Economic Policy, National Treasury (2019) 'Economic transformation, inclusive growth, and competitiveness: Towards an Economic Strategy for South Africa' 60.

⁵³⁹ National Planning Commission 'National Development Plan 2030 Our Future-make it work' 24.

⁵⁴⁰ National Planning Commission 'National Development Plan 2030 Our Future-make it work' 32.

⁵⁴¹ Nkolomba MN & Futshane V 'South Africa's Rising Poverty Rates are Indicators of a Deteriorating Human Rights Situation' Huffington Post (15 August 2017), https://www.huffingtonpost.co.za/mawethu-nkosana/south-africas-rising-poverty-rates-are-indicators-of-a-deteriorating-human-rights-situation_a_23170066/ (accessed 30 April 2020).

⁵⁴² Statistics South Africa (Stats SA), Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015 (2017), page 14.

⁵⁴³ O'Connell, et al., Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources (New York: Routledge, 2014) 67.

that, the concept of progressive realisation recognises various factors which means that socio-economic rights must then be realised over time.⁵⁴⁴

This is because socio-economic rights are both context and resource dependent.⁵⁴⁵ Even though there can be number of challenges in the process of progressive realisation, such as the availability of resources, states remain obligated to take steps that are 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.'⁵⁴⁶ This also applies to the socio-economic rights, as be found in the RSA Constitution.

In the 2018 national budget speech,⁵⁴⁷ the flat-rate Value Added Tax (VAT) was increased from 14% to 15% so that the government could 'generate an additional R36 billion in tax revenue for 2018/19'. However, this increase of VAT brought negatively impacted the poor as this meant that the cost of living also went up. While the R36 billion gained from the VAT increase can contribute towards the enforcement of socio-economic rights (since it is part of the revenue divided to different departments, some of which enforce socio-economic rights, such as the Department of Human Settlements), the government needs to find ways to generate revenue as opposed to directly affecting the poor negatively by increasing VAT.

Although the government has considered VAT zero-rating certain goods and services, this is not the best option for the poor.⁵⁴⁸ The government must

⁵⁴⁴ Chirwa DM & Chenwi L 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 51.

⁵⁴⁵ Chapman A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 28.

⁵⁴⁶ CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) para 2.

⁵⁴⁷ See Budget Speech by Malusi Gigaba, Minister of Finance (21 February 2018), p. 11, available at: <http://www.treasury.gov.za/documents/national%20budget/2018/speech/speech.pdf>. (accessed 30 April 2020).

⁵⁴⁸ Joint Submission to the United Nations Committee on Economic, Social and Cultural Rights, 64th Session, 24 September - 12 October 2018 Economic, Social and Cultural Rights in South Africa 15 August 2018 para 14.

ensure that a significant number of individuals have access to minimum essential levels of the rights in the ICESCR.⁵⁴⁹

b) Maximum Available Resources

Maximum available resources (hereinafter MAR) require states to show that they have used all of their available resources towards enforcing socio-economic rights, given current economic conditions, including international aid, when needed.⁵⁵⁰ When any 'significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education,' then there is a violation of socio-economic rights.⁵⁵¹

As alluded to earlier, the RSA Constitution places the onus on the government to advance socio-economic rights 'within its available resources' which is not similar to the ICESCR which requires a, 'maximum of its available resources',⁵⁵² these terms are not different conceptually, and the courts in South Africa have not interpreted these terms differently.⁵⁵³

The notion of MAR is to generally give an obligation to the government to generate maximum resources to progressively realise socio-economic rights.⁵⁵⁴ As the present research suggests, for this to be realised, the government must work on and support the argument that African will be able to

⁵⁴⁹ CESCR, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) (14 December 1990), UN Doc No E/1991/23 para. 10.

⁵⁵⁰ Helena and Blyberg, Article 2 & Governments' Budgets, International Budget Partnership (2014) available at <http://www.internationalbudget.org/wp-content/uploads/Maximum-Available-Resources-booklet.pdf>. (accessed 30 April 2020).

⁵⁵¹ International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997, available at <http://www.refworld.org/docid/48abd5730.html>. (accessed 30 April 2020).

⁵⁵² International Covenant on Economic, Social and Cultural Rights ICESCR art 2.

⁵⁵³ Studies in Poverty and Inequality Institution (2016) 'Budget Analysis for Advancing Socio-Economic Rights' 8.

⁵⁵⁴ Blyberg A & Hofbauer H (2014) 'Article 2 & Governments Budgets' available at <http://www.internationalbudget.org/wp-content/uploads/Article-2-and-Governments-Budgets.pdf> (accessed 30 April 2020).

enforce socio-economic rights if it unites and trades with itself. The AfCFTA as noted above,⁵⁵⁵ is a step in the right direction.

The rights that are discussed in this research must be prioritised and be given the 'minimum core' obligation, such as, the rights to education, shelter, food and healthcare, in order to comply with the requirements of MAR. A government that fails to meet at least these 'minimum core' obligations, based on an argument of lack of available resources,⁵⁵⁶ which this research has argue against because the Africa has enough resources to feed its people, the said government must show that they did their best to use all the resources in their territory.

The courts do not want to be prescriptive in the enforcement of socio-economic rights. In *Mazibuko & Others v City of Johannesburg & Others* (hereinafter *Mazibuko*),⁵⁵⁷ the Court was cautious about overstepping into the roles of executive and the legislature, and was unwilling to specify what the 'minimum core' of socio-economic rights ought to be.⁵⁵⁸

In order to meet the concept of MAR the government must show that the expenditure towards the enforcement of socio-economic rights, is not only to the minimum, but that the state must show that it is doing its best and that these rights are given maximum protection.⁵⁵⁹ Government must make sure that

⁵⁵⁵ See 2.3.3.3 in Chapter 2.

⁵⁵⁶ CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) para 10.

⁵⁵⁷ *Mazibuko & Others v City of Johannesburg & Others* CCT 39/09 [2009].

⁵⁵⁸ *Mazibuko & Others v City of Johannesburg & Others* CCT 39/09 [2009].

⁵⁵⁹ Blyberg A & Hofbauer H (2014) 'Article 2 & Governments Budgets' available at <http://www.internationalbudget.org/wp-content/uploads/Article-2-and-Governments-Budgets.pdf> (accessed 30 April 2020).

programme design and implementation is accessible to intended beneficiaries.⁵⁶⁰

Funds allocated by government for the realization of socio-economic rights must be spent fully and on the enforcement of socio-economic, and if there is under-spending, government must give an account and remedy that.⁵⁶¹ Government is required to achieve socio-economic rights progressively and effectively as expeditiously as possible.⁵⁶² The government must not merely increase state allocation and expenditure.⁵⁶³

3.4. Other factors affecting the enforcement of socio-economic rights

There are number of factors that affect the enforcement of socio-economic rights, these include corruption and separation of powers. The reason the research focuses only on the two factors it is because these factors are considered more significant in terms of negatively affecting the enforcement of the socio-economic rights.

3.4.1. Corruption

Corruption is a crisis that affects many countries in the world and it appears to be much worse in Africa.⁵⁶⁴ Corruption, regardless of its magnitude, must be considered a violation of the socio-economic rights.⁵⁶⁵ Against this background, Human Rights Treaty Bodies have 'identified mismanagement of resources and

⁵⁶⁰ Blyberg A & Hofbauer H (2014) 'Article 2 & Governments Budgets' available at <http://www.internationalbudget.org/wp-content/uploads/Article-2-and-Governments-Budgets.pdf> (accessed 30 April 2020).

⁵⁶¹ Blyberg A & Hofbauer H (2014) 'Article 2 & Governments Budgets' available at <http://www.internationalbudget.org/wp-content/uploads/Article-2-and-Governments-Budgets.pdf> (accessed 30 April 2020).

⁵⁶² CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) para 9.

⁵⁶³ Studies in Poverty and Inequality Institution (2016) 'Budget Analysis for Advancing Socio-Economic Rights' 6.

⁵⁶⁴ Shehu AT 'The enforcement of social and economic rights in Africa: The Nigerian experience (2013) 2(1) *Journal of Sustainable Development Law and Policy* 117.

⁵⁶⁵ Peters A 'Corruption as a violation of international human rights' (2019) 29 (4) *The European Journal of International Law* 1262.

corruption as obstacles to the allocation of resources to promote equal rights'.⁵⁶⁶ With regards to corruption, the Constitutional Court has held that:

'Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms'.⁵⁶⁷

The Constitutional Court again arrived at a similar conclusion when it held that:

'Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public...in turn the national prosecuting authority bears the authority and indeed the duty to prosecute crime, including corruption and allied corrupt practices'.⁵⁶⁸

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The National Development Plan indicates as follows:

'That South Africa suffers from high levels of corruption that undermine the rule of law and hinder development and socioeconomic transformation. Defined as the misuse of an official position for personal gain, corruption occurs in both the public and private sectors. The costs of corrupt practices fall most heavily on the poor because they degrade the quality and accessibility of public

⁵⁶⁶ Human Rights Treaty Bodies, Contributions to the 2030 Agenda for Sustainable Development, May 2016 7.

⁵⁶⁷ *South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77 (28 November 2000) para 4.

⁵⁶⁸ *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011) para 176.

services. State systems of accountability have been uneven, enabling corruption to thrive. This is not specific to the public sector. It is a broader societal disease. To address this comprehensively, anti-corruption efforts should target the bribe-maker, as well as the bribe-taker'.⁵⁶⁹

3.4.2. The doctrine of separation of powers

The separation of powers doctrine generally 'means that specific functions, duties and responsibilities are allocated to distinctive institutions with defined areas of competence and jurisdiction. Separation of public powers is, in short, separation of public institutions (legislature, executive and judiciary) and of public functions, for example 'the making of law, law application and execution, and dispute resolution'.⁵⁷⁰

According to French jurist Montesquieu, 'in every government there are three sorts of powers: the legislative; the executive in respect of things dependent on the law of nations; and the executive in regard to matters that depend on civil law.'⁵⁷¹ Montesquieu argued that, unless each power only exercises its own function, 'there can be no liberty...and there would be an end of everything, were the same the man or the same body...to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the cause of individuals.'⁵⁷²

In South Africa, the principle of separation of powers has been a point of debate even before the adoption of the RSA Constitution, especially for those who were debating against the inclusion of socio-economic rights.⁵⁷³

⁵⁶⁹ National Development Plan 446.

⁵⁷⁰ Seedorf S & Sibanda S 'Separation of Powers' in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (2013): 12 - 2.

⁵⁷¹ De Secondant CL *The Spirit of Laws*, translated by Nugent T (1899) Book 11, s.6, 151.

⁵⁷² De Secondant CL *The Spirit of Laws*, translated by Nugent T (1899) Book 11, s.6, 151-152.

⁵⁷³ See 3.2 of this Chapter.

The court's reluctance to overstep the boundaries of the executive and legislature and specifying what the minimum core of socio-economic rights ought was reflected in *Mazibuko & Others v City of Johannesburg & Others*.⁵⁷⁴ Based on this, one can argue that the interpretation and application of the separation of powers principle can hinder the full enforcement of socio-economic rights as the Courts cannot give their full views in relation to the enforcement of socio-economic rights.

In addition, checks and balances is included in the RSA Constitution, and its aim was and still is to create links between the different branches of government, to make government in general and the doctrine of separation of powers in particular more efficient. The basic idea of a division of functions remains and is only modified by the fact that each of the branches may assert some specifically defined authority in the field of the others.⁵⁷⁵

3.5. Conclusion

It is without doubt that RSA Constitution is one of the best in Africa and the world. This Chapter has shown the South Africa courts have handed down commendable judgments in enforcing the socio-economic rights as they are found in the Bill of Rights. From the landmark cases, such as *Grootboom* and those that followed thereafter, such as *Soobramoney*.

