

CHAPTER FOUR

SOCIO-ECONOMIC RIGHTS OF WOMEN IN NIGERIA AND SOUTH AFRICA

Poverty is the worst form of violence.

- Ghandi

- 4.1 *Introduction*
 - 4.2 *Socio-economic rights in international human rights law*
 - 4.3 *Socio-economic rights in Nigeria*
 - 4.4 *Socio-economic rights in South Africa*
 - 4.5 *A comparison of socio-economic rights of women in Nigeria and South Africa*
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4.1 INTRODUCTION

A comparative study of gender equality in Nigeria and South Africa will be incomplete without looking at socio-economic rights in the two countries, as this aspect impacts significantly on the position of women in any society.

The first part of this chapter starts with a discussion of socio-economic rights at the international level. The International Covenant on Economic, Social and Culture Rights (ICESCR) is discussed. The hierarchy of rights is discussed, in other words, the question of whether rights should be classified into 'first', 'second' and 'third generations' and whether the 'first generation rights' are more important than the 'second generation rights', as is sometimes argued. It is further inquired into whether Nigerian and South African legislation and policies are in line with ICESCR and other international human rights documents, and whether the reporting obligations under ICESCR have had any impact in the two countries.

The second part of this chapter discusses socio-economic rights in Nigeria. The third part discusses socio-economic rights in South Africa. The position in the two countries is compared in the last part.

4.2 SOCIO-ECONOMIC RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW

There has been much discussion¹ in recent years over which rights constitute the most important human rights. It has been argued² that political and civil liberties form the true bedrock of human rights, such as freedom of the press, speech and assembly, the right to vote and to petition the government; and entitlement to due process of law and other legal protections.³ These form what is sometimes called the “traditional” concept of human rights and are reflected in large part in the International Covenant on Civil and Political Rights (ICCPR). Others contend that a fundamental right to basic necessities for an adequate standard of living, including employment, nutrition, shelter, health care and education, are more important, particularly for the poor.⁴

4.2.1 Interdependence and indivisibility of socio-economic and civil and political rights

The Universal Declaration of Human Rights (UDHR)⁵ contains a range of human rights within one consolidated document. The General Assembly decided that all the rights embodied should be divided into two conventions: one on civil and political rights and

¹ See e.g. Eide (1995) 22; Liebenberg (1995) 361; De Vos (1996) 67; Scott & Macklem (1992) 44.

² Eide *op. cit.* 22; De Vos *op. cit.* 68.

³ De Vos *op. cit.* 68.

⁴ See *Development and Human Rights: The role of the World Bank 2*.

⁵ Adopted by United Nations General Assembly Resolution 217A(III) of 10 December 1948.

another on social, economic and cultural rights.⁶ Underlying this decision are several assumptions about the nature of the two sets of rights, which have led many commentators to see the two types of rights as conceptually different.⁷ These assumptions are based on the traditionally held views about the nature of rights. It is widely believed that economic and social rights are positive rights and therefore require government action⁸ Socio-economic rights are regarded as being different from the civil and political rights for the following reasons.

- their implementation is costly because they require the state to provide welfare to the individual;
- they are programmatic and therefore require time to be realised;
- they are also vague and therefore suffer from a high degree of imprecision;
- Courts would be unable to translate such abstract values and aspirations into enforceable orders in specific cases; and
- they involve complex polycentric (sic) and diffuse interest in collective goods.⁹

Civil and political rights are said to be negative in nature, placing negative obligations on the state not to interfere with the freedom and integrity of the individual. The implementation of civil and political rights is presumed to be free or at least inexpensive because they merely require the state to refrain from acting. They are absolute and immediately satisfiable, they are formulated with a high degree of precision and courts

⁶ In 1950 the General Assembly adopted a resolution (Res 421(V) of 4 December 1950) in which it emphasised the interdependence of all categories of human rights and called upon the United Nations Commission on Human Rights to adopt a single convention. The next year, the Western states are able to reverse the decision, asking the Commission to divide the rights contained in the UDHR into two separate international covenants. See General Assembly Resolution 543(VI) of 5 February 1952. See also Eide (1995) 21-22; Liebenberg (1995) 11 *SAJHR* 359 at 361-2.

⁷ See Eide *op. cit.* 25.

⁸ See *e.g.* Liebenberg *op. cit.* 368.

⁹ De Vos (1997) 13 *SAJHR* 67-107. See further Eide *op. cit.* at 22-4; Berenstein (1981) *Human Rights Law Journal* 258-60.

therefore find it relatively easy to establish because they involve discrete clashes of identifiable individual interests.¹⁰

Civil and political rights are also presumed to be potentially neutral as they merely protect individuals against undue state interference. In reality, however, civil and political rights can be as expensive as socio-economic rights, for example if the state has to build additional prisons in order to ensure that prisoners and other detainees are kept in conditions that are consistent with human dignity and have political implications.¹¹

Internationally all human rights are recognised as being interdependent and indivisible.¹² In *Minerva Mills v Union of India*,¹³ the Indian Supreme Court also endorse the view of indivisibility and interdependence of rights when it found that both the fundamental (civil) rights contained in Part III of the Indian Constitution and the Directive Principles of State Policy found in Part IV are based on human rights and that the later is in no way inferior to the former.

The distinction between civil and political rights and socio-economic rights is usually based on the nature of the interests they aim to protect. All rights are aimed at guaranteeing an individual the autonomy freely to pursue personal and political choices without interference from the state or other powerful parties. Socio-economic rights are mostly concerned with guaranteeing everyone an autonomous space within which the individual may pursue his or her social and economic well-being and with appropriate assistance from the state, live a life free from economic and social want. The different rights operate in support of each other and the realisation of one right might be dependent

¹⁰ See Scott and Macklem (1992) *University of Pennsylvania Law Review* 1 at 44-5.

¹¹ See e.g. S.35 (2)(e) 1996 Constitution Act 108 of 1995.

¹² Scott (1989) 27 *Osgoode Hall Law Journal* 769-878; See also Economic and Social Council of UN, Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights" C/CN.4/1987/s7 at 2 and 3. See also Vienna Declaration and Programme of Action.

