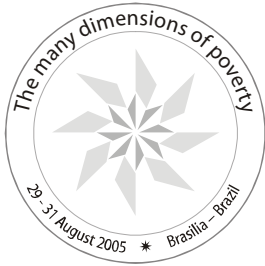


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A Rights-Based Approach to Poverty: the South African Experience

Conference paper

Linda Jansen van Rensburg
North-West University, South Africa

DFID Department for
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Development



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A RIGHTS-BASED APPROACH TO POVERTY - THE SOUTH AFRICAN EXPERIENCE

Linda Jansen van Rensburg B Comm, LL B, LL M, LL D.
Associate Professor, North-West University (Potchefstroom Campus), South Africa.
Private Bag X6001, Potchefstroom 2520, South Africa
hnrljvr@puknet.puk.ac.za
+27 18 299 1954 (tel); +27 18 299 1955 (fax); +27 83 290 4573 (mobile)

Poverty is a human rights violation, and freedom from poverty is an integral and inalienable human right. - United Nations Development Programme, January 1998.

1 INTRODUCTION

South Africa is an upper-middle-income country, but despite this relative wealth, the experience of most South African households is that of outright poverty or of continuing vulnerability to being poor.¹ The main reason for this is the fact that apartheid has left South Africa with an exceptionally divided society, with **extensive social and economic inequality**.² A consequence of this social and economic inequality is that the **distribution of income and wealth in South Africa is among the most unequal in the world**, and many households still have unsatisfactory access to education, health care, energy and clean water, as well as to wealth-generating assets and opportunities.³

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- ¹ Adato M, Carter M and May J *Sense in Sociability? Social Exclusion and Persistent Poverty in South Africa* (December 2004) available on the Internet under the South African Regional Poverty Network web page <http://www.sarpn.org.za/documents/d0001127/index.php> that acknowledges the University of Wisconsin website as the original source of this document: <http://www.basis.wisc.edu/live/persistent%20poverty/sense%20in%20sociabilityDec2004.pdf>
- ² Noble M, Ratcliffe A and Wright G *Conceptualizing, Defining and Measuring Poverty in South Africa – An Argument for a Consensual Approach* (Oxford 2004) 13.
- ³ Jansen van Rensburg L and Olivier MP "The Role and Influence of International Human Rights Instruments on South African Poverty Law" (Spain 2001) *Law and Poverty IV - Moving towards International Poverty*

To address the problems of poverty a rights-based approach may be used. I have chosen South Africa to serve as an example of how such an approach may be applied for the following reasons:

Firstly, as indicated above, many South African households face **outright poverty** and the distribution of income and wealth in South Africa is among the most unequal in the world.⁴

Secondly, South Africa **lacks a comprehensive social protection system** aimed at combating poverty. Permanent social assistance grants in South Africa are highly categorised. It only covers children from infancy to 14 years (Child Support Grant), children in foster care (Foster Child Grant), people with disabilities (Disability Grant), children with disabilities (Care Dependency Grant) and, the elderly (Old Age Grant). In addition to the Old Age and Disability Grant, one can apply for a Grant-in-Aid. This entire grant system is subject to a strict means test under the Social Assistance Act 59 of 1992. No provision is made by way of the social assistance process for people without disabilities from the age of 14 to 60/65 depending on gender. This implies that a large section of the population is still excluded from the social security (or protection) programme which serves as the main safety net in South Africa, if one is not contributing to the Unemployment Fund or the Compensation for Occupational Sickness and Diseases Fund (Social Insurance) or to any private scheme. The only exception to the above is the temporary financial award an individual may apply for, called the Social Relief of Distress, aimed at being temporary financial material

Law? Paper presented at the Oñati International Institute for the Sociology of Law Oñati (unpublished). See Noble, Ratcliffe and Wright (2004) 4.

⁴ Adato, Carter and May (2004).

assistance, issued to people who are unable to meet their family's most basic needs.⁵

Thirdly, South Africa has a **unique Constitution that contains a number of "fundamental rights for the poor"**⁶. These rights are justiciable and have been positively enforced by the highest court on constitutional matters in South Africa, namely the Constitutional Court.⁷

Fourthly, the South African Constitution provides for an **"international friendly"** approach whereby courts are obliged to consider binding as well as non-binding international law when interpreting the fundamental rights in the Constitution.⁸ Seeing that South Africa is a young democracy there is little substantial and developing jurisprudence available in South Africa on the scope and core content of poverty rights and the courts may rely on the Commentaries and Reports of International bodies.⁹ The importance and role of international bodies and the monitoring bodies associated with these bodies must not be underestimated. The instruments and especially the bodies mandated by them, play a vital role in influencing the very scope and content of municipal poverty law.

The following methodology will be used:

⁵ Social Assistance Act 59 of 1992 as amended by the Welfare Laws Amendment Act 106 of 1997.

⁶ Also known as socio-economic rights, red rights or second-generation rights. See Tomasevski K *Human Rights and Poverty Reduction - Strengthening pro-poor law: Legal enforcement of economic and social rights* (January 2005) Available on the internet <http://www.odi.org.uk/rights/Meeting%20Series/EcoSocRights.pdf> 6.

⁷ See heading 3 below.

⁸ Section 39(2)(b). See heading 3 below.

⁹ See especially reference to *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) as discussed below. Hereafter Grootboom case.

- As a starting point I will examine the **concepts** of poverty, social exclusion, rights-based approach and social protection as understood within the South African context.
- I will then discuss the **fundamental rights of the poor as contained in the Constitution of the Republic of South Africa, 1996**.¹⁰ It must however, be stressed that not only socio-economic rights may be considered as rights affecting the poor, but that some civil and political rights may also be considered because of the interrelatedness and indivisibility of fundamental rights.
- The **linkage between South African poverty law and international and regional poverty instruments**¹¹ **will then be discussed**. A number of important international instruments will briefly be referred to in order to illustrate the way the rights of the poor are included in these documents and how these instruments may influence and assist South African courts in defining and giving content to the fundamental rights of the poor in our Constitution.
- The next step will be to **discuss the way the South African Constitutional Court**¹² **is prepared to enforce the rights of the poor** by way of a rights-based approach. The aim is to establish to what extent the courts may enforce the fundamental rights of the poor when a government fails to realise programmes and policies (international or national) aimed at alleviating poverty in a particular country. The **boundaries for judicial activism** will thus be examined. Reference will also be

¹⁰ Hereafter the Constitution.

¹¹ It is impossible to cover all international and regional instruments that may influence poverty law in South Africa for purposes of this discussion. A number of the most relevant and well-known instruments will be discussed.

¹² *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC); *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC) and *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

made to instances where the Constitutional Court referred to International instruments and the way the Court make utilises or in some cases, denies the principles of international law.

- **Weaknesses and strengths** will be deducted from the South African experience in order to make **recommendations** on how the rights-based approach may be used in other foreign and (possibly) international jurisdictions.

2 POVERTY AND A RIGHTS-BASED APPROACH

There exist numerous definitions of poverty. Traditionally, poverty has been associated with a lack of resources¹³, the more recent concept of **social exclusion**¹⁴ is now no longer seen as an alternative to the poverty concept, but as a more comprehensive concept, which concerns much more than money. In fact, poverty (referring to a lack of disposable income) can be seen as part of the multi-dimensional and dynamic concept of social exclusion (referring to multi-faceted failure). Social exclusion, therefore, has to be understood with reference to the failure of any one or more of the following:

- (a) the democratic and legal system (civic integration);
- (b) the labour market (economic integration);
- (c) the welfare state system (social integration); and
- (d) the family and community system (interpersonal integration).¹⁵

¹³ UNICEF *Poverty Reduction begins with Children* (New York 2000) 5.

¹⁴ This concept apparently has its origin in the European Union context, dating back to the second half of the 1980's: Berghman J "The resurgence of poverty and the struggle against exclusion: A new challenge for social security?" (1997) *International Social Security Review* vol 50 4. The most significant innovation in the recent poverty literature in the developed world is the emergence of the concept of 'Social Exclusion'. Noble Ratcliffe and Wright (2004) 11.

¹⁵ Jansen van Rensburg and Olivier (2001). See Noble Ratcliffe and Wright (2004) 7, Adato, Carter and May (2004) 5.

Conversely, social participation, being the positive counterpart of social exclusion, is to be determined with reference to all four systems.¹⁶ Or, as an ILO/UNDP study remarks, the notion of social exclusion links together both social rights and material deprivation. **It encompasses not only the lack of access to goods and services, which underlie poverty and basic needs satisfaction, but also exclusion from security, justice, representation and citizenship.**¹⁷ It concerns inequality in many dimensions - economic, social, political, and cultural.¹⁸

UNICEF¹⁹ describes poverty as follows:

Poverty is a denial of human rights²⁰ and human dignity.
It means not having a good primary school or health

¹⁶ Berghman (1997) 6 refers to the comment by certain European researchers that "one's sense of belonging in society depends on all four systems". Compare Commins P (ed) *Combating exclusion in Ireland 1990-1994 A Midway Report* (Brussels European Commission 1993) 4, which continues as follows: "Civic integration means being an equal citizen in a democratic system. Economic integration means having a job, having a valued economic function, being able to pay your way. Social integration means being able to avail oneself of the social services provided by the state. Interpersonal integration means having family and friends, neighbours and social networks to provide care and companionship and moral support when these are needed. All four systems are therefore, important... In a way the four systems are complementary: when one or two are weak the others need to be strong. And the worst off are those for whom all systems have failed...". For a similar appreciation of the distinction between the (narrower) income-related poverty concept and the (wider) multi-dimensional social exclusion concept, see Rodgers G *ea Overcoming social exclusion, A contribution to the World Summit for Social Development*, (International Institute for Labour Studies, ILO; United Nations Development Programme 1994) 2-3, 8.

¹⁷ Rodgers (1994) 8.

¹⁸ As discussed in Jansen van Rensburg and Olivier (2001), Tomasevski (2005) 4, 6-7.

¹⁹ UNICEF *Poverty Reduction begins with Children* (New York 2000) 45. See UNDP *Integrating Human Rights with Sustainable Development* (New York 1998) as referred by De Gaay Fortman B *Pro Poor Growth, the State and the (Non)-Implementation of the Rights of the Poor* (Unpublished Paper) Lecture for the Ministry of Foreign Affairs and the RAWOO (The Hague, Foreign Ministry, 26 April 2001).

²⁰ For exactly the similar definition see Committee of Economic Social and Cultural Rights E/C.12/2001/10 10 May 2001 paras 1-2 and Piron *Learning*

centre to go to and not having access to safe drinking water and adequate sanitation. It means insecurity, powerlessness, exposure to violence and discrimination and exclusion from the mainstream of society. It also means not having a voice to influence decision-making, living at the margin of society and being stigmatized. *Obviously, poverty reduction involves more than crossing an income threshold.*²¹

A broad definition of poverty as "the lack of basic capabilities to live in dignity"²² seems to be the most appropriate for purposes of this paper.

The above description of poverty and social exclusion clearly recognises that poverty constitutes a denial of **human rights** and **human dignity**.²³ A human rights-based approach provides legal protection for basic human dignity.²⁴ Human dignity is considered to be one of the core constitutional values in the South African Constitution.²⁵ The universal aim and basis for the existence of rights pertaining to poverty is to protect a person's right to human dignity.²⁶ Accordingly, human dignity, as a fundamental constitutional value²⁷ as well as a fundamental right²⁸ contained in the Bill of Rights, plays a very important role with regard to

from the UK Department of International Development's Rights-Based Approach to Development Assistance (Bonn 2003) 19.

²¹ Own emphasis.

²² Piron (2003) 19.

²³ UNICEF (2000) 19. De Gaay Fortman (2001), CESCR E/C.12/2001/10 10 May 2001 paras 1-2 and Piron (2003) 19.

²⁴ De Gaay Fortman (2001).

²⁵ Section 1 of the Constitution states that the Republic of South Africa is one sovereign democratic state founded on the values of human dignity, the achievement of equality and advancement of human rights and freedoms, non-racialism and non-sexism. Section 7(1) further states that the Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

²⁶ Grootboom case para 23. See Piron (2003) 19.

²⁷ Sections 1 and 7(1) of the Constitution.

²⁸ Section 10 of the Constitution reads as follows: "Everyone has inherent dignity and the right to have their dignity respected and protected."

fundamental rights of the poor and the equal treatment of those who are historically deprived.²⁹

UNICEF³⁰ describes a rights-based approach as follows:

A human rights-based approach means that the situation of poor people is viewed not only in terms of welfare outcomes but also in terms of *the obligation to prevent and respond to human rights violations*. For example, any action that excludes a specific group of children from school or discriminates against girls constitutes such a violation. The human rights approach aims to empower families and communities to secure assistance and advocates a fair and just distribution of income and assets.³¹

In other words a human rights-based approach implies protection by law of fundamental freedoms and entitlements needed for a decent standard of living.³² This implies that a number of rights may be infringed at a given moment when the situation of poor people is viewed.³³ For example denying squatters access to housing rights also implies that there are an infringement on their rights to health, human dignity, water, food, freedom from discrimination and depending on the circumstances, social assistance. This is a typical situation where poor people are socially excluded, marginalized and placed in a vulnerable position and therefore seeks **social protection** from the state.

²⁹ The South African courts have consistently stated that there is close correlation between the right to equality and the protection of a person's dignity: *Hoffmann v SA Airways* 2000 21 ILJ 2357 (CC); *Walters v Transitional Local Council of Port Elizabeth & Another* 2001 BCLR 98 (LC).

³⁰ UNICEF (2000) 3-4.

³¹ Own emphasis.

³² De Gaay Fortman (2001).

³³ See discussion of *Khosa and Others v Minister of Social Development and Others*; *Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) below and the reference to intersecting rights.

I thus propose that when the fundamental rights relating to poverty are infringed, such a person needs social protection.

The type of social protection will differ depending on the type of right that has been infringed upon. For example, when a person's right to social assistance is denied, such a person is entitled to some kind of social grant. Social protection is usually connected to social security but has a much wider meaning. Social security's and especially social assistance's, primary objective is to combat poverty. The definition that is going to be suggested will cover a much broader terrain of poverty issues and may in fact be seen as a method to address poverty. It must be kept in mind that the package that will be suggested will be entitlements and not welfare measures based on the fact that we are working from a rights-based approach.

A committee appointed by cabinet recently developed a **definition for social protection** for unique South African circumstances. The report by the Committee of Inquiry into a Comprehensive System of Social Security for South Africa,³⁴ suggested that the current categorised social security system must be phased out. The Committee indicated that the **current social security system in South Africa is unequal, exclusionary and inequitable** and will not stand the test of reasonableness as defined in the Grootboom case.³⁵ The Committee further stressed the importance of compliance of the social security system with international

³⁴ Committee of Inquiry Into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future Consolidated Report* (Pretoria March 2002) 61. Hereafter Committee of Inquiry (2002).

³⁵ SAHRC "5th Economic and Social Rights Report – The right to Social Security" (2002/2003) Available from the Internet http://www.sahrc.org.za/esr_report_2002_2003.htm 5-7. See below for discussion on Grootboom case. In the Grootboom judgment the Court held that socio-economic policies and programmes must be reasonable both in their conception and their implementation. It stressed that vulnerable communities must be given priority and their needs must be addressed effectively.

standards.³⁶ The Committee suggested a comprehensive social protection (CSP) package in the place of the current categorised social security system:

Comprehensive social protection is broader than the traditional concept of social security, and **incorporates development strategies and programmes**³⁷ designed to ensure, collectively, at least a **minimum acceptable living standard for all citizens**. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an **integrated policy approach** including many of the developmental initiatives undertaken by the State.³⁸

The committee further developed "minimum" requirements for the comprehensive social protection package. It remarks that CSP will work through a variety of mechanisms, embracing a package of social protection interventions and measures. In identifying the practical aspects of such an approach, and taking into account necessary adaptations for South Africa, the Committee has arrived at the following measures:

- Measures to address "income poverty" (provision of minimum income)
- Measures to address "capability poverty" (provision of certain basic services)
- Measures to address "asset poverty" (income-generating assets)
- Measures to address "special needs" (e.g. disability or child support)

³⁶ SAHRC (2002/2003) 5-7.

³⁷ This suggests rights-based approach to development. See Malone M and Belshaw D "The Human Rights-Based Approach to Development: overview, context and critical issues" (2003) Transformation 20/2 April 76-89 and Piron (2003) 1-28. Due to the restricted length of this paper and the complexity of the rights based-approach to development as a separate topic, this topic will only be referred to.

³⁸ Own emphasis.

In the CSP package, the first three are **core elements** of the CSP basic platform that should be available to all South Africans and certain categories of non-citizens. In general, so the Committee opines, these components need to be established as a **universal-as-possible package of income transfers**, services and access provided in a non work-related manner and whose availability is not primarily dependent on the ability to pay.³⁹ A minimum level or measure of provision should be made available to everyone. The key components of this relate to the (eventual) introduction of a Basic Income Grant, the immediate extension of the Child Support Grant to gradually cover children under the age of 18, and maintaining the state Old Age Grant. The scrapping of the means test across the board is also recommended.