The government must also be applauded for the number of programs it has put in place, such as, the social assistance program, the housing program, the school feeding program to name the few. However, as this Chapter has shown, more still needs to be done. This Chapter has shown that, socio-economic rights still remain a challenge as many South Africans continue living under poverty lines, with over 27 percent of unemployment and many South Africans

⁵⁷⁴ *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009).

⁵⁷⁵ Seedorf S & Sibanda S 'Separation of Powers' in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (2013): 12 - 11.

without housing. It is the researcher's submission that more still needs to be done.

The research argues that, Africa uniting and facilitating intra-African trade can address this lack of full enforcement of socio-economic rights. It is submitted that the newly formed African Continental Free Trade will aid in this aspect. The South African government needs to work with other governments towards a free-trade agreement that will not only open borders for trade but will as well see states working together, supporting each other and seeing each state doing well due to the support they will be giving to each other. The regional trade agreements that South Africa belongs to have not yield good results as far as the economic development that South African needs to enforce socio-economic rights fully.

It is the argument of this research that rapid and sustainable economic development is required in Africa. The research further argues that the WTO does not favour Africa as a developing continent, it is in actual fact in favour of developed nations or Western Nations as they are often called, it is inception was not to see Africa growing economically. Measures that have been put in place by the WTO for least-develop and developing countries have not been helpful to Africa. Should South Africa and all other African states together fail to develop or adjust to the free trade agreement, it would leave millions suffering due to lack of socio-economic rights enforcement.

CHAPTER FOUR: EXAMINING THE LINK BETWEEN ECONOMIC DEVELOPMENT AND THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN NIGERIA

4.1. Introduction

The main objective of this Chapter is to examine the link between economic development and the enforcement of socio-economic rights in Nigeria. The Chapter focuses on Nigeria's track record regarding the enforcement of socio-economic rights. The Chapter also investigates the fact that Nigerian courts do not have power to adjudicate on socio-economic rights. In addition, the Chapter discusses the institutions tasked with enforcing these rights, namely, Nigeria's National Human Rights Commission (hereinafter NHRC) and the NGOs.

The Chapter evaluates how the Nigerian government 'respects', 'protects' and 'fulfils' socio-economic rights. The Chapter also evaluates the Nigerian economy, the country's levels of economic development as factors that impact the full enforcement of socio-economic rights. The chapter then examines other factors affecting the enforcement of socio-economic rights, namely corruption and the doctrine of separation of powers.

With reference to Chapter 2,⁵⁷⁶ socio-economic rights are closely related to development and eradication of poverty.⁵⁷⁷ It bears mentioning that socio-economic rights are Economic, Social and Cultural Rights. Economic rights are 'essential empowerment rights, they enable individuals to sustain a livelihood and achieve independence'.⁵⁷⁸ Such rights include the right to work, the right

⁵⁷⁶ See 2.1 of Chapter 2.

⁵⁷⁷ See 2.1 of Chapter 2.

Chirwa DM & Chenwi L 'The Protection of Economic, Social and Cultural Rights in Africa' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 3.

⁵⁷⁸ See 2.1 of Chapter 2.

Chirwa DM & Chenwi L 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 42.

to just and favourable conditions of work, the right to form and join trade unions, and the right to social security including social insurance. Social rights are 'rights whose purpose is to guarantee the basic means of subsistence, survival and development'.⁵⁷⁹ Such rights include the right to an adequate standard of living including adequate food, clothing and housing, continuous improvement of living conditions, the right to the highest attainable standard of physical and mental health along with the right to family assistance.⁵⁸⁰

Cultural rights are not discussed in this chapter as they are not relevant for this research.

Similar to South Africa, although Nigeria has ratified the ICESCR, the Nigerian government has not ratified⁵⁸¹ the OP-ICESCR, which means that the complaint procedure involving the judiciary is unavailable for Nigerians. Where domestic remedies have been exhausted regarding socio-economic rights, Nigerians do not have access to remedies provided by OP-ICESCR for violations of the rights enshrined in the ICESCR.⁵⁸²

Also, since Nigeria is a party to the Vienna Convention on the Law of Treaties, it is important to know that the legal obligations of the Vienna Convention on the Law of Treaties applies to Nigeria, as seen in chapter 2.⁵⁸³

This Chapter is divided into three main segments: first, socio-economic rights enforcement in Nigeria; secondly, economic development as a factor towards

⁵⁷⁹ See 2.1 of Chapter 2.

Chirwa DM & Chenwi L 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 41.

⁵⁸⁰ See 2.1 of Chapter 2.

⁵⁸¹ UN website <https://indicators.ohchr.org/> (accessed 2 May 2020).

⁵⁸² Viljoen F & Orago N 'An Argument for South Africa's Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the light of its Importance and Implications' (2014) 17.

⁵⁸³ See 2.2.2 of Chapter 2.

the enforcement of socio-economic rights; and thirdly the two factors affecting the enforcement of socio-economic rights in Nigeria, which are corruption and the principle of separation of powers.

4.2. Socio-economic enforcement in Nigeria

The Nigerian Constitution is the supreme law of Nigeria.⁵⁸⁴ Nigeria aimed to 'provide for a Constitution for the purpose of promoting the good government and welfare of all persons'⁵⁸⁵ in its territory.

As outlined in Chapter 2,⁵⁸⁶ there are three types of constitutional protections of socio economic rights, namely: the direct constitutional protection model, whereby socio-economic rights are expressly included in the bill of rights of the respective countries; the 'non constitutional protection' model which does not protect socio-economic rights in the bill of rights; and the hybrid model, in which some socio-economic rights are recognised in the bill of rights, while others are under directive principles of state policy.

Nigeria falls under the second model as it does not expressly protect socio-economic rights and does not have socio-economic rights in its Bill of Rights (Chapter IV of the Nigerian Constitution). Socio-economic rights are found in the 'Fundamental Objectives and Directive Principles of State Policy' (Chapter II) of the Nigerian Constitution, which in fact are just urgings to all branches of government,⁵⁸⁷ and do not give legal obligations to the government.

Some of the socio-economic rights found in the Nigerian Constitution include: the rights to suitable and adequate shelter (housing);⁵⁸⁸ adequate medical and

⁵⁸⁴ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 1.

⁵⁸⁵ Constitution of the Federal Republic of Nigeria Act 24 of 1999 Preamble.

⁵⁸⁶ See 2.3.4 of Chapter 2.

⁵⁸⁷ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 13.

⁵⁸⁸ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 16(2)(d).

health facilities for all persons (health);⁵⁸⁹ suitable and adequate food (food);⁵⁹⁰ water;⁵⁹¹ reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens (social security);⁵⁹² and free education (education).⁵⁹³ With regards to free education, the government 'shall as and when practicable' provide free education.⁵⁹⁴

Nigeria's Bill of Rights only covers the following rights: the right to life;⁵⁹⁵ the right to the dignity of human person;⁵⁹⁶ the right to personal liberty;⁵⁹⁷ the right to a fair hearing;⁵⁹⁸ the right to private and family life;⁵⁹⁹ the right to freedom of thought, conscience and religion;⁶⁰⁰ the right to freedom of expression and the press;⁶⁰¹ the right to peaceful assembly and association;⁶⁰² the right to freedom of movement;⁶⁰³ the right to freedom from discrimination;⁶⁰⁴ the right to acquire and own immovable property in any part of Nigeria,⁶⁰⁵ and rights coming out of compulsory acquisition of property.⁶⁰⁶

In addition, several international instruments protecting socio-economic rights, both at the global level (UN) and regional level (AU) have been ratified by Nigeria, which include, as noted above,⁶⁰⁷ ICESCR, the African Charter and

⁵⁸⁹ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 17(3)(d).

⁵⁹⁰ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 16(2)(d).

⁵⁹¹ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 20.

⁵⁹² Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 16(2)(d).

⁵⁹³ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 18(3).

⁵⁹⁴ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 18(3).

⁵⁹⁵ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 33.

⁵⁹⁶ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 34.

⁵⁹⁷ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 35.

⁵⁹⁸ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 36.

⁵⁹⁹ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 37.

⁶⁰⁰ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 38.

⁶⁰¹ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 39.

⁶⁰² Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 40.

⁶⁰³ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 41.

⁶⁰⁴ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 42.

⁶⁰⁵ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 43.

⁶⁰⁶ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 44.

⁶⁰⁷ See 2.2.2. & 2.3.2 of Chapter 2.

other special treaties which include the CRC, the African Charter on the Rights and Welfare of the Child among others.

In 1993, the Nigerian government ratified⁶⁰⁸ ICESCR to reaffirm its willingness to protect socio-economic rights. The ratification of the ICESCR imposes an obligation on governments to move as expeditiously and effectively as possible towards the goal of realising socio-economic rights.⁶⁰⁹ Therefore, Nigeria ought to move towards the enforcement of socio-economic rights.

Unfortunately, the enforcement of socio-economic rights in Nigeria cannot be done through direct judicial action but rather through political action, this in short means that socio-economic rights are not justiciable, that is, grievances pertaining the implementation of these rights cannot be taken to court.⁶¹⁰ There is a wide gap between the reception and enforcement of socio-economic rights, in relation to civil and political rights. The former are treated less seriously compared to the latter.⁶¹¹

This happens without appreciating the far-reaching implications of socio-economic rights for the lives and livelihood of millions of Africans living in extreme poverty and those Africans who are powerless to hold their governments accountable through the courts.⁶¹² The African Charter regards socio-economic rights free of claw-back clauses.⁶¹³ Claw-back is defined as a clause 'that permits, in normal circumstances, breach of an obligation for a

⁶⁰⁸ United Nations website <https://indicators.ohchr.org/> (accessed 04 May 2020).

⁶⁰⁹ CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) para 9.

⁶¹⁰ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 6(6)(c).

⁶¹¹ Ibe S 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 226.

⁶¹² Ibe S 'Implementing economic, social and cultural rights in Nigeria: Challenges and opportunities' (2010) 10 *African Human Rights Law* 198.

⁶¹³ Ibe S 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 227.

specified number of public reasons'.⁶¹⁴ Civil and political rights are subject to claw-back clauses.⁶¹⁵ This distinction between these two categories of rights has been described as representing 'a significantly new and challenging normative framework for the implementation of economic, social and cultural rights'.⁶¹⁶

There are arguments that civil and political rights are interrelated with socio-economic rights. One of the arguments is that the fulfilment or denial of either civil and political rights or socio-economic rights could have a ripple effect on the enjoyment of other rights. For example, the right to housing, is linked to the right to life, dignity, non-discrimination, freedom of expression, association, participation in public decision making, privacy, health, work, education and personal security.⁶¹⁷

In Chapter II, the Nigerian Constitution recognises the duty and responsibility of 'all organs of government, and all authorities and persons, exercising legislative, executive or judicial powers, to conform to, observe and apply the provisions of this chapter of this Constitution'.⁶¹⁸ In addition the Nigerian Constitution provides that '[t]he programme as well as the aims and objects of a political party shall conform with the provisions of Chapter II of this Constitution'.⁶¹⁹

The Nigerian Constitution further provides for the establishment and regulation of authorities for the Federation or any part thereof to '[t]o promote and enforce

⁶¹⁴ Gittleman R 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1981) 22 (4) *Virginia Journal of International Law* 691.

⁶¹⁵ For instance African Charter art 11 makes provisions for claw-backs.

⁶¹⁶ Odinkalu CA 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in Evans M & Murray R (eds) *The African Charter on Human and Peoples' Rights – The system in practice 1986-2000* (2002) 186.