¹³ *Minerva Mills v Union of India* 1980 SC 1789 at 111-12 (per Bhagwati CJ).

on the realisation of another. Starving people may find it difficult to exercise their freedom of speech, while a restriction on freedom of speech may make it difficult for individuals to enforce their right of access to housing. In *Tellis v Bombay Municipal Corporation* and *Kuppusaml v State of Mahorashtra*,¹⁴ where pavement dwellers are forcefully evicted without prior notice from their shacks on the main streets of Bombay in terms of the Bombay Corporation Act of 1888 Chief Justice Chandrachud emphasised the wide ambit of right to life and state that an equally important facet of the right to life is the right to livelihood because no person can live without a means of living, that is the means of livelihood.¹⁵ This case reinforces the interdependent and indivisibility of human rights.

However, this does not mean that there are absolutely no differences between the various rights. Economic and social rights require relatively greater state action for their realisation than civil and political rights. Socio-economic rights are generally more dependent for their full realisation on positive state action than are civil and political rights.¹⁶

4.2.2 Socio- economic rights protected internationally

As stated earlier, UDHR culminated in two covenants. One of these, ICESCR, deals with socio-economic rights. While Nigeria has ratified the ICESCR, South Africa has only signed the covenant. Nigeria has also reported to ECOSOC through the office of the Secretary-General of the UN.¹⁷ Both countries have also ratified a number of other UN instruments dealing with socio-economic rights.¹⁸

¹⁴ *Tellis v Bombay Municipal Corporation* AIR (1987) LRC 351.

¹⁵ *Ibid.* at 369 B-C.

¹⁶ Alston & Quinnt (1987) 9 *Human Rights Quarterly* 158 at 184.

¹⁷ Articles 16 and 17 ICESCR. See also the Initial Report of Nigeria on the Implementation of International Covenant on Economic, social and Cultural Rights E/1990/5/ add.31 of 23 February 1996. Available on the internet (www.unhcr.ch/tbs/dic.nsf/Maste) accessed on 5 August 1999.

¹⁸ See e.g. CRC and CEDAW.

The African Charter also provide for socio-economic rights.¹⁹ Nigeria and South Africa have both ratified the African Charter. Both countries have also reported to the African Commission on the implementation of the African Charter in their respective jurisdictions.²⁰

4.2.2.1 Right to housing

The right to adequate housing is recognised in a number of international human rights declarations and treaties.²¹ This right is also protected in several domestic Constitutions.²²

4.2.2.2 Right to health and food

The right to health care access to sufficient food, and water and social security is recognised internationally. The UDHR recognises the right to health care, access to

¹⁹ Articles 15, 16 and 17. Article 15 provides for the right to work under equitable and satisfactory conditions and to receive equal pay for equal work. Article 16 guarantees the right to physical and mental health, while Article 17 guarantess the right to education.

²⁰ See Chapter 3 above.

²¹ Universal Declaration of Human Rights (1948) Art 25; European Convention on Human Rights and Fundamental Freedoms (1950) Art 8(1); International Convention relating to the Status of Refugees (1951) Art 21, European Social Charter (1961) Art 61, 19(4) and Art 4 of Additional Protocol, International Covenant on Economic, Social and Cultural Rights (1966) Art 11, International Convention on the Elimination of All Forms of Racial Discrimination (1966) Art 5(e)(iii), international Convention on the Suppression and Punishment of the Crime of Apartheid (1973) Art 11(b) and (d), International Convention on the Elimination of All Forms of Discrimination Against Women (1979) Art 14(2)(h); Convention on the Rights of the Child (1989) Art 27(3).

²² See for example Belgium (1994) Art 23(3); Brazil (1988) Art 7(IV), Art 21(XX), Art 23(IX); Colombia (1991) Art 51; Dominican Republic (1966) Art 15(b), Art 17; Greece (1975) Art 21(4); India (1949) Art 39, Art 47; Mexico (1983) Art 4; Netherlands (1984) Art 2(2); Poland (1992) Art 79(5); Portugal (1982) Art 65; Russian Federation (1993) Art 39; Seychelles (1993) Art 34; Spain (1978) Art 47; Suriname (1978) Art 49; South Africa (1996) S. 26.

sufficient food and clean water and social security. This right is also recognised in other international human rights instruments.²³

4.2.2.3 Environmental rights

The right to an environment that is not harmful to well being is now recognised as a human rights. This is a relatively new right in international human rights protection although there are “a multitude of multilateral and bilateral treaties between states as well as declarations, programmes of action and resolutions adopted by inter-governmental organisations forming a solid body of international environmental law”.²⁴

The right to a healthy environment is included in the African Charter on Human and Peoples’ Rights²⁵ and in the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.²⁶ The right to environment can also be found in one form or another in the domestic Constitutions of countries like Spain, Portugal, Slovakia, Brazil, Germany, India, Namibia and South Africa.

4.3 SOCIO-ECONOMIC RIGHTS IN NIGERIA

²³ Art 25, See also ICESCR Art 9 (social security), Art 11 (sufficient food and clean water), Art 12 (health care), CERD (1966) Art 5(e)(I) (social security), Art 5(e)(iv) (health care); CEDAW Art 15(5)(e) and Art 11(2)(b) (social security), Art 12(2) (sufficient food and clean water), Art 14(2)(b) (health care) Convention on the Rights of the Child (1989) Art 24(c) (sufficient food and clean water) Art 26 and Art 27 (social security); European Social Charter (1961) Art 11 and Art 13 (health care) art 12 (social security) African Charter on Human and Peoples’ Rights (1981) Art 16 (health care) Art 18 (social security). See also Leary, (1994) *Health and Human Rights* 25-56.

²⁴ See Technical Committee to the Theme Committee 4. “Fundamental Rights (undated memorandum) S.17 at 117.

²⁵ Article 24.

²⁶ Article 11(1).