Other elements of the package include, amongst others, free health care (the Committee advocates the eventual introduction of a National Health Insurance system), free primary and secondary education, free water and sanitation, free electricity, access to affordable and adequate housing, access to jobs and skills training, and a reformed disability grant, foster care grant and child dependence grant.⁴⁰

It is clear that the social protection package suggested by the Committee entails not only a **rights based-approach to development** but also a **rights based-approach to respect and**

³⁹ Committee of Inquiry (2002) 41-42. See also Olivier MP and Jansen van Rensburg L "Addressing the alleviation of poverty through social welfare measures" (2002) Paper presented at a joint session between CROP and the International Sociological Association (ISA) Research Committee on Sociology of Poverty, Social Welfare and Social Policy at the XVth World Congress of Sociology, entitled *Issues in pro-poor policy in non-OECD countries* in Brisbane, Australia 7-13 July 2002 36.

⁴⁰ Committee of Inquiry 42-43. See also Olivier and Jansen van Rensburg (2002) 36.

uphold the human dignity of the poor by providing him or her with their basic needs.

3 FUNDAMENTAL RIGHTS OF THE POOR IN THE SOUTH AFRICAN CONSTITUTION

Civil and political rights cannot prevail if socio-economic rights are ignored, and stability of political democracy depends on the extent of balance between the two groups of rights.⁴¹

Along with the birth of the final Constitution and the Bill of Rights in chapter two came the existence of "fundamental rights for the poor". These are rights placing an obligation on the state to act positively in favour of everyone especially the poor, marginalized and vulnerable.⁴² **Socio-economic rights and specifically those rights pertaining to the alleviation of poverty are contained in different sections of the Bill of Rights.** Section 27(1)(c) states that "everyone has the right to have access to - **social security**, including, if they are unable to support themselves and their dependants, appropriate **social assistance**". Section 27(1)(c),

⁴¹ Arat ZF *Democracy and Human Rights in Developing Countries* (Colorado 1991) 4. See Arambulo K *Strengthening the Supervision on the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects* (Antwerpen 1999) 107. In the Proclamation of Teheran adopted on 13 May 1968 during the International Congress on Human Rights para 13 the above has been affirmed: "Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development."

⁴² In their fourth annual report to parliament the South African Human Right Commission identified the following persons as particularly vulnerable and marginalised: Informally employed, the unemployed and the self-employed; Non-citizens, refugees and asylum seekers; Persons infected with HIV with a CD4 cell count bellow 50; Children regardless of their age; Children infected with HIV/AIDS; Child headed households; Children living on streets; Support to extended families due to HIV/AIDS related deaths. South African Human Rights Commission (SAHRC) 4th *Annual Economic and Social Rights Report: (2000-2002)* 227-229.

makes direct reference to the concept of social protection, as a measure to combat poverty. As already indicated social protection is a measure that combats social exclusion, poverty, marginalisation and vulnerability.⁴³

Other provisions in the Bill of Rights make indirect reference to the concept of social protection as a measure to combat poverty. Section 26 grants everyone the right to have access to **adequate housing** while section 27(1)(a) provides for the right to access to **health care services**, including **reproductive health care**; and section 27(1)(b) provides for the right to access **to sufficient food and water**.

Textually linked⁴⁴ to sections 26(1) and 27(1) respectively is sections 26(2) and 27(2) which internally limits the obligation of the state to only ' ... take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [this] right'.⁴⁵ Section 29 further provides that everyone has the right (a) to a **basic education**, including adult basic education; and (b) to **further education**, which the state must take reasonable measures to make progressively available and accessible.

Section 28 specifically addresses the socio-economic rights of children. Section 28(1)(c) grants **every child the right to basic nutrition, shelter, basic health care services and social services**. It does, however, not contain a similar qualification as contained in section 26(2) and 27(2) concerning "reasonable measures" and "progressive realisation".

⁴³ See heading 2 above.

⁴⁴ As discussed in *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC) para 30. Hereafter TAC case.

⁴⁵ Almost the same formulation and phrasing are found in article 2(1) of the International Covenant of Economic Social and Cultural Rights.

4 INTERNATIONAL AND REGIONAL POVERTY INSTRUMENTS

4.1 Introduction

There is a **wide range of international law instruments on poverty that may assist adversarial bodies in South Africa and other countries to interpret the fundamental rights of the poor.** Although these instruments do not directly mention poverty, the current broad definition of poverty as the lack of basic capabilities to live in dignity corresponds to a number of articles different instruments.⁴⁶ Some of the most important instruments are the Millennium Development Declaration and Goals, the Universal Declaration of Human Rights (Universal Declaration),⁴⁷ the United Nations Covenant on Economic Social and Cultural Rights⁴⁸ and the Convention on the Rights of the Child⁴⁹ to name a few.⁵⁰

⁴⁶ CESCR E/C.12/2001/10 10 May 2001 para 7 and Piron (2003) 19.

⁴⁷ GA Res 217A (III), UN Doc A/810 71 (1948).

⁴⁸ GA Res 2200A (XXI), UN GAOR Supp (No 16) 49, Doc A/6316 (1966) UNTS, entered into force 3 January 1976. South Africa is yet to ratify this treaty.

⁴⁹ GA Res 44/25, Annex 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) entered into force 2 September 1990. South Africa ratified the Convention on 16 June 1995, without entering any reservations.

⁵⁰ Other international instruments that contains sections that protects the poor and the vulnerable are inter alia: The Conventions UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) GA Res 34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46, entered into force 3 September 1981. South Africa ratified the Convention on 15 December 1995, without entering any reservations. The Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195, entered into force 4 January 1969. South Africa signed the Convention on 3 October 1994. Convention Relating to the Status of Refugees 189 UNTS 150, entered into force 22 April 1954. South Africa acceded on 12 January 1996. The Protocol Relating to the Status of Refugees 606 UNTS 267, entered into force 4 October 1967. South Africa acceded on 12 January 1996. The International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families GA Res 45/158, Annex, 45 UN GAOR Supp (No 49A) 262, UN Doc A/45/49 (1990), entered into force 1 July 2003. Not yet signed or acceded to by South Africa. The Convention Relating to the Status of Stateless Persons 360 UNTS 117, entered into force 6 June 1960. Not yet signed or acceded to by South Africa. On regional level there are for example the African Charter on the Rights and Welfare of the Child, 1990 OAU Doc

Regional poverty instruments applicable on Africa are for example the African Charter on Human and Peoples' Rights (African Charter or Charter).⁵¹ Within the context of Southern Africa, the Southern African Development Community (SADC)⁵² instruments will also influence the interpretation of socio-economic rights of the poor. It must be stressed that the above are not a closed list of international instruments on poverty but due to the restricted length of this paper its was decided to discuss the mentioned few.

4.2 International Instruments

4.2.1 Customary international law

CAB/LEG/24.9/49 (1990). South Africa ratified the Convention on 7 January 2000.

⁵¹ 1981 OAU Doc CAB/LEG/67/3 (1990). South Africa ratified the Convention on 7 January 2000.

⁵² The Southern African Development Coordination Conference (SADCC), which was the forerunner of the Southern African Development Community (SADC), was formed in Lusaka, Zambia, on 1 April 1980, following the adoption of the Lusaka Declaration (entitled *Southern Africa: Towards Economic Liberation*) by the nine founding member states. The transformation of the organisation from a Coordinating Conference into a Development Community (SADC) took place on August 17, 1992 in Windhoek, Namibia when the Declaration and Treaty was signed at the Summit of Heads of State and Government thereby giving the organisation a legal character. The SADC vision is that of a common future, a future within a regional community that will ensure economic well-being, improvement of the standards of living and quality of life, freedom and social justice and peace and security for the peoples of Southern Africa. This shared vision is anchored on the common values and principles and the historical and cultural affinities that exist between the peoples of Southern Africa. Southern African Development Community (updated 1 April 2005) "SADC Trade, Industry and Investment Review 2005" Available from World Wide Web <http://www.sadcireview.com/sadc/frsadc.htm>, EIA (Energy Information Administration) (updated 15 April 2004) "Southern Africa and the Southern African Development Community" Available from World Wide Web <http://www.eia.doe.gov/emeu/cabs/sadc.html>, ILO (accessed on 24 June 2005) "Southern African Development Community, SADC" Available from World Wide Web <http://www.itcilo.it/english/actrav/telearn/global/ilo/blokit/sadc.htm>, Department of Foreign Affairs, South Africa (updated 12 February 2004) "Southern African Development Community (SADC) history and present status" Available from World Wide Web <http://www.dfa.gov.za/foreign/Multilateral/africa/sadc.htm>

United Nations Assembly Declarations can achieve the status of customary international law once they have been repeated in state practice.⁵³ Such would express the political will of a wide range of states, representative of the regions of the world,⁵⁴ and especially when adopted without discord. It is still highly debatable whether the Universal Declaration of Human Rights⁵⁵ form part of customary international law. I think some of the provisions in the Declaration may form part of the so-called customary international law. Some provisions especially those pertaining to the rights of the poor or socio-economic rights will not necessarily be accepted as customary international law. Whether it is binding or soft law, various judicial authorities have invoked its provisions, both in a domestic and legislative evolution of authoritative legal norms.

The Preamble to the Universal Declaration expressly states that its purpose is to provide "a common understanding" of the human rights and fundamental freedoms referred to in the United Nations Charter and to serve "as a common standard of achievement for all peoples and all nations". Article 22 of the Universal Declaration provides for the following:⁵⁶

Everyone, as a member of society, **has the right to social security** and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each state, of **the economic, social and cultural rights indispensable for his dignity and the free development of his personality.**

⁵³ In order for a rule to attain the status of international law, there must be consistent practice and *opinio juris* in respect of the rule.

⁵⁴ For more on how resolutions of the United Nations General Assembly can attain the status of customary international law, see Dugard *International Law A South African Perspective* (Kenwyn 2000) 32.

⁵⁵ GA Res 217A (III), UN Doc A/810 71 (1948).

⁵⁶ See also Scheinin M *The Right to Social Security* in Eide A, Krause C en Rosas A (ed) *Economic, Social and Cultural Rights A Textbook* (Dordrecht 1995) 161.

It also caters for other areas covered by the concept of social protection. Specifically, it enshrines the right of everyone⁵⁷

to a standard of living adequate for the **health and well-being** of himself and of his family, including **food, clothing, housing and medical care and necessary social services**, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

4.2.2 Soft Law

Soft law consists of imprecise standards, generated by declarations adopted by diplomatic conferences or resolutions of international organisations, that are intended to **serve as guidelines** to states in their conduct, but which lack the status of "law".⁵⁸ An example thereof is the Millennium Development Declaration.⁵⁹ In order to **eradicate poverty**, and to **promote human dignity and equality**, State parties, rich and poor, committed themselves to a global effort through the Millennium Development Goals, which emanated from the 2000 Millennium Declaration. The Millennium Development Goals (MDGs) serve as benchmarks for the assessment of progress. Each MDG is linked to economic, social and cultural rights, and the achievement of the MDGs is a step towards the full realisation of economic, social and cultural rights.⁶⁰

The Millennium Declaration and the MDGs establish the values that guide, amongst other things, global development, freedom, equality

⁵⁷ Article 25(1) Universal Declaration.

⁵⁸ Dugard (2000) 36. See also Klabbbers J *The Concept of Treaty in International Law* (The Hague 1996) 157-164.

⁵⁹ GA Res 60 (b), UN Doc A/55/L.2.

⁶⁰ SAHRC (2002-2003) 5-7. Piron (2003) 19.

and tolerance. World leaders pledged to promote equality and the **empowerment of people as effective ways to combat poverty, hunger and disease** and to stimulate development that is sustainable using the MDG indicators.

The **Road map towards the implementation of the United Nations Millennium Declaration**⁶¹ is but one example of an instrument where **strategies** are proposed to reach the indicated goals and targets set to reach those goals. The South African Human Rights Commission suggested that the South African government should move towards the **goal of halving poverty** by 2015, and tackle the problems of unemployment and exclusion from social security.⁶²

4.2.3 Non-binding instruments

On 3 October 1994 South Africa signed the United Nations' International Covenant on Economic, Social and Cultural Rights (CESCR).⁶³ The treaty has however not been ratified yet. Legally speaking, the principal implication is that South Africa has incurred an international obligation to refrain from acts which would defeat the object and purpose of the treaty, and that it is supposed to review all domestic law and policy to ensure that it will be in compliance with the obligations imposed by the treaty at the moment of ratification.⁶⁴

⁶¹ GA Report to the Secretary-General UN Doc A/56/326 paras 80-163.

⁶² The South African Human Rights Commission suggest that the State should implement the Committee of Inquiry recommendations and begin the process of a comprehensive social protection system for all. SAHRC (2002-2003) 5-7

⁶³ GA Res 2200A (XXI), UN GAOR Supp (No 16) 49, Doc A/6316 (1966) UNTS, entered into force 3 January 1976.

⁶⁴ See the Vienna Convention on the Law of Treaties of 1969, a 18, 26 and 27; Liebenberg "The International Covenant on Economic, social and Cultural Rights and its implications for South Africa" (1995) *SAJHR* 371-372.

Article 11(1), requires that states guarantee an **adequate standard of living** to everyone.⁶⁵ The right to an adequate standard of living can be interpreted to mean that a state must at the very least provide social protection as discussed above to anyone without adequate resources.⁶⁶ The **right to social security** is entrenched in article 9. In addition to the provisions of article 9, sections 10(1) and (2) can also be read to refer to social protection in specific contexts. These sections recognise the **family** as the natural and fundamental group unit of society, worthy of the **widest possible protection**.⁶⁷

These social protection-related rights in articles 9, 10 and 11, like the other rights found in the CESCR, are qualified by article 2(1), which determines that they need be implemented only **progressively** and **to the maximum of available resources**.⁶⁸ The enforcement of the rights is entrusted to a reporting system, in terms of which state parties to the CESCR have to report on a regular basis to the UN Committee on Economic, Social and Cultural Rights.⁶⁹

⁶⁵ Article 11(1): 'The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family.'

⁶⁶ See definition of social protection by in heading 2 above.

⁶⁷ Article 10(1) states that '[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children'.

⁶⁸ Article 2(1): '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 realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

⁶⁹ See articles 16 & 17. In the sphere of international human rights law there are two usual methods for the enforcement of state obligations. One is the reporting procedure in which states report periodically on what they have done to give effect to the rights in the relevant instrument. This is the mechanism most common to the major human rights instruments. The other mechanism is the complaint mechanism for either state or individual complaints through which a state or an individual can bring a complaint against a state party alleging a violation of the rights in the relevant

Unfortunately South Africa is not yet a member of the CESCR and cannot be held accountable to report to the Committee. There is however, substantial and developing jurisprudence and persuasive commentary available for an adversarial body to consider on the **scope and content of socio-economic rights of the poor**. Examples hereof are General Comments of the United Nations Committee on Economic, Social and Cultural Rights as well as the Limburg Principles of 1987 and the so-called Maastricht Guidelines of 1997.

The General Comments have either a direct or indirect impact on the interpretation of the rights of the poor. They are:

- General Comment No 1 (1989) Reporting by States parties (The Comment requires state parties to undertake comprehensive review and regular monitoring in order to determine the extent to which a socio-economic right is enjoyed by all, and to give special attention to those groups or subgroups which appear particularly vulnerable (paras 1,2))
- General Comment No 2 (1990) International technical assistance measures.
- General Comment No 3 (1990) The nature of States parties' obligations (The Comment sets out the so-called obligations of conduct and obligations of result, which the CESCR imposes on a state party. It is expected of a state party to take all appropriate measures, within a reasonable time, to ensure compliance with

instrument. See Addo MK "Justiciability re-examined" in Beddard R and Dilys MH (eds) *Economic, social and cultural rights. Progress and achievement* (London 1992) 97-98. See also Jansen van Rensburg L "Die beregtiging van die fundamentele reg op toegang tot sosiale sekerheid" ('The adjudication of the fundamental right to access to social security') unpublished LLD thesis, Rand Afrikaans University (Johannesburg 2000) 6, where the distinction is drawn between adversarial adjudication (complaint) mechanisms and inquisitorial adjudication (monitoring) mechanisms on international, regional and national level with reference to the right to social security.

the rights enshrined in the Covenant (paras 1-7). The principal obligation of result is to progressively achieve the full realisation of the various rights, even though this may take some time (para 9). It is incumbent upon state parties to satisfy at least a minimum essential level of, for example, the right to social security, even in times of severe resource constraints (paras 10, 12.))

