

**Millennium Development Goals (MDGs) and Women - The implementation of Article  
10(3) of the Protocol on the Rights of Women in South Africa**

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**by**

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## DECLARATION

I, **Akho Ntanjana**, hereby certifying that ***Millennium Development Goals (MDGs) and Women - The implementation of Article 10(3) of the Protocol on the Rights of Women in South Africa*** is my original work and has not been submitted for any degree or examination in any other university or academic institution. The sources that are utilised are duly acknowledged and properly referenced.

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I take the responsibility for any errors and mistakes.

## LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ANC	African National Congress
ARVs	Anti-retrovirals
AU	African Union
CEDAW	Convention on the Elimination of Discrimination against Women
CSOs	Civil Society Organisations
FGM	Female Genital Mutilation
GRBs	Gender Responsive Budgets
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MDGs	Millennium Development Goals
MTCT	Mother-To-Child-Transmission
NEPAD	New Partnership for Africa's Development
NGOs	Non-governmental Organisations
OAU	Organisation of African Unity
TAC	Treatment Action Campaign
SDGEA	Solemn Declaration on Gender Equality in Africa
SDP	Strategic Defence Package
SAHRC	South African Human Rights Commission
SANDF	South African National Defence Force
SIPRI	Stockholm International Peace Research Institute Security
WHO	World Health Organisation

UDHR	Universal Declaration on Human Rights
UNICEF	United Nations International Children's Emergency Fund
UN	United Nations

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## CHAPTER ONE: INTRODUCTION AND THEORETICAL FRAMEWORK

### 1.1 Background

Few would deny that the Republic of South Africa (South Africa) has achieved a lot in its quest to improve the pressing social challenges<sup>1</sup> (such as poverty; illiteracy; HIV/AIDS; crime prevalence; preventable diseases, and high levels unemployment). It must be firmly said that these social ills generally affect everyone – particularly the historically marginalised group in South Africa.<sup>2</sup> However, there are also few who would deny that South African women (including the girl-child),<sup>3</sup> as it is the case elsewhere in Africa suffer disproportionately that their male counterparts. Some have supported the view that gender discrimination is the main source of women's disempowerment today.<sup>4</sup> For instance, society has accepted consciously or otherwise that women are inferior to men and as such cannot take part both in public and private spheres of life. It is nevertheless not the object of this study to delve into to the complex and often misunderstood causes of women's marginalisation in South Africa.

The democratic South Africa emerges from a racist system of apartheid that channelled resources along racial demographics to the disadvantage of the majority. It was an institutionalised state policy that determined individual's dignity and capability according to colour and gender. The adoption of Constitution (the Constitution)<sup>5</sup> in 1996 is a major step towards the amelioration of the position of women in post-apartheid South Africa. The Constitution is premised on the values of human dignity, the achievement of equality, and non-sexism.<sup>6</sup> It envisages some of the following ambitions: a society that respects women and men alike; that treat women with dignity and compassion; that acknowledges that women have been, (and are still) under-represented in private and public spheres, and that take measures to improve women's position (affirmative action).<sup>7</sup>

In 2000, at the United Nations Millennium Summit, the international community adopted a Millennium Declaration where social and economic commitments were made. These commitments were called Millennium Development Goals (MDGs). South Africa is a signatory to this agreement.<sup>8</sup> The MDGs can be numerically listed as follows, (1) to

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<sup>1</sup> It is preferable to use the word 'challenge(s)' in lieu of 'problem(s)'.

<sup>2</sup> The historically 'marginalised group' in South Africa includes blacks in general and women in particular.

<sup>3</sup> Art 1(k) of the Women's Protocol defines women as 'persons of female gender, including girls.'

<sup>4</sup> F Banda *Women, Law & Human Rights* (2005). See eg The Office on the Status of Women 'South Africa's National Policy Framework for Women's Empowerment and Gender Equality.'

<sup>5</sup> The Constitution of the Republic of South Africa, 1996.

<sup>6</sup> Sec 1(a) & (b) of the Constitution.

<sup>7</sup> See e.g sec(s) 9; 10; 7(1) & (2); 8(1); and 10 of the Constitution.

<sup>8</sup> South Africa is one of the 192 countries that signed the Millennium Declaration in 2000.



eradicate extreme poverty and hunger, (2) to achieve universal primary education, (3) to promote gender equality and empower women, (4) to reduce child mortality, (5) to improve maternal health, (6) To combat HIV/AIDS, malaria and other diseases, (7) to ensure environmental sustainability, (8) to develop a global partnership for development.<sup>9</sup>

These MDGs are interdependent, and must be approached in a holistic way.<sup>10</sup> The principle of gender equality and empowerment of women forms a major part of the MDGs. For instance, the MDG 2 (achieve universal primary education) is connected to MDG 3 (promotion of gender equality and empowerment of women). The former enjoins state parties to ensure that children (girls and boys alike) are able to complete a full course of primary schooling whereas the MDG 3 seeks to eliminate gender disparities in primary and secondary education. There is a connection between MDG 4 (on reducing child mortality), MDG 5 (on improving maternal health), and MDG 6 (on combating HIV/AIDS, malaria and other diseases).<sup>11</sup> The scope of this study is in effect limited to MDG 1 to 6 since they doubtlessly affect more women than the other MDGs which have broader objectives.

One of the causes of marginalisation of women and the girl-child alike has been and, still the fact that they grow up under conservative patriarchal society.<sup>12</sup> The societal pressure induces women to accept the given lower status. Traditions such as early marriage threaten MDG 2 because there are very limited chances that the child will continue schooling. Because of the lack of knowledge young girls can be exposed to diseases such as HIV.

In spite of the foregoing, South Africa is estimated to have a high percentage of girls who access education at the primary level.<sup>13</sup> Though females' enrolment levels are higher (97.0% in 2002 to 98.8% in 2009) compared to males (96.4% in 2002 to 98.4% in 2009) the degree of gender disparities is still significantly higher.<sup>14</sup> UNICEF<sup>15</sup> reports that the women adult literacy levels in South Africa stand at 85.7% while for men it is 87%.<sup>16</sup>

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<sup>9</sup> S Feeny & M Clarke *The Millennium Development Goals (MDGs) & Beyond International Assistance to the Asian Pacific (Rethinking International Development)* (2009) 3.

<sup>10</sup> South Africa, 'The Millennium Development Goals Country Report' 2010 12. Sourced from <http://www.undp.org.za/remository/MDGs/SouthAfrica-MDG-Report-2010/> (16 July 2011).

<sup>11</sup> SAHRC, 7<sup>th</sup> Report on Economic and Social Rights, 2006-2009.

<sup>12</sup> Women News Network 'Educate a Woman, You Educate a Nation' – 'South Africa aims to improve its education for girls' <http://womennewsnetwork.net/2007/08/28/%E2%80%9Ceducate-a-woman-you-educate-a-nation%E2%80%9D-%E2%80%93-south-africa-aims-to-improve-its-education-for-girls> (accessed 29 September 2011).

<sup>13</sup> n 8 above.

<sup>14</sup> n 5 above.

<sup>15</sup> UNICEF is United Nations' organisation mandated to look after children's lives, needs and rights in case of emergency.

<sup>16</sup> The World Fact Book. Available at <http://www.cia.gov/library/publications/the-world-factbook/fields/2103.html> accessed 10 May 2011).

South Africa has successfully reduced the number of people living below the poverty line of a \$1 per day. In 2000, poverty declined by 5% whilst in 2006 to 11.3%. Nevertheless, women are still disproportionately affected – the fact that 12.0% of women still live below \$1 per day is highly unacceptable compared to 10.0% of men who live below \$ 1 per day. This trend is found when other measures such as \$1.25, \$2, and \$2.5 per day are used.<sup>17</sup> Structurally linked to poverty is the manifest problem of unemployment, round about 49% for men and 73% for women.<sup>18</sup> The government has tried to halve unemployment by 24% in the last six years.<sup>19</sup> These proportions indicate that there is a serious poverty problem among women which in turn leads to socio-economic insecurity.<sup>20</sup>

South Africa has taken measures that seek to improve however gradually MDG 4, 5 and 6. Government revealed that child and infant mortality had declined by four out of 1000 (0.4%) during the period 1998 to 2003.<sup>21</sup> But the data provided by UNICEF and World Health Organisation (WHO) shows a consistent escalation since 1980.<sup>22</sup> However, between 2006 and 2007 there was a decline of ten out of 1000 (0.10%). Despite this apparent conflicting data, drop in mortality rate was noted in 2006 to 2009.<sup>23</sup> The reliability of these statistics is somewhat questionable based on different data obtained from different sources. The preceding statement is especially true since some cases of deaths hardly get reported especial in rural areas.

It is improbable that South Africa will be able to achieve MDG 5 (to reduce maternal deaths by 75% by 2015). Maternal mortality has increased from 150 deaths to per 100,000 live births in 1998 to 625 in 2007.<sup>24</sup> Apart from the bad oversight and lack of accountability in public health administration, HIV is tipped as one of the causes.<sup>25</sup> South Africa is 'unlikely' to achieve its 2015 MDG target of no more than 38 deaths per 100 000 births.<sup>26</sup> The Sub-Saharan Africa is the most HIV/AIDS affected region in the world, about 67% of

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<sup>17</sup> n 5 above 27.

<sup>18</sup> As above.

<sup>19</sup> As above.

<sup>20</sup> South Africa, Millennium Development Goals Report, 2005.

<sup>21</sup> (n above) 88.

<sup>22</sup> UNICEF Statistics, baseline data from 2004. [www.unicef.org/infobycountry/southafrica\\_statistics.html#61](http://www.unicef.org/infobycountry/southafrica_statistics.html#61).

<sup>23</sup> n 16 above 89.

<sup>24</sup> Human Rights Watch, 'Stop making excuses'.

Available at [www.hrw.org/news/2011/08/08/south-africa-failing-maternity-care](http://www.hrw.org/news/2011/08/08/south-africa-failing-maternity-care) (accessed 25 August 2011). See also South Africa MDG Report 2011, 67. To achieve MDG target, deaths should not be more than 38 per 100 000 births.

<sup>25</sup> As above.

<sup>26</sup> News24 'Alarming rise in maternal deaths'.

<http://www.news24.com/SouthAfrica/News/Alarming-rise-in-maternal-deaths-20101027> (accessed 29 September 2011).

its population is HIV positive.<sup>27</sup> The prevalence of HIV among South African women of the ages between 15 to 24 years old showed a decrease from 30.2% to 28% in 2007.<sup>28</sup> Among women of the age of 50-54 years HIV prevalence is about 10.2% whilst men is about 10.4%, and 6.2% of men whilst 7.7% that of women between the ages of 55-59 years.<sup>29</sup>

The problems highlighted above are attributed to government's decisions (among others revenue division) and/or policy directives which are blind of women's needs and interests. This study seeks to find correlation between ill made decisions by the state to the problems confronted by women in South Africa today with special emphasis on defence budget.

The adoption in 2003 of the Protocol to the African Charter on the Rights of Women (Women's Protocol)<sup>30</sup> was not surprising given the unfortunate position of women in South Africa particularly and in Africa generally. The Women's Protocol accepts that women cannot effectively participate in public life unless pervasive discrimination against them is eliminated. One way of lessening the effect of discrimination is to assist those discriminated against more economically, politically and socially powerful. Article 10(3) of the Women's Protocol, which is the focus of this study, compels state parties to 'reduce military expenditure significantly in favour of spending on social development in general, and *the promotion of women in particular*.'<sup>31</sup> This provision is delineated in the succeeding chapter.