4.3.1 Introduction

Nigeria is one of the many countries in the world where socio-economic rights are protected as non-justiciable principles. Socio-economic rights are contained in Chapter II of the Constitution.²⁷ Chapter II of the Constitution is described as “Fundamental Objectives and Directive Principles of State Policy”. It has been suggested that the idea of separating fundamental objectives and directive principles of state policy from fundamental rights which are contained in Chapter IV of the Constitution and which are fully justiciable is probably borrowed from India.²⁸ Fundamental objectives are the “directive principles” lay down by the policies which are expected to be pursued in the efforts of the nation to realise the national ideals.²⁹

The Nigerian position reinforces the superiority of civil and political rights over socio-economic rights referred to in the introduction to this chapter. Civil and political rights are contained in Chapter IV of the Constitution as fundamental rights and they are fully justiciable. Chapter IV of the Nigerian Constitution has withstood numerous changes in governments but it has remained applicable even during periods of military dictatorships. It has been modified³⁰ by successive military administrations, and some parts have been suspended.³¹

²⁷ Constitution of the Federal Republic of Nigeria 1999.

²⁸ Akande (1982) 13.

²⁹ Report of the Constitution Drafting Committee, Vol 1 at V.

³⁰ See *e.g.* Detention of Persons Act, Cap 414 of LFN 1990 (formerly Decree 2 No 2) promulgated under the Buhari administration where the Inspector of Police can detain a person without trial for six months in the first instance and for a further period of six months ad infinitum. The Decree was enacted to suspend s32(5) of the Constitution of Nigeria, 1979 (Cap 62(fn), 1990) which states that an arrested person must be taken to Court within 24 hours or where there is no Court within a radius of 40 kilometres, such an arrested person must not be kept for a period of longer than 2 days. Decree No 4 of 1984 was also promulgated to contain the right to freedom of expression and the press. Under this Decree anybody that publishes any report that embarrasses the government is subject to a term of imprisonment for one year irrespective of where the report is true or false, as

The rationale for having fundamental objectives and directive principles is that successive governments have tended to be pre-occupied with power and its material perquisites with scant regard for political ideals as to how society can be organised and ruled to the best advantage of all.³² Nigeria is a multi-ethnic and heterogeneous country and that is why a federal option has been adopted. Disregard of the federal Constitution and flagrant violations of the fundamental guarantees in the 1960 and 1963 Constitutions resulted in the Civil War of 1967 – 1970.

In *Okogie and others v Attorney-General of Lagos State*,³³ it was held that the directive principles of state policy in Chapter II of the Constitution have to conform to and run subsidiary to the fundamental rights and that Chapter II is subject to legislative powers conferred on the state. State governments cannot therefore disregard the provisions on directive principles of state policy contained in chapter II of the Constitution.

4.3.2 Fundamental objectives

In Nigeria, there is no right or access to housing, education or health or even to social welfare and security. What obtain in Nigeria are ideals and objectives. All socio-economic rights are left to the government even access to these rights are not protected. In this connection, economic, social and educational objectives are discussed and health will also be mentioned.

long as the Government is embarrassed by the report. Two journalists are actually jailed for one year each under this Decree for publishing a report, which embarrasses the Buhari Government.

³¹ See e.g. Constitution Suspension and Modification Decree No 1 of 1984.

³² Akande (1982) *op. cit.* 14.

4.3.2.1 Economic objectives

The economic objectives of Nigeria are to be found in section 16 of the 1999 Constitution.³⁴ The control of the national economy is vested in the state and the economy is to be controlled in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice, and equality of status and opportunity. The right of every citizen to engage in any economic activities outside the major sectors of the economy is protected. Under Section 16 (2)(d) the state is enjoined to direct its policy towards ensuring that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment and sick benefits are provided for all citizens.

Under section 16, the state is not obliged to provide adequate shelter or food for any citizens. There is even no provision for progressive realisation of shelter and food. Provision of housing in Nigeria is purely a private affair and people build houses of their own choices subject only to the Town Councils Laws. Millions of Nigerians are left at the mercy of exploitative landlords who fix rents that are usually exorbitant. There is no federal legislation on rents, but some states have enacted Rent Control Edicts. The intervention of state governments with introduction of Rent Control Edicts³⁵ have not helped, since people are faced with the option of either paying the exploitative rent or being homeless. Most tenants pay rents over and above the rates stipulated in the Rent Control Edicts. State governments themselves rent houses from private owners and pay rates over and above those fixed in the Edicts and most people who are able to get few of the available government houses are charged rents which are above those fixed by the State Rent Control Edicts. Governments houses where available are priced out of the reach of the people and even the highest paid government employees cannot afford to buy any of the houses. Housing loans and mortgages are not readily available, and where

³³ *Okogie and others v Attorney General of Lagos State* (1981) 1 NCLR 218.

³⁴ This provision is in pari materia with s.16 of the Constitution of Nigeria 1979 (Cap 62 LFN 1990).

³⁵ See e.g. Lagos State Rent Control and Recovery of Residential Premises Edict 6 of 1997.

available, they are usually grossly inadequate to purchase even a very small family unit house.³⁶

The result of this is that many people are homeless (with hundreds sleeping under the bridges) and most people live in highly unsanitary environment. In cities like Lagos, you can find as many as ten people sleeping in a room.

Provision of suitable and adequate food is left to the people. With the prevalent high employment rate and a decline in the economy many people cannot afford to eat adequately. Most people produce their own food. Nigeria used to be an exporter of food, but with the discovery of crude oil, agriculture has been relegated to the background and most people have left the rural areas to look for non-existent jobs in the city.

The Land Use Act regulates access to land.³⁷ The Land Use Act vests ownership of land in Federal and State Government respectively and the highest interest an individual may have is “right of occupancy”. The purpose of his Act is to make land readily available to the state. However, the land tenure is fraught with many irregularities and many people hold land outside the land tenure. Access to land in Nigeria is determined by the ability to pay. Customary land tenure operates outside the urban areas. Under most customary laws in Nigeria, women do not own land. However, they have access to land for agricultural purposes.³⁸ Agricultural loans are not readily available to women.³⁹ There is now Federal Economic Advancement Programme and women now has access to agricultural loans. The Better Life for Rural Women and Family Support Programme (both programmes of two former first ladies) however enhances the status of rural women.