⁶¹⁷ United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant) 13 December 1991 EC/1992/23 para 9.

⁶¹⁸ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 13.

⁶¹⁹ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 224.

the observance of the Fundamental Objectives and Directive Principles contained in this Constitution'.⁶²⁰

However, the Constitution seems to prohibit the courts from adjudicating cases in relation to Chapter II (Fundamental Objectives and Directive Principles of State Policy) of the Nigerian Constitution. It provides that '[t]he judicial powers vested in accordance with the foregoing provisions of this section, shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of 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 II of this Constitution'.⁶²¹ However, the Nigerian Constitution does provide for the adjudication of the socio-economic rights.

The division of the UDHR into ICCPR (civil and political rights) and ICESCR (socio-economic rights) has resulted into the constitutional language of many nations being what they are today. This has resulted in most countries, especially developing countries, recognising civil and political rights as immediate enforceable rights while socio-economic rights are considered as promotional policy of state and marked as non-justiciable fundamental objectives and directive principles of state policy, and Nigeria falls squarely into this category.⁶²²

This is attested by the fact that in Nigeria, civil and political rights have gained traction more than any other category of rights, even though it has been argued that human rights are not restricted to any particular brand of rights but must be combined and united as one, both civil and political rights on one hand, and

⁶²⁰ Constitution of the Federal Republic of Nigeria Act 24 of 1999 Exclusive Legislative List item 60(a).

⁶²¹ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 6(6)(c).

⁶²² Egbewole WO 'Realizing socio-economic rights in Nigeria and the justiciability question: lessons from South Africa and India' (2017) 8 *International Journal of Politics and Good Governance* 2.

socio-economic rights on the other hand.⁶²³ Further, socio-economic rights are generally referred to as 'second generation' rights and are regarded as positive in nature as they require affirmative action by the government for their realisation.⁶²⁴ However, the issue of affirmative action can be argued with regards to the civil and political rights as they also require affirmative action.

The socio-economic rights have been elaborated and described as follows:

[e]conomic and social rights are objectives to be achieved progressively. Therefore, a much longer period of time is contemplated for the fulfilment of the objectives. For civil and political rights, states ratifying the Covenant will immediately be subjected to an obligation to give effect to the rights. The enactment of legislation is generally sufficient to effect the enjoyment of civil and political rights, while legislation is not sufficient for the attainment of socio-economic rights. Very much depends on the economic condition of the State. The machinery of complaint, the Committee on Human Rights envisaged for civil and political rights is not a suitable body for dealing with economic and social rights, since they can only be achieved progressively and since the obligation of members with respect to them are not as precise as those for the other set of rights'.⁶²⁵

Julius Kambarage Nyerere, the first and former President of Tanzania observed in his 'Stability in Africa', an address presented at the University of Toronto, Canada in 1969, that both civil and political rights and socio-economic rights should both be emphasised, as the emphasis on civil and political rights would be meaningless, for example, the right to life and the right to access medical treatment.⁶²⁶

⁶²³ Nwuta Samuel I. (2011-2012) "Legal Framework for the Protection of Socio-Economic Rights in Nigeria," 10 Nigerian Judicial Review. 24.

⁶²⁴ Egbewole WO 'Realizing socio-economic rights in Nigeria and the justiciability question: Lessons from South Africa and India' (2017) 8 *IJPGG* page 5.

⁶²⁵ Roosevelt, General Assembly Official Records, 6th Session 1951-2, Plenary Session page 505.

⁶²⁶ Ihonvbere JO 'Underdevelopment and Human Rights in Africa' in Shepherd GW Anikpo M (eds) *Emerging Human Rights: The African Political Economy Context* (1990) 56.

Further, Justice Bhagwati of the Indian Supreme Court offered similar sentiments when he stated that:

[i]t was realised that to the large majority of people who are living an almost sub-human existence in conditions of object poverty and for whom life is one long unbroken story of want and destitution, notions of individual freedom and liberty, though representing some of the most cherished values of free society, would sound as empty words bandied about only in the drawing rooms of the rich and well-to-do and the only solution for making these 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 pre-conditions of fundamental liberties for all may be secured. It was necessary to create socio-economic conditions in which every citizen of the country would be able to exercise civil and political rights and they will not remain the preserve of only a fortunate few'.⁶²⁷

The Nigerian courts have constantly referred to section 6(6)(c) of the Nigerian Constitution and it is evident that little effort is made to use other provisions of the Constitution to arrive to a different conclusion, as Indian courts have done. For instance, in India, the court has invoked the constitutional provision of right to life to make justiciable other provisions that were generally seen as non-justiciable. In *Unnikrishnan J.P. v. State of Andhra Pradesh*,⁶²⁸ the Indian court invoked the right to life and it stated that every 'child/citizen of this country [India] has a right to free education until he completes the age of fourteen years'.

In elaboration of the above, the court held that:

⁶²⁷ *Minerva Mills Ltd. and Ors. vs Union Of India and Ors* AIR 1980 SC 1789.

⁶²⁸ *Unnikrishnan J.P. v. State of Andhra Pradesh* (1993) 1 SSC. 645.

'[T]he right to basic education is implied by the fundamental right to life (Article 21) when read in conjunction with the directive principle on education (Article 41). The Court held that the parameters of the right must be understood in the context of the Directive Principles of State Policy, including Article 45 which provides that the state is to endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children under the age of 14.'⁶²⁹

In Nigerian courts, a similar case was presented in the *Badejo v. Federal Ministry of Education*,⁶³⁰ the approach was so different to the approach taken by the Indian Court. The Nigerian court did not see a relationship between socio-economic rights and civil and political rights.

In relation to Nigeria and other countries with similar constitutions, similar approach or similar classification of socio-economic rights, the issue at hand is not whether socio-economic rights are second-rated rights. The issue is the fact that governments have continued not to give serious attention to socio-economic rights. This state of affairs is in direct contrast with the governments' responsibilities to provide the basic necessities to their people.⁶³¹

4.2.1. Institutions working towards the enforcement of socio-economic rights

In Nigeria, institutions that play a major role in the enforcement of human rights are mostly the courts, the NHRC and NGOs.

4.2.1.1. The Courts

⁶²⁹ *Unnikrishnan J.P. v. State of Andhra Pradesh* (1993) 1 SSC. 645.

⁶³⁰ *Badejo v. Federal Ministry of Education* (1990) 4 NWLR (Pt. 143) 354.

⁶³¹ Egbewole WO 'Realizing socio-economic rights in Nigeria and the justiciability question: lessons from South Africa and India' (2017) 8 *International Journal of Politics and Good Governance* 7.

The courts function in a way that individuals and/or groups look to them to resolve issues arising from violations of their human rights.⁶³² However in various countries in Africa,⁶³³ as in Nigeria, socio-economic rights are not justiciable, adjudication by the courts only applies to civil and political rights. Justiciability has been described, by one of Nigeria's prominent legal scholars as 'a combination of judicial power and duty bestowed constitutionally on the courts to adjudicate violations of the law'.⁶³⁴

A right is justiciable if a court can consider the right in a concrete set of circumstances and such consideration then results in the further determination of the right's significance.⁶³⁵

Although socio-economic rights are protected under international and regional human rights instruments requiring member states to respect, protect and fulfil them,⁶³⁶ in Nigeria these rights are not justiciable, however, the Nigeria's legal obligations in terms of the treaties which Nigeria has ratified mean that Nigerian citizens can lodge proceedings before regional courts in Africa. The Nigeria judiciary appears to have done little to make the realisation of the socio-economic rights justiciable, as compared to their counterpart, the Indian judiciary.⁶³⁷

4.2.1.2. The National Human Rights Commission

The NHRC was established by the National Human Rights Commission Act,⁶³⁸ in line with United Nations resolution which enjoins all member states

⁶³² Ibe S 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 226.

⁶³³ Such as Botswana, Cameroon and Zambia.

⁶³⁴ Nwabueze BO *Judicialism in Commonwealth Africa: The role of the courts in government* (1977) 21.

⁶³⁵ Ikpeze Ogugua V. (2015) 'Non-Justiciability of Chapter II of the Nigerian Constitution as an Impediment to Economic Rights and Development' 5(18) *Developing Country Studies* 49.

⁶³⁶ Isokpan AJ 'The Role of the Courts in the Justiciability of Socio-Economic Rights in Nigeria: Lessons from India' (2017) 8 (2) *NAUJILJ* 101.

⁶³⁷ See 4.2 of this Chapter.

⁶³⁸ National Human Rights Commission Act Cap N46 LFN 2004 Vol. II. It came into effect on 27th September, 1995.

to establish independent national institutions for the promotion, protection and enforcement of human rights.⁶³⁹ The NHRC serves as an extra-judicial mechanism for the respect and enjoyment of human rights. It also provides avenues for public enlightenment, research, and dialogue to raise awareness on Human Rights issues.⁶⁴⁰

The NHRC Amendment Act has conferred the Commission with the mandate to, amongst others:

'deal with all matters relating to the promotion and protection of human rights as guaranteed by the Constitution of the Federal Republic of Nigeria, the United Nations Charter and the Universal Declaration on Human Rights, the International Convention on Civil and Political Rights, the International Convention on the Elimination of all forms of Racial Discrimination, the International Convention on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Discrimination Against Women, the Convention on the Rights of the Child, the African Charter on Human and Peoples' Rights and other international and regional instruments on human rights to which Nigeria is a party'.⁶⁴¹

The NHRC not only focuses on civil and political rights but also on socio-economic rights, rights such as the right to health,⁶⁴² right to food and shelter,⁶⁴³ and right to education.⁶⁴⁴ Has the NHRC made any determinations on any of these socio-economic rights? What powers does the NHRC have? Can it take action against the state? What is the legal force of its decisions?

⁶³⁹ United Nations General Assembly Resolution No. 48/134 of 20th December 1993.

⁶⁴⁰ Nigeria's National Human Rights Commission website <http://www.nigeriarights.gov.ng/about/overview.html> (accessed 17 May 2020).

⁶⁴¹ National Human Rights Commission Act (Amendment) Act, 2010 sec 5(a).

⁶⁴² Nigeria's National Human Rights Commission website <https://www.nigeriarights.gov.ng/focus-areas/right-to-health.html> (accessed 17 May 2020).

⁶⁴³ Nigeria's National Human Rights Commission website <https://www.nigeriarights.gov.ng/focus-areas/food-and-shelter.html> (accessed 17 May 2020).

⁶⁴⁴ Nigeria's National Human Rights Commission website <https://www.nigeriarights.gov.ng/focus-areas/right-to-education.html> (accessed 17 May 2020).

4.2.1.3. Non-Government Organisations

NGOs together with the Bar Association play a major role in Nigeria, their mandate is to educate, empower and mobilise to arrive to full realisation of human rights, socio-economic rights included. It goes without saying that the rate of poverty in Nigeria means that socio-economic rights cannot and must not be ignored at all. These institutions, amongst other tasks, engage in public advocacy events directed at equipping the rural and urban poor with the requisite skills to interface with government and demand good governance.⁶⁴⁵

It is the duty of civil society, NGOs included, to persuade rulings on the right to adequate housing by bringing cases related to housing rights to courts.⁶⁴⁶ One of the well-known NGOs in Nigeria is Socio Economic Rights Initiative (SERI) formerly called Shelter Rights Initiative. This NGO is 'committed to the advancement of economic and social rights through promotion of the universal rights to health, housing, living environment, education, food, adequate standard of living, equality, security and the rule of law'.⁶⁴⁷

Recently in Nigeria, a citizen-led movement, which protested against the Special Anti-Robbery Squad (hereinafter SARS) and demanded an overhaul of how Nigeria is governed.⁶⁴⁸ The SARS protests began with calls to end the SARS due to its brutality and expanded into other issues.⁶⁴⁹ The SARS protest issues ranged from inequality to corruption to basic

⁶⁴⁵ Ibe S 'Implementing economic, social and cultural rights in Nigeria: Challenges and opportunities' (2010) 10 *African Human Rights Law Journal* 211.