Governments need to take measures to seek to empower women and girls alike, such measures would include some of the following: making funds available for girl-child education; skills development programmes; job creation initiatives; fight criminal activities against women and, discourage some traditional values and customs which prevent women from fully developing. In line with Article 10(3) the government can allocate state resources along gender lines.

Though it is not easy to foretell with certainty the link between excessive military budget and, women's socio-economic problems, clearly it is not difficult to see some aspects of a budget which will not assist the MDGs project. Significant expenditure on the

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<sup>27</sup> n 16 above 92-93. UNICEF *The State of the World Children 2007: Women and World Children-The double Dividend for Gender Equality*, vi. See also ZS Gabela Unpublished Thesis 'The Treatment Action Campaign (TAC) case as a model for the protection of the right to health in Africa, with particular reference to South Africa and Cameroon' 7.

<sup>28</sup> n 16 above 92.

<sup>29</sup> As above.

<sup>30</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003/2005). It was adopted in Maputo, Mozambique on 11 July 2003 and came into force on 25 November 2005.

<sup>31</sup> My emphasis.

defence is one such example. In spite of the aforementioned, South Africa remains one of the countries which devote enormous sums of money on defence.<sup>32</sup>

## **1.2 Research Questions**

In view of the Millennium Development Goals (MDGs) agreed upon by states, what is the impact of state decisions, for instance, revenue division, which fails to take into account women's interests, particularly in South Africa? Is there any basis to assert that substantial military expenditure is one of the barriers to the realisation of MDGs (in other words, what is the link, if any, between military expenditure and, poor performance by states insofar as MDGs are concerned?). Furthermore, to what extent can South Africa government be obliged by domestic courts or international tribunals if necessary to fulfil their socio-economic obligations notwithstanding the old standing principle of separation of powers?

## **1.3 Hypotheses**

This research will address the following three hypotheses:

1. The revenue decision(s) which fail(s) to take women's challenges into account have a negative impact on the achievement of the Millennium Development Goals (MDGs).
2. There is a link between substantial military expenditure and the state's poor performance in relation to MDG agenda.
3. The South African government can be forced by domestic courts to take a positive action in line with their socio-economic obligations as stipulated in the Constitution, and notably the Constitutional Court's jurisprudence.

## **1.4 Purpose of the study**

The purpose of this study is to explore the apparent connection between military expenditure and women's hardships in of the MDGs. It specifically examines South Africa as a party state to the Women's Protocol and supposedly a beacon of democracy and human rights in Africa. In this respect, it is anticipated that the study will immensely contribute to the present knowledge and feminism debates around the globe. And more importantly, it should serves as a tool to sensitise African governments, judicial bodies, non-governmental organisations (NGOs), civil society organisations (CSOs) and academic institutions alike on the subject of expenditure on armaments, and women and general social challenges. The study does not attempt to be a panacea to the existing loopholes but it merely attempts to add to the limited and often diverging existing literature. It will

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<sup>32</sup> Stockholm International Peace Research Institute, Yearbook 2011: Armaments, Disarmament and International Security. Available at [www.sipri.org/yearbook/2011/files/SIPRIYB11summary.pdf](http://www.sipri.org/yearbook/2011/files/SIPRIYB11summary.pdf) (accessed 14 August 2011).

attempt to show the significant of socio-economic litigation in South Africa. In this respect, it is anticipated that interested litigants such as the NGOs and CSOs will use socio-economic jurisprudence where necessary to defend the rights of poor and women's rights in particular. From the foregoing, it is hoped that the study will, at the very least, be an asset to many human rights activists and defenders in order to benefit the less fortunate people.

### **1.5 Delineation of the study**

The study mainly focuses on the MDGs in women's perspective in South Africa, it also goes beyond merely citing statistics on defence expenditures by exploring where such funds are allocated, in other words, are they being channelled to social and women's interests? The scope of this study is limited particularly to quantitative data as to military budget, socio-economic rights as laid down in the Constitution and regional human rights. In addition, this study is premised on the argument that the MDGs are related to human rights, socio-economic right in particular.

### **1.6 Literature review**

It is worrying to notice that there is a dearth of literature on Article 10(3) of the Women's Protocol despite a wide array of literature advocating for the rights of women in the Africa and world-wide in general sense. A number of scholars have written on equality principle between men and women, and some have even noted that there is a correlation between gender and poverty in our continent. Examination of the accessible literature reveals that inequalities between men and women are consequential to deeply entrenched societal attitude and prejudice that women are inferior to men, and do not deserve to be in any improved status. This is the mentality that prevails in Africa, and it can be (cautiously) said that this mentality is directly or indirectly being encouraged by states despite the obligations they assumed under the African Charter and the Protocol on the Rights of Women *inter alia*.

Walker observes that the recognition of women's contribution in the struggle for liberation of their countries was to their empowerment and gives them a sense of dignity.<sup>33</sup> The African National Congress (ANC) government when it took power in 1994 explicitly tried to recognise the effect of apartheid by passing laws which seek to address the existing disparities.<sup>34</sup> However, Banda citing Skat argues that this recognition of women's

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<sup>33</sup> C Walker 'Women, Tradition and Reconstruction' (1994) Review of African Political Economy 347.

<sup>34</sup> Employment Equity Act 55 of 1998, The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 4 of 2000. See M Pieterse 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Final nail in the customary law coffin?' (2000) *South African Law Journal* 267.

role for freedom fighting is yet to deliver rights in a practical way or change discriminatory laws and practices.<sup>35</sup>

The author then proceeds to say that the practicality of states' recognition of women's rights is by clearly guaranteeing human rights of their citizens through constitutions, which expressly guarantees equality before the law and non-discrimination on various grounds, including sex. This is not uncommon in many constitutions in Africa. Nevertheless, Banda's work remains pertinent to this study as she critically analyses human rights in Africa in women's perspective using feminist tools. Referring to *Bhe case*,<sup>36</sup> Himunga is of the view that Bill of Rights may become a useless gain if there are no substantial changes on the ground.<sup>37</sup> The author's view is relevant and carries much weight because women's position in our society cannot only be enhanced through written rights and freedoms but there must be real action but it can be argued that his cynicism serves to discredit state's commitments to human rights norms as reflected in national constitutions (for instance, this appears from the use such words as 'everyone', 'no person', 'no one' and 'all persons', 'every person')<sup>38</sup> and court's decisions.<sup>39</sup>

Munalula makes a very logical construction of human rights, the author submits that human rights universally belong to all people regardless of their sex, race, colour, and language *inter alia*.<sup>40</sup> He submits that the key fundamentals of human rights are equality and non-discrimination. Indeed this is what the Constitutive Act, the African Charter and the Women's Protocol aim to achieve.<sup>41</sup> The AU has further recognised that African women 'continue to be subject to discriminatory laws and practices'.<sup>42</sup> However, Maboreke argues that the rules of equality do not always translate into concrete results. Hence he is advocating for unequal or preferential treatment in order to achieve substantive equality.<sup>43</sup>

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<sup>35</sup> F Banda 'Women, Law and Human Rights – An African Perspective' (2005), T Skat *Continent of Mothers: Understanding and Promoting Development in Africa Today* (2003) 178.

<sup>36</sup> *Bhe and Others v The Magistrate, Khayelitsha & Others High Court South Africa, Cape Provincial Division Case No 9489/02*, unreported. In *Bhe* case the matter involve a challenge by an African woman on patriarchal interpretation of customary law, which supports the right of inheritance by a male other than women. The High Court found that the practice was unconstitutional as the Constitution of South Africa guaranteed equal rights to women and was founded on the principle of non-discrimination.

<sup>37</sup> Banda n 18 above 139, C Himonga 'Legislative & Judicial Approaches to the Reform of the customary law of Marriage and Succession in South Africa: Implications for the Advancement of Women's Rights' (2003). Can also be accessed at [http://www.wlce.co.za/conference2003/2003\\_himonga.php](http://www.wlce.co.za/conference2003/2003_himonga.php) 1-17 6 (accessed 24 September 2011).

<sup>38</sup> Chapter 2 of the Constitution of South Africa, (1996).

<sup>39</sup> See for e.g *Bhe case* (n 22 above), & *Ephraim v Pastory* 1990 LRC 757.

<sup>40</sup> MG Munalula 'Women, Gender Discrimination & law – Cases & Materials' (2005) 8.

<sup>41</sup> Constitutive Act principle I; Art 2 of the African Charter, & Art 2 of the Protocol on the Rights of Women. See Heyns & Killander *Compendium of Keys Human Rights Documents of the African Union* (2010).

<sup>42</sup> Resolution on the status of women in Africa and the entry into force of the Protocol to the African Charter on Human & Peoples' Rights on the Rights of Women in Africa (2005).

<sup>43</sup> M Maboreke 'Introducing Women's Law, Women and Law in Southern Africa: The Legal situation of women in Southern Africa' (1990) 2-3.

Institutionally, the OAU/AU once emphasised that women's involvement in decision making processes is an integral part of Africa's development and should, and must not be a matter of generosity of member-states.<sup>44</sup> Failure by a number of state members to submit periodical reports to the African Commission strengthens this argument, in other words, it indicates a lack of commitment by states.<sup>45</sup>

Budlender gives an analysis of benefits gender-responsive budgets (GRBs). He points out that they can improve economic governance and financial management, provide feedback to government on whether it is meeting the needs of different groups or women including girls.<sup>46</sup> The author sees GRBs as a vital measure that could be employed by government for the country's development. For instance the government can use GRBs to assess the resource allocation priorities and the need for policy framework that aims to address gender equality concerns. The author furthermore notes that gender inequality constrains growth and other macro-economic results.<sup>47</sup>

Murray points out that a perception exists within the OAU structures that certain attitudes will result from the inclusion rather than exclusion of women, for instance states were requested to cut military spending and channel such funds to humanitarian and development programmes.<sup>48</sup> Murray's work does not deal with allocation of resources explicitly, but it remains important as it contextualise women's participation within the OAU/AU domain. Viljoen has applauded the African states for coming up with a specific women's instrument, the Women's Protocol because international human rights law normatively failed to deal with women's rights in a normative.<sup>49</sup>

Nevertheless, he (Viljoen) notes scant reflection of feminisation of poverty, especially in rural Africa. Moreover, he puts emphasis on Article 4(2)(b) of the Protocol which recognises that violence against women can be eradicated through 'social and

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<sup>44</sup> A 1995 African Plan of Action on Women the AHSG noted Arts 13(3) & 19 of the ACHPR and that 'women's empowerment is the key to development,' & reaffirmed 'that there is both economic value & social justice in investing in the improvement of the health of African women,' Declaration on the African Plan of Action Concerning the Situation of Women in Africa in the Context of Family Health, AHG/Dec.1 (XXXI) cited by R Murray *Human Rights in Africa – From the OAU to the African Union* (2004) 140.

<sup>45</sup> Viljoen is correct when he says that African states adopt international human rights instruments largely to appease the west or to be seen as 'good international citizens'. F Viljoen *International Human Rights Law in Africa* (2007) 305.

<sup>46</sup> D Budlender & G Hewitt *Engendering budgets: A practitioners' guide to understanding & implementing gender-responsive Budgets*. (2004).