- General Comment No 4 (1991) The right to adequate housing (As far as the marginalised and the excluded are concerned, the Committee has interpreted article 11(1) of the CESCR as requiring state parties to give "due priority to those groups living in unfavourable conditions by giving them particular consideration" (para 11).)
- General Comment No 5 (1994) Persons with disabilities
- General Comment No 6 (1995) The economic, social and cultural rights of older persons
- General Comment No 7 (1997) The right to adequate housing: forced evictions
- General Comment No 8 (1997) The relationship between economic sanctions and respect for economic, social and cultural rights
- General Comment No 9 (1998) The Domestic application of the Covenant
- General Comment No 10 (1998) The role of the national human rights institutions in the protection of economic, social and cultural rights
- General Comment No 11 (1999) Plans of Action for Primary Education
- General Comment No 12 (1999) The right to Adequate Food
- General Comment No 13 (1999) The right to Education
- General Comment No 14 (2000) The right to the highest attainable standard of health

- General Comment No 15 (2003) The right to water
- General Comment No 16 (2004) Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies
- General Comment No 17 (2005) Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies

4.2.4 Binding Instruments

4.2.4.1 UN Convention on the Rights of the Child

South Africa has already ratified the United Nations Convention on the Rights of the Child, which is applicable *inter alia* to the socio-economic rights of all children throughout the world. Article 6 of the Convention places state parties under an obligation to ensure the **survival and development of children** to the maximum extent possible. This provision gives rise to numerous rights pertaining to poverty, such as the **right to health care** necessary for survival and to a standard of living that meets the needs for **food, clothing, shelter and education**.

The most important duties towards children listed in the Convention, for the purposes of social protection, are that the state should provide appropriate assistance to parents and legal guardians and should take all appropriate measures to ensure that the children of working parents have the right to benefit from child-care services and facilities.⁷⁰ In terms of article 23, the state has the responsibility to extend appropriate assistance (to ensure *inter alia* dignity and self-reliance) to disabled children and to those

⁷⁰ Article 18.

responsible for the care of such children, subject to available resources. Every child has the right to benefit from social security, including social insurance, and the state should take the necessary measures to achieve the full realisation of this right in accordance with national law.⁷¹ Linked to the above is the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. The primary responsibility in this regard lies with the parents or with other persons responsible for the child. The state's duty is to assist the parents with this responsibility (within the means available) by taking measures which may include material assistance and support programmes, particularly with regard to nutrition, clothing and housing.⁷² The state must take all appropriate measures for the implementation of the rights contained in the Convention on the Rights of the Child, at least to the maximum extent of available resources.⁷³

The fact that this Convention has been ratified by South Africa places the South African government under an international obligation to comply with the duties placed on member states. In terms of article 43 of the Convention, state parties must submit reports to the Committee on the Rights of the Child,⁷⁴ regarding the measures they have adopted to give effect to the rights of the child and the progress made in this regard. On 25 and 26 January 2000, the Committee considered South Africa's first report and adopted concluding observations on South Africa's compliance with the indicated Convention. It is clear from the report that South Africa in major respects failed to comply with the provisions of CRC.

⁷¹ Article 26.

⁷² Article 27.

⁷³ Article 4.

⁷⁴ Within two years of entry into force of the Convention, and thereafter every five years.

4.2.4.2 *African Charter on Human and Peoples' Rights (African Charter or Charter)*

The African Charter on Human and Peoples' Rights (African Charter or Charter)⁷⁵ came into force in 1986.⁷⁶ South Africa acceded to the Charter on 9 July 1996, following the growing trend in the international community of states towards the regional development, protection and adjudication of international human rights standards.⁷⁷

Article 16 states that every individual shall have the right to enjoy the **best attainable state of physical and mental health**, and that state parties are obliged to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.⁷⁸ Article 18(1) places a duty on state parties to **protect the family as the natural unit** and basis of society and to protect the physical health and morals of the family. Article 18(4) recognises the right of the **aged and disabled to special measures of protection** in keeping with their physical and moral needs.⁷⁹

⁷⁵ 1981 OAU Doc CAB/LEG/67/3 (1990). (South Africa ratified the Convention on 7 January 2000.)

⁷⁶ Odinkalu CA and Christensen C "The African Commission on Human and Peoples' Rights: The development of its non-state communication procedure" (1998) 16 *Human Rights Quarterly* 235-280.

⁷⁷ Lindholt L *Questioning the universality of human rights - The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique* (1997) 3-10.

⁷⁸ Article 16, which guarantees the right to "the best attainable state of mental and physical health", has been considered by the African Commission in Communications 25/89, 47/90, 56/92 & 100/93, *World Organisation against Torture, Lawyers' Committee for Human Rights & Others v Zaire* 19th Session of the African Commission, April 1996. In its decision, the Commission gave a generous interpretation to the right to health, holding that it places a duty on the government of Zaire to "provide basic services such as safe drinking water and electricity", in addition to its basic obligation to supply adequate medicine.

⁷⁹ Article 15 enshrines the right of every individual to work under equitable and satisfactory conditions, and declares that every worker shall receive equal

The African continent has a unique way of addressing the human rights of the poor. The duties of the family and community are of paramount importance in the social protection of the most needy. This **interdependence** becomes apparent from the **individual's obligation to maintain his or her parents** in the event of need.⁸⁰ The duty to pay taxes in the interest of society⁸¹ further implies that the state has a duty to focus its budget on social expenditure in order to ensure social inclusion.

The three main avenues of enforcing the Charter provisions are state reporting,⁸² inter-state complaints⁸³ and individual complaints.⁸⁴ State parties have to submit bi-annual reports to the African Commission on Human and Peoples' Rights (African Commission or Commission). In their reports, states must describe the 'legislative and other measures' they have taken to give effect to all the rights in the Charter.

4.2.4.3 *Southern African Development Community*

The Southern African Development Community (SADC) objectives as set out in the founding Treaty aim, amongst other objectives, at the promotion of economic and social development, the

pay for equal work. The Charter further assures the best attainable state of mental and physical health, and the obligation to take the necessary measures to protect the health of the people and to give medical attention to the sick.

⁸⁰ Article 29(1).

⁸¹ Article 29(6).

⁸² Article 62.

⁸³ Involving complaints by one state party to the Charter that another has violated the Charter provisions.

⁸⁴ For a full explanation how these enforcement mechanisms work, see Jansen van Rensburg (2000) 217-227 287-299 390-397.

establishment of common ideals and institutions.⁸⁵ One of the objectives of the Community is to

achieve development and economic growth, **alleviate poverty**, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.⁸⁶

According to article 5 of the Treaty, some of SADC's objectives are to achieve development and economic growth, **alleviate poverty**, enhance the quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration. "Human resources development" and "social welfare" are specifically mentioned as areas on which SADC member states agreed to cooperate with a view to foster regional development and integration, and in respect of which the member states undertook, through appropriate institutions of SADC, to coordinate, rationalise and harmonise their overall macro-economic and sectoral policies and strategies, programmes and projects.⁸⁷ Therefore, in order to achieve these ideals, a programme of regional integration, collective self-reliance and interdependence of member states is envisaged.

The **SADC Charter of Fundamental Social Rights** came into operation on August 2003.⁸⁸ The SADC region is one of the poorest regions in the world.⁸⁹ It is widely appreciated that issues such as the low economic growth rate, unemployment and

⁸⁵ See generally article 5 of the SADC Treaty.

⁸⁶ Article 5(1)(a).

⁸⁷ Article 21.

⁸⁸ The final version is dated August 2004. See *SADC Social Charter* (Aug 2004) Available on the internet http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/sadc/socialchar.pdf.

⁸⁹ Olivier MP and Jansen van Rensburg L *Regional integration: Synopsis of social security measures and different protocols within the Southern African Development Community (SADC)* Paper prepared for the Ministerial Committee of Inquiry into a Comprehensive Social Security System (Unpublished paper 14 March 2001).

underemployment, **social exclusion** and marginalisation, as well as the inadequacy of current labour and social protection standards and regulations must be addressed in the context of the regional integration agenda of SADC.⁹⁰ In this regard the Charter recalls some of the significant objectives of the SADC Treaty, namely to

- achieve development and economic growth,
- **alleviate poverty,**
- enhance the standard and quality of life of the peoples of Southern Africa and
- support the socially disadvantaged through SADC regional integration.

These objectives can only be reached through the creation and development of **viable social protection measures** and structures throughout the region.

The onus to implement the SADC Charter lies with the national tripartite institutions and existing regional structures. All Member States are required to submit regular progress reports to the annual tripartite sectoral meeting – the most representative organisation of employment and workers must be consulted in the preparation of the report.⁹¹

5 SOUTH AFRICAN JURISPRUDENCE

This section explains the importance of rights-based approach followed by the Constitutional Court in the **protection of the rights of the poor.**

⁹⁰ Article 2.

⁹¹ Article 16(1). Article 16(2) stipulates that these institutions and structures must promote social legislation and equitable growth within the Region and prevent non-implementation of the Charter.

5.1 Government of the Republic of South Africa and Others v Grootboom and Others

The most important case relating to the fundamental rights of the poor is *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC). The case is important for *inter alia* the following reasons:

- It was the first case recognising the **justiciability** of socio-economic rights in South Africa;
- The Court considered **international law** and specifically the provisions of section 2(1) of the CESCRC;
- The way the court used the **fundamental values** of human dignity and equality in the Constitution to give content to the rights of the poor.

5.1.1 Facts of the case

The *Grootboom* case raised the state's obligations under section 26 of the Constitution, which gives everyone the right to access to adequate housing, and section 28(1)(c), which affords children the right to shelter. The respondent in this case, Mrs Grootboom was one of a group of 510 children and 390 adults living in appalling circumstances in Wallacedene informal settlement. They illegally occupied nearby land earmarked for low-cost housing but were forcibly evicted and their shacks were bulldozed and burnt and their possessions destroyed in the process. The land they had occupied in Wallacedene had been taken over by others and in desperation they settled on the sports field and in an adjacent community hall.

5.1.2 Considering international law

5.1.2.1 *Similarity between Sections 26(2) and 27(2) of the South African Constitution and Article 2(1) of the ICESCR*

Sections 26(2)⁹² state that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. Almost the same formulation and phrasing are found in article 2(1) of the CDESCR and the comments on the document can serve as a **valuable source for interpreting** the South African provisions.

5.1.2.2 *International similarities and deviation*

Sections 26(2) and 27(2) of the South African Constitution state that the state must realise the rights "within its available resources," as opposed to the language of the Covenant which states "to the **maximum** of its available resources".

The United Nation Committee on Economic Social and Cultural Rights (UNCSECR) is of the opinion that if the state is a developing country or is experiencing some economic difficulties, it must at least realise **minimum core obligations**. The UNCESCR makes the following statement with regard to minimum core obligations:

The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party.⁹³

The UNCESCR further states that

⁹² And 27(2).

⁹³ General Comment No 3 at 86 par 10.

If the Covenant were to be read in such a way as to not establish such a minimum core obligation, it would largely be deprived of its *raison d'être*.

The failure by the state to provide for the **basic subsistence needs** of the population and in effect the fundamental rights of the poor may be considered as a *prima facie* violation of the Covenant.

The South African Constitutional Court noted that the General Comment of the UNCESCR does not specify precisely the meaning of "minimum core."⁹⁴ The Court further stressed that the minimum core obligation is determined generally by having regard to the **needs of the most vulnerable group** that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligations must be understood in international law.

The Court argued that it **is not possible to determine the minimum threshold for South African purposes** due to the fact that the Court does not have **comparable information like the UNCESCR**. The Court mentioned that the UNCESCR developed the concept of "minimum core" over many years of examining reports by reporting states. The Court therefore concluded that the real question in terms of the South African Constitution **is whether the measures taken by the state to realise social rights are reasonable**. For this reason the Court deviated from the recognised international principle of minimum care obligation.

5.1.2.3 Reasonableness and fundamental values

⁹⁴ *Grootboom* para 30.

The Court then went further and interpreted the relevant limitation by considering **reasonableness**. First of all the Court stated that the court will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The Court stresses further that the policies and programmes must be reasonable both in their conception and their implementation. The court states further that:

Reasonableness must also be understood in the context of the Bill of Rights as a whole. A society must seek to ensure that the **basic necessities** of life are provided to all if it is to be a society based on **human dignity**, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. **Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril**, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. **Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.**⁹⁵

5.1.2.4 *Progressive Realisation*

The UNCESCR summarises the position of the "progressive realisation" of socio-economic rights as follows:

On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for State parties in respect of the full realisation of the rights in

⁹⁵ *Grootboom* par 44.

question. It thus imposes an obligation to move as expeditiously and effectively as possible towards the goal.

The UNCESCR further mentions that:

...any deliberately retrogressive measureswould require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum of available resources."⁹⁶

It then states that the ultimate objective of the Covenant is the "full realisation"⁹⁷ of the rights. The fact that the "full realisation" is subject to the condition of progressiveness is merely recognition of the fact that the full realisation of all socio-economic rights will generally not be able to be achieved in a short period of time.

In the *Grootboom* case, the court drew on the UNCESCR's interpretation of the phrase "progressive realisation". The court stated that "progressive realisation" contemplates that rights cannot be realised immediately, but that the goal of the Constitution is for the basic needs of all in our society to be effectively met; the requirement of progressive realisation means that the state must take steps to achieve this goal.

5.1.3 Priority to the most vulnerable

As already indicated the court remarked that a society must seek to ensure that the **basic necessities** of life are provided to all if it is to be a society based on **human dignity**, freedom and equality. In

⁹⁶ General Comment No 3 at 85 par 9.

⁹⁷ Sections 26(2) and 27(2) of the South African Constitution reads that the state must "achieve the progressive realisation of each of these rights" and not the **full realisation** of these rights.

this case the Court revealed a hesitant, context-sensitive approach by taking the position of the weakest members of society into account when deciding whether policies of the government are reasonable.⁹⁸ This confirms that socio-economic transformation cannot always occur overnight and that in some cases formal equality and identical treatment must be postponed to avoid unnecessary harm to the **weakest and poorest members of society**.

It is clear that the Court makes use of the **constitutional values** in the Constitution to give **content** to socio-economic rights.⁹⁹ **Denial of basic standards of living results in denial of a person's human dignity**. It can further be argued that the value of equality and the equality clause as contained in the Bill of Rights strive to repair the historical inequalities and injustices of the past. De Vos¹⁰⁰ remarks that the rights in the Bill of Rights are interrelated and mutually supportive.¹⁰¹ He argues that there is a relationship between social and economic rights and the right to equality¹⁰² and that the transformative vision of the Constitution is one that is committed to **remedying socio-economic inequality**. When investigating an infringement of a specific socio-economic right, such investigation must take place in conjunction with all other

⁹⁸ Van der Walt AJ "Tentative Urgency: sensitivity for the paradoxes of stability and change in social transformation decisions of the Constitutional Court" (2001) 16(1) *SAPL* 11.

⁹⁹ So-called dignitarian approach.

¹⁰⁰ De Vos P "Grootboom, the right of access to housing and substantive equality as contextual fairness" (2001) 13 *SAJHR* 258 – 276.

¹⁰¹ See also Jansen van Rensburg (2000) 55-66. Leckie makes the following observation with regard to the interdependence, interrelatedness and mutually supportiveness of civil and political rights on the one hand and socio-economic rights on the other hand: 'Equality and nondiscrimination form the basis of human rights law, and although generally associated with civil and political rights, these principles have always had pertinence to economic, social and cultural rights'. Leckie S "Another step towards indivisibility: identifying the key features of the violations of economic, social and cultural rights" (1998) 20 *Human Rights Quarterly* 104-105.

¹⁰² See discussion of Khosa below.

socio-economic rights in the Bill of Rights. The Court emphasises that socio-economic rights must not be seen in isolation from one another. They must thus be read within the Constitution as a whole.¹⁰³

The conclusion can be made that the state cannot realise all the rights of the poor immediately, and that the Courts must keep this in mind, and that the material needs of those persons who are the **most vulnerable** ought to enjoy priority.¹⁰⁴ It is a difficult task to determine the infringement of a particular socio-economic right and each specific situation of alleged infringement must be evaluated on a case-to-case basis.¹⁰⁵ It is clear from the Grootboom case that the Courts will more readily interfere, where it appears that the state has not realised the **basic needs** of a vulnerable group.

5.2 Minister of Health and others v Treatment Action Campaign and others 2002 (10) BCLR 1033 (CC)

5.2.1 Facts of the case

This case deals with provision of **anti-retroviral drugs to pregnant mothers** that do not have the means to afford these drugs. The case was based on section 27(1)(a) of the Bill of Rights, which determines that everyone has the right to **access to medical care**, including reproductive medical care. Section 27(1)(a), like most other socio-economic rights in the Bill of Rights, is limited by the following provision contained in section 27(2), namely that the state must take reasonable legislative and other measures, within its available resources, to progressively realise these rights.

¹⁰³ *Grootboom* para 44.

¹⁰⁴ *Grootboom* para 43.

¹⁰⁵ *Grootboom* para 20.

Only three remarks on this case will be made. Firstly, the way the court **interpreted section 27**, secondly, the approach of the court towards the consideration of **international law** and thirdly, the **boundaries of judicial activism** in this particular judgment.

5.2.2 Interpretation of section 27

In line with the *Grootboom* decision, the Court denies the existence of the **international law** principle of "minimum core entitlement" or basic minimum realisation of every socio-economic right. The Court interprets this as part of the question as to whether the state had a **reasonable programme** to realise socio-economic rights.¹⁰⁶ The Court indicates that the court is

not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent.¹⁰⁷

The Court recognises its inability to consider social and economic factors and further notes that a court is not in the position to make orders that can have social and economic consequences for the community.¹⁰⁸

The Court's contention that it is impossible to give everyone access even to a "core" service immediately has merit. At least the court in this specific case indicated that government programmes must at least satisfy the **basic needs of the most vulnerable**. Unfortunately, courts as adjudicating forums can only enforce those

¹⁰⁶ TAC para 34.