⁶⁴⁶ Amnesty International 'Open letter to His Excellency Rotimi Amaechi, Governor of Rivers State' (AI Index: AFR 44/028/2010, 9 November 2010).

⁶⁴⁷ Socio Economic Rights Initiative website <http://serifoundation.org/about-us/> (accessed 17 May 2020).

⁶⁴⁸ The New York Times website, available at <https://www.nytimes.com/article/sars-nigeria-police.html> (accessed 16 December 2020).

⁶⁴⁹ The New York Times website, available at <https://www.nytimes.com/article/sars-nigeria-police.html> (accessed 16 December 2020).

distrust of politicians.⁶⁵⁰ These protests finally led the Nigeria Government declaring that SARS would be dismantled.⁶⁵¹

4.2.2. Some of the essential socio-economic rights found in the Nigerian Constitution

Socio-economic rights are understood as being able to guarantee that each person is afforded conditions under which they can meet their needs required for survival and enjoyment of life.⁶⁵² These rights, such as, the right to housing, right food, the right to clean water, the right to social security and the right to education are crucial especially to those groups of people classified as vulnerable and disadvantaged as these rights help to bridge the equality gap between the rich and the poor as much as possible.⁶⁵³

Shehu argues that where a person is denied his right to housing, his health will be in danger and that puts his life at risk. Shehu continues to argue that the right to life is related to health and food, without good health and food, the right to life is threatened.⁶⁵⁴ An attempt to create or open a gap between these categories of rights will result in a great difficulty when interpreting the content of the rights.⁶⁵⁵

4.2.2.1. The right to housing

The right to housing or adequate shelter is universally recognised and it appears in many constitutions in Africa and other parts of the globe. It appears in Chapter II of the Nigerian Constitution, which provides that

⁶⁵⁰ The New York Times website, available at <https://www.nytimes.com/article/sars-nigeria-police.html> (accessed 16 December 2020).

⁶⁵¹ The New York Times website, available at <https://www.nytimes.com/article/sars-nigeria-police.html> (accessed 16 December 2020).

⁶⁵² Brand D 'Introduction to socio-economic rights in the South African constitution' in Brand D & Heyns C (eds) *Socio-economic Rights in South Africa* (2005) 1.

⁶⁵³ Shehu AT 'The enforcement of social and economic rights in Africa: The Nigerian experience (2013) 2(1) *Journal of Sustainable Development Law and Policy* 102.

⁶⁵⁴ Shehu AT 'The enforcement of social and economic rights in Africa: The Nigerian experience (2013) 2(1) *Journal of Sustainable Development Law and Policy* 108.

⁶⁵⁵ Shehu AT 'The enforcement of social and economic rights in Africa: The Nigerian experience (2013) 2(1) *Journal of Sustainable Development Law and Policy* 108.

Nigeria, shall direct its policy towards ensuring 'that suitable and adequate shelter... [is] provided for all citizens'.⁶⁵⁶ Even though Chapter II of the Nigerian Constitution is not justiciable⁶⁵⁷ as noted above,⁶⁵⁸ it is still important for one to evaluate what the government has done to enforce this right.

The UN Global Shelter Strategy has defined adequate shelter as encompassing more than just the roof over one's head.⁶⁵⁹ Adequate shelter includes adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities.⁶⁶⁰

Further, all of this must be at a reasonable cost.⁶⁶¹ In clarifying this definition, the CESCR has added the elements of legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility to essential services, and cultural adequacy to this definition of housing.⁶⁶²

Adequate shelter must not only be seen as a shelter that protects human beings but as providing psychological stability, affording personal space (personal space which is important for reproduction and upbringing of children and privacy amongst others).⁶⁶³ Unfortunately, the state of housing Nigeria woefully inadequate as attested to by a study that reported that of Nigeria's estimated 140 million people at that time (in 2011), 16 million were landless, inadequately housed, or living in slums all this because of the great

⁶⁵⁶ Nigerian Constitution sec 16(2)(d).

⁶⁵⁷ Nigerian Constitution sec 6(6)(c).

⁶⁵⁸ See 4.2 of this Chapter.

⁶⁵⁹ United Nations Centre for Human Settlements Global Shelter Strategy for the Year 2000 13.

⁶⁶⁰ United Nations Centre for Human Settlements Global Shelter Strategy for the Year 2000 13.

⁶⁶¹ United Nations Centre for Human Settlements Global Shelter Strategy for the Year 2000 13.

⁶⁶² United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant) 13 December 1991 EC/1992/23 para 8.

⁶⁶³ Diala AC 'Realising the Right to Adequate Housing in Nigeria' (2012) 2 *Madonna University Law Journal* 1.

amount of housing deficit.⁶⁶⁴ This must be understood in context of estimates from the UN which indicate that three billion people across the world will be living in slums or ghettos in 2050.⁶⁶⁵ A large number of these people will be in Nigeria.

A number of problems are present in regard to the challenges of adequate shelters, which includes the popular assumption that houses or adequate shelters should be provided by the government.⁶⁶⁶ This view or belief of leaving this to government may possibly account for the fact that between 1973 and 2006, the Federal Housing Authority of Nigeria built only 30 000 housing units in the entire country.⁶⁶⁷ At that time, Nigeria's housing deficit was over 17 million.⁶⁶⁸

Another problem plaguing Nigeria's housing crisis is that the mortgage system in Nigeria does not to function at all. Reports state that 'the contribution of mortgage financing to Nigeria's GDP is close to negligible, with real estate contributing less than 5% and mortgage loans and advances at 0.5% of GDP'.⁶⁶⁹ This problem leads to difficulty that individuals are confronted with when obtaining loans for building houses. A pressing issue is that private firms that do business in real estate development are hindered by insufficient funds, high interest rates and a lack of adequate legislation to regulate planning and construction of houses.⁶⁷⁰

⁶⁶⁴ Centre on Housing Rights and Evictions, Geneva Community Guide to Asserting and Defending Housing Rights in Nigeria (2011) 4.

⁶⁶⁵ UN-Habitat, "A Safe City is a Just City" World Habitat Day 2007 available at https://issuu.com/unhabitat/docs/2944_alt (accessed 19 May 2020).

⁶⁶⁶ Diala AC 'Realising the Right to Adequate Housing in Nigeria' (2012) 2 *Madonna University Law Journal* 12.

⁶⁶⁷ Akeju AA 'Challenges to Providing Affordable Housing in Nigeria' (October 17-19, 2007) Paper Presented at the 2nd Emerging Urban Africa International Conference on Housing Finance in Nigeria, Shehu Yar'adua Centre Abuja 1.

⁶⁶⁸ Onoji E 'The Nigeria Housing Deficit: Which Way Forward?' available at <http://primeraal.com/news/the-nigeria-housing-deficit-which-way-forward/> (accessed 19 May 2020).

⁶⁶⁹ Onoji E 'The Nigeria Housing Deficit: Which Way Forward?' available at <http://primeraal.com/news/the-nigeria-housing-deficit-which-way-forward/> (accessed 19 May 2020).

⁶⁷⁰ Diala AC 'Realising the Right to Adequate Housing in Nigeria' (2012) 2 *Madonna University Law Journal* 13.

The said difficulties could be addressed through appropriate legislative and policy measures in the banking, construction and town planning sectors of the economy, these legislative measures could include the enactment of a condominium law, which entails of housing and/or real property ownership that is settled amongst other similar arrangements with a common facilitates area that is controlled by a joint-ownership association.⁶⁷¹ Nigeria can learn from other countries that did this and it works for them and address this housing problem.⁶⁷²

Another problem contributing to Nigeria's housing crisis is the budget allocations for housing. For the 2020 financial year, the government allocated nearly 344 billion Nigerian Naira (hereinafter NGN) to the Federal Ministry of Works and Housing,⁶⁷³ while close to 975 billion NGN was allocated to the Ministry of Defence in the same period.⁶⁷⁴ This raises questions as to the priorities of the government when it comes to providing adequate housing to citizens.

4.2.2.2. The right to health

Nigeria's Constitution provides that '[t]he State shall direct its policy towards ensuring that...there are adequate medical and health facilities for all persons'.⁶⁷⁵ The right to health appears in many international treaties to which Nigeria is a party to, the said treaties include the ICESCR, CERD, CEDAW and CRC, all these treaties include provisions that protect the right to health.

Nigeria is also a party to civil and political rights treaties, such as, the ICCPR and the Convention against Torture and Other Cruel, Inhuman or Degrading

⁶⁷¹ Diala AC 'Realising the Right to Adequate Housing in Nigeria' (2012) 2 *Madonna University Law Journal* 13.

⁶⁷² Diala AC 'Realising the Right to Adequate Housing in Nigeria' (2012) 2 *Madonna University Law Journal* 13.

⁶⁷³ *BudgIT 2020 Budget Analysis and Opportunities* (2020) 26.

⁶⁷⁴ *BudgIT 2020 Budget Analysis and Opportunities* (2020) 26.

⁶⁷⁵ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 17(3)(d).

Treatment or Punishment which as well consist of health-related rights. These treaties may suggest the commitment of Nigeria towards the right to health. At the regional (African) level, Nigeria is a party to 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' Rights on the Rights of Women in Africa.

These treaties include provisions that protect the right to health. However, the issue of applicability of these treaties within domestic framework needs to be highlighted. While Nigeria might be party to all these treaties, only the African Charter has been incorporated into domestic legal order. This means that only the African Charter has direct application, no other treaty has direct application in Nigeria.⁶⁷⁶

Nnamuchi submits that 'prior to the economic travails of the mid-1980s, the health sector witnessed robust growth, principally as a result of adequate support by the government, coupled with assistance from bilateral and multilateral partners. Except in rural areas, access to health care was readily available at public hospitals and clinics at no charge or highly subsidized rates'.⁶⁷⁷ Currently, the health policy of Nigeria is incorporated in the National Health Policy and Strategy to Achieve Health for All Nigerians, which was introduced in 1988 and revised in 2004.⁶⁷⁸ This policy, which is founded on equality principles and seeks to improve the health of all Nigerians, adopted the primary health care (hereinafter PHC) by the World Health Organisation's strategy for realising PHC.⁶⁷⁹

⁶⁷⁶ African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter 10, Laws of the Federation of Nigeria 1990 sec 1.

⁶⁷⁷ Nnamuchi O 'The Right to Health in Nigeria' (2010) *SSRN Electronic Journal* 1.

⁶⁷⁸ Federal Ministry of Health (FMH), National Health Policy and Strategy to Achieve Health for all Nigerians (Lagos, Nigeria: FMH, 1988); Revised National Health Policy (Abuja, Nigeria: FMH, 2004).

⁶⁷⁹ Declaration of Alma-Ata, adopted by the International Conference on Primary Health Care, jointly sponsored by WHO and UNICEF in 1978, Principle VII, available at https://www.who.int/publications/almaata_declaration_en.pdf (accessed 19 May 2020).