<sup>47</sup> Costs of gender inequality were highlighted in the World Bank Report (2001): 'Engendering Development'. [http://www.wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2001/03/01/000094946\\_0102080539496/Rendered/PDF/multi\\_page.pdf](http://www.wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2001/03/01/000094946_0102080539496/Rendered/PDF/multi_page.pdf) (accessed 02 October 2011). The Report notes that 'by hindering the accumulation of human capital in the home and labour market, & by systematically excluding women or men from access to resources, public services, or productive activities, gender discrimination diminishes an economy's capacity to grow and to raise living standards'.

<sup>48</sup> R Murray *Human Rights in Africa: From the Organisation of African Unity to the African Union* (2004) 146.

<sup>49</sup> n 34 above 268.

economic measures' other than legislation.<sup>50</sup> Finally, the author admits that there is a need to fuse legal and non-legal means of implementation of the Protocol if women's position is to be improved. The envisaged 'non-legal means' are none other than 'political empowerment, education, sensitisation, outreach, public awareness, and resource allocation'.<sup>51</sup> This is an astute way of discouraging non-compliance with treaty obligations. However, he does not take the critique further apart from underlining the relationship between socio-economic rights and adequate budgetary allocation which is the point of this research.

Sub-Saharan Africa spends about \$10 billion annually on military spending.<sup>52</sup> The High Representative for Disarmament Affairs supported the reduction of military expenditure,<sup>53</sup> saying that the funds for the realisation of the MDGs are large, estimated at \$ 60 billion annually.<sup>54</sup> He moreover said that military spending has risen by half over the past decade only, such expenditures reported to the United Nations (UN) now total over 1.2 trillion dollars per year.<sup>55</sup> Why spend more money on military? This question though apparently rhetoric should stimulate exchange of views among African states, civil society organisations and the public in general.

Distinctly from the surveyed literature which discusses aspects of the equality debate between men and women, and other feminist perspectives, and themes which are already in the public domain, this study innovatively confronts the aspect of revenue allocation, an assignment constitutionally reserved for the executive and legislative arms of government. There is a tense debate in the world today about this controversial issue, some often rely on separation of powers principle and while others invoke human rights standards and values. This study brings to the fore a critical analysis of (excessive) military expenditure and socio-economic related data and its (unnecessary military expenditure) impact on women in South Africa. This will contribute to the existing contemporary women's rights discourse. Finally, this study is 'innovative' solely because few, if any, have written extensively specifically on Article 10(3) provision since the Protocol took effect.

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<sup>50</sup> n 34 above 276.

<sup>51</sup> As above.

<sup>52</sup> 'Military spending worldwide' available at <http://www.visualeconomics.com/military-spending-worldwide/> (accessed 22 August 2011).

<sup>53</sup> High Representative for Disarmament Affairs Global Day of Action on Military Spending, 2011. Available, <http://www.defenceweb.co.za/index.php?option=com-content&view=article&id=14703:world-military-spend-us16trillion-in-2010&catid=7:Industry&Itemid=116> (accessed 22 August 2011).

<sup>54</sup> As above.

<sup>55</sup> As above.



## **1.7 Methodology of the study**

This will be mainly a library research. Besides utilised text books and journals, legal instruments (international and national) as well as court decisions will be used extensively in order to answer some of the questions. In addition, reports on budgetary matters and that of women's organisations and various institutions will be reviewed. The study is both qualitative and quantitative in nature (mixed study). Moreover, the study is multidisciplinary in nature as it incorporates legal dimension and socio-political perspective. The study further acknowledges that the questions asked can not only be answered by the application of law.

## **1.8 Chapterisation**

The study is made up of four chapters. Chapter one will provide a contextual analysis of the study and present the problem, purpose of the study, methodology as well as literature review. To put it differently, it gives a broad understanding of the study as a whole. Chapter two is an international and regional chapter. It starts by assessing the position of women under the United Nations (UN) legal regime and it then critically evaluates the African Charter on Human and Peoples' Rights (the Charter). A brief overview of the Women's Protocol is also undertaken. Moreover, chapter two examines the real content of Article 10(3), including its rationale.

Chiefly, chapter three is devoted at showing connection (close or remote) between, on the one hand, sluggish social development and women's empowerment and, on the other hand, excessive military expenditure in South Africa. The apparent relationship between the MDGs and socio-economic rights shall also be demonstrated. The study argues that the MDGs and socio-economic rights are mutual reinforcing. This justifies the consideration of the South African jurisprudence on socio-economic rights. Finally, on Chapter four, the researcher provides a summary of the conclusions drawn and, recommendations shall be are proffered.

## CHAPTER TWO: THE UNITED NATIONS AND AFRICAN HUMAN RIGHTS NORMATIVE SYSTEM GOVERNING WOMEN'S RIGHTS

### 2.1 Introduction

*'Women's rights are human rights'*. – Beijing Platform for Action, 1995.

The question of women's rights is a currently one of the topical issues worldwide. The international community accepts that gender equality and women's empowerment are essential to poverty eradication, human development, and economic growth in Africa.<sup>56</sup> Thus, it is hardly surprising that the UN (together with the AU) has put much emphasis on women's rights through the adoption of treaties. The Convention on the Elimination of Discrimination against Women (CEDAW) is the main human rights instrument of international character which protects women's rights.<sup>57</sup> The Universal Declaration of Human Rights (UDHR),<sup>58</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>59</sup> are relevant insofar as they enshrine the principle of equality and non-discrimination. Regionally, the first document of the AU to cater for the rights of women is the African Charter.<sup>60</sup> However, the African Charter suffered criticism on the basis that it failed to provide adequate protection for women despite its promises to eliminate discrimination against women. Thus it was necessary to adopt a separate document that addresses women's experiences and inequalities. On 11<sup>th</sup> July 2003, the AU resolved to adopt the Women's Protocol to the African Charter.

This chapter evaluates the international and regional human rights normative system in women's perspective. It should be noted that Article 60 and 61 of the African Charter permit the evaluation of the international human rights documents as an interpretative authority. The positives and negatives or failings of the African Charter, and the Women's Protocol are considered. An attempt is also made to clarify the real meaning of Article 10(3).

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<sup>56</sup> See the United Nations Plans of Action on the Environment & Development (1992), on Human Rights (1993), on Population and Development in 1994 and on Social Development (1995).

<sup>57</sup> CEDAW was adopted in 1979, and entered into force in 1981.

<sup>58</sup> UDHR was adopted in 1948.

<sup>59</sup> ICESCR adopted by General Assembly Resolution 2200a (XXI) of 16 December 1966. See also International Covenant on Civil and Political Rights (ICCPR) (1966).

<sup>60</sup> The African Charter was adopted in Nairobi, Kenya, on 27 June 1981 at the 18<sup>th</sup> Assembly of Heads of State and Government of the OAU, and entered into force on 21 October 1986.

## 2.2 International law on women's rights at a global level

### 2.2.1 The Universal Declaration of Human Rights (UDHR)

The UDHR is the oldest 'treaty' on human rights adopted by the UN General Assembly. It is one of the international human rights instruments to uphold the principle of non-discrimination on the basis of sex. For instance, Article 2 states that everyone is entitled to benefit under the rights and freedoms stipulated without distinction of any kind, such as race, colour, sex ....<sup>61</sup> The UDHR guarantees equality before the law.<sup>62</sup> It also demonstrates that international community was not only concerned with the so-called first generation rights (civil and political rights). It makes a number of socio-economic promises like the right to a standard of living adequate for the health and well-being of humans (this includes availability of food, housing and medical care).<sup>63</sup> The right to education is also recognised in the UDHR.<sup>64</sup> Despite the fact that the UDHR is not binding on states, its provisions had much influence on international human rights law. In fact, these are underlying objectives of the MDGs.

### 2.2.2 Convention on the Elimination of Discrimination against Women (CEDAW)

The CEDAW<sup>65</sup> is a product of more than three decades of work by the UN Commission on the Status of Women, an organisation formed in 1948 to observe the situation of women and to promote women's rights.<sup>66</sup> CEDAW has been commended for bringing women's rights into focus. Its letter and spirit is founded in the goals of the UN - to reaffirm faith in fundamental human rights, in the dignity, and worth of the human person, and in the equal rights of men and women.<sup>67</sup>

The CEDAW accepts that 'extensive discrimination against women continues to exist', and this 'violates the principles of equality of rights and respect for human dignity'.<sup>68</sup> CEDAW defines discrimination as 'any distinction, exclusion or restriction made on the basis of sex...in the political, economic, social, cultural, civil or any other field'.<sup>69</sup> State

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<sup>61</sup> Art 1 reads with Art 2 of UDHR.

<sup>62</sup> Art 7 of UDHR.

<sup>63</sup> Art 25(1) of UDHR.

<sup>64</sup> Art 26(1) of the UDHR.

<sup>65</sup> The Republic of South Africa signed the CEDAW (and its Optional Protocol in March 2005) on 29 January 1993 and ratified it on 15 December 1995 without entering reservations.

<sup>66</sup> MM Munalula *Women, gender discrimination and law – Cases & Materials* (2005) 18.

<sup>67</sup> As above. See also the preamble of the Charter of the United Nations.

<sup>68</sup> CEDAW preamble.

<sup>69</sup> Art 1.

parties are further obliged to take 'all appropriate measures, including legislation, to ensure the full development and advancement of women'.<sup>70</sup> In this respect, Article 5 specifies that states shall modify their social and cultural patterns of conduct of men and women which reinforces the stereotype idea that either sex is inferior or superior to another.<sup>71</sup> CEDAW also takes rural women's situation by requiring state parties to take into account specific problems rural women face.<sup>72</sup> It is argued that CEDAW is a good agenda for action by national governments not only to promise but to realise women's rights.

### **2.2.3 International Covenant on Economic, Social and Cultural Rights (ICESCR)**

The ICESCR is the main document (with the ICCPR) adopted after UDHR to embody all ideals of the UDHR.<sup>73</sup> It is unnecessary to recite all the rights guaranteed in the covenant. But suffice to mention that it contains mostly socio-economic and cultural rights, ranging from the right to employment, education, health, family and cultures and languages. Article 2 obliges states to 'take steps' to the 'maximum of its available resources with a view to achieving progressively the full realization of the rights'.<sup>74</sup> State parties under the ICESCR agree to ensure 'the equal right of men and women to the enjoyment of all economic, social and cultural rights' stipulated in the Covenant. It should, however be remarked here that South Africa has not ratified the ICESCR. Hence, South Africa is not legally bound by the ICESCR. Nonetheless, South Africa is politically bound not to go against spirit of ICESCR.

### **2.2.4 Other global trends**

There have been a number of initiatives internationally with a particular focus on women's empowerment. The Beijing Platform for Action, (1995)<sup>75</sup> provides a vibrant and active agenda for women's empowerment. It understands that the empowerment of women and their effective participation on the basis of equality in all spheres of life are the essential ingredients for the achievement of equality, development and peace.<sup>76</sup> The International Conference on Population and Development (ICPD) (1994) is hailed by many as a turning point since it raised and promoted gender equality and women's health,

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<sup>70</sup> Art 3.

<sup>71</sup> Art 5(a).

<sup>72</sup> Art 14(1). See Art 7 (as to political and public life participation) & Art 10 (on equal access to education facilities).

<sup>73</sup> See the ICESCR preamble.

<sup>74</sup> F Vijoer n 34 above, 120-121.

<sup>75</sup> Fourth World Conference on Women, Beijing, (4-15 September 1995). Downloaded from [www.unesco.org/education/information/.../pdf/BEIJIN\\_E.PDF](http://www.unesco.org/education/information/.../pdf/BEIJIN_E.PDF) (Accessed 20 October 2011).