³⁶ For example the condition of Service of the Ogun State University does not include housing loan. This is what obtains in almost all companies and establishments in Nigeria.

³⁷ Cap 202 LFN 1990.

³⁸ See generally Elias (1971).

³⁹ See *Nezianya v Okagbue* (1963) 1 All NLR 352

In Nigeria, there is no access to unemployment, disability or old age benefits. Pensions are however paid only to people who have put in 10 years service or more in the public sector. Some private companies also pay out pensions to their employees. Nigeria practices a free market economy and economic survival is left to the individual's ability.

4.3.2.2 *Social objectives*

The social objectives are contained in Section 17 of the 1999 Constitution.⁴⁰ The Nigerian State's social order is founded on ideals of freedom, equality and justice.⁴¹ Equality of rights, obligations and opportunities of every citizen before the law is guaranteed and the exploitation of human or natural resources in any form whatsoever for reasons other than the good of the community is prohibited.⁴² The state is to direct its policy towards ensuring that all citizens without discrimination on any ground whatsoever have the opportunity for securing adequate means of livelihood as well as adequate opportunities to secure suitable employment.⁴³ The state is also to direct its policy to ensure that the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused.⁴⁴

Many of the provisions in the social objectives are incorporated in Chapter IV of the Constitution.⁴⁵ Housing and social security remain unattainable goals and ideals in Nigeria.

⁴⁰ *Op cit.*

⁴¹ S17 (1) 1999 Constitution of the Federal Republic of Nigeria.

⁴² S17(2)(d) 1999 Constitution of the Federal Republic of Nigeria.

⁴³ S17(3)(a) 1999 Constitution of the Federal Republic of Nigeria.

⁴⁴ See also the Labour Act Cap 198 LFN 1990, Workmen's Compensation Act Cap 470 LFN 1990.

⁴⁵ For example, the right to life, dignity and fair hearing.

4.3.2.3 *Educational objectives*

Section 18 (1) of the Constitution enjoins government to direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels, science and technology are to be promoted, government shall also strive to eradicate illiteracy and the government is to provide where practicable:

free, compulsory and universal primary education,
 free secondary education,
 free university education, and
 free adult literacy programme.

Primary education is free and compulsory in Nigeria and secondary education is subsidised.⁴⁶ Governments all over Nigeria has provided for free and universal primary education, which is also compulsory. It is only in government schools that primary education is free. However, most people interviewed prefer to send their children to fee-paying schools due to lack of confidence in public schools. Some people interviewed also stated that the standards of education in public schools have fallen and because of poor salaries most teachers are no longer committed to their work.

In Nigeria, the girl child is disadvantaged, due to the cultural practice of male child preference and the practice of early marriages, which is prevalent in the Northern part of the country. In these areas girls as young as 11 years are married off.⁴⁷ In primary education enrolment, there is disparity between the enrolment of boys and girls in schools in some parts of the country, while in other parts there are equal opportunities as evidenced by the Federal Office of Statistics (FOS) 1994 table:

⁴⁶ Akande (1982) *op. cit.* 18.

⁴⁷ See Chapter 8 below.

Percentage of primary school enrolment in 1994	Male	Female
Akwa Ibom State	94%	94%
Bauchi State	33%	28%
Benue State	75%	67%
Delta State	93%	92%
Kogi State	78%	74%
Ogun State	95%	94%

Of the six states listed above, three are in the Southern parts of the country and the remaining three are in the Northern parts. All the Southern states have high enrolment percentage for both boys and girls. The Southern states are Akwa Ibom, Delta and Ogun. In Akwa Ibom state, both boys and girls have equal enrolment rate (94%), while Delta and Ogun States have slightly lower rates for girls but still very high enrolment rates on the average.

The state with the lowest enrolment rate is Bauchi State, which is located in the heart of the Northern part of the country. Enrolment rate is very low for both boys and girls compared with the Southern states. These figures show that not only the girl child is disadvantaged, but that young boys are also disadvantaged. Parents in most Northern states are not taking advantage of the free, compulsory and universal primary education.

In order to enhance girl-child enrolment and promote their rights to education, a National Task Force on the Girl Child was established in 1993. Zonal and state Task Forces have also been set up for effective monitoring and implementation of the girl child education programme at the grass roots. The Task Force at both national and zonal levels have not

achieved much after more than six years in existence. Enrolment and retention of the girl-child in school is still very poor especially in the Northern States.

During the Second Republic,⁴⁸ some states operated free education at all levels up to university levels.⁴⁹ Books are given free at primary and secondary schools while bursaries are granted to students in tertiary institutions. The provision of free education in some states has been made possible by the inclusion of Education on the Concurrent Legislature List.⁵⁰

Although the girl-child is not one of the focus of this study, it is however pertinent to talk about the discrimination that the girl-child experiences when it comes to family deciding on whom amongst the children to send to school where resources are very limited.

In the family, the girl child plays a secondary role compared to her brother. She is looked upon as a prospective wife and mother, who will only be of benefit to another family (the one she will eventually marry into) and not her biological family. For this reason formal education is an area where the girl child is discriminated against in the family. When a family has to decide which of the children to send to school in cases where funds are limited, the boy child, no matter if he is younger to the girl child, is often chosen. The argument usually put forth is that the boy child would remain in the family, bearing the family name, thereby continuing the lineage. The girl child on the other hand, would get married and bear somebody else's name thereby making investments on her education a 'waste' to her biological family.⁵¹

⁴⁸ The period between 1 October 1979 and 30 December 1983.

⁴⁹ Lagos, Oyo, Ogun, Ondo and Bendel states. (Oyo State is now divided into two – Oyo and Osun, Ondo is also divided into two – Ondo and Ekiti and Bendel are also divided into two – Ondo Edo and Delta).

⁵⁰ See Second Schedule Part II, 1999 Constitution of the Federal Republic of Nigeria.

⁵¹ *Unequal rights op. cit.* 30.