¹⁰⁷ TAC para 37.

¹⁰⁸ TAC para 39.

rights that are alleged by a specific party in a specific case. This has the implication that others members of the community whose basic need of access to socio-economic rights are infringed but who do not have the resources to approach the courts, cannot be satisfied

It must, however, be stressed that it is the **minimum core approach** that provides economic and social rights with a determinacy and certainty.¹⁰⁹ It is suggested that nothing prevents the Court from giving instructions to executive and legislative authorities¹¹⁰ to start with programmes and to identify the "minimum core obligation" of each right. This, however, again requires a specific party in a specific case alleging infringement of a socio-economic right.

5.2.3 Boundaries of judicial activism

A positive step by the Court is the way the court views the doctrine of separation of powers. The Court acknowledges that

there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others.

The court further acknowledges that the different spheres of government must respect each other's different functions, but

¹⁰⁹ Van Bueren G "Alleviating poverty through the Constitutional Court" (1999) 15 *SAJHR*, 57. See further Brand D, and Russell S *Exploring the Core Content of Socio-economic Rights: South African and International perspectives*, (Menlo Park 2002) 1-21.

¹¹⁰ An example thereof is the baseline approach recommended by the Committee of Inquiry (2002).

recognises that the court may make orders to impact on policy.¹¹¹ The Court¹¹² elaborates further that if state policy is inconsistent with the Constitution, the court has to examine this to comply with its Constitutional duties. If the **executive act is inconsistent with the Constitution**, it can be considered as an intrusion mandated by the Constitution itself.

5.3 *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others 2004 (6) BCLR 569 (CC).*

5.3.1 Facts of the case

In a most recent case, *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others*¹¹³ the court addressed the constitutionality of some of the provisions in the Social Assistance Act 59 of 1992¹¹⁴ and the requirements to qualify for some of the grants in the grant administration process in South Africa.

The applicants in both cases are permanent residents. The applicant in the *Khosa* case challenged section 3(c) of the Social Assistance Act 59 of 1992 because it only reserves grants for the elderly for South African citizens and thereby excludes permanent residents. In the *Mahluale* case section 4(b)(ii) and 4(B)(ii) of the Social Assistance Act 59 of 1992 was challenged because it only reserves child support grants and care-dependency grants for South African citizens again excluding permanent residents. The applicants in both

¹¹¹ TAC para 98.

¹¹² TAC para 99.

¹¹³ Hereafter *Khosa* case.

¹¹⁴ As amended in some instances by the Welfare Laws Amendment Act 106 of 1997.

matters would qualify for social assistance except for the fact that they did not meet the citizenship requirement.¹¹⁵ Because the two matters are related and involve similar considerations and arguments of law, they had been heard together both in the High Court and the Constitutional Court.¹¹⁶ The Constitutional Court found these provisions to be unconstitutional emphasising the fact that permanent residents are a **vulnerable group** and they need special constitutional protection.

Only three remarks on this case will be made. Firstly, the **intersecting rights** (so-called special approach) the Court refers to in its interpretation of the rights of a particular poor and socially excluded group. Secondly, the **objects and aims** of social assistance. Thirdly, the way in which the Court examines the social expenditure budget along with the drastic remedy the Court gives with relation to the argument of **judicial activism**.

5.3.2 Intersecting rights

The Court referred to the foundational values in the Constitution, namely **human dignity**, equality and freedom.¹¹⁷ It recognised that all rights are interdependent, mutually related and equally important and emphasised that this specific case concerned intersecting rights which reinforce one another at the point of intersection.¹¹⁸ The implication of this remark in this particular case, is the fact that a number of rights are alleged to be infringed and

¹¹⁵ Khosa para 3.

¹¹⁶ For purposes of this discussion these cases will be referred to as one case, as only one judgment was made.

¹¹⁷ Khosa para 40.

¹¹⁸ Khosa para 40. Referring to the judgement in *Grootboom* case.

this requires that the Court adopt a **special approach**. The Court¹¹⁹ comments that:

When the **rights to life, dignity and equality** are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources in determining whether the state has complied with the constitutional standard of **reasonableness**. This is, however, not a closed list and all relevant factors have to be taken into account in this exercise. What is relevant may vary from case to case depending on the particular facts and circumstances. **What makes this case different to other cases that have previously been considered by this Court is that, in addition to the rights to life and dignity, the social-security scheme put in place by the state to meet its obligations under section 27 of the Constitution raises the question of the prohibition of unfair discrimination.**¹²⁰

The Court remarked that where the state argues that they cannot afford to pay benefits to everyone entitled under section 27(1)(c) the criteria for excluding a specific group, for example permanent residents, must be consistent with the Bill of Rights as a whole.¹²¹ As indicated the state choose to differentiate between citizens and non-citizens in their Social Assistance legislation. The Court¹²² remarked that this differentiation must be constitutionally valid and cannot be arbitrary, irrational or manifest a naked preference:

There must be a rational connection between differentiating law and the legitimate government purpose it is designed to achieve. A differentiating law or action which does not meet these standards will be in violation of section 9(1) and section 27(2) of the Constitution.

¹¹⁹ Khosa para 44.

¹²⁰ Own emphasis.

¹²¹ Khosa para 45.

¹²² Khosa para 53.

It is clear from the Court's approach that when it comes to the **infringement of the rights of the poor** it is possible that **civil and political rights** such as human dignity and equality can also be infringed along with the typical rights of the poor or so-called socio-economic rights

5.3.3 The objects and aims of social assistance

The Court further referred to the testimony of the Director-General of the Department of Social Development that described the **object** of the social assistance legislation as

- a strategy to **combat poverty**,
- to realise the **objectives of the Constitution** and the Reconstruction and Development Plan and
- to comply with South Africa's international obligations.¹²³

The Court further remarked that the aim of social security and especially social assistance is to ensure that **society values human beings by providing them with their basic needs**.¹²⁴

This statement is of particular relevance for the **rights-based approach** and the protection such an approach must provide to protect the human dignity of the poor.¹²⁵ The Court explicitly states that by excluding permanent residents from the social assistance system, limits their rights and fundamentally affects their dignity and equality.¹²⁶ As proposed¹²⁷ a social protection system is one way to respect and protect and realise the rights of the poor.

¹²³ Khosa para 51.

¹²⁴ Khosa para 52.

¹²⁵ See heading 2 above. UNICEF (2000) 19. De Gaay Fortman (2001).

¹²⁶ Khosa para 84.

¹²⁷ See heading 2 above.

5.3.4 Judicial activism

Regarding the argument about the availability of resources¹²⁸ the respondents argued that the inclusion of permanent residents in the Social Grant System would impose an impermissible high financial burden on the state.¹²⁹ The respondents indicated a progressive trend in government expenditure on social security spending.¹³⁰ In the absence of providing clear evidence of the additional cost in providing social grants to permanent residents, the respondents made some assumptions of the groups and numbers of eligible permanent residents, and came to the conclusion that this inclusion would cost the state an additional R243 million – R672 million per annum.

The Court, taking above numbers into account decided that the cost of including permanent residents in the system will only be a small portion of the cost compared with the total budget spent on social grants.¹³¹ In this case the **Court considered evidence on the budget** and decided as the judicial branch of government whether the financial burden on the executive branch of government is acceptable or not. This may be seen as an infringement of the separation of power argument. It is my submission that the Court did not directly calculate the budget or interfered with the budget. They only examined the evidence before them and did what was expected from them, namely to give social protection to the poor by

¹²⁸ Khosa para 19.

¹²⁹ Khosa para 60.

¹³⁰ For example, in the last three years, the spending on social grants (including administrative cost) increased from R16.1 billion to R26.2 billion and a further increase to R44.6 billion is estimated in the following three years. The respondents further estimated that there are about 260 000 permanent residents residing in the country. The respondents failed to furnish the court with statistical evidence on the number of permanent residents that might be eligible for social grants if the citizenship requirement is removed. Khosa paras 60-61.

¹³¹ Khosa para 62.

providing an appropriate remedy. The Court clearly described the rights-based approach they used when they¹³² came to the following conclusion:

There can be no doubt that the applicants are part of a **vulnerable group** in society and, in the circumstances of the present case, are worthy of **constitutional protection**. We are dealing, here, with **intentional, statutorily sanctioned unequal treatment** of part of the South African community. This has a strong stigmatising effect. Because both permanent residents and citizens contribute to the welfare system through the payment of taxes, the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents are in some way inferior to citizens and less worthy of social assistance.¹³³

Referring to the impact of the exclusion, the Court also stressed the burden permanent residents without social assistance benefits, place on other members of the community such as their families and friends and how this effects their dignity.¹³⁴ This exclusion is unfair, because permanent residents are outcast to the margins of society and are **deprived of those rights** that may be essential for them to enjoy their other constitutional rights.¹³⁵ The Court further ruled that this unfairness would not be justified under the general limitation clause¹³⁶ of the Constitution.¹³⁷

¹³² Khosa para 74.

¹³³ Own emphasis.

¹³⁴ Khosa paras 76, 80 and 81.

¹³⁵ Khosa para 77. See further para 81 where the Court remarked: "The denial of access to social assistance is total, and for as long as it endures, permanent residents unable to sustain themselves or to secure meaningful support from other sources will be relegated to the margins of society and deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution. Denying permanent residents access to social security therefore affects them in a most fundamental way".

¹³⁶ Section 36.

¹³⁷ Khosa paras 80, 83 and 84.

The Court decided that the most appropriate order to make was the "reading-in" of the words "permanent resident" in the challenged legislation. This again may be seen as a drastic remedy and an interference with the other branches of government by the Constitutional Court. In this case the remedy was chosen because of the urgency of the matter.¹³⁸

6 CONCLUSION

Poverty is more than a lack of income. It can better be described as **social exclusion** from the democratic and legal system, the labour market, the welfare state system and the family and community system. With relation to rights, poverty may be seen as a **denial of human rights and human dignity**. Human dignity and equality as fundamental values and rights in the Constitution, are infringed if they are denied to the poor because of their economic status.

Poverty from a rights perspective is about a denial of human rights. A rights-based approach implies **protection by law of fundamental freedoms** and entitlements needed for a **decent standard of living**. It is further important to keep in mind that a number of rights may be infringed at a given moment when the situation of poor people is viewed. This may include civil and political rights such as human dignity and equality on the one hand, and socio-economic rights such as the rights to social security, health, food and water on the other.

Where there is poverty or social exclusion, a rights-based approach demand **action to rectify** the situation. If possible, and financially

¹³⁸ Khosa paras 92 and 95.

viable, the poor may **approach the Court** for help as in the cases of Grootboom, TAC and Khosa. The fact that this is possible in South Africa because we have justiciable socio-economic rights, is a strength. However approaching the courts is not only an expensive exercise but also one that only remedies, in most cases the situation of those people who brought the action before the court. This may be seen as a weakness of the current system of enforcement. The Grootboom case is an excellent example of this.

A better solution may be to provide **social protection**, where the fundamental rights relating to poverty are infringed. The type of social protection will differ depending on the type of right that has been infringed upon. Social protection is a measure that combats social exclusion, poverty, marginalisation and vulnerability. A committee appointed by cabinet recently developed a **definition for social protection** for unique South African circumstances. This definition lies out the perfect tools to protect the poor. It includes measures to address "income poverty", measures to address "capability poverty", measures to address "asset poverty" and measures to address "special needs".

Unfortunately the new Social Assistance Act 13 of 2004 soon to be enacted by proclamation by President is only aimed at consolidation of legal requirements and provisions for social assistance in the Republic, and to create uniform norms and standards, which can apply countrywide.¹³⁹ The Department of Social Development in

¹³⁹ Memorandum on the objects of the Social Assistance Bill B 57A-2003. As amended by the Portfolio Committee on Social Development (National Assembly). (As introduced in the National Assembly as a section 76 Bill; explanatory summary of Bill published in *Government Gazette* 25340 of 8/08/2003.) See *Mashavha v President of the Republic of South Africa and others* CCT 67/03 in this case it was argued that social assistance is a matter that cannot be regulated effectively by provincial legislation and requires minimum standards across the nation for the rendering of public services.

briefing the Portfolio Committee on Social Development indicated that it will not be making any policy shifts in the new Social Assistance Act and that the act is tabled to remove the assignment to the provinces as indicated in the Memorandum. One may only ask why did they appoint a committee to examine a comprehensive social protection system. **Lack of political commitment and will** to help the plight of the poor may be seen as a further weakness in the rights-based approach where a proper remedy may only be obtained by approaching the courts and trying to enforce the rights of the poor. A further disadvantage, as already mentioned, is that remedies is given in isolation and is only applicable on a specific case.

There are several **reasons** why international poverty law must be taken into account when fundamental rights of the poor contained in the South African Constitution are interpreted. As starting point section 39(1)(b) compels adversarial bodies to consider international law when interpreting the Bill of rights. **International Commentaries and Reports may further serve as valuable information in the interpretation of the rights of the poor in the Bill of Rights.** This may be interpreted as an "international friendly-approach". In the *Makwanyane* case¹⁴⁰, the court emphasised that binding as well as non-binding international law must be taken into consideration. This implies that soft law must be considered. Soft law consists of imprecise standards, generated by declarations adopted by diplomatic conferences or resolutions of international organisations, that are intended to serve as guidelines to states in their conduct, but which lack the status of 'law'.¹⁴¹ Examples of soft law for purposes of poverty law are, *inter alia*, the

¹⁴⁰ 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) par 35. This phrase was also quoted in the case of *The Government of the Republic of South Africa and Others v Grootboom and Others* CCT 2000 (11) BCLR 1169 (CC).

¹⁴¹ Dugard (2000) 36. See also Klabbers (1996) 157-164.

Millennium Development Declaration and Goals. The court further held that, although the court must take into consideration, and may be assisted by public international law, it is in no way bound to follow it.¹⁴²

South African has further indicated its intention to become a party to, and to be **legally bound** by the obligations imposed by relevant international treaties by signing and ratifying these, for example the United Nations Convention on the Rights of the Child on international level and the African Charter on Human and Peoples Rights on regional level.

What is clear from the **decisions made by the Constitutional Court** is that for government programmes to be **reasonable**, it must make provision for poor and vulnerable groups to access socio-economic rights. From the perspective of formulating programmes, the State is under a clear duty in terms of *Grootboom, TAC and Khosa* to adopt and implement reasonable programmes catering for those in desperate need on an expedited basis.¹⁴³

In the *Grootboom* and the *TAC* case the Court **considered international law** and specifically the CESCR. In both cases the Court refused to develop or to comment on the content of a **"minimum core"** entitlement. This approach by the Court is understandable but nothing stands in the way of the Court to order

¹⁴² See *Prince v The President of the Law Society, Cape of Good Hope* 1998 (8) BCLR 976 (C) 984-986, 988-989. In the case *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), the court states as follows: "The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable."

¹⁴³ Liebenberg S "Taking Stock The jurisprudence on Children's socio-economic rights and its implications for government policy" *Economic and Social Rights Review* (2004) Vol 5 no 4 Sep 5.

government and/or other stakeholders to start developing the content of "minimum core" of each socio-economic right. It is thus clear that the Court considers international law even in circumstances where it is not binding on the particular state. The Court unfortunately still has the power to deviate from international law where it is not bound by it as in the case of Grootboom.

In the Khosa case the Court referred to the foundational values in the Constitution, namely human dignity, equality and freedom. As in the Grootboom and TAC cases it recognised that all rights are interdependent, mutually related and equally important and emphasised that the Khosa case concerned intersecting rights which reinforce one another at the point of intersection. The Court remarked that what makes this case different to other cases that have previously been considered by this Court is that, in addition to the rights to life and dignity, the social-security scheme put in place by the state to meet its obligations under section 27 of the Constitution, raises the question of the prohibition of unfair discrimination. **It is clear from the Court's approach that when it comes to the infringement of the rights of the poor it is possible that civil and political rights such as human dignity and equality can also be infringed along with the typical rights of the poor or so-called socio-economic rights.**

In the Grootboom, TAC and Khosa cases the Court ordered the state to act positively and to alleviate the plight of the poorest members of the South African society. These remedies may be seen as an infringement on the principle of **separation of powers** because the judiciary encroaches upon the proper terrain of the legislature and executive. The TAC case clearly indicated that if the boundaries between the different branches of government are drawn to strict

there will be no way open for the court to assist the poor and socio-economic rights will exist merely on paper.

I suggest that **judicial activism** requires the development of a culture of co-operative and constructive effort between the judiciary, the executive, the legislature and civil society to respect, protect, promote and fulfil the rights of poor people. To some, such action offends against the doctrine of separation of powers, but the doctrine only states that powers should be separated, and to use the words of the Constitutional Court in the TAC case there are no bright lines referring to the separation of powers.

To conclude, the new Constitution in South Africa set the way for the development and usage of a **rights-based approach**. According to UNICEF¹⁴⁴ all countries, even those at low levels of income, can achieve the **realisation of at least the rights of the most vulnerable**. Universal access to basic social services and the pursuit of socio-economic rights does not have to wait until rapid economic growth is achieved.

¹⁴⁴ UNICEF (2000) 46.