<sup>76</sup> As above, para 13.

including maternal mortality and education.<sup>77</sup> The UN World Summit (2005) accepted that MDG 3 (the promotion of gender equality and empowerment of women) cannot be achieved unless gender equality is fostered in education, non-agricultural employment and participation in decision-making.<sup>78</sup>

In 2005, the UN World Summit recognised the importance of achieving MDG3 through gender equality in education, non-agricultural employment and participation in decision making. Moreover, it stressed the promotion of women's right to own and inherit property; ensuring tenure of property and housing, and equal access to productive assets and resources, including land, credit and technology; ensuring universal access to reproductive health; and elimination all forms of discrimination and violence against women and girls.<sup>79</sup> On education, the Summit accepted the importance of formal and informal education in the achievement of poverty eradication and other development goals, particularly, the basic education and training of girls and women.<sup>80</sup> The Summit was convinced that progress for women is beneficial to all. These developments are laudable as the heads of state voluntarily and boldly give support to women's rights.

### **2.3 A critical reflection on the position of women under African Charter on Human and People's Rights (the Charter)**

The Charter is the main regional human rights instrument uniquely designed to reflect the values, traditions and development of Africa.<sup>81</sup> It aims to find a balance between international human rights norms and the so-called traditional values. The Charter is the first document of its kind to make provision for the protection of human's rights in Africa. It is, however, not without imperfections, for instance, it has been noted that there is a scant protection of women's rights. The general language of the Charter is masculine oriented. For instance, the use of words such as 'chairman' creates the impression that the women's interests were not taken into account during the drafting stages.<sup>82</sup> However, any notions that the rights and freedoms enshrined in the Charter are reserved only for men should be dismissed.<sup>83</sup> The Charter states clearly that every individual shall be entitled to enjoy the

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<sup>77</sup> African Development Forum, 'Action on Gender Equality, women empowerment & ending violence against women in Africa: Achieving gender equality and women's empowerment in Africa Progress Report' (2008). [http://www.uneca.org/adfvi/documents/ADFVI\\_progress\\_Report\\_ENG.pdf](http://www.uneca.org/adfvi/documents/ADFVI_progress_Report_ENG.pdf) (accessed 11 October 2011).

<sup>78</sup> As above.

<sup>79</sup> UN General Assembly Res. 60/1 World Summit Outcome (2005) para 58(a) & (b).

<sup>80</sup> As above, para 43.

<sup>81</sup> Munalula (n 66 above) 33.

<sup>82</sup> See e.g Arts 37,39,42,58 & 59.

<sup>83</sup> Viljoen n 34 above 269.

rights and freedoms without distinction.<sup>84</sup> Therefore, women whose rights are being abused by restrictive and out-dated cultural practices can invoke these provisions.

Protagonists of the Charter have proudly referred to it as a solution to African problems. In its preamble, it underscores the 'virtues of historical tradition and the values of African civilisation'.<sup>85</sup> In Article 29(1) it refers to the preservation of harmonious development of the family. It is also not clear what the Charter means by 'promotion and protection of traditional values recognised by the community'.<sup>86</sup> However, disturbing, is its silence in addressing the harmful problems that are inherent in these 'traditional values'.<sup>87</sup> Traditional values and social attitudes reinforce the view that women cannot do without men. Early marriages, female genital mutilation (FGM) and generally the inferior status accorded to women are some of the cases in point on the difficulties they face. Moreover, the Charter has been criticised for failing to recognise that human rights violation mostly occurs in private relations than in public realm.<sup>88</sup>

There are, however, many positive aspects about the Charter that relates to women and MDGs. Firstly, as it has been indicated above, - (regardless of the language and form of the Charter), the principle of equality is the cornerstone of the Charter. It proscribes discrimination against women, calls upon states to protect the rights of women and children as stipulated under international law.<sup>89</sup> Insofar as the MDGs are concerned, the Charter accepts that civil and political rights cannot be separated from economic, social and cultural rights, and broadly the right to development.<sup>90</sup> Moreover, a cursory reading of Article 15 indicates that the Charter envisages an environment where everyone has right to work. In this respect, the elimination of poverty (goal 1) cannot be achieved unless people, in particular women, have some kind of occupation or means of generating income. The Charter guarantees everyone the right to education.<sup>91</sup> Although it does not oblige states to provide bursaries to all poor women, it clearly bestows an obligation on states to take pro-active and co-ordinated measures to ensure that everyone is literate. This can mean, for instance, taking of affirmative action measures in favour of women.

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<sup>84</sup> Art 2 of the African Charter. For e.g Art 3 provides that *everyone* is equal before the law.

<sup>85</sup> African Charter, preamble.

<sup>86</sup> Art 17 of the African Charter.

<sup>87</sup> See n 55 above.

<sup>88</sup> J Oder '*Reclaiming women's social and economic rights in Africa: The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*,' (2004)13. Available at <http://www.communitylawcentre.org.za/Projects/Socio-Economic-Rights/esr-previous-editions/esrreviewsept2004.pdf>; (accessed 02 October 2011).

<sup>89</sup> Art 18(3) of the African Charter.

<sup>90</sup> African Charter, preamble.

<sup>91</sup> See Art 29.

Even though the Charter recognises the position of women through non-discrimination and equality clauses, the protection was, however, not sufficient. Hence, the need for the adoption of an instrument that would adequately protect the rights and freedoms of women.

## 2.4 An overview of the Protocol to the African Charter on the Rights of Women (Women's Protocol)

This section seeks to explore whether the Women's Protocol can provide answers to the women's challenges highlighted in this study thus far. The adoption of the Women's Protocol was celebrated by human rights activists from all quarters of society.<sup>92</sup> The Women's Protocol<sup>93</sup> is an instrument that clearly addresses women's experiences and hardships on the African continent.<sup>94</sup> Similarly to CEDAW, the Women's Protocol contains both civil and political and, socio-economic rights and cultural rights. However, it is important to note that unlike CEDAW, it defines discrimination without explicitly referring to gender paradigm 'men and women'. The Women's Protocol<sup>95</sup> defines 'discrimination against women' as

any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or exercise by women, regardless of their marital status, of human beings and fundamental freedoms in all spheres of life.

It consists of general provisions on gender equality and specific challenges which are peculiar to women. The Women's Protocol obligates state parties to take legislative, institutional and other measures to eradicate all forms of discrimination against women. In order to fight and defeat discrimination against women, states should, *inter alia*:<sup>96</sup>

(a) Include in their constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application; (b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women; (c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life; (d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist.

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<sup>92</sup> Banda,83.

<sup>93</sup> The researcher employs 'Women's Protocol' and 'the Protocol' interchangeable in this study.

<sup>94</sup> Munalula (n 73 above). The introductory note of the Draft Women's Protocol (*Drafting Process of the Draft Protocol on the Rights of Women in Africa (Item 8(e)) DOC/OS/(XXVII)/159b 1*) notes that 'To date, no African instrument relating to human rights proclaimed or stated in a precise way what are the fundamental rights of women in Africa. There is thus a vacuum in the African Charter as regard [sic] real taking care of women [sic] current preoccupations in Africa.'

<sup>95</sup> Art1(f). CEDAW says that enjoyment of rights shall be 'on a basis of equality of men and women.'

<sup>96</sup> See Art 2.

As pointed out earlier, discrimination against women is socially and mentally deep-rooted in patriarchal Africa. Therefore, it is the responsibility of the state parties to undertake measures not only through the enactment and the modification of laws, but also, to engage in public education and awareness building programmes with a view of eliminating discrimination against women.<sup>97</sup> This dissertation accepts that discrimination is the main source of women's challenges today. The following are some of the challenges that confront women on a daily basis, acute poverty; HIV infections; general lack of awareness and knowledge, - and limited involvement in public life. The Women's Protocol attempts to provide answers to these very issues.

The Women's Protocol guarantees to all women the right to health. It obliges states to take appropriate measures to provide adequate, affordable and accessible health services, including information, education and communication programmes to women particularly those in rural areas.<sup>98</sup> States are further enjoined to establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy.<sup>99</sup> The Women's Protocol also gives women a right to have equal access to housing and to acceptable living conditions in a healthy environment. In this respect states are enjoined to grant women 'adequate housing' notwithstanding their marital status.<sup>100</sup>

This research admits that it will be difficult to eradicate the challenges faced by women unless a vast number of women can receive basic and quality education. The Protocol obliges state parties to eliminate all forms of discrimination against women and guarantees equal opportunity and access in the sphere of education and training.<sup>101</sup> Moreover, it stresses the need to eliminate all stereotypes, if any, in textbooks, syllabuses and the media, that perpetuate such discrimination,<sup>102</sup> and to integrate gender sensitisation and human rights education at all levels of education curricula including teacher training.<sup>103</sup> It takes women's education more seriously than it was the case before by calling upon state parties to do the following specific actions, - promote literacy among women;<sup>104</sup> to promote education and training for women at levels and in all disciplines, particularly in the field of science and technology;<sup>105</sup> to promote girls enrolment and retention in schools and

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<sup>97</sup> Art 2(2).

<sup>98</sup> Art 14(2)(a).

<sup>99</sup> Art 14(2)(b).

<sup>100</sup> Art 16.

<sup>101</sup> Art 12(1)(a).

<sup>102</sup> Art 12(1)(b).

<sup>103</sup> Art 12(1)(e).

<sup>104</sup> Art 12(2)(a).

<sup>105</sup> Art 12(2)(b).



other training institutions and organisation of programmes for women who leave school prematurely.<sup>106</sup>

The Women's Protocol also aims to eradicate hunger which is a widespread problem in Africa. State parties have a duty to ensure that women have the right to have nutritious and adequate food. They shall provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food.<sup>107</sup> These stipulations are not in conflict with the broad objectives of the MDGs. To fight HIV and other diseases women and children need to have nutritious food, ways to generate food, ability to purchase, or receive support from safety-net programmes or from other people.<sup>108</sup> On governance and political affairs, the Protocol puts an obligation on state parties to take positive action to promote participative governance and equal participation of women in the political life of their countries.<sup>109</sup> Moreover, states should expedite and increase women's effective participation at all levels of decision-making.<sup>110</sup> All these issues are related to the Millennium Declaration and its MDGs, and should not be undermined.

Against this backdrop the Women's Protocol is the first distinctive and progressive document to deal adequately with women's challenges particularly those that affect their socio-economic status and political life. It has provided a fertile ground for women to build upon the significant achievement (which has been attained through the adoption of the Women's Protocol) by defending and holding accountable states that violate their rights. However, scant mention of rural women is discomfiting as their experiences varies from the urban women.

## 2.5 Other regional initiatives

On July 2004, the AU Heads of State and Government adopted the Solemn Declaration on Gender Equality in Africa (SDGEA).<sup>111</sup> The SDGEA supports and encourages states to respect the current normative international and regional system of human rights<sup>112</sup> which acknowledges the disproportionate disparities between women and men. States have made a pledge through the SDGEA to 'expand and promote the gender

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<sup>106</sup> Art 12(2)(c).

<sup>107</sup> Art15(a). The Protocol also covers rights such as economic and social welfare rights in detail (see Art 13).

<sup>108</sup> UNAIDS Policy Brief – 'HIV, Food Security & Nutrition' (2008).

<sup>109</sup> Art 9(1).

<sup>110</sup> Art 9(2).