In most countries, the higher the illiteracy rates the greater the number of illiterate girls and women.⁵² In Nigeria, literacy rate is estimated at 15 per cent for adult females and 45 per cent for adult males. Nigeria's literacy rate is currently estimated at 42%.⁵³ In a research conducted by Euler-Ajayi in 1989, it was found that fewer girls than boys go to school. The research revealed that female enrolments thin out as girls move up the education ladder.⁵⁴ The percentage of girls enrolled in school falls comfortably from 30 – 40 per cent in primary school to 20 - 30 per cent in secondary schools, to 10 – 15 per cent in tertiary institutions. This indicates a drop rate of about 50 per cent, meaning 50 per cent of the girls who are lucky to get into schools do not complete their education up to the tertiary level.⁵⁵

In a study of girls' education in Obubra local government area of Cross River State, it was found that an average of 35 per cent females as against 64 per cent males enrolled in post primary schools between 1979–1984. This is also reflected in the number of male/female teachers. Twelve per cent of the teachers are female while 88 per cent are male.⁵⁶ In Northern Nigeria, the statistics for female education is even worse.⁵⁷

In Nigeria, parents continue to withdraw their female children from schools for various reasons such as lack of finance, marriage and housework. This is to the detriment of the girl child in particular, and the nation at large, for to educate a woman is to educate the nation.⁵⁸

⁵² *Ibid.*

⁵³ See the Initial Report of Nigeria on the Implementation of the International Covenant on Economic, Social and Cultural Rights E/1990/5/Add.31 23 February 1996. Also available on (www.unhchr.ch/tbs/dic.nsf/Maste) accessed on 5 August 1999.

⁵⁴ *Sunday Times* (Nigeria) July 1994 14.

⁵⁵ *Ibid.*

⁵⁶ Braide (1987).

⁵⁷ Forum For African Women in Education Conference held in Lagos, Nigeria October 1998.

⁵⁸ *Unequal Rights op cit.* 39

4.4 SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA

4.4.1 Introduction

The South African Constitution contains a Bill of Rights in Chapter 2.⁵⁹ The Bill of Rights is the cornerstone of democracy in South Africa. The rights guaranteed in the Bill of Rights range from civil and political rights (first generation), social economic and cultural rights (second generation) to environmental rights (third generation). Some of the rights are fully protected, while only access is protected in respect of other.⁶⁰ The Bill of Rights makes no distinction between the first generation, second generation and third generation of rights, in that the various forms of rights are protected together in one chapter. All the rights protected are enshrined together in one chapter, thereby affirming the interdependence, interrelatedness and indivisibility of all human rights.

South Africa Constitution is one of the few constitutions in the world where socio-economic rights are justiciable in one document, with civil and political rights. In most countries civil and political rights are protected as fully justiciable rights, while socio-economic rights are protected as fundamental objectives and Directive Principles of State Policy, as in Nigeria.⁶¹ These directive principles of state policy are usually not justiciable, reinforcing the inferiority of socio-economic rights to civil and political rights, thus suggesting a hierarchy of rights.

A discussion on socio-economic rights in South Africa would not be complete without discussing poverty and its impact on women. Some of the poorest households are those in rural areas headed by women – the average monthly income per head in female headed

⁵⁹ S. 7(1) of Act 108 of 1996.

⁶⁰ See *e.g.* S. 26(2) where the State is enjoined to take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right.

⁶¹ See *e.g.* Chapter II of the 1999 Constitution of the Federal Republic of Nigeria; Part IV Indian Constitution.

households was R243 compared to R468 for all households.⁶² The unemployment rate amongst African women is 50.2%, compared to 33.6% amongst African men.⁶³ This disparity in the unemployment rates between men and women is the same amongst all race groups.⁶⁴

South Africa is characterised by grave poverty and an extremely unequal distribution of income and wealth between blacks and whites. The richest ten percent of South Africans accounts for 51 percent of the national income, whereas less than four percent of the national income goes to the poorest 40 percent.⁶⁵ The distribution of wealth is even more distorted: five per cent of the population lay claim to almost 90 percent of all assets. In the rural areas of the former homelands, two thirds of the blacks live below the official poverty line.⁶⁶ Whites earn ten times as much as blacks on average, and they live an average ten year longer. The infant mortality rate among whites is ten (in 1,000), as compared to 100 (in 1,000) for blacks.⁶⁷

South Africa is one of the most unequal societies in the world. Moreover, its inequalities are based to a unique extent on race. Despite being a middle-income country, the key indicators of poverty for the African population are equal to or worse than those for much poorer countries elsewhere in Africa.⁶⁸ The poorest 40% of households in South Africa (equivalent to 53 per cent of the population) account for less than 10 percent of total consumption, while the richest 10 per cent (equivalent to 5,8 per cent of the population), accounts for over 40 percent of consumption.⁶⁹ South Africa's Gini co-efficient⁷⁰ is much worse than those of most countries with a similar per Capita Gross National Product, and

⁶² The First South African CEDAW Country Report (1998); See generally Budlender (1998).

⁶³ The first South African Report to CEDAW (1998) *op. cit.*

⁶⁴ Budlender *op cit.* The First South African CEDAW Country Report 1998 *op. cit.*

⁶⁵ Human Rights Watch (1995) 67.