A RIGHTS-BASED APPROACH TO POVERTY - THE SOUTH AFRICAN EXPERIENCE

Linda Jansen van Rensburg B Comm, LL B, LL M, LL D.
Associate Professor, North-West University (Potchefstroom Campus), South Africa.
Private Bag X6001, Potchefstroom 2520, South Africa
hnrljvr@puknet.puk.ac.za
+27 18 299 1954 (tel); +27 18 299 1955 (fax); +27 83 290 4573 (mobile)

Poverty is a human rights violation, and freedom from poverty is an integral and inalienable human right. - United Nations Development Programme, January 1998.

1 INTRODUCTION

South Africa is an upper-middle-income country, but despite this relative wealth, the experience of most South African households is that of outright poverty or of continuing vulnerability to being poor.¹ The main reason for this is the fact that apartheid has left South Africa with an exceptionally divided society, with **extensive social and economic inequality**.² A consequence of this social and economic inequality is that the **distribution of income and wealth in South Africa is among the most unequal in the world**, and many households still have unsatisfactory access to education, health care, energy and clean water, as well as to wealth-generating assets and opportunities.³

¹ Adato M, Carter M and May J *Sense in Sociability? Social Exclusion and Persistent Poverty in South Africa* (December 2004) available on the Internet under the South African Regional Poverty Network web page <http://www.sarpn.org.za/documents/d0001127/index.php> that acknowledges the University of Wisconsin website as the original source of this document: <http://www.basis.wisc.edu/live/persistent%20poverty/sense%20in%20sociabilityDec2004.pdf>

² Noble M, Ratcliffe A and Wright G *Conceptualizing, Defining and Measuring Poverty in South Africa – An Argument for a Consensual Approach* (Oxford 2004) 13.

³ Jansen van Rensburg L and Olivier MP "The Role and Influence of International Human Rights Instruments on South African Poverty Law" (Spain 2001) *Law and Poverty IV - Moving towards International Poverty*

To address the problems of poverty a rights-based approach may be used. I have chosen South Africa to serve as an example of how such an approach may be applied for the following reasons:

Firstly, as indicated above, many South African households face **outright poverty** and the distribution of income and wealth in South Africa is among the most unequal in the world.⁴

Secondly, South Africa **lacks a comprehensive social protection system** aimed at combating poverty. Permanent social assistance grants in South Africa are highly categorised. It only covers children from infancy to 14 years (Child Support Grant), children in foster care (Foster Child Grant), people with disabilities (Disability Grant), children with disabilities (Care Dependency Grant) and, the elderly (Old Age Grant). In addition to the Old Age and Disability Grant, one can apply for a Grant-in-Aid. This entire grant system is subject to a strict means test under the Social Assistance Act 59 of 1992. No provision is made by way of the social assistance process for people without disabilities from the age of 14 to 60/65 depending on gender. This implies that a large section of the population is still excluded from the social security (or protection) programme which serves as the main safety net in South Africa, if one is not contributing to the Unemployment Fund or the Compensation for Occupational Sickness and Diseases Fund (Social Insurance) or to any private scheme. The only exception to the above is the temporary financial award an individual may apply for, called the Social Relief of Distress, aimed at being temporary financial material

Law? Paper presented at the Oñati International Institute for the Sociology of Law Oñati (unpublished). See Noble, Ratcliffe and Wright (2004) 4.

⁴ Adato, Carter and May (2004).

assistance, issued to people who are unable to meet their family's most basic needs.⁵

Thirdly, South Africa has a **unique Constitution that contains a number of "fundamental rights for the poor"**⁶. These rights are justiciable and have been positively enforced by the highest court on constitutional matters in South Africa, namely the Constitutional Court.⁷

Fourthly, the South African Constitution provides for an **"international friendly"** approach whereby courts are obliged to consider binding as well as non-binding international law when interpreting the fundamental rights in the Constitution.⁸ Seeing that South Africa is a young democracy there is little substantial and developing jurisprudence available in South Africa on the scope and core content of poverty rights and the courts may rely on the Commentaries and Reports of International bodies.⁹ The importance and role of international bodies and the monitoring bodies associated with these bodies must not be underestimated. The instruments and especially the bodies mandated by them, play a vital role in influencing the very scope and content of municipal poverty law.

The following methodology will be used:

⁵ Social Assistance Act 59 of 1992 as amended by the Welfare Laws Amendment Act 106 of 1997.

⁶ Also known as socio-economic rights, red rights or second-generation rights. See Tomasevski K *Human Rights and Poverty Reduction - Strengthening pro-poor law: Legal enforcement of economic and social rights* (January 2005) Available on the internet <http://www.odi.org.uk/rights/Meeting%20Series/EcoSocRights.pdf> 6.

⁷ See heading 3 below.

⁸ Section 39(2)(b). See heading 3 below.

⁹ See especially reference to *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) as discussed below. Hereafter Grootboom case.

- As a starting point I will examine the **concepts** of poverty, social exclusion, rights-based approach and social protection as understood within the South African context.
- I will then discuss the **fundamental rights of the poor as contained in the Constitution of the Republic of South Africa, 1996**.¹⁰ It must however, be stressed that not only socio-economic rights may be considered as rights affecting the poor, but that some civil and political rights may also be considered because of the interrelatedness and indivisibility of fundamental rights.
- The **linkage between South African poverty law and international and regional poverty instruments**¹¹ **will then be discussed**. A number of important international instruments will briefly be referred to in order to illustrate the way the rights of the poor are included in these documents and how these instruments may influence and assist South African courts in defining and giving content to the fundamental rights of the poor in our Constitution.
- The next step will be to **discuss the way the South African Constitutional Court**¹² **is prepared to enforce the rights of the poor** by way of a rights-based approach. The aim is to establish to what extent the courts may enforce the fundamental rights of the poor when a government fails to realise programmes and policies (international or national) aimed at alleviating poverty in a particular country. The **boundaries for judicial activism** will thus be examined. Reference will also be

¹⁰ Hereafter the Constitution.

¹¹ It is impossible to cover all international and regional instruments that may influence poverty law in South Africa for purposes of this discussion. A number of the most relevant and well-known instruments will be discussed.

¹² *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC); *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC) and *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

made to instances where the Constitutional Court referred to International instruments and the way the Court make utilises or in some cases, denies the principles of international law.

- **Weaknesses and strengths** will be deducted from the South African experience in order to make **recommendations** on how the rights-based approach may be used in other foreign and (possibly) international jurisdictions.

2 POVERTY AND A RIGHTS-BASED APPROACH

There exist numerous definitions of poverty. Traditionally, poverty has been associated with a lack of resources¹³, the more recent concept of **social exclusion**¹⁴ is now no longer seen as an alternative to the poverty concept, but as a more comprehensive concept, which concerns much more than money. In fact, poverty (referring to a lack of disposable income) can be seen as part of the multi-dimensional and dynamic concept of social exclusion (referring to multi-faceted failure). Social exclusion, therefore, has to be understood with reference to the failure of any one or more of the following:

- (a) the democratic and legal system (civic integration);
- (b) the labour market (economic integration);
- (c) the welfare state system (social integration); and
- (d) the family and community system (interpersonal integration).¹⁵

¹³ UNICEF *Poverty Reduction begins with Children* (New York 2000) 5.

¹⁴ This concept apparently has its origin in the European Union context, dating back to the second half of the 1980's: Berghman J "The resurgence of poverty and the struggle against exclusion: A new challenge for social security?" (1997) *International Social Security Review* vol 50 4. The most significant innovation in the recent poverty literature in the developed world is the emergence of the concept of 'Social Exclusion'. Noble Ratcliffe and Wright (2004) 11.

¹⁵ Jansen van Rensburg and Olivier (2001). See Noble Ratcliffe and Wright (2004) 7, Adato, Carter and May (2004) 5.

Conversely, social participation, being the positive counterpart of social exclusion, is to be determined with reference to all four systems.¹⁶ Or, as an ILO/UNDP study remarks, the notion of social exclusion links together both social rights and material deprivation. **It encompasses not only the lack of access to goods and services, which underlie poverty and basic needs satisfaction, but also exclusion from security, justice, representation and citizenship.**¹⁷ It concerns inequality in many dimensions - economic, social, political, and cultural.¹⁸

UNICEF¹⁹ describes poverty as follows:

*Poverty is a denial of human rights²⁰ and human dignity.
It means not having a good primary school or health*

¹⁶ Berghman (1997) 6 refers to the comment by certain European researchers that "one's sense of belonging in society depends on all four systems". Compare Commins P (ed) *Combating exclusion in Ireland 1990-1994 A Midway Report* (Brussels European Commission 1993) 4, which continues as follows: "Civic integration means being an equal citizen in a democratic system. Economic integration means having a job, having a valued economic function, being able to pay your way. Social integration means being able to avail oneself of the social services provided by the state. Interpersonal integration means having family and friends, neighbours and social networks to provide care and companionship and moral support when these are needed. All four systems are therefore, important... In a way the four systems are complementary: when one or two are weak the others need to be strong. And the worst off are those for whom all systems have failed...". For a similar appreciation of the distinction between the (narrower) income-related poverty concept and the (wider) multi-dimensional social exclusion concept, see Rodgers G *ea Overcoming social exclusion, A contribution to the World Summit for Social Development*, (International Institute for Labour Studies, ILO; United Nations Development Programme 1994) 2-3, 8.

¹⁷ Rodgers (1994) 8.

¹⁸ As discussed in Jansen van Rensburg and Olivier (2001), Tomasevski (2005) 4, 6-7.

¹⁹ UNICEF *Poverty Reduction begins with Children* (New York 2000) 45. See UNDP *Integrating Human Rights with Sustainable Development* (New York 1998) as referred by De Gaay Fortman B *Pro Poor Growth, the State and the (Non)-Implementation of the Rights of the Poor* (Unpublished Paper) Lecture for the Ministry of Foreign Affairs and the RAWOO (The Hague, Foreign Ministry, 26 April 2001).

²⁰ For exactly the similar definition see Committee of Economic Social and Cultural Rights E/C.12/2001/10 10 May 2001 paras 1-2 and Piron *Learning*

centre to go to and not having access to safe drinking water and adequate sanitation. It means insecurity, powerlessness, exposure to violence and discrimination and exclusion from the mainstream of society. It also means not having a voice to influence decision-making, living at the margin of society and being stigmatized. *Obviously, poverty reduction involves more than crossing an income threshold.*²¹

A broad definition of poverty as "the lack of basic capabilities to live in dignity"²² seems to be the most appropriate for purposes of this paper.

The above description of poverty and social exclusion clearly recognises that poverty constitutes a denial of **human rights** and **human dignity**.²³ A human rights-based approach provides legal protection for basic human dignity.²⁴ Human dignity is considered to be one of the core constitutional values in the South African Constitution.²⁵ The universal aim and basis for the existence of rights pertaining to poverty is to protect a person's right to human dignity.²⁶ Accordingly, human dignity, as a fundamental constitutional value²⁷ as well as a fundamental right²⁸ contained in the Bill of Rights, plays a very important role with regard to

from the UK Department of International Development's Rights-Based Approach to Development Assistance (Bonn 2003) 19.

²¹ Own emphasis.

²² Piron (2003) 19.

²³ UNICEF (2000) 19. De Gaay Fortman (2001), CESCR E/C.12/2001/10 10 May 2001 paras 1-2 and Piron (2003) 19.

²⁴ De Gaay Fortman (2001).

²⁵ Section 1 of the Constitution states that the Republic of South Africa is one sovereign democratic state founded on the values of human dignity, the achievement of equality and advancement of human rights and freedoms, non-racialism and non-sexism. Section 7(1) further states that the Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

²⁶ Grootboom case para 23. See Piron (2003) 19.

²⁷ Sections 1 and 7(1) of the Constitution.

²⁸ Section 10 of the Constitution reads as follows: "Everyone has inherent dignity and the right to have their dignity respected and protected."

fundamental rights of the poor and the equal treatment of those who are historically deprived.²⁹

UNICEF³⁰ describes a rights-based approach as follows:

A human rights-based approach means that the situation of poor people is viewed not only in terms of welfare outcomes but also in terms of *the obligation to prevent and respond to human rights violations*. For example, any action that excludes a specific group of children from school or discriminates against girls constitutes such a violation. The human rights approach aims to empower families and communities to secure assistance and advocates a fair and just distribution of income and assets.³¹

In other words a human rights-based approach implies protection by law of fundamental freedoms and entitlements needed for a decent standard of living.³² This implies that a number of rights may be infringed at a given moment when the situation of poor people is viewed.³³ For example denying squatters access to housing rights also implies that there are an infringement on their rights to health, human dignity, water, food, freedom from discrimination and depending on the circumstances, social assistance. This is a typical situation where poor people are socially excluded, marginalized and placed in a vulnerable position and therefore seeks **social protection** from the state.

²⁹ The South African courts have consistently stated that there is close correlation between the right to equality and the protection of a person's dignity: *Hoffmann v SA Airways* 2000 21 ILJ 2357 (CC); *Walters v Transitional Local Council of Port Elizabeth & Another* 2001 BCLR 98 (LC).

³⁰ UNICEF (2000) 3-4.

³¹ Own emphasis.

³² De Gaay Fortman (2001).

³³ See discussion of *Khosa and Others v Minister of Social Development and Others*; *Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) below and the reference to intersecting rights.

I thus propose that when the fundamental rights relating to poverty are infringed, such a person needs social protection.

The type of social protection will differ depending on the type of right that has been infringed upon. For example, when a person's right to social assistance is denied, such a person is entitled to some kind of social grant. Social protection is usually connected to social security but has a much wider meaning. Social security's and especially social assistance's, primary objective is to combat poverty. The definition that is going to be suggested will cover a much broader terrain of poverty issues and may in fact be seen as a method to address poverty. It must be kept in mind that the package that will be suggested will be entitlements and not welfare measures based on the fact that we are working from a rights-based approach.

A committee appointed by cabinet recently developed a **definition for social protection** for unique South African circumstances. The report by the Committee of Inquiry into a Comprehensive System of Social Security for South Africa,³⁴ suggested that the current categorised social security system must be phased out. The Committee indicated that the **current social security system in South Africa is unequal, exclusionary and inequitable** and will not stand the test of reasonableness as defined in the Grootboom case.³⁵ The Committee further stressed the importance of compliance of the social security system with international

³⁴ Committee of Inquiry Into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future Consolidated Report* (Pretoria March 2002) 61. Hereafter Committee of Inquiry (2002).

³⁵ SAHRC "5th Economic and Social Rights Report – The right to Social Security" (2002/2003) Available from the Internet http://www.sahrc.org.za/esr_report_2002_2003.htm 5-7. See below for discussion on Grootboom case. In the Grootboom judgment the Court held that socio-economic policies and programmes must be reasonable both in their conception and their implementation. It stressed that vulnerable communities must be given priority and their needs must be addressed effectively.

standards.³⁶ The Committee suggested a comprehensive social protection (CSP) package in the place of the current categorised social security system:

Comprehensive social protection is broader than the traditional concept of social security, and **incorporates development strategies and programmes**³⁷ designed to ensure, collectively, at least a **minimum acceptable living standard for all citizens**. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an **integrated policy approach** including many of the developmental initiatives undertaken by the State.³⁸

The committee further developed "minimum" requirements for the comprehensive social protection package. It remarks that CSP will work through a variety of mechanisms, embracing a package of social protection interventions and measures. In identifying the practical aspects of such an approach, and taking into account necessary adaptations for South Africa, the Committee has arrived at the following measures:

- Measures to address "income poverty" (provision of minimum income)
- Measures to address "capability poverty" (provision of certain basic services)
- Measures to address "asset poverty" (income-generating assets)
- Measures to address "special needs" (e.g. disability or child support)

³⁶ SAHRC (2002/2003) 5-7.

³⁷ This suggests rights-based approach to development. See Malone M and Belshaw D "The Human Rights-Based Approach to Development: overview, context and critical issues" (2003) Transformation 20/2 April 76-89 and Piron (2003) 1-28. Due to the restricted length of this paper and the complexity of the rights based-approach to development as a separate topic, this topic will only be referred to.

³⁸ Own emphasis.

In the CSP package, the first three are **core elements** of the CSP basic platform that should be available to all South Africans and certain categories of non-citizens. In general, so the Committee opines, these components need to be established as a **universal-as-possible package of income transfers**, services and access provided in a non work-related manner and whose availability is not primarily dependent on the ability to pay.³⁹ A minimum level or measure of provision should be made available to everyone. The key components of this relate to the (eventual) introduction of a Basic Income Grant, the immediate extension of the Child Support Grant to gradually cover children under the age of 18, and maintaining the state Old Age Grant. The scrapping of the means test across the board is also recommended.

Other elements of the package include, amongst others, free health care (the Committee advocates the eventual introduction of a National Health Insurance system), free primary and secondary education, free water and sanitation, free electricity, access to affordable and adequate housing, access to jobs and skills training, and a reformed disability grant, foster care grant and child dependence grant.⁴⁰

It is clear that the social protection package suggested by the Committee entails not only a **rights based-approach to development** but also a **rights based-approach to respect and**

³⁹ Committee of Inquiry (2002) 41-42. See also Olivier MP and Jansen van Rensburg L "Addressing the alleviation of poverty through social welfare measures" (2002) Paper presented at a joint session between CROP and the International Sociological Association (ISA) Research Committee on Sociology of Poverty, Social Welfare and Social Policy at the XVth World Congress of Sociology, entitled *Issues in pro-poor policy in non-OECD countries* in Brisbane, Australia 7-13 July 2002 36.