<sup>111</sup> Solemn Declaration on Gender Equality in Africa (SDGEA) (2004), adopted at the AU Heads of State Summit in Addis Ababa in July 2004.

<sup>112</sup> These instruments being CEDAW (1979), UN Resolution 1325 on Women, the Dakar Platform for Action (1994), Peace and Security (2000), Beijing Platform for Action (2000), and the Constitutive Act of the AU (2001), the Protocol to the African Charter on the Rights of Women in Africa (2003). See also C Heyns & M Killander *Compendium of key human rights documents of the African Union* (2000) 173.

parity principle, and ensure active promotion and protection of all human rights for women and girls including the right to development by raising awareness by legislation where necessary.<sup>113</sup> The high incidence of HIV/AIDS among women and girls, poverty, harmful traditional practices, few women from politics and decision-making bodies and, illiteracy and limited access of girls to education was a serious concern to state parties.<sup>114</sup> Essentially, this Declaration is an important tool to promote gender equality and empowerment of women, and it shows that African states can own and drive forward the gender equality project.<sup>115</sup>

The promotion of gender equality is one of the principles recognised in the Constitutive Act of the AU.<sup>116</sup> Further, the AU's New Partnership for Africa's Development's (NEPAD) vision is the eradication of poverty. It notes that in Africa, around 340 million people, or half of the population live on less than a US \$1 per day. The mortality rate among children under the age of five is 140 per 1000.<sup>117</sup> Despite South Africa's booming economy in the region, the mortality rate is much high.<sup>118</sup> The Women, Gender and Development Directorate of the AU has established a strategic plan institutional arrangement to mainstream gender in the AU, its organs, the regional economic communities and its member states.<sup>119</sup> Although the AU's dynamism regarding women's rights gives one a feeling of optimism, nevertheless it is contended that there are some on-going concerns such as the lack of an appropriate state reporting mechanism, enforcement left to the African Commission to name but few.

## **2.6 Evaluation of Article 10(3) of the Protocol to the African Charter on the Rights of Women in Africa**

Although there is undoubtedly a dearth of literature on Article 10(3), this section will provide an attempt to understand the meaning underpinned in Article 10(3) provision. For a good grasp of Article 10(3) it is important to quote verbatim the main provision of the Article 10, it states that:

1. Women have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace.
2. States parties shall take all appropriate measures to ensure the increased participation of women:
  - (a) in programmes of education for peace and a culture of peace;

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<sup>113</sup> See paras 5 & 6 of the SDGEA.

<sup>114</sup> SDGEA preamble.

<sup>115</sup> Available at <http://www.africaunion.org/root/au/conferences/past/2006/October/WG/doc.htm> (accessed 10 October 2011).

<sup>116</sup> Constitutive Act of the African Union (2000/2001), see Art 4(I) thereof.

<sup>117</sup> The New Partnership for Africa's Development (NEPAD) Declaration (2001) paras 1, 4 & 6.

<sup>118</sup> Refer to chapter 1 for the figures.

<sup>119</sup> See n 77 above, 4.

- (b) in the structures and processes for conflict prevention, management and resolution at local, national, regional, continental and international levels;
- (c) .....
- (d) .....
- (e) in all aspects of planning, formulation and implementation of post-conflict reconstruction and rehabilitation.

(3) States parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular.

Article 10 strives to increase women's effective participation in peace building mechanisms that are presently in place. It also obliges states to involve women after the conflict in reconstruction and rehabilitation. The drafters of the Protocol appreciated that the most spending countries have problems which detrimentally affects women and poor people society disproportionately.<sup>120</sup> It is, nevertheless, hard to understand why the drafters of the Women's Protocol chose to include sub-article (3) under Article 10. This view is reinforced by the fact that the link between the reduction of military expenditure and the right to peace which as stated in Article 10(1) to (2) is ambiguous. Does the reduction of a military expenditure by itself lead to peace? Or is there a direct link between it and social development. In other words, can it end hunger and unequal treatment of women?.

The above are some of the difficulties one encounters when evaluating the content and the rationale of Article 10(3). It is submitted here that Article 10(3) should have formed part of Article 13 (economic and social welfare rights) with reference to Article 10. However, Article 10(3) is not a stand-alone provision. It must be considered within the umbrella of other provisions under the Protocol. For example, state parties can simply devote a certain amount of funds to education and training, health, and other socio-economic rights as these are recognised in the Protocol.

Article 10(3) may be linked to 'human security' which is generally concerned with eliminating insecurities that exists among women and peoples' lives. The insecurities which can be a danger to human survival are not limited to war or conflicts but can include, as this provision possibly envisages, uncertainty of diseases, and economic depressions.<sup>121</sup> Human security actually entails protection from these dangers. Further, states can empower their people to be able to cope should they be confronted with these dangers. Some view had referred to the notion of 'larger freedom' which includes human security, human development (which is broadly concerned with augmentation) and human rights. For example, a woman with AIDS and or with no income to fight poverty cannot be referred to free. This notion entails that men and women everywhere have the right to be

<sup>120</sup> Report of the Secretary-General on the Twenty-Second Ordinary Session of the OAU Labour and Social Affairs Commission.

<sup>121</sup> C Heyns & K Stefiszyn (eds) *Human Rights, Peace and Justice in Africa: A reader* (2006) 145.

free from want, to be from 'sentences of death' by extreme poverty and infectious diseases.<sup>122</sup>

As argued in subsequent chapters, there is a close relationship between socio-economic rights and state's budgetary allocation. In fact, states are obliged in their implementation of the Protocol to adopt 'necessary measures' and 'provide budgetary and other resources' for the full and effective implementation of the rights so stipulated.<sup>123</sup>

The underlying objective of Article 10(3) is completely aimed at improving socio-economic conditions in many parts of Africa and, more importantly, this should be geared towards women and girls' benefits. It will be tremendously hard to attain achievements in this regard unless states cut military expenditure and inject such resources in programmes that support women and public empowerment. It is worrying to note that there has not been any communication directly founded on Article 10(3) before the African Commission or before the domestic courts considering the peremptory language of the provision.

In line with Article 26, read together with Article 62 of the African Charter, the Women's Protocol obliges states to submit every two years a report on measures taken to realise the rights set forth in the Protocol. Many African states, including South Africa, are yet to submit these periodic reports as required instead they prefer to submit report on Article 62 of the African Charter and/ or in terms of CEDAW Committee rules.<sup>124</sup> Even though state's reports under the Charter invariably deal with women's rights, they do not sufficiently cover all rights as required.<sup>125</sup> The argument would weaken any claim that reporting under the Protocol is a merely superfluous exercise. Civil society organisations have a major role to play for the effective implementation of human rights in Africa. One way of doing this is through the submission of reports (shadow reports) to the African Commission.

## 2.7 Conclusion

The international human rights instruments discussed above paved way for women's emancipation globally. They indicate that the international community appreciates the need to counter problems faced by women through binding legal obligations. Despite the shortcomings of the African Charter to sufficiently articulate women's rights, the adoption and coming into effect of the Women's Protocol should be seen as a relief. It is a transformative and comprehensive document that sufficiently

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<sup>122</sup> n 121 above, 156.

<sup>123</sup> Art 26(2).

<sup>124</sup> n 34 above, 275.

<sup>125</sup> Guidelines for state reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2010).

responds to the real challenges confronting women. However, that should not be understood as an admission that there are no shortcomings at all. For instance, the Women's Protocol does not really improve its implementation mechanisms. The African Commission which monitors the Charter is also responsible for monitoring the Protocol using the same procedures despite its generally flawed performance in discharging its functions in this regard. Many women are not aware that an instrument such as the Women's Protocol exists. Therefore, this requires states together with human rights activists, women's organisations and lawyers in general to engage in awareness raising campaigns. Moreover, without necessarily undermining the weight attached to national constitutions, domestic courts should seek assistance from the Women's Protocol when the need arises. Finally, the interpretation of Article 10(3) provision should be sufficiently broad enough to encompass the content of socio-economic rights as found in South African constitution.

## CHAPTER THREE: MILLENNIUM DEVELOPMENT GOALS AND WOMEN IN SOUTH AFRICA

### 3.1 Introduction

The problems facing women globally and, in particular Sub-Saharan Africa currently can be ascribed to entrenched gender discrimination. A number of international conventions,<sup>126</sup> (including resolutions and declarations) have been adopted and ratified by states decades ago but it can be denied that there are fundamental challenges in achieving objectives envisaged by these conventions. The inequalities between women and men is the one of the problems preventing the realisation of the MDGs.<sup>127</sup> Even though South Africa has certainly tried to ameliorate women's needs through good policy documents and laws, a vast number of women still live in poverty, those who are able to attain education receive poor education, and are mostly affected by HIV/AIDS than men. Although there is no direct link between poverty and violence, studies also show that women living in poverty stricken communities are also likely to experience gender-based violence.<sup>128</sup>

The discussions in this chapter tackle budgetary issues in relation to gender priorities in South Africa. In view of the MDG commitments, the implications of gender-blind budgets shall be considered. It also notes the apparent misapprehension surrounding 'socio-economic rights jurisprudence's significance in this study, therefore relationship between MDGs and socio-economic rights will be discussed.

### 3.2 An overview of budget division in South Africa

Although available history records relatively show that military budget in South Africa was very high, (for instance, between the period 1975 to 1989 it grew from R 1 billion to R9.4 billion) perusal of the existing literature reveals that military budget in the post-apartheid government has declined by 28% in 1990s from 44% in the 1980s.<sup>129</sup> South

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<sup>126</sup> CEDAW; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, (adopted and opened for signature, ratification and accession by GA Res. 54/4, 6 October 1999); General Assembly Resolution Adopting the Declaration on the Elimination of All Forms of Discrimination against Women (7 November 1967 A/RES/2263 (XXII) (CEDAW); General Assembly Declarations on the Elimination of All Forms of Violence against Women, (20 December 1993) G.A Res. 48/104 (DEVAW), and ICESCR *inter alia*.

<sup>127</sup> n 24 above 1.

<sup>128</sup> N Callaghan et al, 'A triad of oppression: Violence, women and poverty (1997), available at <http://www.csvr.org.za/wits/articles/artgend.html> (accessed 28 October 2011).

<sup>129</sup> 'Military Budget in Sub-Saharan Africa' available at: <http://www.globalsecurity.org/military/world/rsa/budget.htm> (accessed 20 August 2011). This step prompted the former Chief General of the SANDF, George Meiring and other officials to question readiness of SA's defence.

Africa is the fifth major spending country on military after Angola, Algeria, Morocco and Nigeria.<sup>130</sup>

The total military expenditure (per cent of central government expenditure) in South Africa is estimated to be around 4.40 % in 2008.<sup>131</sup> In year 2000 South Africa spent close to 5.5%;<sup>132</sup> in 2002 it was 6%, this shows that there was an increase in budgetary spending,<sup>133</sup> in 2003 there was further budget the ministry of finance increased the budget by 1% to 7%,<sup>134</sup> in 2004 it declined by 1% to 6%,<sup>135</sup> in 2005 it decreased from 6% to 5.5%,<sup>136</sup> in 2006 it further decreased by 0.1% to 5.4%<sup>137</sup>, in 2007 it decline to 4.8%,<sup>138</sup> and finally, in 2008 and 2009 it showed a steady decline to 4.7% and 4.3% respectively.<sup>139</sup> These figures show that South Africa recognised the socio-economic challenges faced by South Africa people especially poverty among rural women and lack of education opportunities. Poverty; unemployment; poor education and crime prevalence are threatening the newly democratic South Africa.