⁶⁶ *Ibid.*

⁶⁷ Human Rights Watch (1995) *op. cit.* 80.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ This is used to measure inequality within a country.

about the same as the worst, Brazil. A Gini co-efficient of 0 signifies absolute equality, and 1 signifies absolute concentration of wealth. South Africa's Gini co-efficient is 0.61.⁷¹

Greatest among the effects of the apartheid system was the impoverishment of large sections of the population. Alleviation of poverty has been described as the most urgent problem facing South Africa's government.⁷² Poverty is concentrated amongst the African population. 95 percent of those in the poorest 40 percent of the population are African and 65 percent of Africans are poor, by the same measure.⁷³ Research published by the Centre for Social and Development Studies at the University of Natal found that seventeen million people are living below the minimum subsistence level in 1992.⁷⁴ In 1993, it was estimated by the Department of National Health and Population Development that 68 percent of Africans living in rural areas and 32 percent in urban areas had an income below the official government poverty line of (R1, 200 per family a month (about US\$200)).⁷⁵

The economics disparities between races, started by the colonial regime, are sharply accentuated by the policies of apartheid implemented by the National Party government elected in 1948. Black South Africans are forcibly removed from "white" areas and compelled to live in substandard housing in the townships or if they are African, in the already overcrowded "tribal reserves" established in colonial times, which are now renamed "bantustans" or "homelands" and granted nominal "independent" or "self

⁷¹ GNP per Capita is US\$2,670. See: The World bank, Key Indicators of Poverty in South Africa: an Analysis prepared for the Office of the Reconstruction and Development Programme by the World bank, based on the South Africa living standards Survey, Co-ordinated by the Southern Africa Labour and development Research Unit at the University of Cape Town. (Office of the President, Pretoria, 1995, 5.

⁷² See Wilson & Ramphela (1989) 68.

⁷³ *The World Bank, Key Indicators of Poverty in South Africa* (1995) 13.

⁷⁴ Human Rights Watch *op. cit.* 92.

⁷⁵ *Ibid.*

governing” status.⁷⁶ Blacks are excluded from opportunities for advancement by job reservation and legal restrictions on economic activity for “non-whites”. Pass laws prevented Africans from working, travelling or living outside certain areas without official permission.⁷⁷

The legislated inequalities of the apartheid system applied also to gender. Women are brought under direct state control after 1948 to a far greater extent than had previously been the case.⁷⁸ Women of all races are legally inferior to men and African women are especially disadvantaged. It can thus be said that African women suffered triple disadvantages under the apartheid system. Firstly, because they are black, secondly because they are women and thirdly, because they are black women. This is so because apart from the pain inflicted by the apartheid system, black women also have to contend with the customary laws, which are generally anti-women.

Women are disproportionately represented both amongst the rural population and (in part as a consequence) amongst the poor. The population profile of the former homelands was heavily weighted towards women and children. The majority of working-age men left the area to look for work in the urban areas, either permanently or as migrant labourers, returning home only occasionally.⁷⁹ Until the abolition of the “influx control” laws, which controlled population movement, in the mid-1980s women are unable to leave to seek work in the cities. If a woman’s husband died or ceased to send money home, total destitution could result.⁸⁰

⁷⁶ By way of the Groups Area Act 41 of 1950.

⁷⁷ Population Registration Act 30 of 1950.

⁷⁸ See generally Walker (1991).

⁷⁹ About 54.99 per cent of the adult population of South Africa is female and 45.43 percent of the total population is under eighteen years of age. In the former homelands, the gender and age imbalance is even more marked – *The World bank, Key Indicators of Poverty op. cit.* 11.

⁸⁰ Human Rights Watch *op. cit.* 16

Although the state's control of the labour flow and regulation of residential areas by race is over, the legacy of such apartheid policies is still very much around. Nearly 70 percent of the poor (defined as the poorest 40 percent of the population, with an income of R301 (US \$45 per month per adult equivalent) are resident in the former homelands: in all the former homelands except KaNgwane the poor form over half of the populations and of in the former Transkei 92 percent of the population is poor.⁸¹ Remittances home from migrant workers and old age pensioners are the only source of income for many families in those areas.

Women do the bulk of subsistence farming as in most African countries. Their access to land under the communal tribal land tenure systems is only through their husbands or male relatives. Traditional leaders or chiefs, who decide land allocations, are almost exclusively men, and men are regarded as the head of the households for land tenure purposes.⁸² A large number of rural households, both in the homelands and the commercial farming areas, in fact have no access to land other than a plot or a house. Of the nearly 2.5 million poor rural households (representing roughly twelve million poor people) more than two million have no access to piped water, modern sanitation or electricity, and nearly 1.6 million poor rural households (roughly ten million people) rely on wood as the main source of energy for cooking.⁸³ Fetching water and collecting wood are overwhelmingly regarded as female tasks, in the most majority of poor rural households women have to spend more than four hours a day collecting water and firewood.⁸⁴

The migrant labour system also has a negative impact on women in the cities. Migrant workers still stay mostly in supposedly single sex hostels run by the state in private companies. As apartheid controls have broken down, women have moved into the hostels where their partners are living due to housing shortages. As a result, they are

⁸¹ *World Bank Key Indicators of Poverty op. cit.* 12.

⁸² Marital Power has since been abolished. See Law of Evidence Amendment Act 45 of 1988.

⁸³ Walker *op. cit.*

⁸⁴ *World Bank Report (1995) op. cit.* 20; See also Walker *op. cit.* In August 2000 a cholera epidemic has been ravaging some parts of KwaZulu Natal Province due to lack of portable drinking water.

dependent on the men with whom they are staying. Conditions in these hostels are appalling, but the consequences of being thrown out are nonetheless sufficiently serious to result in tolerance of abuse.

According to the 1991 census, women form 36 per cent of the total work force in South Africa.⁸⁵ When women have paid employment, they are concentrated in lower paying service-sector jobs, including domestic service (where they form 89 per cent of those employed) in other sectors they are concentrated in secretarial and other non-managerial positions.⁸⁶

Unemployment is very high amongst women. Average unemployment rates is defined as “those who are not working but would like to work and are either actively seeking work or have given up looking” are 35 per cent for women and 25 per cent for men. Forty-eight per cent of working age women are in poor households, compared to 42 per cent of working age men.⁸⁷

4.4.2 Socio-economic rights protected under the South African Constitution

The Constitution guarantees a number of socio-economic rights. The following socio-economic rights are protected – right to access to adequate housing, education, the right to have access to health care services, sufficient food, water and social security. The right of the child, and also the socio-economic rights of everyone detained including every sentenced prisoner are also guaranteed under the Constitution. The implication of this is that while it is only the rights of access that are provided for adults, children and detained persons have fully justiciable rights.

⁸⁵ South African Institute of Race Relations Survey 457.

⁸⁶ *Ibid.* at 457. The position of domestic workers was Improved by the 1993 extension of the Basic Conditions of Employment Act 75 of 1997 to domestic worker.