In addition, there is a concern that the budgeted figures may not be representative of the actual amount spent on health as a gap continues to exist between the allocated budgets and the actual health expenditure.⁶⁸⁰ Moreover, it is not even clear whether the budgetary allocations were spent on health-related services or wound up in private hands.⁶⁸¹

4.2.2.3. The right to food, water and social security

In Chapter 3,⁶⁸² these rights were addressed as a collective as they are similar in nature, however, in this chapter, these rights will be addressed separately.

a) The right to food

As with the other rights discussed above, the right to food is covered in the international human right laws such as UDHR,⁶⁸³ the ICESCR,⁶⁸⁴ and the CRC.⁶⁸⁵ The Nigerian Constitution, under Chapter II, provides that the state, of Nigeria, shall direct its policy towards ensuring ‘...suitable and adequate food... [is] provided for all citizens’.⁶⁸⁶

A nation has attained food security when food is always adequate on citizens’ table, when there is nutritional adequate supply of food by way of quantity, quality and variety.⁶⁸⁷ Elements of food security are the availability, access and affordability of food.⁶⁸⁸ Further, access to food relates to economic and physical access.

⁶⁸⁰ WHO Health Financing and Social Protection available at <http://www9.who.int/healthsystems/topics/financing/en/> (accessed 19 May 2020).

⁶⁸¹ FMH, Health Sector Reform Programme: Strategic Thrusts with a Logical Framework and a Plan of Action 2004 – 2007 (Abuja: FMH, 2004) 12, 20.

⁶⁸² See 3.2.2.3 of Chapter 3.

⁶⁸³ Universal Declaration of Human Rights art 25.

⁶⁸⁴ International Covenant on Economic, Social and Cultural Rights art 11.

⁶⁸⁵ Convention on the Rights of the Child arts 24 & 27.

⁶⁸⁶ Nigerian Constitution sec 16(2)(d).

⁶⁸⁷ Clover J ‘Food Security in Sub-saharan Africa’ (2003) *African Security Review*, Vol. 12, No.1. 7.

⁶⁸⁸ Ojo EO & Adebayo PF ‘Food Security in Nigeria: An Overview’ (2012) 1 (2) *European Journal of Sustainable Development* 205.

In the 2019 Global Hunger Index, Nigeria ranked 93rd out of 117 countries, with a score of 27.9, meaning that Nigeria suffers from acute levels of hunger.⁶⁸⁹ Poverty is linked to malnutrition and hunger is linked to poverty.⁶⁹⁰ Unfortunately, poverty is common in developing countries and Nigeria has been classified as one of the poorest countries, which in fact highlights its failure to achieve its development policy and its national food security.⁶⁹¹

b) The right to water

Chapter II of the Nigerian Constitution makes provision for the right to water.⁶⁹² Indirectly, the argument being that there can be no adequate food without portable water. Further the Nigeria Constitution states that '[t]he State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria'.⁶⁹³

Langford submits that '[t]he water issues being faced today are not novel. A cursory glance at water history reveals millennia-old struggles over the ownership of water, the pollution and depletion of water sources, and conflicting water uses. What is new is the scale of the problem'.⁶⁹⁴ Langford further submits that 'particularly access to water for the poorest of the poor' is a challenge.⁶⁹⁵

⁶⁸⁹ Global Hunger Index available at <https://www.globalhungerindex.org/results.html> (accessed 19 May 2020).

⁶⁹⁰ Metu, AG & Others 'Achieving Sustainable Food Security in Nigeria: Challenges and Way Forward' 3rd International Conference on African Development Issues (CU-KADI 2016) 182.

⁶⁹¹ Metu, AG & Others 'Achieving Sustainable Food Security in Nigeria: Challenges and Way Forward' 3rd International Conference on African Development Issues (CU-KADI 2016) 182.

⁶⁹² Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 16(2)(d).

⁶⁹³ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 20.

⁶⁹⁴ Langford M 'The United Nations Concept of Water as a Human Right: A New Paradigm for Old Problems?' 21(2) (2005) *International Journal of Water Resources Development* 273.

⁶⁹⁵ Langford M 'The United Nations Concept of Water as a Human Right: A New Paradigm for Old Problems?' 21(2) (2005) *International Journal of Water Resources Development* abstract.

The challenges connected to the availability and access to water are numerous. These challenges include: insufficient and decaying infrastructure for water delivery, particularly in deprived urban areas and rural areas; the insufficient funding and capacity for the maintenance and expansion of water supply systems; the pollution of traditional water sources, particularly from human and animal waste; agricultural run-off and industrial waste; and reduced access to, and depletion of water resources due to drought, population growth, armed conflict; and the dominance of commercial agricultural and industrial activities.⁶⁹⁶

One of the targets of the UN's Sustainable Development Goals (SDGs) include the achievement of universal and equitable access to safe and affordable drinking water for all by 2030.⁶⁹⁷ This target is twofold, it can be realised through efforts at the international and national level, if access to water can be viewed from a human rights perspective and be justiciable and not mere goals as some countries may view it. If the right to water is viewed as a human right, particularly in developing countries, this will actually impose some obligations and budgets can be channeled towards the enforcement of this right.

Fortunately, Nigeria has significant water resources, the only concern is the sequential variation in water availability. The north of Nigeria has low rainwater of only about 500mm in the northeastern area, while the south of Nigeria there is precipitation of over 4,000mm in the southeast.⁶⁹⁸ This high variability of rainfall in time and space is a significant characteristic of the tropical climatic belt, which requires water resources control and management in Nigeria.⁶⁹⁹

⁶⁹⁶ Langford M 'The United Nations Concept of Water as a Human Right: A New Paradigm for Old Problems?' 21(2) (2005) *International Journal of Water Resources Development* 273.

⁶⁹⁷ Sustainable Development Goals (SDGs) (2015) Goal 6.

⁶⁹⁸ Federal Republic of Nigeria National Water Policy, July 2004 3.

⁶⁹⁹ Federal Republic of Nigeria National Water Policy, July 2004 3.

The numerous water shortages have been fueled partly by the recurrent drought and violence which have been around for a considerable period.⁷⁰⁰ It is worth noting that access to water supply in Nigeria was at 67% in 2013 and an estimated 63 million people did not have access to improved sources of drinking water.⁷⁰¹ Nigeria's water sector must be made sustainable, particularly because operation and maintenance of water resources have been insufficient.⁷⁰²

The three tiers of government (Federal, State and Local) have exclusive legislative powers, and in addition concurrent responsibility for water resources, which results in conflicts and challenges in relation to the management of these inter-linked river basins.⁷⁰³ Fortunately, Nigeria has recognised the right to water as a fundamental human rights, as evidenced by the fact that Nigeria has voted in favour of the right to safe and clean drinking water as human right that is essential for the full enjoyment of life and all human rights.⁷⁰⁴

In addition, Nigeria also co-sponsored the Human Rights Council Resolution (which relates to right to water) in September 2013 and September 2014.⁷⁰⁵ All three tiers of the government are involved in the institutional arrangement

⁷⁰⁰ Dominique Mosbergen 'Nigeria's Water Bill Could Criminalize Water for Millions' March 19 2017, available at https://www.huffpost.com/entry/laqos-water-crisis-bill-nigeria_n_58c8b63ce4b01c029d7758b7 (accessed 19 May 2020).

⁷⁰¹ UN-Water Global Analysis and Assessment of Sanitation and Drinking Water, available at http://www.who.int/water_sanitation_health/monitoring/investments/nigeria-10-nov.pdf?ua=1 (accessed 19 May 2020).

⁷⁰² Ajai O 'Law, Water and Sustainable Development: Framework of Nigerian Law' (2012) 8 (1) *Law, Environment and Development Journal* 93.

⁷⁰³ Ajai O 'Law, Water and Sustainable Development: Framework of Nigerian Law' (2012) 8 (1) *Law, Environment and Development Journal* 93.

⁷⁰⁴ Recognition of the Human Rights to Water and Sanitation by UN Member States at the International Level: An Overview of Resolutions and Declarations that Recognise the Human Right to Water and Sanitation 84.

⁷⁰⁵ Recognition of the Human Rights to Water and Sanitation by UN Member States at the International Level: An Overview of Resolutions and Declarations that Recognise the Human Right to Water and Sanitation 84.

for water resources development and management in Nigeria⁷⁰⁶ through different agencies. This sector is guided by the National Water Policy and currently regulated by the following the Nigerian Constitution, the Water Resources Act, the River Basin and Development Authorities Act.

c) The right to social security

The right to social security appears in Chapter II of the Nigerian Constitution, which provides that the state, Nigeria, shall direct its policy towards ensuring 'reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens'.⁷⁰⁷

Further, universally, social security is recognised as a human right, this is confirmed by the number of international instruments that have affirmed the right as one of the socio-economic rights which everyone is entitled to. Social security was first established as a basic human right in 1944 in the Declaration of Philadelphia of the International Labour Organisation (hereinafter ILO), wherein the International Labour Conference recognised the ILO's obligation concerning 'the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care'.⁷⁰⁸

This Declaration was pivotal to the ILO Income Security Recommendation 67 of 1944, which provides that 'social insurance should afford protection, in the contingencies to which they are exposed, to all employed and self-employed persons, together with their dependants'⁷⁰⁹ and the subsequent drafting of the ILO Social Security (Minimum Standards) Convention 102 of

⁷⁰⁶ Macheve B, Danilenko A, Abdullah R, Bove A & Moffitt LJ 'State Water Agencies in Nigeria - A Performance Assessment' (2015) World Bank Project 17.

⁷⁰⁷ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 16(2)(d).

⁷⁰⁸ International Labour Organisation Declaration of Philadelphia para III(f).

⁷⁰⁹ International Labour Organisation Income Security Recommendation 67 of 1944 para 17.

1952. The right to social security is also recognised in the UDHR;⁷¹⁰ the ICESCR;⁷¹¹ the CEDAW;⁷¹² and the CRC.⁷¹³

In addition, at the regional level, particularly in Africa, there is the African Charter. While not directly providing for the right to social security or to an adequate standard of living as contained in the ICESCR, the African Charter contains specific provisions that have a bearing on social security, namely: the right of the aged and the disabled to special measures of protection in keeping with their physical or moral needs; the right of every individual to enjoy the best attainable state of physical and mental health; and the obligation imposed upon state parties to take the necessary measures to protect the health of their people and to ensure that they receive medical attention where it is required.⁷¹⁴

Anifalaje sees social security as referring 'to the schedule of reliefs, benefits, entitlements and facilities that are accessible to and obtainable by citizens in any given community in terms of the relevant municipal laws, and under the auspices and control of the state. These are usually deployed as viable and formidable palliatives to the endless social and economic risks to which the strong and young, as well as the feeble and old members of the community are exposed'.⁷¹⁵

Nwabueze defines social security as 'the social protection, organised collective protection of the individual against want, poverty, destitution, disease and idleness, which may be thrust upon him by the varied hazards and vicissitudes of social life, notably loss or suspension of income or

⁷¹⁰ Universal Declaration of Human Rights arts 22, 23 & 25.

⁷¹¹ International Covenant on Economic, Social and Cultural Rights art 9(1).

⁷¹² Convention on the Elimination of All Forms of Discrimination against Women arts 11(1)(e) & 14(2)(c).

⁷¹³ Convention on the Rights of the Child art 26.

⁷¹⁴ African Charter on Human and Peoples' Rights arts 18 & 16.