South Africa spent 1.6% of Gross Domestic Product (GDP) on defence compared to 4.5% in 1989/90.<sup>140</sup> This dramatic decline is attributed to the readiness and compassion showed by defence department in reprioritising spending in favour of social development programmes.<sup>141</sup> Substantial amounts of money were devoted to poverty relief programmes, and investment in people through a significant reprioritisation of expenditures in favour of social development.<sup>142</sup> In view of the apartheid legacy, the government's main object was and, is still, also to improve the infrastructure. The benefits of the latter are as follows, provision of basic services; increasing investment; creating opportunities for private-public sector partnerships; modernisation of information technology,

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<sup>130</sup> See n 17 above.

<sup>131</sup> World Bank Indicators, <http://dataworldbank.org/indicator/MS.ML.XPND.GD.ZS> (accessed 14 April 2011).

<sup>132</sup> National budget (2000) available at [www.info.gov.za/speeches/2000/000223202p1001.html](http://www.info.gov.za/speeches/2000/000223202p1001.html) (accessed 24 September 2011).

<sup>133</sup> 'The military expenditure (% of central government expenditure) in South Africa'. Available at [www.trading-economics.com/south-africa/military-expenditure-percent-of-central-government-expenditure-wb-data](http://www.trading-economics.com/south-africa/military-expenditure-percent-of-central-government-expenditure-wb-data) (accessed 14 August 2011).

<sup>134</sup> National budget (2003) Available at [www.info.gov.za/speeches/2003/03022614201001.html](http://www.info.gov.za/speeches/2003/03022614201001.html) (accessed 24 September 2011).

<sup>135</sup> National budget (2004) Available at [www.info.gov.za/speeches/2004/04021815161001.htm](http://www.info.gov.za/speeches/2004/04021815161001.htm) (accessed 24 September 2011).

<sup>136</sup> National budget (2005). Available at [www.info.gov.za/speeches/2005/05022316151001.htm](http://www.info.gov.za/speeches/2005/05022316151001.htm) (accessed 24 September 2011).

<sup>137</sup> National budget (2006). Available at [www.info.gov.za/speeches/2006/060251550100.htm](http://www.info.gov.za/speeches/2006/060251550100.htm) (accessed 25 September 2011).

<sup>138</sup> National budget (2007). Available at [www.info.gov.za/speeches/2007/07022115261001.htm](http://www.info.gov.za/speeches/2007/07022115261001.htm) (accessed 25 September 2011).

<sup>139</sup> National budget (2008 & 2009). See [www.info.gov.za/speeches/2008/08022016151001.htm](http://www.info.gov.za/speeches/2008/08022016151001.htm) & [www.info.gov.za/speeches/2009/09021114561001.htm](http://www.info.gov.za/speeches/2009/09021114561001.htm) (accessed 25 September 2011).

<sup>140</sup> National budget (1997).

Downloaded from: [www.info.gov.za/view/DynamicAction?Pageid=528](http://www.info.gov.za/view/DynamicAction?Pageid=528) (accessed 04 September 2011).

<sup>141</sup> As above.

<sup>142</sup> n 127 above 1.

telecommunications and transport capacity so as to enhance efficiency and competitiveness, and creating potential for further technological innovation which in turn could enhance the delivery of services to people and increase participation in economic activities.<sup>143</sup>

South Africa tried to set up programmes geared towards poverty eradication and general women empowerment programmes. This ranges from job creation initiatives to social grants and the provision of bursaries to the indigent people especially women. The state described the problem of pervasive poverty stating that:

'the legacy of Apartheid is most stark when we consider the abject poverty which characterises the lives of a substantial portion of our population. It is well understood that growth and job creation are critical elements in redistributing income and reducing poverty. The quality and available of education opportunities are also key elements in the battle against poverty'.<sup>144</sup>

In response to the scourge of poverty, government allocated R300 million for community based poverty relief plans. A substantial amount of this money targeted women and rural communities in 1998.<sup>145</sup> The state acknowledged that the redistributive spending programmes (social security and welfare) are the primary investment strategies in alleviation of poverty.<sup>146</sup> Poverty grants are currently paid to over 5 million households.<sup>147</sup> Spending on social development or welfare was increased tremendously from R14 billion in 1995/96 to R19 billion in 1998/99.<sup>148</sup> On job creation, poverty relief and investment on infrastructure allocated R1,2 billion in 2000/01 and R1,5 billion in 2001/02, and intended to add R1,5 billion to the programme in 2002/03. These funds target poor people especially those living in rural areas.<sup>149</sup>

Education expenditure accounted for 21.3% of the government expenditure and 6.5% of GDP. These figures are considerably high when measured against the international standards. A 5.4% of GDP in industrialised countries and 3.9% in developing countries, at least it gives an indication that South Africa attaches high priority in the education of its people. There is a scant mention of women except under government

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<sup>143</sup> As above.

<sup>144</sup> As above.

<sup>145</sup> n 70 above. Former President Mbeki in 2003 stated that '...within government, we will continue to insist on implementation of the National Framework for Women's Empowerment and Gender Equality. Concretely, we will soon introduce a system through which gender representation targets and content of programmes become part of the core performance criteria of every government institution and manager.' - 'State of the nation address' (2003).

Available at [www.dfa.gov.za/docs/speeches/2003/mbek0214.htm](http://www.dfa.gov.za/docs/speeches/2003/mbek0214.htm) (accessed 12 October 2011).

<sup>146</sup> National budget (1998) 8-9.

Available at [http://www.info.gov.za/speeches/1998/98916\\_3659810986.htm](http://www.info.gov.za/speeches/1998/98916_3659810986.htm) (accessed 4 September 2011).

<sup>147</sup> As above.

<sup>148</sup> n 69 above.

<sup>149</sup> National budget (2000).

Available at <http://www.info.gov.za/speeches/2000/000223202p1001.htm> (accessed 24 September 2011)



public works programme which, in the main, targets women. Huge spending on public health has always been one of the priorities of the government, at least rhetorically.

On health matters, government of South Africa has spent over 3.3% of the GDP.<sup>150</sup> South Africa acknowledged the fact that this was below the level of public spending on health by developed countries (which stands at 5.6% of the GDP). However, it was above the average for developing countries which is merely 0.9%.<sup>151</sup> On HIV/AIDS scourge, South Africa spent R 75 million in 2000/01, R125 million 2001/02 and R300 million 2002/03. This trend is praiseworthy, although it is troubling to observe that South Africa has failed to devise an effective 'anti-corruption unit' to closely monitor the use of these funds. With regard to the latter, it pointed out, for instance:

'In addition, we are conscious that the benefits of government programmes cannot simply be measured by departmental expenditure records. Much depends on the quality of hospital management, the content of learning materials or *how effectively resources are used*. Our focus must remain more effective and efficient service delivery...'<sup>152</sup>

Insofar as the department of defence is concerned, there was no reduction in its budget instead the state allocated to it R 10 billion in 1998/99 which increased further to R 11 billion in 2000/01.<sup>153</sup> Disturbingly, R30 billion was further allocated in period 2000/01.<sup>154</sup> The justification for this increment was based on ageing military equipment. The decision was primarily founded on intensive analysis of the economic and fiscal impact of the procurements.<sup>155</sup> In some years, information data is not forthcoming on actual allocation to the military. However, there are some initiatives (as the MDG report and state policies and laws affirm) undertaken by government to improve women's conditions. For instance, in the period between 2007 to 2010, it is unclear how much was allocated to the defence ministry but in the 2011 budget year, the ministry was allocated R1.3 billion.<sup>156</sup> This increment is worrisome regardless of the reason(s) for it since it potentially undermines the work that has been done by South Africa.

The table below attempts to clarify the expenditure on the critical sectors examined above, however, in some few cases the accuracy, as opposed to validity thereof, raises a

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<sup>150</sup> National budget (1997).

Available at <http://www.info.gov.za/speeches/1997/000223318p2003.htm> (accessed 24 September 2011).

<sup>151</sup> As above.

<sup>152</sup> My emphasis.

<sup>153</sup> However, the 1999 budget speech one notes a decline by 1.8% a year between 1995 and 1998.

<sup>154</sup> National budget (1999).

Available at [http://www.info.gov.za/speeches/1999/99217\\_budget99\\_10158.htm](http://www.info.gov.za/speeches/1999/99217_budget99_10158.htm). (accessed 4 September 2011).

<sup>155</sup> As above.

<sup>156</sup> National budget (2011).

Sourced from [www.info.gov.za/speech/DynamicAction?pageid=4618&sid=16483&tid=28773](http://www.info.gov.za/speech/DynamicAction?pageid=4618&sid=16483&tid=28773) (accessed 27 March 2011).

lot of questions. The table shows that South Africa has channeled funds to the military especial during the early years after independence but after 2003 and afterwards one notes that there has been a reduction by 1 percent. The reason for this reduction is linked to the adoption of the Protocol in the same period where South Africa might have played a major role for its adoption.

<b>Year</b>	<b>Ministry of Education</b>	<b>Ministry of Health</b>	<b>Ministry of Social Development &amp; Welfare</b>	<b>Ministry of Defence</b>
1997	6.7%	3.3%	9.3%	1.6%
1998	22.3%	2.4%	9.4%	-
1999	-	11.0%	10.3%	-
2000	-	-	-	5.5%
2001	21.2%	-	11.2%	-
2002	23.3%	12%	42.0%	6%
2003	17.65	2.5%	-	7%
2004	-	4.8%	18.9%	6%
2005	-	-	7.1%	5.5%
2006	20.1%	-	-	5.4%
2007	19.8%	0.9%	37.0%	4.8%
2008	19.3%	15%	26.4%	4.7%
2009	-	-	11.2%	4.8%
2010	21%	15.3%	12.6%	4.9%
2011	29.8%	165	-	5%

### **3.3 Relationship between Millennium Development Goals (MDGs) and socio-economic rights**

It has been said that there is a connection between MDGs and socio-economic rights or broadly human rights. This study argues that the realisation of the MDGs is a step forward towards the achievement of human rights, in particular socio-economic rights. Having access to quality education, to land that generate food, to quality health services etcetera as required by MDGs and the constitution will restore the dignity of the individual.

The MDGs and human rights (socio-economic rights) should not be seen as different agendas, though there are some differences between the two.

The MDGs are not inconsistent with socio-economic rights, for instance, human rights requires that states should meet their minimum core obligations with regards to economic, social and cultural rights. Further, the international law regime endorses the principle of non-discrimination. Discrimination is a direct cause of women's current problems.<sup>157</sup> The urgent implementation of the international conventions such as ICESCR and CEDAW which have a bearing on the equality of human beings would indicate that states view the MDG commitments seriously. As pointed out in the introductory section of this chapter, the achievement of the MDGs requires one to address the root causes of poverty and lack of income among women, particularly rural women.

There are quite a number of similarities (and differences) between the MDGs and socio-economic rights. The ultimate objective and commitment that permeates both MDGs and socio-economic rights is to improve the quality of life and/or promote the wellbeing of humans.<sup>158</sup> A thorough reading of the eight listed MDGs would demonstrate that in actual fact MDGs and human rights are interdependent. They are mutually reinforcing agendas.<sup>159</sup> The MDGs are time-bound commitments whereas socio-economic rights create an obligation upon states to progressively realise them by deploying maximum resources towards their improvement.<sup>160</sup> The MDGs are quantifiable and focus on particular aspects of development. But the overall objective as stated in the Millennium Declaration is the 'eradicating human poverty and fighting inequality.'<sup>161</sup> Almost for each goal in the Millennium Declaration there are corresponding human rights obligations and norms. A slight and non-significant difference must, however, be noted, MDGs are political goals while socio-economic rights are said to carry national and international law weight – a legal obligation exists.