⁸⁷ World Bank Report *op. cit.* 15, 16.

4.4.2.1 Right of access to housing

Section 26 of the Constitution guarantees to everyone the right of access to adequate housing. The section provides as follows:

- Everyone has the right to have access to adequate housing.
- The state must take reasonable legislative and other measure within its available resources to achieve the progressive realisation of this right.
- No one may be evicted from their home, or have their home demolished, without an order of Court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

The first thing to note is that what is protected under this right is “access to adequate housing”. This section does not place an obligation on the government to provide housing to everyone. It has been suggested that two categories of rights exist in the Bill of Rights. The first category is “those with a fairly standard list of internal qualifications and the second category are those without these qualifications”.⁸⁸ The first category are described as “internally qualified rights” and the second category are those without qualifications. These are called “priority rights”.⁸⁹

The internal qualifications to socio-economic rights in the South Africa Constitution are similar in formulation to qualifications attached to economic and social rights in ICESCR.⁹⁰ The state is only required to take reasonable legislative and other measures within its “available resources” to achieve progressive realisation of this right.

⁸⁸ Heyns & Brand (1999) 1 *Economic and Social Rights Series*

⁸⁹ *Ibid.*

⁹⁰ See article 2(1) ICESCR.

Section 26(3), which prohibits evictions and demolitions without an order of Court, has been described as creating priority obligations on the state.⁹¹ In *Despatch Municipality v. Sunridge Estate and Development Corporations (Pty) Ltd*,⁹² the High Court held that sections 3B of the Prevention of Illegal Squatting Act,⁹³ which permitted the summary demolitions of unauthorised buildings or structures, without a Court order, was in conflict with section 26(3) and accordingly declared invalid.

The right of women to equal access to housing has been enhanced. The South African Human Rights Commission assisted a woman working with the Western Cape Education Department to obtain housing subsidy. The woman, Ms Karen George, applied for a housing subsidy in 1994. Her request was turned down on the grounds that she was married and her husband was not “medically unfit”. Ms. George took the matter to the Industrial Court and won the case on the grounds of unfair labour practice. The department appealed, lost and further appealed to the Appellate Division.⁹⁴

The South African Human Rights Commission was approached with the case, and the Commission affirmed that the clause in the Public Staff Code was a violation of the equality clause in terms of gender and marital status. Following months of negotiation, the dispute was settled out of Court. The offending clause in the Staff Code has subsequently been amended.⁹⁵

The right of access to housing was tested in the case of *Grootboom v Oostenberg Municipality and Others*.⁹⁶ In this case, a group of applicants comprising 390 adults and

⁹¹ Heyns and Brand (1999) 1 *Economic and Social Sciences Series*.

⁹² *Despatch Municipality v Sunridge Estate and Development Corporations (Pty) Ltd* 1997 (8) BCLR 1023

⁹³ 52 of 1951.

⁹⁴ Paper presented by the SAHRC at the National Conference on Women organised by NIPILAR (National Institute for Public Interest Law and Research) 9-10 December 1997.

⁹⁵ *Ibid.*

⁹⁶ *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C).

510 children are squatters who, at one point, had moved from squatter settlements in the Wallacedene area of the Western Cape to what they considered to be vacant land known as “New Rust”.⁹⁷ During December 1998 an application was brought in the Kuilsriver Magistrate’s Court for the removal of the applicant from “New Rust” in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act.⁹⁸ On 18 May eviction from New Rust took place. The applicants sought an order directing first respondent, the local authority, alternatively one or more of the other respondents, to provide adequate basic temporary shelter or housing for them and their children in premises or on land owned or leased by any of the respondents, pending their obtaining permanent accommodation and also for an order compelling the first respondent or any one or more of the other respondents, to provide adequate and sufficient basic nutrition, shelter, health care services and social services to all of applicants’ children.

Applicants relied upon sections 26 and 28 of the Constitution to justify their submission that respondents had a duty to provide them and their children with basic shelter. Applicants contended that the right to adequate housing included the right to basic shelter.⁹⁹

The court rejected an argument that the right of access to adequate housing under section 26 of the Constitution included a minimum core entitlement to shelter in terms of which the state was obliged to provide some form of shelter pending implementation of the program to provide adequate housing.¹⁰⁰ The court held that the application insofar as it relates to housing or adequate housing must fail insofar as it is based on section 26 of the Constitution.¹⁰¹

⁹⁷ *Ibid.* para 280 B-C.

⁹⁸ Act 19 of 1998.

⁹⁹ See Scott & Alston (2000) 16 *SAJHR* 206.

¹⁰⁰ *Grootboom v Oostenberg Municipality supra* para 285A-B.

¹⁰¹ *Grootboom v Oostenberg Municipality and Others supra* at 293.

The second part of the judgment addressed the claim of the children for shelter in terms of section 28(1)(c) of the Constitution. The court reasoned that the parents bore the primary obligation to provide shelter for their children, but that section 28(1)(c) imposed an obligation on the state to provide that shelter if parents could not. The court therefore held that in terms of section 28 of the Constitution that:

- (a) the applicant children are entitled to be provided with shelter by the appropriate organ or department of state;
- (b) the applicant parents are entitled to be accommodated with their children in the foregoing shelter, and
- (c) the appropriate organ or department of state is obliged to provide the applicant children; and their accompanying parents, with such shelter until such time as the parents are able to shelter their own children.

The respondents appealed against the above decision.¹⁰² They contended that they have adopted legislative and other measures concerning housing. The appellants submitted that section 26 did not require the provision of relief to families in crisis and that in fact, provision for people on desperate need would detract significantly from any integrated housing development.