⁴⁰ Committee of Inquiry 42-43. See also Olivier and Jansen van Rensburg (2002) 36.

uphold the human dignity of the poor by providing him or her with their basic needs.

3 FUNDAMENTAL RIGHTS OF THE POOR IN THE SOUTH AFRICAN CONSTITUTION

Civil and political rights cannot prevail if socio-economic rights are ignored, and stability of political democracy depends on the extent of balance between the two groups of rights.⁴¹

Along with the birth of the final Constitution and the Bill of Rights in chapter two came the existence of "fundamental rights for the poor". These are rights placing an obligation on the state to act positively in favour of everyone especially the poor, marginalized and vulnerable.⁴² **Socio-economic rights and specifically those rights pertaining to the alleviation of poverty are contained in different sections of the Bill of Rights.** Section 27(1)(c) states that "everyone has the right to have access to - **social security**, including, if they are unable to support themselves and their dependants, appropriate **social assistance**". Section 27(1)(c),

⁴¹ Arat ZF *Democracy and Human Rights in Developing Countries* (Colorado 1991) 4. See Arambulo K *Strengthening the Supervision on the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects* (Antwerpen 1999) 107. In the Proclamation of Teheran adopted on 13 May 1968 during the International Congress on Human Rights para 13 the above has been affirmed: "Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development."

⁴² In their fourth annual report to parliament the South African Human Right Commission identified the following persons as particularly vulnerable and marginalised: Informally employed, the unemployed and the self-employed; Non-citizens, refugees and asylum seekers; Persons infected with HIV with a CD4 cell count bellow 50; Children regardless of their age; Children infected with HIV/AIDS; Child headed households; Children living on streets; Support to extended families due to HIV/AIDS related deaths. South African Human Rights Commission (SAHRC) 4th *Annual Economic and Social Rights Report: (2000-2002)* 227-229.

makes direct reference to the concept of social protection, as a measure to combat poverty. As already indicated social protection is a measure that combats social exclusion, poverty, marginalisation and vulnerability.⁴³

Other provisions in the Bill of Rights make indirect reference to the concept of social protection as a measure to combat poverty. Section 26 grants everyone the right to have access to **adequate housing** while section 27(1)(a) provides for the right to access to **health care services**, including **reproductive health care**; and section 27(1)(b) provides for the right to access **to sufficient food and water**.

Textually linked⁴⁴ to sections 26(1) and 27(1) respectively is sections 26(2) and 27(2) which internally limits the obligation of the state to only ' ... take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [this] right'.⁴⁵ Section 29 further provides that everyone has the right (a) to a **basic education**, including adult basic education; and (b) to **further education**, which the state must take reasonable measures to make progressively available and accessible.

Section 28 specifically addresses the socio-economic rights of children. Section 28(1)(c) grants **every child the right to basic nutrition, shelter, basic health care services and social services**. It does, however, not contain a similar qualification as contained in section 26(2) and 27(2) concerning "reasonable measures" and "progressive realisation".

⁴³ See heading 2 above.

⁴⁴ As discussed in *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC) para 30. Hereafter TAC case.

⁴⁵ Almost the same formulation and phrasing are found in article 2(1) of the International Covenant of Economic Social and Cultural Rights.

4 INTERNATIONAL AND REGIONAL POVERTY INSTRUMENTS

4.1 Introduction

There is a **wide range of international law instruments on poverty that may assist adversarial bodies in South Africa and other countries to interpret the fundamental rights of the poor.** Although these instruments do not directly mention poverty, the current broad definition of poverty as the lack of basic capabilities to live in dignity corresponds to a number of articles different instruments.⁴⁶ Some of the most important instruments are the Millennium Development Declaration and Goals, the Universal Declaration of Human Rights (Universal Declaration),⁴⁷ the United Nations Covenant on Economic Social and Cultural Rights⁴⁸ and the Convention on the Rights of the Child⁴⁹ to name a few.⁵⁰

⁴⁶ CESCR E/C.12/2001/10 10 May 2001 para 7 and Piron (2003) 19.

⁴⁷ GA Res 217A (III), UN Doc A/810 71 (1948).

⁴⁸ GA Res 2200A (XXI), UN GAOR Supp (No 16) 49, Doc A/6316 (1966) UNTS, entered into force 3 January 1976. South Africa is yet to ratify this treaty.

⁴⁹ GA Res 44/25, Annex 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989) entered into force 2 September 1990. South Africa ratified the Convention on 16 June 1995, without entering any reservations.

⁵⁰ Other international instruments that contains sections that protects the poor and the vulnerable are inter alia: The Conventions UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) GA Res 34/180, 34 UN GAOR Supp (No 46) at 193, UN Doc A/34/46, entered into force 3 September 1981. South Africa ratified the Convention on 15 December 1995, without entering any reservations. The Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195, entered into force 4 January 1969. South Africa signed the Convention on 3 October 1994. Convention Relating to the Status of Refugees 189 UNTS 150, entered into force 22 April 1954. South Africa acceded on 12 January 1996. The Protocol Relating to the Status of Refugees 606 UNTS 267, entered into force 4 October 1967. South Africa acceded on 12 January 1996. The International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families GA Res 45/158, Annex, 45 UN GAOR Supp (No 49A) 262, UN Doc A/45/49 (1990), entered into force 1 July 2003. Not yet signed or acceded to by South Africa. The Convention Relating to the Status of Stateless Persons 360 UNTS 117, entered into force 6 June 1960. Not yet signed or acceded to by South Africa. On regional level there are for example the African Charter on the Rights and Welfare of the Child, 1990 OAU Doc

Regional poverty instruments applicable on Africa are for example the African Charter on Human and Peoples' Rights (African Charter or Charter).⁵¹ Within the context of Southern Africa, the Southern African Development Community (SADC)⁵² instruments will also influence the interpretation of socio-economic rights of the poor. It must be stressed that the above are not a closed list of international instruments on poverty but due to the restricted length of this paper its was decided to discuss the mentioned few.

4.2 International Instruments

4.2.1 Customary international law

CAB/LEG/24.9/49 (1990). South Africa ratified the Convention on 7 January 2000.

⁵¹ 1981 OAU Doc CAB/LEG/67/3 (1990). South Africa ratified the Convention on 7 January 2000.

⁵² The Southern African Development Coordination Conference (SADCC), which was the forerunner of the Southern African Development Community (SADC), was formed in Lusaka, Zambia, on 1 April 1980, following the adoption of the Lusaka Declaration (entitled *Southern Africa: Towards Economic Liberation*) by the nine founding member states. The transformation of the organisation from a Coordinating Conference into a Development Community (SADC) took place on August 17, 1992 in Windhoek, Namibia when the Declaration and Treaty was signed at the Summit of Heads of State and Government thereby giving the organisation a legal character. The SADC vision is that of a common future, a future within a regional community that will ensure economic well-being, improvement of the standards of living and quality of life, freedom and social justice and peace and security for the peoples of Southern Africa. This shared vision is anchored on the common values and principles and the historical and cultural affinities that exist between the peoples of Southern Africa. Southern African Development Community (updated 1 April 2005) "SADC Trade, Industry and Investment Review 2005" Available from World Wide Web <http://www.sadcireview.com/sadc/frsadc.htm>, EIA (Energy Information Administration) (updated 15 April 2004) "Southern Africa and the Southern African Development Community" Available from World Wide Web <http://www.eia.doe.gov/emeu/cabs/sadc.html>, ILO (accessed on 24 June 2005) "Southern African Development Community, SADC" Available from World Wide Web <http://www.itcilo.it/english/actrav/telearn/global/ilo/blokit/sadc.htm>, Department of Foreign Affairs, South Africa (updated 12 February 2004) "Southern African Development Community (SADC) history and present status" Available from World Wide Web <http://www.dfa.gov.za/foreign/Multilateral/africa/sadc.htm>

United Nations Assembly Declarations can achieve the status of customary international law once they have been repeated in state practice.⁵³ Such would express the political will of a wide range of states, representative of the regions of the world,⁵⁴ and especially when adopted without discord. It is still highly debatable whether the Universal Declaration of Human Rights⁵⁵ form part of customary international law. I think some of the provisions in the Declaration may form part of the so-called customary international law. Some provisions especially those pertaining to the rights of the poor or socio-economic rights will not necessarily be accepted as customary international law. Whether it is binding or soft law, various judicial authorities have invoked its provisions, both in a domestic and legislative evolution of authoritative legal norms.

The Preamble to the Universal Declaration expressly states that its purpose is to provide "a common understanding" of the human rights and fundamental freedoms referred to in the United Nations Charter and to serve "as a common standard of achievement for all peoples and all nations". Article 22 of the Universal Declaration provides for the following:⁵⁶

Everyone, as a member of society, **has the right to social security** and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each state, of **the economic, social and cultural rights indispensable for his dignity and the free development of his personality.**

⁵³ In order for a rule to attain the status of international law, there must be consistent practice and *opinio juris* in respect of the rule.

⁵⁴ For more on how resolutions of the United Nations General Assembly can attain the status of customary international law, see Dugard *International Law A South African Perspective* (Kenwyn 2000) 32.

⁵⁵ GA Res 217A (III), UN Doc A/810 71 (1948).

⁵⁶ See also Scheinin M *The Right to Social Security* in Eide A, Krause C en Rosas A (ed) *Economic, Social and Cultural Rights A Textbook* (Dordrecht 1995) 161.

It also caters for other areas covered by the concept of social protection. Specifically, it enshrines the right of everyone⁵⁷

to a standard of living adequate for the **health and well-being** of himself and of his family, including **food, clothing, housing and medical care and necessary social services**, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

4.2.2 Soft Law

Soft law consists of imprecise standards, generated by declarations adopted by diplomatic conferences or resolutions of international organisations, that are intended to **serve as guidelines** to states in their conduct, but which lack the status of "law".⁵⁸ An example thereof is the Millennium Development Declaration.⁵⁹ In order to **eradicate poverty**, and to **promote human dignity and equality**, State parties, rich and poor, committed themselves to a global effort through the Millennium Development Goals, which emanated from the 2000 Millennium Declaration. The Millennium Development Goals (MDGs) serve as benchmarks for the assessment of progress. Each MDG is linked to economic, social and cultural rights, and the achievement of the MDGs is a step towards the full realisation of economic, social and cultural rights.⁶⁰

The Millennium Declaration and the MDGs establish the values that guide, amongst other things, global development, freedom, equality

⁵⁷ Article 25(1) Universal Declaration.

⁵⁸ Dugard (2000) 36. See also Klabbbers J *The Concept of Treaty in International Law* (The Hague 1996) 157-164.

⁵⁹ GA Res 60 (b), UN Doc A/55/L.2.

⁶⁰ SAHRC (2002-2003) 5-7. Piron (2003) 19.

and tolerance. World leaders pledged to promote equality and the **empowerment of people as effective ways to combat poverty, hunger and disease** and to stimulate development that is sustainable using the MDG indicators.

The **Road map towards the implementation of the United Nations Millennium Declaration**⁶¹ is but one example of an instrument where **strategies** are proposed to reach the indicated goals and targets set to reach those goals. The South African Human Rights Commission suggested that the South African government should move towards the **goal of halving poverty** by 2015, and tackle the problems of unemployment and exclusion from social security.⁶²

4.2.3 Non-binding instruments

On 3 October 1994 South Africa signed the United Nations' International Covenant on Economic, Social and Cultural Rights (CESCR).⁶³ The treaty has however not been ratified yet. Legally speaking, the principal implication is that South Africa has incurred an international obligation to refrain from acts which would defeat the object and purpose of the treaty, and that it is supposed to review all domestic law and policy to ensure that it will be in compliance with the obligations imposed by the treaty at the moment of ratification.⁶⁴

⁶¹ GA Report to the Secretary-General UN Doc A/56/326 paras 80-163.

⁶² The South African Human Rights Commission suggest that the State should implement the Committee of Inquiry recommendations and begin the process of a comprehensive social protection system for all. SAHRC (2002-2003) 5-7

⁶³ GA Res 2200A (XXI), UN GAOR Supp (No 16) 49, Doc A/6316 (1966) UNTS, entered into force 3 January 1976.

⁶⁴ See the Vienna Convention on the Law of Treaties of 1969, a 18, 26 and 27; Liebenberg "The International Covenant on Economic, social and Cultural Rights and its implications for South Africa" (1995) *SAJHR* 371-372.

Article 11(1), requires that states guarantee an **adequate standard of living** to everyone.⁶⁵ The right to an adequate standard of living can be interpreted to mean that a state must at the very least provide social protection as discussed above to anyone without adequate resources.⁶⁶ The **right to social security** is entrenched in article 9. In addition to the provisions of article 9, sections 10(1) and (2) can also be read to refer to social protection in specific contexts. These sections recognise the **family** as the natural and fundamental group unit of society, worthy of the **widest possible protection**.⁶⁷

These social protection-related rights in articles 9, 10 and 11, like the other rights found in the CESCR, are qualified by article 2(1), which determines that they need be implemented only **progressively** and **to the maximum of available resources**.⁶⁸ The enforcement of the rights is entrusted to a reporting system, in terms of which state parties to the CESCR have to report on a regular basis to the UN Committee on Economic, Social and Cultural Rights.⁶⁹

⁶⁵ Article 11(1): 'The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family.'

⁶⁶ See definition of social protection by in heading 2 above.

⁶⁷ Article 10(1) states that '[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children'.

⁶⁸ Article 2(1): '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 realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

⁶⁹ See articles 16 & 17. In the sphere of international human rights law there are two usual methods for the enforcement of state obligations. One is the reporting procedure in which states report periodically on what they have done to give effect to the rights in the relevant instrument. This is the mechanism most common to the major human rights instruments. The other mechanism is the complaint mechanism for either state or individual complaints through which a state or an individual can bring a complaint against a state party alleging a violation of the rights in the relevant

Unfortunately South Africa is not yet a member of the CESCR and cannot be held accountable to report to the Committee. There is however, substantial and developing jurisprudence and persuasive commentary available for an adversarial body to consider on the **scope and content of socio-economic rights of the poor**. Examples hereof are General Comments of the United Nations Committee on Economic, Social and Cultural Rights as well as the Limburg Principles of 1987 and the so-called Maastricht Guidelines of 1997.

The General Comments have either a direct or indirect impact on the interpretation of the rights of the poor. They are:

- General Comment No 1 (1989) Reporting by States parties (The Comment requires state parties to undertake comprehensive review and regular monitoring in order to determine the extent to which a socio-economic right is enjoyed by all, and to give special attention to those groups or subgroups which appear particularly vulnerable (paras 1,2))
- General Comment No 2 (1990) International technical assistance measures.
- General Comment No 3 (1990) The nature of States parties' obligations (The Comment sets out the so-called obligations of conduct and obligations of result, which the CESCR imposes on a state party. It is expected of a state party to take all appropriate measures, within a reasonable time, to ensure compliance with

instrument. See Addo MK "Justiciability re-examined" in Beddard R and Dilys MH (eds) *Economic, social and cultural rights. Progress and achievement* (London 1992) 97-98. See also Jansen van Rensburg L "Die beregtiging van die fundamentele reg op toegang tot sosiale sekerheid" ('The adjudication of the fundamental right to access to social security') unpublished LLD thesis, Rand Afrikaans University (Johannesburg 2000) 6, where the distinction is drawn between adversarial adjudication (complaint) mechanisms and inquisitorial adjudication (monitoring) mechanisms on international, regional and national level with reference to the right to social security.

the rights enshrined in the Covenant (paras 1-7). The principal obligation of result is to progressively achieve the full realisation of the various rights, even though this may take some time (para 9). It is incumbent upon state parties to satisfy at least a minimum essential level of, for example, the right to social security, even in times of severe resource constraints (paras 10, 12.))

- General Comment No 4 (1991) The right to adequate housing (As far as the marginalised and the excluded are concerned, the Committee has interpreted article 11(1) of the CESCRC as requiring state parties to give "due priority to those groups living in unfavourable conditions by giving them particular consideration" (para 11).)
- General Comment No 5 (1994) Persons with disabilities
- General Comment No 6 (1995) The economic, social and cultural rights of older persons
- General Comment No 7 (1997) The right to adequate housing: forced evictions
- General Comment No 8 (1997) The relationship between economic sanctions and respect for economic, social and cultural rights
- General Comment No 9 (1998) The Domestic application of the Covenant
- General Comment No 10 (1998) The role of the national human rights institutions in the protection of economic, social and cultural rights
- General Comment No 11 (1999) Plans of Action for Primary Education
- General Comment No 12 (1999) The right to Adequate Food
- General Comment No 13 (1999) The right to Education
- General Comment No 14 (2000) The right to the highest attainable standard of health

- General Comment No 15 (2003) The right to water
- General Comment No 16 (2004) Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies
- General Comment No 17 (2005) Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies

4.2.4 *Binding Instruments*

4.2.4.1 *UN Convention on the Rights of the Child*

South Africa has already ratified the United Nations Convention on the Rights of the Child, which is applicable *inter alia* to the socio-economic rights of all children throughout the world. Article 6 of the Convention places state parties under an obligation to ensure the **survival and development of children** to the maximum extent possible. This provision gives rise to numerous rights pertaining to poverty, such as the **right to health care** necessary for survival and to a standard of living that meets the needs for **food, clothing, shelter and education**.