Despite the above discussion, the MDGs and human rights should not, however, be equated. Few (non-significant)<sup>162</sup> differences have been noted between the two frameworks. Firstly, human rights apply extensively - they deal with the human condition in

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<sup>157</sup> See South MDGs Reports (2005) & (2010).

<sup>158</sup> UN Human Rights, Office of the High Commissioner for Human Rights 'Claiming the Millennium Development Goals: A human rights approach (2008) 3. Downloaded from [www.ohchr.org/.../Claiming\\_MDGs\\_en.pdf](http://www.ohchr.org/.../Claiming_MDGs_en.pdf) (accessed 03 October 2011).

<sup>159</sup> UNDP 'Human Rights and the Millennium Development Goals: Making the link,' (2005) 11. Downloaded from [http://hurilink.org/Primer-HR-MDGs\\_pdf](http://hurilink.org/Primer-HR-MDGs_pdf) (accessed 02 October 2011).

<sup>160</sup> As above.

<sup>161</sup> The UN Millennium Declaration, UN Doc.A/RES/55/2 (2000); World Leaders Adopt 'United Nations Millennium Declaration' at Conclusion of Extraordinary Three-Day Summit, reprinted in, G.A.

<sup>162</sup> The researcher claims that the differences between MDGs and human rights should not blur the desired ultimate objective to improve human life though the modalities are certainly different hence 'non-significant' label.

the broadest sense. By contrast, the MDGs only focus on key aspects for achieving human development.<sup>163</sup> Application of human rights is not limited to the so-called developing countries - they apply to everyone in any country whereas, the MDGs mostly focus on developing countries. Human rights norms are binding. By contrast, the MDGs are merely set of political goals and pledges with no legal status. Lastly, but certainly not least, human rights are not time-bounded while MDGs have time limitation.

The achievement of one framework can potentially lead to the achievement of the other. Human rights approach to MDGs should be all-inclusive, in other words, it must be aligned to the existing MDGs process. Moreover, when dealing with the problem of poverty women as a vulnerable group should effectively participate in the development programmes that occur. States might be forced as it is required by law to mend their budgets to be women-orientated. This means that governments will have to adopt socially responsible and gender-responsive budgets.

### **3.4 A jurisprudential analysis of socio-economic rights in South Africa**

The 1996 Constitution of South Africa is progressive and transformative in nature, this is the reason it incorporates justiciable socio-economic rights. Section 26; 27; 28 and 29 guarantees the right to socio-economic rights to everyone. Since its establishment in 1994 the Constitutional Court (the Court) has been approached by various litigants on the question of socio-economic rights. This is unsurprising because the apartheid government only catered for the needs and interests of the minority white to the detriment of the majority in the country.

The theory of separation of powers has often been invoked by lawyers in South African courts questioning the appropriateness or suitability of the court to adjudicate on decisions made by the executive and the legislature. They ask if the court is the right institution to adjudicate the matter? Is the court not usurping the executive's mandate?<sup>164</sup> The theory of separation of powers is relevant when one asks herself whether the states can be compelled to allocate resources towards certain goals. For instance, allocate a certain amount of funds for women's empowerment programmes. In dealing with this conundrum the Court remarked as follows:

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<sup>163</sup> UNDP 'Human rights and the MDGs: Making the link' (2005) 13. Available at <http://hurilink.org/Primer-HR-MDGs-pdf> (accessed 13 October 2011).

<sup>164</sup> This question for instance arose in *Minister of Health and Others Treatment Action Campaign and Others* 2002 10 BCLR 1075 (CC).

The primary duty of courts is to the Constitution and the law, 'which they must apply impartially and without fear, favour or prejudice'.<sup>165</sup> The Constitution requires the state to 'respect, protect, promote, and fulfil the rights in the Bills of Rights'.<sup>166</sup> Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is intrusion mandated by the Constitution itself.<sup>167</sup>

The following brief discussion reflects on the landmark jurisprudence of the Constitutional Court where it adjudicated on socio-economic rights and the theory of separation of powers.<sup>168</sup>

In *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>169</sup> (*Grootboom case*), the Court for the first time dealt with the right of access to housing as espoused in the Constitution. Mrs Grootboom who has since passed away was among the extremely poor group of people who were living in deplorable conditions in an informal settlement called Wallecedene, Cape Town. The evidence presented before the court revealed that they had no water, sewage, refuse removal and less than 6% of shacks had sewerage.<sup>170</sup> In a bid to ameliorate their condition, they moved to a nearby unoccupied land which was privately owned and allocated for low-cost housing. Eviction proceedings were successfully instituted, that left Mrs Grootboom and the other respondents without shelter.

An application was launched before the Cape of Good Hope High Court (the High Court)<sup>171</sup> for an order directing state to provide them with basic shelter or housing until they got permanent accommodation.<sup>172</sup> The High Court gave minimal relief as it held that there was only a violation of the right of children to shelter under section 28<sup>173</sup> and not the right to adequate housing, and rejected forthright the claim under section 26(1) of the

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<sup>165</sup> Sec 165(2) of the Constitution.

<sup>166</sup> Sec 7(2) of the Constitution.

<sup>167</sup> TAC case para 99, 56.

<sup>168</sup> *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC); *Minister of Health & Others v Treatment Action Campaign & Others* 2002 10 BCLR 1075 (CC); *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development & Others* 2004 6 BCLR 569 (CC) and *Lindiwe Mazibuko & Others v City Johannesburg & Others* 2009 CCT 39/09 (CC).

<sup>169</sup> As above.

<sup>170</sup> SAHRC 7<sup>th</sup> *Report on Economic and Social Rights – Millennium Development Goals and the Progressive Realisation of Economic and Social Rights in South Africa* (2006-2009) 10.

<sup>171</sup> *Grootboom v Oostenberg Municipality and Others* 2000 3 BCLR 277 (C).

<sup>172</sup> *Grootboom case* (n 165 above).

<sup>173</sup> Sec 28(1)(c) provides 'Every child has the right to basic nutrition, shelter, basic health care services and social services.'

Constitution.<sup>174</sup> The government appealed to the Constitutional Court against the finding of the High Court, the Court *per* Jacob J adopting the 'reasonableness' approach, held that section 26 right was violated. The constitution imposes negative and positive obligations on the state. Section 7(2) obliges the state 'to respect, protect, promote and fulfil the rights in the Bills of Rights'. This suggests that the executive, the legislature and the judiciary are bound to protect, promoted and fulfil the rights in Constitution.

The Court found that the housing policy of the state was not reasonable. It stated that it 'must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available'.<sup>175</sup> The Court further held that a programme must of necessity be 'comprehensive one' in which all spheres of government can participate and consult with each other as envisaged by Chapter 3 of the Constitution.<sup>176</sup><sup>177</sup> The Court firmly stated that the programme must be 'coherent' and be 'capable' of achieving realisation of section 26 right.<sup>178</sup> The government's programme failed to meet the constitutional requirement of reasonableness.<sup>179</sup> The Court stated:

'The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation.'<sup>180</sup>

Moreover, the Court found that a programme should be balanced and flexible. This would imply that circumstances might require it to be reviewed continuously. The programme should, moreover, 'make appropriate provision for attention to housing crises and to short, medium and long term needs'.<sup>181</sup> A programme that excludes a significant segment of society cannot be said to be reasonable.<sup>182</sup> Those whose needs are the most urgent must not be ignored by the measures aimed at achieving realisation of the right.<sup>183</sup> It is important to note, however, that the Court disregarded government's statistical achievements in respect of its housing programme because the measures, objectively viewed, failed to respond to the needs of those in less fortunate situation.<sup>184</sup>

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<sup>174</sup> Sec 26(1) states that 'everyone has the right to have access to adequate housing. Sec 26 (2) in turn state that 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.'

<sup>175</sup> *Grootboom* case (n 165 above) para 39.

<sup>176</sup> *Grootboom* case (n 165 above) para 40.

<sup>177</sup> Chapter 3 of the Constitution contemplates co-operation between the three spheres of government, namely national, provincial and local government.

<sup>178</sup> *Grootboom* case (n 165 above) para 41.

<sup>179</sup> See n 39 above.

<sup>180</sup> *Grootboom* case (n 165 above) para 41.

<sup>181</sup> *Grootboom* case (n 165 above) para 41.

<sup>182</sup> As above.

<sup>183</sup> *Grootboom* case (n 165 above) para 44.

<sup>184</sup> As above.

Thus, the Court correctly found that the state failed to fulfil its constitutional obligations since its housing programme did not provide for those in desperate need. It is worth noting that the Court did not prescribe what exactly should be done by the state, and left that particular issue to the state's discretion. Even though lawyers appearing before the Court often invoke the theory of separation of powers, it does not arise because courts are enjoined to interpret the constitution. In its interpretation process, the Court may not tell government exactly what to do instead it can be find a policy or programme which is manifestly unconstitutional. However, the Court is too cautious not to trespass beyond its terrain.

The *Minister of Health and Others v Treatment Action Campaign and Others* case<sup>185</sup> (TAC case) relates to the right of access to adequate health care. The state in 2001 implemented a programme to deal with the problem of Mother-To-Child Transmission (MTCT) using Nevirapine.<sup>186</sup> The state's programme limited the availability of Nevirapine to two sites in each province. Government refused even though Nevirapine manufacturers offered to make Nevirapine available for free to government, for a five-year period.<sup>187</sup> There was, however, not restriction to doctors in the private profession to prescribe Nevirapine to their patients, doctors in the public profession were absolutely barred from prescribing Nevirapine. This suggested that pregnant mothers who did not have access to satellite clinics, and who could not afford private health care, were left to die because they could not afford ARVs.

The Court held that the government's programme constituted a breach of section 27(2) obligations reads with section 27(1) (a) of the Constitution. The Court explicitly declared that section 27(1) and (2) 'require the government to devise and implement within its available resources a comprehensive and coordinated program to realize progressively the rights of pregnant women and their new-born children to have access to health services to combat MTCT.'<sup>188</sup> The Court slammed the government's programme for its unreasonableness in the following words:<sup>189</sup>

The rigidity of government's approach when these proceedings commenced affected its policy as a whole. If, as we have held, it was not reasonable to restrict the use of nevirapine to the research and training sites, the policy as a whole will have to be reviewed. Hospitals and clinics that have testing and counselling facilities should be able to prescribe nevirapine where that is medically indicated. The training of counsellors ought now to include training for counselling on the use of nevirapine. As previously indicated, this is not a complex task and it should not be difficult to equip existing counsellors

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<sup>185</sup> TAC case (n 165 above).

<sup>186</sup> 'Nevirapine is a fast-acting and potent antiretroviral drug long since used worldwide in the treatment of HIV/AIDS and registered in South Africa since 1998.'

<sup>187</sup> S Khoza *Socio-Economic Rights in South Africa*, (2007) 32.

<sup>188</sup> TAC case para 137.

<sup>189</sup> TAC (n 165 above) para 137.

with the necessary additional knowledge. In addition, government will need to take reasonable measures to extend the testing and counselling facilities to hospitals and clinics throughout the public health sector beyond the test sites to facilitate and expedite the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.