⁷¹⁵ Anifalaje K 'Implementation of the right to social security in Nigeria' (2017) 17 *African Human Rights Law Journal* 413.

means of sustenance resulting from sickness, maternity, accident injury, invalidity, old age, death of breadwinner or unemployment'.⁷¹⁶ Anifalaje further argues that guaranteeing to everyone the right to social security is essential towards the significant reduction in poverty in society and enhancement of the socioeconomic development of a nation.⁷¹⁷

Despite the protection of this right in Nigeria, as already noted above, this right remains an illusion to a large majority of Nigerians as social security laws are targeted at workers in the formal sector of the economy mostly, which leads to continuing and worsening poverty due to socio-economic challenges.⁷¹⁸ Even though Nigeria recognises the socio-economic right to social security, its laws are too limited as they only cover employment-related social security.⁷¹⁹

Recommendations have been made that the Nigerian government should provide vulnerable persons such as the aged, the disabled and the orphaned, including also the self-employed, with a special maintenance allowance at prescribed rates.⁷²⁰ This is especially relevant considering the fact that the vast majority of the Nigerian population do not have any form of assistance from any quarters, and are more often than not left without any form of a social safety net at all.⁷²¹

⁷¹⁶ Nwabueze BO 'Social security in Nigeria' (1989), the 10th anniversary lecture of the Nigerian institute of advanced legal studies, available at <http://www.nials-nigeria.org/Editedbookcovers/ssn.pdf> (accessed 16 December 2020).

⁷¹⁷ Anifalaje K 'Implementation of the right to social security in Nigeria' (2017) 17 *African Human Rights Law Journal* 413.

⁷¹⁸ K Anifalaje 'Implementation of the right to social security in Nigeria' (2017) 17 *African Human Rights Law Journal* 414.

⁷¹⁹ K Anifalaje 'Implementation of the right to social security in Nigeria' (2017) 17 *African Human Rights Law Journal* 422.

⁷²⁰ Income Security Recommendation para 17.

⁷²¹ Income Security Recommendation para 17.

It must be noted that the formal sector covered by social assistance schemes represents only about 20 to 25 per cent of the population.⁷²² This attests to the fact that the general coverage for social security is not in compliance with the classes of employees prescribed, as they constitute not less than 50 per cent of all employees, and including their wives and children.⁷²³

4.2.2.4. The right to education

The Nigerian Constitution makes provision for the right to education and states that:

'[g]overnment shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels...[g]overnment shall strive to eradicate illiteracy; and to this end [g]overnment shall as and when practicable provide (a) free, compulsory and universal primary education; (b) free secondary education; (c) free university education; and (d) free adult literacy programme'.⁷²⁴

Even though Chapter II is not justiciable, Nigeria has, pursuant to the objectives of section 18 of the Constitution enacted the Compulsory, Free and Universal Basic Education Act 2004 (hereinafter UBE Act).⁷²⁵ The primary objective of the Act is to provide free, compulsory and universal basic education for every child of primary and junior secondary school age. Section 2 of the UBE Act provides that '[e]very Government in Nigeria shall provide free, compulsory and universal basic education for every child of primary and junior secondary age.'⁷²⁶

⁷²² Social Security (Minimum Standards) Convention 102 of 1952 arts 9, 15 & 27.

⁷²³ Social Security (Minimum Standards) Convention 102 of 1952 arts 9, 15 & 27.

⁷²⁴ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 18(3).

⁷²⁵ Compulsory, Free Universal Basic Education Act 2004. 2004 Act No. A 115. (26111 May, 2004).

⁷²⁶ Universal Basic Education Act 2004 sec 2(1).

Further that '[e]very parent shall ensure that his child or ward attends and completes his: (a) primary school education; and (b) junior secondary school education by endeavouring to send the child to primary and junior secondary school'.⁷²⁷ It also provides that '[t]he stakeholders in education in a Local Government shall ensure that every parent or person who has the care and custody of a child performs the duty imposed on him under section 2(2) of this Act'.⁷²⁸

The UBE Act stipulates that 'the services provided in public primary and junior secondary schools shall be free of charge'.⁷²⁹ Providing these services at a fee is a criminal offence in terms of section 3(2) of the Act. In 2003 the Federal Government of Nigeria enacted the Child Rights Act 2003 (hereinafter Child Rights Act). Section 15(1) of the Child Rights Act provides that 'every child has the right to free, compulsory and universal basic education and it shall be the duty of the Government in Nigeria to provide such education'. Further, section 15(2), stipulates that every parent or guardian shall ensure that his child or ward attends and completes primary school education and junior secondary school education.

Nwauzi and George-Ibikiri argue that:

'[e]ducation is critical for all round development. It is critical and crucial for economic, social, political and cultural development. It is crucial for building human capabilities and capacities and for opening up opportunities. Education is an enabler to other rights. It is the true essence of human development. Education is not a privilege, it is a right. For the complete and harmonious development of the personality of any child or human-being it is important that

⁷²⁷ Universal Basic Education Act 2004 sec 2(2).

⁷²⁸ Universal Basic Education Act 2004 sec 2(2).

⁷²⁹ Universal Basic Education Act 2004 sec 3(1).

he or she be given proper education. Without education no human-being will be in a position to assert his or her rights.⁷³⁰

International and regional legal instruments also make provision for the right to education, and Nigeria has ratified and acceded to some of these instruments. The UDHR, provides that '[e]veryone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit'.⁷³¹ The ICESCR also provides that:

'[t]he state 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.'⁷³²

Similarly, the CRC stipulates that:

'[s]tate parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular, make primary education compulsory and available and available free to all, encourage the development of different forms of secondary education, including general and, vocational education, make them available

⁷³⁰ Nwauzi LO and George-Ibikiri S 'The right to Education in Nigeria: An Appraisal' (2018) 8(1) *African Journal of Law and Criminology* 12.

⁷³¹ Universal Declaration of Human Rights art 26(1).

⁷³² International Covenant on Economic, Social and Cultural Rights art 13(1).

and accessible to every child, and take appropriate measures such as the introduction of free education and offering financing assistance in case of need, make higher education accessible to all on the basis of capacity by every appropriate means, make educational and vocational information and guidance available and accessible to all children, take measures to encourage regular attendance at schools and the reduction of dropout rates'.⁷³³

Likewise, the African Charter provides for right to education, and states that 'every individual shall have the right to education'.⁷³⁴ It bears pointing out that the African Charter is domesticated in terms of the Nigeria Constitution. Looking at the above, it can be concluded that that Nigerians have a fundamental right to education and this right can be argued that extends until at least junior secondary school.⁷³⁵

4.2.3. The Nigerian government's obligations to 'respect', 'protect' and 'fulfil' socio-economic rights

The ICESCR⁷³⁶ supports the 'progressive realisation' principle, which is described as 'a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time'.⁷³⁷ However, unlike ICESCR, state parties to the African Charter assume obligations immediately or with immediate effect. As a state party to the African Charter, Nigeria must respect, protect and fulfil all the rights in the African Charter, including economic, social and cultural rights.

The obligation to 'respect', under the African Charter, similar to the ICESCR, means that states must 'refrain from actions or conduct that contravene or are

⁷³³ Convention on the Rights of the Child art 28 (1).

⁷³⁴ African Charter on Human and Peoples' Rights art 17(1).

⁷³⁵ Nwauzi LO and George-Ibikiri S 'The right to Education in Nigeria: An Appraisal' (2018) 8 (1) *African Journal of Law and Criminology* 17.

⁷³⁶ International Covenant on Economic, Social and Cultural Rights art 2.

⁷³⁷ CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) para 9.

capable of impeding the enjoyment of economic, social and cultural rights'.⁷³⁸ This obligation does not depend on the 'availability of resources', and it is not subject to the notion of 'progressive realisation'.

The obligation to 'protect' involves a duty to encourage third parties, including non-state parties, such as companies (foreign and local) to respect these rights or refrain from violating them. The obligation to 'fulfil' creates a duty that 'requires states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights'.⁷³⁹

It must be noted that the African Charter⁷⁴⁰ makes all rights justiciable.⁷⁴¹ Even though these obligations are not expressly provided in the African Charter, it must be said again that since Nigeria has ratified and domesticated the African Charter,⁷⁴² this obligations must be adhered to by Nigeria as the Ratification Acts states that '[a]s from the commencement of this Act, the provisions of the African Charter on Human and Peoples' Rights which are set out in the Schedule to this Act shall, subject as thereunder provided, have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria'.⁷⁴³

4.3. Economic development as a factor impacting the enforcement of socio-economic rights

⁷³⁸ Morka F 'Economic, social and cultural rights and democracy: Establishing causality and mutuality' in HURILAWS Enforcing economic, social and cultural rights in Nigeria – Rhetoric or reality? (2005) 85 88.

⁷³⁹ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) 15 *Netherlands Quarterly of Human Rights* 244.

⁷⁴⁰ African Charter on Human and Peoples' Rights art 45.

⁷⁴¹ Ibe S 'Beyond justiciability: Realising the promise of socio-economic rights in Nigeria' (2007) 7 *African Human Rights Law Journal* 228.

⁷⁴² African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act ch A9, Laws of the Federation of Nigeria, 2004 which domesticates the Charter in accordance with sec 12 of the 1999 Constitution.

⁷⁴³ African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act sec 1.

The beginning of a new decade presents an opportunity for Nigeria to reposition its economy for prosperity.⁷⁴⁴ It must be noted that Nigeria's record quarterly GDP growth of 2.55% in the fourth quarter of 2019, inflation remaining high⁷⁴⁵ and the future of foreign investments jeopardised by demotion in credit ratings.⁷⁴⁶ The GDP growth for 2019 is recorded at 2.27% and this is the highest since the 2016 recession, however, this growth is less than the target projection of 4.5% in the Economic Recovery and Growth Plan (ERGP) and the 2019 budget target of 3.5%.⁷⁴⁷ It bears also mentioning that Nigeria still spends less than 11% of its budget on its education and health sector, combined.⁷⁴⁸

Some scholars have been quick to claim that socio-economic rights are programmatic, judging by the notion that they have to be 'realised gradually' that they are of 'more political nature', that they are 'not capable of judicial enforcement' and are therefore incapable of immediate realisation.⁷⁴⁹ Further, that the states are urged to 'progressively realise' these rights.⁷⁵⁰

Even though there are exceptions, for example, to the right to free and compulsory primary education and the principle of non-discrimination, these claims are reinforced by the ICERSC, which gives discretion to the states in relation to standard and timing of recognising these socio-economic rights.⁷⁵¹

Socio-economic rights are said to be lacking universality and are not automatically available based on the fact that one is a human being, their realisation is subject

⁷⁴⁴ Budget 2020 Budget Analysis and Opportunities (2020) 8.

⁷⁴⁵ Budget 2020 Budget Analysis and Opportunities (2020) 8.

⁷⁴⁶ Moody's available at <https://www.moody.com/research/Moodys-changes-the-outlook-on-Nigerias-ratings-to-negative-from-PR-413627> (accessed 19 May 2020).

⁷⁴⁷ Budget 2020 Budget Analysis and Opportunities (2020) 8.

⁷⁴⁸ Budget 2020 Budget Analysis and Opportunities (2020) 9.

⁷⁴⁹ Eide A 'Economic, social and cultural rights as human rights' in Eide A, Krause C & Rosas A (eds) *Economic, social and cultural rights: A textbook* 2 ed (2001) 3.

⁷⁵⁰ International Covenant on Economic, Social and Cultural Rights art 2.

⁷⁵¹ Cottrell J & Ghai Y 'The role of the courts in implementing economic, social and cultural rights' in Ghai Y & Cottrell J (eds) *Economic, social and cultural rights in practice – The role of judges in implementing economic, social and cultural rights* (2004) 61.

to numerous conditions, which include the realisation of the rights progressively and the availability of resources. It can be argued that the reason socio-economic rights are not to be made available and enforceable is due to the costs or financial constraints they bring, because for these rights to be enforced, appropriate budgets must be allocated from the available resources.⁷⁵²

The ICESCR states that '[e]ach 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 recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.⁷⁵³ Simply put, a state cannot do more than its resources can permit, which is to say that, a state is limited to the resources it has at its disposal.⁷⁵⁴

The CESCR has noted that states cannot neglect their obligations towards the realisation of socio-economic rights.⁷⁵⁵ The CESCR has stressed that although socio-economic rights are generally realised progressively, this must not be an excuse for the state in question to unnecessarily delay the fulfilment of its obligation as it is required to move as 'expeditiously and effectively' and make sure that socio-economic rights are realised.⁷⁵⁶

Further the state is expected to comply with its obligations regarding the realisation of these socio-economic rights. This requires the state to take appropriate means

⁷⁵² Isokpan AJ 'The Role of the Courts in the Justiciability of Socio-Economic Rights in Nigeria: Lessons from India' (2017) 8 (2) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 103.