The most important duties towards children listed in the Convention, for the purposes of social protection, are that the state should provide appropriate assistance to parents and legal guardians and should take all appropriate measures to ensure that the children of working parents have the right to benefit from child-care services and facilities.⁷⁰ In terms of article 23, the state has the responsibility to extend appropriate assistance (to ensure *inter alia* dignity and self-reliance) to disabled children and to those

⁷⁰ Article 18.

responsible for the care of such children, subject to available resources. Every child has the right to benefit from social security, including social insurance, and the state should take the necessary measures to achieve the full realisation of this right in accordance with national law.⁷¹ Linked to the above is the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. The primary responsibility in this regard lies with the parents or with other persons responsible for the child. The state's duty is to assist the parents with this responsibility (within the means available) by taking measures which may include material assistance and support programmes, particularly with regard to nutrition, clothing and housing.⁷² The state must take all appropriate measures for the implementation of the rights contained in the Convention on the Rights of the Child, at least to the maximum extent of available resources.⁷³

The fact that this Convention has been ratified by South Africa places the South African government under an international obligation to comply with the duties placed on member states. In terms of article 43 of the Convention, state parties must submit reports to the Committee on the Rights of the Child,⁷⁴ regarding the measures they have adopted to give effect to the rights of the child and the progress made in this regard. On 25 and 26 January 2000, the Committee considered South Africa's first report and adopted concluding observations on South Africa's compliance with the indicated Convention. It is clear from the report that South Africa in major respects failed to comply with the provisions of CRC.

⁷¹ Article 26.

⁷² Article 27.

⁷³ Article 4.

⁷⁴ Within two years of entry into force of the Convention, and thereafter every five years.

4.2.4.2 *African Charter on Human and Peoples' Rights (African Charter or Charter)*

The African Charter on Human and Peoples' Rights (African Charter or Charter)⁷⁵ came into force in 1986.⁷⁶ South Africa acceded to the Charter on 9 July 1996, following the growing trend in the international community of states towards the regional development, protection and adjudication of international human rights standards.⁷⁷

Article 16 states that every individual shall have the right to enjoy the **best attainable state of physical and mental health**, and that state parties are obliged to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.⁷⁸ Article 18(1) places a duty on state parties to **protect the family as the natural unit** and basis of society and to protect the physical health and morals of the family. Article 18(4) recognises the right of the **aged and disabled to special measures of protection** in keeping with their physical and moral needs.⁷⁹

⁷⁵ 1981 OAU Doc CAB/LEG/67/3 (1990). (South Africa ratified the Convention on 7 January 2000.)

⁷⁶ Odinkalu CA and Christensen C "The African Commission on Human and Peoples' Rights: The development of its non-state communication procedure" (1998) 16 *Human Rights Quarterly* 235-280.

⁷⁷ Lindholt L *Questioning the universality of human rights - The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique* (1997) 3-10.

⁷⁸ Article 16, which guarantees the right to "the best attainable state of mental and physical health", has been considered by the African Commission in Communications 25/89, 47/90, 56/92 & 100/93, *World Organisation against Torture, Lawyers' Committee for Human Rights & Others v Zaire* 19th Session of the African Commission, April 1996. In its decision, the Commission gave a generous interpretation to the right to health, holding that it places a duty on the government of Zaire to "provide basic services such as safe drinking water and electricity", in addition to its basic obligation to supply adequate medicine.

⁷⁹ Article 15 enshrines the right of every individual to work under equitable and satisfactory conditions, and declares that every worker shall receive equal

The African continent has a unique way of addressing the human rights of the poor. The duties of the family and community are of paramount importance in the social protection of the most needy. This **interdependence** becomes apparent from the **individual's obligation to maintain his or her parents** in the event of need.⁸⁰ The duty to pay taxes in the interest of society⁸¹ further implies that the state has a duty to focus its budget on social expenditure in order to ensure social inclusion.

The three main avenues of enforcing the Charter provisions are state reporting,⁸² inter-state complaints⁸³ and individual complaints.⁸⁴ State parties have to submit bi-annual reports to the African Commission on Human and Peoples' Rights (African Commission or Commission). In their reports, states must describe the 'legislative and other measures' they have taken to give effect to all the rights in the Charter.

4.2.4.3 *Southern African Development Community*

The Southern African Development Community (SADC) objectives as set out in the founding Treaty aim, amongst other objectives, at the promotion of economic and social development, the

pay for equal work. The Charter further assures the best attainable state of mental and physical health, and the obligation to take the necessary measures to protect the health of the people and to give medical attention to the sick.

⁸⁰ Article 29(1).

⁸¹ Article 29(6).

⁸² Article 62.

⁸³ Involving complaints by one state party to the Charter that another has violated the Charter provisions.

⁸⁴ For a full explanation how these enforcement mechanisms work, see Jansen van Rensburg (2000) 217-227 287-299 390-397.

establishment of common ideals and institutions.⁸⁵ One of the objectives of the Community is to

achieve development and economic growth, **alleviate poverty**, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.⁸⁶

According to article 5 of the Treaty, some of SADC's objectives are to achieve development and economic growth, **alleviate poverty**, enhance the quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration. "Human resources development" and "social welfare" are specifically mentioned as areas on which SADC member states agreed to cooperate with a view to foster regional development and integration, and in respect of which the member states undertook, through appropriate institutions of SADC, to coordinate, rationalise and harmonise their overall macro-economic and sectoral policies and strategies, programmes and projects.⁸⁷ Therefore, in order to achieve these ideals, a programme of regional integration, collective self-reliance and interdependence of member states is envisaged.

The **SADC Charter of Fundamental Social Rights** came into operation on August 2003.⁸⁸ The SADC region is one of the poorest regions in the world.⁸⁹ It is widely appreciated that issues such as the low economic growth rate, unemployment and

⁸⁵ See generally article 5 of the SADC Treaty.

⁸⁶ Article 5(1)(a).

⁸⁷ Article 21.

⁸⁸ The final version is dated August 2004. See *SADC Social Charter* (Aug 2004) Available on the internet http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/sadc/socialchar.pdf.

⁸⁹ Olivier MP and Jansen van Rensburg L *Regional integration: Synopsis of social security measures and different protocols within the Southern African Development Community (SADC)* Paper prepared for the Ministerial Committee of Inquiry into a Comprehensive Social Security System (Unpublished paper 14 March 2001).

underemployment, **social exclusion** and marginalisation, as well as the inadequacy of current labour and social protection standards and regulations must be addressed in the context of the regional integration agenda of SADC.⁹⁰ In this regard the Charter recalls some of the significant objectives of the SADC Treaty, namely to

- achieve development and economic growth,
- **alleviate poverty,**
- enhance the standard and quality of life of the peoples of Southern Africa and
- support the socially disadvantaged through SADC regional integration.

These objectives can only be reached through the creation and development of **viable social protection measures** and structures throughout the region.

The onus to implement the SADC Charter lies with the national tripartite institutions and existing regional structures. All Member States are required to submit regular progress reports to the annual tripartite sectoral meeting – the most representative organisation of employment and workers must be consulted in the preparation of the report.⁹¹

5 SOUTH AFRICAN JURISPRUDENCE

This section explains the importance of rights-based approach followed by the Constitutional Court in the **protection of the rights of the poor.**

⁹⁰ Article 2.

⁹¹ Article 16(1). Article 16(2) stipulates that these institutions and structures must promote social legislation and equitable growth within the Region and prevent non-implementation of the Charter.

5.1 Government of the Republic of South Africa and Others v Grootboom and Others

The most important case relating to the fundamental rights of the poor is *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC). The case is important for *inter alia* the following reasons:

- It was the first case recognising the **justiciability** of socio-economic rights in South Africa;
- The Court considered **international law** and specifically the provisions of section 2(1) of the CESCRC;
- The way the court used the **fundamental values** of human dignity and equality in the Constitution to give content to the rights of the poor.

5.1.1 Facts of the case

The *Grootboom* case raised the state's obligations under section 26 of the Constitution, which gives everyone the right to access to adequate housing, and section 28(1)(c), which affords children the right to shelter. The respondent in this case, Mrs Grootboom was one of a group of 510 children and 390 adults living in appalling circumstances in Wallacedene informal settlement. They illegally occupied nearby land earmarked for low-cost housing but were forcibly evicted and their shacks were bulldozed and burnt and their possessions destroyed in the process. The land they had occupied in Wallacedene had been taken over by others and in desperation they settled on the sports field and in an adjacent community hall.

5.1.2 Considering international law

5.1.2.1 *Similarity between Sections 26(2) and 27(2) of the South African Constitution and Article 2(1) of the ICESCR*

Sections 26(2)⁹² state that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. Almost the same formulation and phrasing are found in article 2(1) of the CDESCR and the comments on the document can serve as a **valuable source for interpreting** the South African provisions.

5.1.2.2 *International similarities and deviation*

Sections 26(2) and 27(2) of the South African Constitution state that the state must realise the rights "within its available resources," as opposed to the language of the Covenant which states "to the **maximum** of its available resources".

The United Nation Committee on Economic Social and Cultural Rights (UNCSECR) is of the opinion that if the state is a developing country or is experiencing some economic difficulties, it must at least realise **minimum core obligations**. The UNCESCR makes the following statement with regard to minimum core obligations:

The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party.⁹³

The UNCESCR further states that

⁹² And 27(2).

⁹³ General Comment No 3 at 86 par 10.

If the Covenant were to be read in such a way as to not establish such a minimum core obligation, it would largely be deprived of its *raison d'être*.

The failure by the state to provide for the **basic subsistence needs** of the population and in effect the fundamental rights of the poor may be considered as a *prima facie* violation of the Covenant.

The South African Constitutional Court noted that the General Comment of the UNCESCR does not specify precisely the meaning of "minimum core."⁹⁴ The Court further stressed that the minimum core obligation is determined generally by having regard to the **needs of the most vulnerable group** that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligations must be understood in international law.

The Court argued that it **is not possible to determine the minimum threshold for South African purposes** due to the fact that the Court does not have **comparable information like the UNCESCR**. The Court mentioned that the UNCESCR developed the concept of "minimum core" over many years of examining reports by reporting states. The Court therefore concluded that the real question in terms of the South African Constitution **is whether the measures taken by the state to realise social rights are reasonable**. For this reason the Court deviated from the recognised international principle of minimum care obligation.

5.1.2.3 Reasonableness and fundamental values

⁹⁴ *Grootboom* para 30.

The Court then went further and interpreted the relevant limitation by considering **reasonableness**. First of all the Court stated that the court will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The Court stresses further that the policies and programmes must be reasonable both in their conception and their implementation. The court states further that:

Reasonableness must also be understood in the context of the Bill of Rights as a whole. A society must seek to ensure that the **basic necessities** of life are provided to all if it is to be a society based on **human dignity**, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. **Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril**, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. **Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.**⁹⁵

5.1.2.4 *Progressive Realisation*

The UNCESCR summarises the position of the "progressive realisation" of socio-economic rights as follows:

On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for State parties in respect of the full realisation of the rights in

⁹⁵ *Grootboom* par 44.

question. It thus imposes an obligation to move as expeditiously and effectively as possible towards the goal.

The UNCESCR further mentions that:

...any deliberately retrogressive measureswould require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum of available resources."⁹⁶

It then states that the ultimate objective of the Covenant is the "full realisation"⁹⁷ of the rights. The fact that the "full realisation" is subject to the condition of progressiveness is merely recognition of the fact that the full realisation of all socio-economic rights will generally not be able to be achieved in a short period of time.

In the *Grootboom* case, the court drew on the UNCESCR's interpretation of the phrase "progressive realisation". The court stated that "progressive realisation" contemplates that rights cannot be realised immediately, but that the goal of the Constitution is for the basic needs of all in our society to be effectively met; the requirement of progressive realisation means that the state must take steps to achieve this goal.

5.1.3 Priority to the most vulnerable

As already indicated the court remarked that a society must seek to ensure that the **basic necessities** of life are provided to all if it is to be a society based on **human dignity**, freedom and equality. In

⁹⁶ General Comment No 3 at 85 par 9.

⁹⁷ Sections 26(2) and 27(2) of the South African Constitution reads that the state must "achieve the progressive realisation of each of these rights" and not the **full realisation** of these rights.

this case the Court revealed a hesitant, context-sensitive approach by taking the position of the weakest members of society into account when deciding whether policies of the government are reasonable.⁹⁸ This confirms that socio-economic transformation cannot always occur overnight and that in some cases formal equality and identical treatment must be postponed to avoid unnecessary harm to the **weakest and poorest members of society**.

It is clear that the Court makes use of the **constitutional values** in the Constitution to give **content** to socio-economic rights.⁹⁹ **Denial of basic standards of living results in denial of a person's human dignity**. It can further be argued that the value of equality and the equality clause as contained in the Bill of Rights strive to repair the historical inequalities and injustices of the past. De Vos¹⁰⁰ remarks that the rights in the Bill of Rights are interrelated and mutually supportive.¹⁰¹ He argues that there is a relationship between social and economic rights and the right to equality¹⁰² and that the transformative vision of the Constitution is one that is committed to **remedying socio-economic inequality**. When investigating an infringement of a specific socio-economic right, such investigation must take place in conjunction with all other

⁹⁸ Van der Walt AJ "Tentative Urgency: sensitivity for the paradoxes of stability and change in social transformation decisions of the Constitutional Court" (2001) 16(1) *SAPL* 11.

⁹⁹ So-called dignitarian approach.

¹⁰⁰ De Vos P "Grootboom, the right of access to housing and substantive equality as contextual fairness" (2001) 13 *SAJHR* 258 – 276.

¹⁰¹ See also Jansen van Rensburg (2000) 55-66. Leckie makes the following observation with regard to the interdependence, interrelatedness and mutually supportiveness of civil and political rights on the one hand and socio-economic rights on the other hand: 'Equality and nondiscrimination form the basis of human rights law, and although generally associated with civil and political rights, these principles have always had pertinence to economic, social and cultural rights'. Leckie S "Another step towards indivisibility: identifying the key features of the violations of economic, social and cultural rights" (1998) 20 *Human Rights Quarterly* 104-105.

¹⁰² See discussion of Khosa below.

socio-economic rights in the Bill of Rights. The Court emphasises that socio-economic rights must not be seen in isolation from one another. They must thus be read within the Constitution as a whole.¹⁰³

The conclusion can be made that the state cannot realise all the rights of the poor immediately, and that the Courts must keep this in mind, and that the material needs of those persons who are the **most vulnerable** ought to enjoy priority.¹⁰⁴ It is a difficult task to determine the infringement of a particular socio-economic right and each specific situation of alleged infringement must be evaluated on a case-to-case basis.¹⁰⁵ It is clear from the Grootboom case that the Courts will more readily interfere, where it appears that the state has not realised the **basic needs** of a vulnerable group.

5.2 Minister of Health and others v Treatment Action Campaign and others 2002 (10) BCLR 1033 (CC)

5.2.1 Facts of the case

This case deals with provision of **anti-retroviral drugs to pregnant mothers** that do not have the means to afford these drugs. The case was based on section 27(1)(a) of the Bill of Rights, which determines that everyone has the right to **access to medical care**, including reproductive medical care. Section 27(1)(a), like most other socio-economic rights in the Bill of Rights, is limited by the following provision contained in section 27(2), namely that the state must take reasonable legislative and other measures, within its available resources, to progressively realise these rights.

¹⁰³ *Grootboom* para 44.

¹⁰⁴ *Grootboom* para 43.

¹⁰⁵ *Grootboom* para 20.

Only three remarks on this case will be made. Firstly, the way the court **interpreted section 27**, secondly, the approach of the court towards the consideration of **international law** and thirdly, the **boundaries of judicial activism** in this particular judgment.

5.2.2 Interpretation of section 27

In line with the *Grootboom* decision, the Court denies the existence of the **international law** principle of "minimum core entitlement" or basic minimum realisation of every socio-economic right. The Court interprets this as part of the question as to whether the state had a **reasonable programme** to realise socio-economic rights.¹⁰⁶ The Court indicates that the court is

not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent.¹⁰⁷

The Court recognises its inability to consider social and economic factors and further notes that a court is not in the position to make orders that can have social and economic consequences for the community.¹⁰⁸

The Court's contention that it is impossible to give everyone access even to a "core" service immediately has merit. At least the court in this specific case indicated that government programmes must at least satisfy the **basic needs of the most vulnerable**. Unfortunately, courts as adjudicating forums can only enforce those

¹⁰⁶ TAC para 34.

¹⁰⁷ TAC para 37.