The Court used the 'reasonableness' approach developed in *Grootboom* case in finding that the government's programme failed to meet the requirements of section 27(1) of the Constitution read together with section 27(2). In this case, one learns that the Court was prepared to take an assertive step and confront an unreasonable government's policy, this is in fact required by the Constitution. The Court, however, recognised some of the challenges besetting the state and all have budgetary implications. These challenges include access to education, land, housing, health care, food, water and social security. These are the socio-economic rights entrenched in the Constitution, and the state is obliged to take reasonable legislative and other measures within its available resources to achieve their progressive realisation respectively.

However, it is not clear whether the *Mazibuko and Others v City of Johannesburg and Others*<sup>190</sup> (*Mazibuko* case) case is a step backward to the Court's approach in dealing with socio-economic rights. The Court was called upon to interpret the right to have access to sufficient water. In short, the applicants wanted the monthly free water allocation to be increased from six kilolitres to 50 kilolitres. They contended that the court should determine a quantified amount of water as 'sufficient water' within the meaning of the section 27 and suggested that it be 50 litres per person per day. It was also argued that the standard prescribed in the National Water Standards regulation is a minimum standard and a court through its inherent powers can determine a higher amount. Moreover, they argued that 6 kilolitres of free water per month is unreasonable within the meaning of section 27.

The Court refused to prescribe a certain measurable amount that would constitute sufficient water in terms of section 27. The Court viewed the applicant's argument in this regard as identical to a minimum core argument. It held that section 27 actually requires the state to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within the available resources. The Court held that there is no right to claim sufficient water immediately. The Court pointed out:

Secondly, ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of [the] available budgets and to determine what targets are achievable in relation to social and economic rights.

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<sup>190</sup> *Mazibuko* case (n 165 above).



Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.<sup>191</sup>

The Court ruled in favour of the state holding that the City of Johannesburg's Free Basic Water Policy was not in conflict with section 27 of the Constitution as it fell within reasonableness bounds. This case shows reluctance by the courts to give a clear content to socio-economic rights. Despite the complexity of issues, the Court should have addressed the state's obligation to take concrete and meaningful steps towards the realisation of the right to water to all poor South Africans.

### **3.5 Conclusion**

This chapter attempted to demonstrate the trend on budgetary allocation that has taken place in South Africa. Further, the main aim was essential to discover whether there exists connection between the current challenges facing women and unnecessary military budget in South Africa. Presentation and interpretation of statistics obtained from different sources helped the researcher to draw conclusions. In researcher's view, it is commendable to note South Africa's policies and other progressive measures taken with a view to prioritise poverty alleviation, women's education, and the general health of the people. If South Africa will be able to achieve its MDG commitments, it certainly has a duty to reduce its military budget as required by Article 10(3) provision. South Africa should to continue to reduce military budget and channel significant amount of funds towards education, health, social security and public works initiatives. Because of pervasive corruption in South Africa, there is a need to establish an independent unit mandated to monitor the use of such funds. The preceding claim implies that South Africa should look closely on *how* allocated resources are used. This is a major challenge that few would try to gainsay. Furthermore, the close connection between the MDGs and socio-economic rights as highlighted in this chapter should be understood as assisting the realisation of either framework. Finally, the value of the jurisprudence was merely to demonstrate the court's approach towards socio-economic rights cases. Therefore, it is hoped that the NGOs, CSOs and other interested parties will challenge government's revenue or decisions which fail to respond adequately to women's and social problems.

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<sup>191</sup> *Mazibuko* case (n 165 above) para 61.

## CHAPTER FOUR: CONCLUSIONS AND RECOMMENDATIONS

### 4.1 Conclusion

It is of cardinal importance to recall that this research endeavoured to provide an answer to the following questions: Firstly, in view of the MDGs, what is the impact on women of state decisions which disregard women's interests, particularly in South Africa? Secondly, what is the link, if any, between substantial military expenditure and the MDGs? Lastly, to what degree can South African government be compelled to take positive action in line with its constitutional obligations to realise socio-economic rights?

As a prediction, it was presumed that (a) revenue allocation which fails to take women's challenges into account shall have negative impact on the achievement of the MDGs by 2015, (b) there is some connection between substantial military expenditure and the state's poor performance insofar as the MDG agenda is concerned, and (c) the South African government can be constitutionally forced to take positive action aimed at the realisation of socio-economic rights despite the theory of separation of powers. It is advisable to deal with few aspects which form part of this research before considering these issues.

The research has attempted to show that South Africa has done well to improve women's and society in general's conditions. However, as noted that there are still fundamental challenges that should be attended to immediately. Further, as shown in chapter one and three, the Constitution is not blind of the challenges faced by women in particular. In line with the Constitution, South Africa's laws and policies *prima facie* give one a feeling of optimism. More importantly, the Constitution is particularly premised on the values of equality, non-sexism and human dignity. This implies that the interpretation of the Bill of Rights must be informed by these values. Furthermore, these 'values' means that state's laws, policies and decisions must not have a discriminatory effect on women. The Constitutional Court repeatedly cites and underscores these principles in its judicial work.

The research has repeatedly named, *inter alia*, acute poverty, HIV/AIDS and illiteracy as the main challenges facing women in South Africa. Other issues such as diseases and HIV/AIDS, reduction of child mortality, maternal health, and environmental sustainability as mentioned in the Millennium Declaration are a consequent result of the main problems, viz poverty and illiteracy. It is very important for South Africa to tackle the root causes. The achievement of the MDGs is certainly dependent on the availability of resources and good acumen of those mandated to manage such resources towards the

MDG project. It has also been observed that South Africa is facing problems that were left by the past apartheid system. Despite this often cited 'apartheid legacy', the research argues, (though not in explicit language) that South Africa could have made immense achievement in its quest to improve the conditions of women.

This research has shown that South Africa has tried to divert resources towards the needs of the people. The major beneficiaries are the department of education, social development and welfare and health. This steadily happened after the attainment of the independence. Clearly as shown above, the main challenge for the post-apartheid South Africa was to improve the living conditions of its people, and to empower them. In this respect, women are seen as the main targeted group. However, there have been no concrete and plausible outcomes on the ground. Poverty, HIV/AIDS, and illiteracy disproportionately affect women in the main. Despite all this South Africa is listed as the fifth spending country on the military. One of the initial assumption of this research essentially suggested substantial military expenditure leads to state's poor performance with regards to the MDG agenda, it is difficult to claim with certainty that there is a direct link between the challenges that face women and military expenditure (excessive or not) or the poor performance in respect of the MDGs indicated above. It is, however, concluded that South Africa should put more energies on these challenges as envisaged by the Women's Protocol, and other international human rights instruments.

The importance of the socio-economic jurisprudence that has been discussed above must be emphasised. Even though government has shown to some extent will to improve women's conditions, these landmark cases have certain implications that no one can disregard. This view is based on the fact that the excessive budget allocation on defence shows ineptitude of the state. In other words, there can be no justification for such conduct before the court. The court should ask itself whether a reasonable person empowered to divide revenue would have channelled a substantial amount of resources to the defence ministry despite the patent problems that plague South African education and health system, for example, if the matter is justiciable, the Court would find that the government's decision was unlawful and unconstitutional. The socio-economic jurisprudence which South Africa prides itself of inevitably contributes enormously to the human rights jurisprudence. The *TAC* case can be used as a useful tool by activists and advocates fighting for the right to health (bearing in mind its broadness). It was clearly wrong for South Africa to enter into an arms deal fraud-tainted contract (scholarly known

as the Strategic Defence Package (SDP) acquisitions which cost the country about R70 billions despite being aware of the socio-economic challenges facing its people.<sup>192</sup>

The argument that courts are not well-suited to enforce socio-economic rights is based on misapprehension of the role of the court in a constitutional democracy and the ever evolving doctrine of separation of powers. The principle of separation of powers permits necessary intrusion into the domain of other branches of government. This does not contravene the doctrine of separation of powers but it is a response to the supremacy of the constitution.<sup>193</sup> However, the Constitutional Court will always be loath to develop a clear and precise standard of tackling the reasonableness of budgetary allocations.

Furthermore, it is suggested that education and training of women, though important, is not enough to ameliorate the subordinate status of women. Possessing education qualifications does not, for instance, lead result to equal participation of women with men on equal terms. There is a need for the elimination of gender discrimination in the labour market. This actually means that South Africa should adopt an integrated approach which includes training, education, public awareness campaigns and, this might involve revamping the existing social structures (viz, the legal system and property rights). Government has to create a space for genuine participation of women and other vulnerable groups. Participation implies having access to information so that one can be able to fully participate. In this way it is a process that is empowering women. Civic organisations should have an opinion on how resources are allocated by advocating for the MDG agenda that supports human rights. The Women's Protocol itself requires states to 'ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes'.<sup>194</sup>

## 4.2 Recommendations

In this part the research suggests some of the specific actions which South Africa can be utilise to adequately address women's challenges:

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<sup>192</sup> For more information on this see the following links, 'Arms deal case' - [http://www.ifaisa.org/current\\_affairs\\_arms\\_deal.html](http://www.ifaisa.org/current_affairs_arms_deal.html), 'Public Protector welcomes arms deal inquiry' - <http://blogs.sun.ac.za/news/2011/09/30/public-protector-welcomes-arms-deal-inquiry/> & 'The arms deal probe' - <http://mg.co.za/article/2010-10-15-arms-deal-probe-20002010> (accessed 21 October 2011).

<sup>193</sup> For a detailed analysis of the doctrine of separation of powers and majoritarian democracy, see C Mbhazira 'Enforcing the Economic, Social and Cultural Rights in the South African Constitution as justiciable individual rights: The role of judicial remedies' unpublished LLD thesis, University of Western Cape, 2006. Sourced from <http://www.communitylawcentre.org.za/library/lld-phd-theses-llm-theses-mini-theses-and-dissertations> (accessed 19 October 2011).

<sup>194</sup> Art 19(c).

1. South Africa should, in addition to the existing legal and policy framework, take practical and concrete measures aimed at ameliorating the situation of women. This could mean, for example, supporting gender equity in the workplace, setting up rural development projects which can be run by women etcetera. Substantive as opposed to formal equality is the goal. Further, because South Africa is a patriarchal society, it is important that it should encourage the men to respect women as human beings.

2. South Africa should use the GRB mechanism which has contributed a lot to the achievement of the MDGs.

3. CSOs can play a major role by advocating for women's rights, - this implies that CSOs shall engage in evidence-based research which, amongst others, explores the current causes of women's marginalisation. The aim is to understand the peculiarities of women's challenges in South Africa. Moreover, the CSOs should have a say in planning, policy formulation and in budgetary allocation and, the related matters. For example, CSOs jointly with women formations can lobby government not to fund the military for a certain period and instead channel such resources to the women's empowerment programmes in place as envisaged by Article 10(3). In this respect, it is strongly suggested that South Africa should create a favourable environment for the CSOs to freely do their advocacy work.

4. To avoid fragmentation, the women's issues must be mainstreamed into the overarching development agendas that South Africa has embarked upon. 'Mainstreaming' does not, however, absolve government from its obligation to provide a specific attention to women's challenges. A balance has to be found in this regard.

5. The African Commission, in line with its mandate (Article 45), should actively co-operate with other African and international institutions concerned with the promotion of human rights. It also can engage in awareness raising campaigns insofar as the Women's Protocol is concerned.

**WORD COUNT: 15 758**

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