⁷⁵³ International Covenant on Economic, Social and Cultural Rights art 2(1).

⁷⁵⁴ Heyns C & Brand D 'Introduction to socio-economic rights in the South African Constitution' (1998) 2 *Law, Democracy and Development* 159.

⁷⁵⁵ CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) para 1.

⁷⁵⁶ CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) para 2.

including the adoption of legislative measures. The CESCR has noted that beyond legislation, other reasonable measures include 'educational', 'administrative', 'financial', and 'social measures'⁷⁵⁷ as well as 'judicial' and 'other effective remedies' where there has been a violation of socio-economic rights.⁷⁵⁸

Proponents of the socio-economic rights enforcement argue that socio-economic rights involve huge financial investments over which the judiciary does not have power to adjudicate, this in other words implies that significant financial resources are needed for socio-economic rights to be enforced.⁷⁵⁹

The CESCR has clarified that it imposes an obligation to 'move as expeditiously and effectively as possible' towards achieving a set goal, namely, the full realisation of economic, social and cultural rights.⁷⁶⁰

However, the challenge in many African states is lack of financial resources. As such, the CESCR has further established a minimum core obligation on the basis of which every state party owes an obligation to 'ensure the satisfaction of minimum essential levels of each of the rights'.⁷⁶¹ State parties that would seek to rely on the unavailability of resources for not adhering to the 'minimum core obligation' must demonstrate that 'every effort has been made to use all resources that are at its

⁷⁵⁷ CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) para 7.

⁷⁵⁸ CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) 3 para 5.

⁷⁵⁹ An-Na'im AA 'To affirm the full human rights standing of economic, social and cultural rights' in Ghai Y & Cottrell J (eds) *Economic, social and cultural rights in practice – The role of judges in implementing economic, social and cultural rights* (2004) 7-16.

⁷⁶⁰ CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) para 9.

⁷⁶¹ CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) para 10.

(their) disposition in an effort to satisfy, as a matter of priority, those minimum obligations'.⁷⁶²

Nigeria is a country rich in natural resources, such as, petroleum, natural gas, iron ore, lead and zinc.⁷⁶³ Therefore, the country needs appropriate measures in place to accelerate its economic development.⁷⁶⁴ These measures are reflected in Nigeria's Vision 20-20-20 Program.⁷⁶⁵ With this Program Nigeria aimed to make itself one of the twenty largest world economies by the year 2020. The seven points in the 20-20-20 Program are: power and energy; food security and agriculture; wealth creation and employment; mass transportation; land reforms security and functional education.⁷⁶⁶

Since Nigeria aimed at becoming a leading economy in Africa by 2020 and being a major player in the world's economic and political affairs it made this policy its guideline. The focus as found in this program is that there is a need to speed up economic growth by focusing on vital economic sectors like education, energy, agriculture and manufacturing.⁷⁶⁷

Economic development requires policies that will ensure it becomes success. For instance, Nigeria has vast areas land suitable for agriculture⁷⁶⁸ which can be utilized to address food security, as well as employment. Nigeria can focus on agriculture, increase the low productivity of current agricultural companies, engage

⁷⁶² CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) para 10.

⁷⁶³ Nigerian Embassy website, available at <http://nigerianembassythehaque.nl/about-nigeria/natural-resources/> (accessed 15 December 2020).

⁷⁶⁴ Omorogiuwa O, Zivkovic J & Ademoh F 'The role of agriculture in the economic development of Nigeria' (2014) 10 (4) *European Scientific Journal* 133.

⁷⁶⁵ Adopted in 2008.

⁷⁶⁶ Omorogiuwa O, Zivkovic J & Ademoh F 'The role of agriculture in the economic development of Nigeria' (2014) 10 (4) *European Scientific Journal* 133.

⁷⁶⁷ Omorogiuwa O, Zivkovic J & Ademoh F 'The role of agriculture in the economic development of Nigeria' (2014) 10 (4) *European Scientific Journal* 134.

⁷⁶⁸ World Bank website, available at <https://data.worldbank.org/indicator/AG.LND.ARBL.HA?locations=NG> (accessed 15 December 2020).

competition within the agricultural sector, develop domestic policies and increase funding.⁷⁶⁹ It is submitted that this will contribute towards Nigeria's economic development. Thus, Nigeria must use to its advantage the abundant fertile soil that is has as well as having a climate suitable for agriculture.⁷⁷⁰

a) Progressive realisation

As noted above,⁷⁷¹ the concept of 'progressive realisation' can be traced to the distinction between rights, civil and political rights on the one hand, and socio-economic rights, on the other hand. Civil and political rights are considered to be more important than socio-economic rights, and states have repeatedly used the phrases like 'available resources' and 'progressive realisation' to justify why they failed or fail to implement the socio-economic rights.⁷⁷²

b) Maximum available resources

As noted above,⁷⁷³ the principle of maximum available resources requires states to show that they have used all of their available resources towards enforcing socio-economic rights, given current economic conditions, including international aid, when needed.⁷⁷⁴ When any "significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education," then there is a violation of socio-economic rights.⁷⁷⁵ However, the Nigeria Constitution use the

⁷⁶⁹ Ayodele OS, Obafemi FN & Ebong FS 'Challenges facing the achievement of the Nigeria vision' (2013) 27 *Global Advanced Research Journal of Social Sciences* 143 - 157.

⁷⁷⁰ Omorogiuwa O, Zivkovic J & Ademoh F 'The role of agriculture in the economic development of Nigeria' (2014) 10(4) *European Scientific Journal* 135.

⁷⁷¹ See 3.3.(a) of Chapter 3.

⁷⁷² Duru OW 'Evolution of Constitutional Guarantee Socio-economic Rights under the Nigerian and South African Constitution'

https://www.academia.edu/6792712/EVOLUTION_OF_CONSTITUTIONAL_GUARANTEE_OF_SOCIO-ECONOMIC_RIGHTS_UNDER_THE_NIGERIAN_AND_SOUTH_AFRICAN_CONSTITUTIONS_A_CRITICAL_OVERVIEW (accessed 19 May 2020).

⁷⁷³ See 3.3.(b) of Chapter 3.

⁷⁷⁴ Chapman A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 31.

⁷⁷⁵ International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997, available at <https://www.refworld.org/docid/48abd5730.html> (accessed 19 May 2020).

terms such as 'within the context of the ideals and objectives',⁷⁷⁶ and 'when practicable provide'.⁷⁷⁷ The concept of 'maximum available resources' does not appear in the Nigerian Constitution.

4.4. Other factors affecting the enforcement of socio-economic rights

As the research has argued, economic development is one of the main factors that impact the enforcement of socio-economic rights. There are other factors as well, however, the research is limited on corruption and separation of power as other factors in addition to economic development, the rationale being that this factors (corruption and separation of powers) are deemed as significant factors.

4.4.1. Corruption

Shehu argues that corruption is a worldwide phenomenon and that there is hardly any nation in the world today without one form of corruption or the other.⁷⁷⁸ He argues that it all depends on perception or what is regarded as corruption in each society.⁷⁷⁹ Nigeria seems to have widespread corruption and almost all previous efforts of fighting corruption have not been successful.⁷⁸⁰

Shehu continues to argue that '[t]he cost of corrupt practices has been very enormous that economic, social and political developments have fallen victims and Nigerians become the more impoverished by the day notwithstanding the abundant natural wealth of the nation'.⁷⁸¹ No matter

⁷⁷⁶ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 16(1).

⁷⁷⁷ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 18(3).

⁷⁷⁸ Shehu AT 'The Enforcement Of Social And Economic Rights In Africa: The Nigerian Experience' (2013) 2 (1) *Journal of Sustainable Development Law and Policy* 117.

⁷⁷⁹ Shehu AT 'The Enforcement Of Social And Economic Rights In Africa: The Nigerian Experience' (2013) 2 (1) *Journal of Sustainable Development Law and Policy* 117.

⁷⁸⁰ Shehu AT 'The Enforcement Of Social And Economic Rights In Africa: The Nigerian Experience' (2013) 2 (1) *Journal of Sustainable Development Law and Policy* 117.

⁷⁸¹ Shehu AT 'The Enforcement Of Social And Economic Rights In Africa: The Nigerian Experience' (2013) 2 (1) *Journal of Sustainable Development Law and Policy* 117.

how big or how small corruption, it must be considered a violation of the socio-economic rights.⁷⁸² Against this background, human rights treaty bodies have 'identified mismanagement of resources and corruption as obstacles to the allocation of resources to promote equal rights'.⁷⁸³

4.4.2. The doctrine of separation of powers

The separation of powers can be defined simply as the division of governmental authority into three branches of government, the legislature, the executive and the judiciary.⁷⁸⁴ Each branch specified duties on which neither of the other branches can encroach.⁷⁸⁵ It is essential that the doctrine is enshrined in the constitution of every democratic State whether written or unwritten, to avoid the abuse of power by a single person or group.⁷⁸⁶

The notion of the separation of powers has affected Nigeria in such a way that Nigerian courts are failing to enforce socio-economic rights as they believe that doing so amounts to encroaching on the executive.⁷⁸⁷ The courts have taken the view that the executive is tasked with setting budgets and that the issue socio-economic rights has budget implications.⁷⁸⁸ Further, the courts do not want to intrude on the legislature's function of law making.⁷⁸⁹

⁷⁸² Peters A 'Corruption as a violation of international human rights' (2019) 29(4) *The European Journal of International Law* 1262.

⁷⁸³ Human Rights Treaty Bodies, Contributions to the 2030 Agenda for Sustainable Development, May 2016 7.

⁷⁸⁴ Oden C 'The challenges of the doctrine of separation of powers under the 1999 Nigerian constitution' available at <https://www.projecttopics.org/challenges-doctrine-separation-powers-1999-nigerian-constitution.html> (accessed 19 May 2020).

⁷⁸⁵ Oden C 'The challenges of the doctrine of separation of powers under the 1999 Nigerian constitution' available at <https://www.projecttopics.org/challenges-doctrine-separation-powers-1999-nigerian-constitution.html> (accessed 19 May 2020).

⁷⁸⁶ Oden C 'The challenges of the doctrine of separation of powers under the 1999 Nigerian constitution' available at <https://www.projecttopics.org/challenges-doctrine-separation-powers-1999-nigerian-constitution.html> (accessed 19 May 2020).

⁷⁸⁷ See 4.2 and 4.2.1.1 of this Chapter.

⁷⁸⁸ See 4.2 and 4.2.1.1 of this Chapter.

⁷⁸⁹ See 4.2 and 4.2.1.1 of this Chapter.