¹⁰⁸ TAC para 39.

rights that are alleged by a specific party in a specific case. This has the implication that others members of the community whose basic need of access to socio-economic rights are infringed but who do not have the resources to approach the courts, cannot be satisfied

It must, however, be stressed that it is the **minimum core approach** that provides economic and social rights with a determinacy and certainty.¹⁰⁹ It is suggested that nothing prevents the Court from giving instructions to executive and legislative authorities¹¹⁰ to start with programmes and to identify the "minimum core obligation" of each right. This, however, again requires a specific party in a specific case alleging infringement of a socio-economic right.

5.2.3 Boundaries of judicial activism

A positive step by the Court is the way the court views the doctrine of separation of powers. The Court acknowledges that

there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others.

The court further acknowledges that the different spheres of government must respect each other's different functions, but

¹⁰⁹ Van Bueren G "Alleviating poverty through the Constitutional Court" (1999) 15 *SAJHR*, 57. See further Brand D, and Russell S *Exploring the Core Content of Socio-economic Rights: South African and International perspectives*, (Menlo Park 2002) 1-21.

¹¹⁰ An example thereof is the baseline approach recommended by the Committee of Inquiry (2002).

recognises that the court may make orders to impact on policy.¹¹¹ The Court¹¹² elaborates further that if state policy is inconsistent with the Constitution, the court has to examine this to comply with its Constitutional duties. If the **executive act is inconsistent with the Constitution**, it can be considered as an intrusion mandated by the Constitution itself.

5.3 *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others 2004 (6) BCLR 569 (CC).*

5.3.1 Facts of the case

In a most recent case, *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others*¹¹³ the court addressed the constitutionality of some of the provisions in the Social Assistance Act 59 of 1992¹¹⁴ and the requirements to qualify for some of the grants in the grant administration process in South Africa.

The applicants in both cases are permanent residents. The applicant in the *Khosa* case challenged section 3(c) of the Social Assistance Act 59 of 1992 because it only reserves grants for the elderly for South African citizens and thereby excludes permanent residents. In the *Mahluale* case section 4(b)(ii) and 4(B)(ii) of the Social Assistance Act 59 of 1992 was challenged because it only reserves child support grants and care-dependency grants for South African citizens again excluding permanent residents. The applicants in both

¹¹¹ TAC para 98.

¹¹² TAC para 99.

¹¹³ Hereafter *Khosa* case.

¹¹⁴ As amended in some instances by the Welfare Laws Amendment Act 106 of 1997.

matters would qualify for social assistance except for the fact that they did not meet the citizenship requirement.¹¹⁵ Because the two matters are related and involve similar considerations and arguments of law, they had been heard together both in the High Court and the Constitutional Court.¹¹⁶ The Constitutional Court found these provisions to be unconstitutional emphasising the fact that permanent residents are a **vulnerable group** and they need special constitutional protection.

Only three remarks on this case will be made. Firstly, the **intersecting rights** (so-called special approach) the Court refers to in its interpretation of the rights of a particular poor and socially excluded group. Secondly, the **objects and aims** of social assistance. Thirdly, the way in which the Court examines the social expenditure budget along with the drastic remedy the Court gives with relation to the argument of **judicial activism**.

5.3.2 Intersecting rights

The Court referred to the foundational values in the Constitution, namely **human dignity**, equality and freedom.¹¹⁷ It recognised that all rights are interdependent, mutually related and equally important and emphasised that this specific case concerned intersecting rights which reinforce one another at the point of intersection.¹¹⁸ The implication of this remark in this particular case, is the fact that a number of rights are alleged to be infringed and

¹¹⁵ Khosa para 3.

¹¹⁶ For purposes of this discussion these cases will be referred to as one case, as only one judgment was made.

¹¹⁷ Khosa para 40.

¹¹⁸ Khosa para 40. Referring to the judgement in *Grootboom* case.

this requires that the Court adopt a **special approach**. The Court¹¹⁹ comments that:

When the **rights to life, dignity and equality** are implicated in cases dealing with socio-economic rights, they have to be taken into account along with the availability of human and financial resources in determining whether the state has complied with the constitutional standard of **reasonableness**. This is, however, not a closed list and all relevant factors have to be taken into account in this exercise. What is relevant may vary from case to case depending on the particular facts and circumstances. **What makes this case different to other cases that have previously been considered by this Court is that, in addition to the rights to life and dignity, the social-security scheme put in place by the state to meet its obligations under section 27 of the Constitution raises the question of the prohibition of unfair discrimination.**¹²⁰

The Court remarked that where the state argues that they cannot afford to pay benefits to everyone entitled under section 27(1)(c) the criteria for excluding a specific group, for example permanent residents, must be consistent with the Bill of Rights as a whole.¹²¹ As indicated the state choose to differentiate between citizens and non-citizens in their Social Assistance legislation. The Court¹²² remarked that this differentiation must be constitutionally valid and cannot be arbitrary, irrational or manifest a naked preference:

There must be a rational connection between differentiating law and the legitimate government purpose it is designed to achieve. A differentiating law or action which does not meet these standards will be in violation of section 9(1) and section 27(2) of the Constitution.

¹¹⁹ Khosa para 44.

¹²⁰ Own emphasis.

¹²¹ Khosa para 45.

¹²² Khosa para 53.

It is clear from the Court's approach that when it comes to the **infringement of the rights of the poor** it is possible that **civil and political rights** such as human dignity and equality can also be infringed along with the typical rights of the poor or so-called socio-economic rights

5.3.3 The objects and aims of social assistance

The Court further referred to the testimony of the Director-General of the Department of Social Development that described the **object** of the social assistance legislation as

- a strategy to **combat poverty**,
- to realise the **objectives of the Constitution** and the Reconstruction and Development Plan and
- to comply with South Africa's international obligations.¹²³

The Court further remarked that the aim of social security and especially social assistance is to ensure that **society values human beings by providing them with their basic needs**.¹²⁴

This statement is of particular relevance for the **rights-based approach** and the protection such an approach must provide to protect the human dignity of the poor.¹²⁵ The Court explicitly states that by excluding permanent residents from the social assistance system, limits their rights and fundamentally affects their dignity and equality.¹²⁶ As proposed¹²⁷ a social protection system is one way to respect and protect and realise the rights of the poor.

¹²³ Khosa para 51.

¹²⁴ Khosa para 52.

¹²⁵ See heading 2 above. UNICEF (2000) 19. De Gaay Fortman (2001).

¹²⁶ Khosa para 84.

¹²⁷ See heading 2 above.

5.3.4 Judicial activism

Regarding the argument about the availability of resources¹²⁸ the respondents argued that the inclusion of permanent residents in the Social Grant System would impose an impermissible high financial burden on the state.¹²⁹ The respondents indicated a progressive trend in government expenditure on social security spending.¹³⁰ In the absence of providing clear evidence of the additional cost in providing social grants to permanent residents, the respondents made some assumptions of the groups and numbers of eligible permanent residents, and came to the conclusion that this inclusion would cost the state an additional R243 million – R672 million per annum.

The Court, taking above numbers into account decided that the cost of including permanent residents in the system will only be a small portion of the cost compared with the total budget spent on social grants.¹³¹ In this case the **Court considered evidence on the budget** and decided as the judicial branch of government whether the financial burden on the executive branch of government is acceptable or not. This may be seen as an infringement of the separation of power argument. It is my submission that the Court did not directly calculate the budget or interfered with the budget. They only examined the evidence before them and did what was expected from them, namely to give social protection to the poor by

¹²⁸ Khosa para 19.

¹²⁹ Khosa para 60.

¹³⁰ For example, in the last three years, the spending on social grants (including administrative cost) increased from R16.1 billion to R26.2 billion and a further increase to R44.6 billion is estimated in the following three years. The respondents further estimated that there are about 260 000 permanent residents residing in the country. The respondents failed to furnish the court with statistical evidence on the number of permanent residents that might be eligible for social grants if the citizenship requirement is removed. Khosa paras 60-61.

¹³¹ Khosa para 62.

providing an appropriate remedy. The Court clearly described the rights-based approach they used when they¹³² came to the following conclusion:

There can be no doubt that the applicants are part of a **vulnerable group** in society and, in the circumstances of the present case, are worthy of **constitutional protection**. We are dealing, here, with **intentional, statutorily sanctioned unequal treatment** of part of the South African community. This has a strong stigmatising effect. Because both permanent residents and citizens contribute to the welfare system through the payment of taxes, the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents are in some way inferior to citizens and less worthy of social assistance.¹³³

Referring to the impact of the exclusion, the Court also stressed the burden permanent residents without social assistance benefits, place on other members of the community such as their families and friends and how this effects their dignity.¹³⁴ This exclusion is unfair, because permanent residents are outcast to the margins of society and are **deprived of those rights** that may be essential for them to enjoy their other constitutional rights.¹³⁵ The Court further ruled that this unfairness would not be justified under the general limitation clause¹³⁶ of the Constitution.¹³⁷

¹³² Khosa para 74.

¹³³ Own emphasis.

¹³⁴ Khosa paras 76, 80 and 81.

¹³⁵ Khosa para 77. See further para 81 where the Court remarked: "The denial of access to social assistance is total, and for as long as it endures, permanent residents unable to sustain themselves or to secure meaningful support from other sources will be relegated to the margins of society and deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution. Denying permanent residents access to social security therefore affects them in a most fundamental way".

¹³⁶ Section 36.

¹³⁷ Khosa paras 80, 83 and 84.

The Court decided that the most appropriate order to make was the "reading-in" of the words "permanent resident" in the challenged legislation. This again may be seen as a drastic remedy and an interference with the other branches of government by the Constitutional Court. In this case the remedy was chosen because of the urgency of the matter.¹³⁸

6 CONCLUSION

Poverty is more than a lack of income. It can better be described as **social exclusion** from the democratic and legal system, the labour market, the welfare state system and the family and community system. With relation to rights, poverty may be seen as a **denial of human rights and human dignity**. Human dignity and equality as fundamental values and rights in the Constitution, are infringed if they are denied to the poor because of their economic status.

Poverty from a rights perspective is about a denial of human rights. A rights-based approach implies **protection by law of fundamental freedoms** and entitlements needed for a **decent standard of living**. It is further important to keep in mind that a number of rights may be infringed at a given moment when the situation of poor people is viewed. This may include civil and political rights such as human dignity and equality on the one hand, and socio-economic rights such as the rights to social security, health, food and water on the other.

Where there is poverty or social exclusion, a rights-based approach demand **action to rectify** the situation. If possible, and financially

¹³⁸ Khosa paras 92 and 95.

viable, the poor may **approach the Court** for help as in the cases of Grootboom, TAC and Khosa. The fact that this is possible in South Africa because we have justiciable socio-economic rights, is a strength. However approaching the courts is not only an expensive exercise but also one that only remedies, in most cases the situation of those people who brought the action before the court. This may be seen as a weakness of the current system of enforcement. The Grootboom case is an excellent example of this.

A better solution may be to provide **social protection**, where the fundamental rights relating to poverty are infringed. The type of social protection will differ depending on the type of right that has been infringed upon. Social protection is a measure that combats social exclusion, poverty, marginalisation and vulnerability. A committee appointed by cabinet recently developed a **definition for social protection** for unique South African circumstances. This definition lies out the perfect tools to protect the poor. It includes measures to address "income poverty", measures to address "capability poverty", measures to address "asset poverty" and measures to address "special needs".

Unfortunately the new Social Assistance Act 13 of 2004 soon to be enacted by proclamation by President is only aimed at consolidation of legal requirements and provisions for social assistance in the Republic, and to create uniform norms and standards, which can apply countrywide.¹³⁹ The Department of Social Development in

¹³⁹ Memorandum on the objects of the Social Assistance Bill B 57A-2003. As amended by the Portfolio Committee on Social Development (National Assembly). (As introduced in the National Assembly as a section 76 Bill; explanatory summary of Bill published in *Government Gazette* 25340 of 8/08/2003.) See *Mashavha v President of the Republic of South Africa and others* CCT 67/03 in this case it was argued that social assistance is a matter that cannot be regulated effectively by provincial legislation and requires minimum standards across the nation for the rendering of public services.

briefing the Portfolio Committee on Social Development indicated that it will not be making any policy shifts in the new Social Assistance Act and that the act is tabled to remove the assignment to the provinces as indicated in the Memorandum. One may only ask why did they appoint a committee to examine a comprehensive social protection system. **Lack of political commitment and will** to help the plight of the poor may be seen as a further weakness in the rights-based approach where a proper remedy may only be obtained by approaching the courts and trying to enforce the rights of the poor. A further disadvantage, as already mentioned, is that remedies is given in isolation and is only applicable on a specific case.

There are several **reasons** why international poverty law must be taken into account when fundamental rights of the poor contained in the South African Constitution are interpreted. As starting point section 39(1)(b) compels adversarial bodies to consider international law when interpreting the Bill of rights. **International Commentaries and Reports may further serve as valuable information in the interpretation of the rights of the poor in the Bill of Rights.** This may be interpreted as an "international friendly-approach". In the *Makwanyane* case¹⁴⁰, the court emphasised that binding as well as non-binding international law must be taken into consideration. This implies that soft law must be considered. Soft law consists of imprecise standards, generated by declarations adopted by diplomatic conferences or resolutions of international organisations, that are intended to serve as guidelines to states in their conduct, but which lack the status of 'law'.¹⁴¹ Examples of soft law for purposes of poverty law are, *inter alia*, the

¹⁴⁰ 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) par 35. This phrase was also quoted in the case of *The Government of the Republic of South Africa and Others v Grootboom and Others* CCT 2000 (11) BCLR 1169 (CC).

¹⁴¹ Dugard (2000) 36. See also Klabbers (1996) 157-164.

Millennium Development Declaration and Goals. The court further held that, although the court must take into consideration, and may be assisted by public international law, it is in no way bound to follow it.¹⁴²

South African has further indicated its intention to become a party to, and to be **legally bound** by the obligations imposed by relevant international treaties by signing and ratifying these, for example the United Nations Convention on the Rights of the Child on international level and the African Charter on Human and Peoples Rights on regional level.

What is clear from the **decisions made by the Constitutional Court** is that for government programmes to be **reasonable**, it must make provision for poor and vulnerable groups to access socio-economic rights. From the perspective of formulating programmes, the State is under a clear duty in terms of *Grootboom, TAC and Khosa* to adopt and implement reasonable programmes catering for those in desperate need on an expedited basis.¹⁴³

In the *Grootboom* and the *TAC* case the Court **considered international law** and specifically the CESCR. In both cases the Court refused to develop or to comment on the content of a **"minimum core"** entitlement. This approach by the Court is understandable but nothing stands in the way of the Court to order

¹⁴² See *Prince v The President of the Law Society, Cape of Good Hope* 1998 (8) BCLR 976 (C) 984-986, 988-989. In the case *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC), the court states as follows: "The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable."

¹⁴³ Liebenberg S "Taking Stock The jurisprudence on Children's socio-economic rights and its implications for government policy" *Economic and Social Rights Review* (2004) Vol 5 no 4 Sep 5.

government and/or other stakeholders to start developing the content of "minimum core" of each socio-economic right. It is thus clear that the Court considers international law even in circumstances where it is not binding on the particular state. The Court unfortunately still has the power to deviate from international law where it is not bound by it as in the case of Grootboom.

In the Khosa case the Court referred to the foundational values in the Constitution, namely human dignity, equality and freedom. As in the Grootboom and TAC cases it recognised that all rights are interdependent, mutually related and equally important and emphasised that the Khosa case concerned intersecting rights which reinforce one another at the point of intersection. The Court remarked that what makes this case different to other cases that have previously been considered by this Court is that, in addition to the rights to life and dignity, the social-security scheme put in place by the state to meet its obligations under section 27 of the Constitution, raises the question of the prohibition of unfair discrimination. **It is clear from the Court's approach that when it comes to the infringement of the rights of the poor it is possible that civil and political rights such as human dignity and equality can also be infringed along with the typical rights of the poor or so-called socio-economic rights.**

In the Grootboom, TAC and Khosa cases the Court ordered the state to act positively and to alleviate the plight of the poorest members of the South African society. These remedies may be seen as an infringement on the principle of **separation of powers** because the judiciary encroaches upon the proper terrain of the legislature and executive. The TAC case clearly indicated that if the boundaries between the different branches of government are drawn to strict

there will be no way open for the court to assist the poor and socio-economic rights will exist merely on paper.

I suggest that **judicial activism** requires the development of a culture of co-operative and constructive effort between the judiciary, the executive, the legislature and civil society to respect, protect, promote and fulfil the rights of poor people. To some, such action offends against the doctrine of separation of powers, but the doctrine only states that powers should be separated, and to use the words of the Constitutional Court in the TAC case there are no bright lines referring to the separation of powers.

To conclude, the new Constitution in South Africa set the way for the development and usage of a **rights-based approach**. According to UNICEF¹⁴⁴ all countries, even those at low levels of income, can achieve the **realisation of at least the rights of the most vulnerable**. Universal access to basic social services and the pursuit of socio-economic rights does not have to wait until rapid economic growth is achieved.

¹⁴⁴ UNICEF (2000) 46.



International Poverty Centre

SBS – Ed. BNDES, 10º andar
70076-900 Brasilia DF
Brazil

povertycentre@undp-povertycentre.org
www.undp.org/povertycentre
Telephone +55 61 2105 5000