Section 4 of the Nigerian Constitution vests the legislative powers of the Federation on the National and State Houses of Assembly.⁷⁹⁰ While section 5 vests the executive powers of the Federation on the President and Governors⁷⁹¹ and section 6 vests judicial powers to the courts established by the Nigerian Constitution.⁷⁹² In addition, section 147(4) of the Constitution provides that a member of the legislature appointed as a minister of the Federation after taking the oath he is deemed to have resigned in the legislature.⁷⁹³

Nigeria has a chequered history when it comes to democratic rule.⁷⁹⁴ It is argued that when the judiciary is independent (not suggesting that Nigerian courts are not independent), it will dispense justice without fear or favour - adjudicating and arbitrating among individuals and institutions, subject only to the law.⁷⁹⁵

4.5. Conclusion

It goes without saying that Nigeria is not doing enough to protect socio-economic rights, unlike South Africa and other African countries that have socio-economic rights which are justiciable, as discussed in Chapter 3. The system of Nigeria have seen Nigerians failing to approach the courts for redress in relation to socio-economic rights enforcement.

⁷⁹⁰ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 4.

⁷⁹¹ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 5.

⁷⁹² Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 6.

⁷⁹³ Constitution of the Federal Republic of Nigeria Act 24 of 1999 sec 147(4).

⁷⁹⁴ Maduekwe VC, Ojukwu UG & Agbata IF 'Judiciary and the theory of separation of powers in achieving sustainable democracy in Nigeria (the fourth republic)' (2016) 4(8) *British Journal of Education* 84.

⁷⁹⁵ Maduekwe VC, Ojukwu UG & Agbata IF 'Judiciary and the theory of separation of powers in achieving sustainable democracy in Nigeria (the fourth republic)' (2016) 4(8) *British Journal of Education* 101.

Even though Nigeria is known as the 'giant of Africa',⁷⁹⁶ not enough financial resources have been directed towards the enforcement of socio-economic rights. This is noted in the deficits in budgets that the country often has with regards to allocation for the enforcement of socio-economic rights.⁷⁹⁷

It is submitted that one of the solutions to problems faced by Nigeria and other African countries is that, Nigeria and all other African countries must make concerted efforts on increasing Africa intra-trade. Treaties must be established that will see African countries trading more with each other and on a fair trade deals. With reference to Nigeria, this will contribute to the growth of the Nigerian economy and thus availing more resources towards the realisation of socio-economic rights. Unfortunately, the Nigerian economy currently relies heavily on its petroleum exports and already noted, petroleum contributes a significant percentage on the revenue generated by the country each financial year.⁷⁹⁸

While Nigeria certainly must focus on domestic sectors, such as, agriculture to generate revenue towards economic development which will improve socio-economic rights enforcement, the country also needs to make sure that trade relations are deepened with other African nations as Africa can be a significant market for African countries. For example, it is anticipated that the AfCFTA 'will cover 1.2 billion Africans with a combined GDP of US\$2.5 trillion, increase intra-African trade by up to 52.3%, increase the real wages for unskilled workers in the agricultural and non-agricultural sectors and expand Africa's economy to US\$29 trillion by 2050.'⁷⁹⁹ For Nigeria, the AfCFTA will provide an opportunity to expand market access for Nigeria's exports of goods and services thereby improving the country's economy.⁸⁰⁰ When this is done, Nigeria can afford the enforcement of

⁷⁹⁶ United for Human Rights, available at <https://www.humanrights.com/newsletter/volume4/issue1/the-giant-of-africa-becomes-a-giant-of-human-rights.html> (accessed 16 December 2020).

⁷⁹⁷ See 4.2.2.1 of this Chapter.

⁷⁹⁸ Tralac, available at <https://www.tralac.org/documents/resources/african-union/2026-fact-sheet-on-the-afcfta-benefits-for-africa-and-nigeria-notn-june-2018-1/file.html> (accessed 16 December 2020).

⁷⁹⁹ Tralac, available at <https://www.tralac.org/documents/resources/african-union/2026-fact-sheet-on-the-afcfta-benefits-for-africa-and-nigeria-notn-june-2018-1/file.html> (accessed 16 December 2020).

⁸⁰⁰ Tralac, available at <https://www.tralac.org/documents/resources/african-union/2026-fact-sheet-on-the-afcfta-benefits-for-africa-and-nigeria-notn-june-2018-1/file.html> (accessed 16 December 2020).

socio-economic rights and African intra-trade will be one of the tools to ensure that this happens.

Nigeria needs to reposition itself and put the citizens first. It needs to do so by amongst others coming up with 'effective' mechanisms to combat corruption. As already noted,⁸⁰¹ corruption is a major issue in Nigeria. Public corruption in particular have direct consequences on many individuals, particularly the poor and as such it must not be tolerated at all. This can be supported by the recent SARS protests,⁸⁰² a youth-led movement, with one of the issues being raised was corruption.



⁸⁰¹ See 4.4.1 of this Chapter.

⁸⁰² See 4.2.1.3 of this Chapter.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1. Introduction

The question is not whether a country can enforce socio-economic rights, rather, the question is what must a country do to ensure the enforcement of all socio-economic rights? This research has highlighted number of issues which will be looked at in brief below. It must be reiterated and understood that the core of this research was to examine the link between economic development and the enforcement of socio-economic rights in Africa and in doing so, two countries were identified and examined, South African and Nigeria (with a few African countries considered for purposes of comparisons). Both South Africa and Nigeria have different approaches to socio-economic enforcement. In particular, Chapter 3 showed that South Africa recognises socio-economic rights fully in its Bill of Rights in the RSA Constitution and such rights are justiciable. On the other hand, Chapter 4 showed that Nigeria does not have socio-economic rights in its Bill of Rights in the Nigeria Constitution, such rights are only under Chapter II of the Nigerian Constitution and are regarded as the 'Fundamental Objectives and Directive Principles of State Policy' and they are not justiciable, that is to say, a person cannot approach a court to adjudicate on them.

The argument that persisted in this research was that Africa has an abundance of natural resources. Further, that with these resources and Africa-centered regional trade (the AfCFTA as a case in point), the economies of Africa can and will experience growth. In addition, the argument that persisted in this research was that there is a link between economic development and socio-economic rights and that with economic development in Africa, Africa governments will be able to enforce socio-economic rights (as economic development means that government revenue is available). It was submitted that since different African countries have considerable natural and other resources, intra-African trade will bring about a good outcome. It was also submitted that there are number of factors besides the challenges of economic development, such as endemic corruption that continues to plague Africa.

5.2. Socio-economic rights enforcement in Africa

As noted in this research, African people are in dire need of the full enforcement of their socio-economic rights primarily because of the prevalent poverty in many parts of the continent. This research has shown that there are number of countries that fully enforce socio-economic rights, based on the fact that they have incorporated these rights in their constitutions' Bill of Rights. Some countries have only incorporated selected socio-economic rights in their constitutions' Bill of Rights. While some countries do not incorporate socio-economic rights in their constitutions at all, that is, they do not have socio-economic rights in their constitutions' Bill of Rights.

The countries that do not have socio-economic rights in their constitutions' Bill of Rights, means that these rights are not justiciable. It is the submission of this research that these countries must consider having the socio-economic rights in their constitutions' Bill of Rights and have them to be realised progressively. This research has also established, that there are other factors that have left African countries unable to enforce socio-economic rights at all, such as, the prevalent corruption and the separation of powers principle.

In Chapter Three, this research established that even for those states that recognise socio-economic rights as fully justiciable, there are large number of people whose challenging circumstances, for example, inadequate housing, have not changed. Chapter Three also showed that even though some form of enforcement has occurred in the realisation of the socio-economic rights such enforcement efforts have not been substantial, that is to say not enough has been done in the way of enforcement. Examples of this are the social grants given by the South African government, through South African Social Security Agency (SASSA) which are below the extreme poverty line, meaning that the recipients are not able to attain basic living conditions. Arguments have been raised that the South African government is currently unable to increase these social grants due to budgetary constraints.

Chapter Four focused on Nigeria, a country that does not provide for socio-economic rights in its Constitutions' Bill of Rights and this leaves the citizens in abject poverty

without access to basic necessities such as adequate housing and health care. It was submitted that Nigeria is facing challenges in enforcing the socio-economic rights of its people due to the fact that it does not have means to. The budget allocations support this as we have seen deficits in the budgets.

This research established that indeed some African governments are doing their best within their available budgetary constraints, but that the primary challenge in this instance is that of economic development, and not necessarily African governments are not doing enough. This research continues to argue that with the rigorous implementation of the AfCFTA, this problem can be addressed, and this argument is fully elaborated on in the below section.

5.3. Economic development as a factor towards the enforcement of socio-economic rights

The principal argument in this research is that the lack of economic development is the main contributing factor towards the failure of African governments to enforce or fully enforce socio-economic rights. Some commentators have drawn a distinction between socio-economic rights on the one hand, and civil and political rights on the other hand, by arguing that the former require financial resources for their enforcement, while the latter do not. However, it is submitted that this line argument assumes that civil and political rights do not require financial resources for their enforcement, when the reality is that they do.

In order to ensure economic development, this research argues that trade, is the main contributor to achieve said objective. The research further makes the point that the current trade framework, as regulated by the World Trade Organization (WTO) has not been favourable for the African. The research acknowledges that the WTO does make provision for Special and Differential Treatment for developing countries (African countries included), but it is submitted that this has not been helpful in assisting African benefit from opening up their market to developed-country competitors. For example, African trade cannot compete with the goods from subsidised product from developed-

country Members of the WTO. For its part, the African Union has conceded to this fact.

This research makes the point that African countries have to shift focus from the WTO framework and focus more on intra-African trade. It is thus recommended that African countries make concerted efforts and make intra-African trade a priority. African countries must engage on good faith in their current African trade regional trade agreements and a good example is the AfCFTA. As it has been indicated, some countries are reluctant participate in this agreement, particularly on the issue of free movement of people, as they believe it will cause number of problems.

5.4. Other factors affecting the enforcement of the socio-economic rights

There are number of other factors that affect the enforcement of the socio-economic rights. There may be many factors, however, in this research the focus was on corruption and the separation of powers principle. The former is actually contributing immensely, as corruption is endemic in Africa. For example, leaders of various African nations have been known to misusing funds meant for the public benefit for their own personal use. It is therefore recommended that with this recommended treaty that aims to improve intra-Africa trade, must also incorporate issues of corruption, such as monitoring mechanisms or institutions of similar nature to ensure that the benefits of intra-African trade are fully realised. If issues such as corruption are not addressed, it can be that the fruits of the intra-African trade cannot be seen by the African people but only by the corrupt.

Although, the separation of powers has number of advantages, it has nonetheless prevented the judiciary from fully liberal adjudicating the enforcement of socio-economic rights. This principle has been used by South African courts as shown in Chapter 3.

5.5. Recommended rigorous implementation of the AfCFTA

On 21 March 2018 in Kigali, Rwanda, 44 member States of the African Union signed the Agreement Establishing the African Continental Free Trade Area. With this Agreement there is a great hope for improved job creation, poverty reduction and prosperity for the continent. In other words, this Agreement can assist in terms of socio-economic issues. The present research argues that an intra-African trade agreement is pivotal towards achieving economic development and consequently the enforcement of socio-economic rights. The AfCFTA will successfully facilitate economic development of Africa, if it is rigorously implemented. That is all the African countries must commit themselves in order to have this Agreement rigorously implemented. It is recommended that all African countries ratify this Agreement to have it binding in all of Africa and have common ground to have this Agreement fully functional. It is when Africa trades more with itself that there can be changes in the enforcement of socio-economic rights and poverty alleviation in the lives of the African people.

5.6. Final Remarks

In this general conclusion, the researcher finally argues that no group or category of rights is better than the other, that the satisfaction of socio-economic rights is a guarantee for the enjoyment of civil and political rights as these rights are intertwined. Furthermore, if the arguments and submissions raised in this research is taken into account, in the coming years, the world will witness the lives of Africa's people improving as human beings deserving of human dignity and respect.

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