The Constitutional Court held that the issue whether socio-economic rights are justiciable at all in South Africa was put beyond question by the text of the Constitution as construed in the judgment *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*.¹⁰³ The question of how socio-economic rights were to be enforced was, however, a difficult issue which had to be carefully explored on a case-by-case basis considering the terms and context of the

¹⁰² *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

¹⁰³ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC).

relevant constitutional provision and its application to the circumstances of the case.¹⁰⁴ The court held further that the state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. The interconnectedness of the rights and the Constitution as a whole had to be taken into account in interpreting the socio-economic rights and, in particular, in determining whether the state had met its obligations in terms of them.¹⁰⁵

The Constitutional Court held further that the real question in terms of the Constitution was whether the measures taken by the state to realise the rights afforded by section 26 was reasonable.¹⁰⁶ The court further held that section 26 as a whole placed, at the very least, a negative obligation upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing. The manner in which the eviction in the present circumstances had been carried out had resulted in a breach of this obligation.¹⁰⁷ The courts stated further that section 26(2) made it clear that the obligation imposed upon the state was not an absolute or unqualified one. The extent of the state's obligation was defined by three key elements which had to be considered separately:¹⁰⁸

- (a) the obligation to take reasonable legislative and other measures;
- (b) to achieve the progressive realisation of the rights; and
- (c) within available resources.

On section 28 of the Constitution dealing with children's right, the Constitutional Court stated that section 28 as a whole ensured that children are properly cared for by their parents or families and that they receive appropriate alternative care in the absence of family or parental care as well as encapsulated the conception of the scope of care that children are to receive in society. Through legislation and the common law; the

¹⁰⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 60A/B-61A and 61 C/D-E.

¹⁰⁵ *Ibid.* para 62D-E.

¹⁰⁶ *Ibid.* para 66A-B and 66B/C-C/D.

¹⁰⁷ *Ibid.* para 66G/H and 84I-85A.

¹⁰⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 67H-I.

provision at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

This provision was interpreted in the case of *B & Ors v Minister of Correctional Services and others*.¹¹⁷ In this case, HIV positive prisoners claimed that they had a right to receive certain anti-retro viral medications at state expense. Such medications are provided to non-paying patients at provincial hospitals outside prison only under very limited circumstances. The Court ordered the Department of Correctional Services to provide the necessary anti-viral treatment as the department was unable to prove that it did not have the necessary fund and that the department's doctor had prescribed the anti-viral treatment. This case thus set a standard as to what is "adequate medical treatment" in section 35(2)(e).

This case has raised the issue of the right of prisoners' vis-à-vis other law abiding citizens. It is submitted that prisoners should not have more rights than law-abiding citizens.¹¹⁸

There is an ongoing debate as to whether the state should provide the drug AZT¹¹⁹ free for rape victims and pregnant women who are HIV positive. AZT treatment is said to prevent the transmission of HIV from pregnant women to their unborn babies. Apart from the financial considerations, the state is of the opinion that the drug is toxic and has a lot of side effects and may be "a danger to health".¹²⁰

¹¹⁷ *B & Ors v Minister of Correctional Services* 1997 (6) BCLR 798 (C) (also cited as *Van Biljon & Ors v Minister of Correctional Services and others* 1997 (4) SA 441 (C).

¹¹⁸ Compare *Soobramoney (Supra)* with *B v Minister of Correctional Services supra*.

¹¹⁹ AZT (zidovudine) is one of the few anti HIV drugs that cross the blood brain barrier. Researchers have found that giving AZT to pregnant HIV/AIDS women reduces mother to child transmission. Available on the internet (www.abcnews.go.com) accessed on 8 May 2000. See also (www.channel3000.com/sh/health/conditionsaz/new-health) accessed on 8 May 2000.

¹²⁰ See "Mbeki slams rape figures" *The Citizen* 29 October 1999.

The Kwa-Zulu Natal government has set aside the sum of R100 million to combat AIDS. In the year 2000 the government at the centre embarked on a high-poared public enlightenment campaign on HIV/AIDS. The Minister for Health is also urging the youth to forget about AZT, but to practice “ABC” instead. ABC stands for Abstinence, Be loyal, and use a Condom if abstinence is not possible.

The South African government’s AIDS policy is however questionable. The government has rejected the widely held belief that HIV causes AIDS. The government is insisting that HIV is not the only cause of AIDS. According to the government, poverty also causes AIDS. This position is unfortunate. While poverty could be an aggravating circumstances and could help in early deterioration of HIV to AIDS, it could not on its own causes AIDS.

The government needs to change its HIV/AIDS policy and ensure that pregnant women with HIV/AIDS are given the drug AZT or other drugs that could help to prevent mother to child transmission. HIV/AIDS drugs should be provided free to sufferers or the price should be subsidised to ensure that they are affordable.

The Choice of Termination of Pregnancy Act¹²¹ makes abortions available on demand in the first 12 weeks of pregnancy. In certain cases, abortion is also available from the 13th up to 20th week and abortions may also be available in the third trimester under certain circumstances. The provisions of the Choice on Termination of Pregnancy Act is commendable as it preserves the right to bodily and psychological integrity to make decisions concerning reproductions and to security in and control over one’s body.¹²² Pregnant women who seek abortions do not require the consent of their husbands and minors can have abortion without the consent of their parents.¹²³

¹²¹ Act 92 of 1996. See page 219 below.

¹²² See S. 12(2)(a)(b) Constitution of the Republic of South Africa, Act 108 of 1996. See also Sarkin, (1998) 4 *Buffalo Human Rights Law Review* 141.

¹²³ See the Chapter on Reproductive Rights below.

Single women are now able to have in-vitro fertilisation. Under the Human Tissue Act¹²⁴ single women are prohibited from receiving in-vitro fertilisation. Three single women brought complaints to the South African Human Rights Commission (SAHRC) about the discrimination contained in the Human Tissue Act. They maintained that the Human Tissue Act violates the right to non-discrimination on the grounds of marital status¹²⁵ and the right to equal treatment before the law.¹²⁶ Under the Human Tissue Act, eligible married women require the consent of their husbands, this is also a further discriminatory clause.

The (SAHRC) intervened and stated publicly that it was prepared to take the case to the Constitutional Court if necessary. The Department of Health conceded that the clauses are discriminatory, but failed to make the necessary amendment speedily, thus threatening the reproductive choices of two of the complainants. A subpoena was issued to the then Minister of Health, Dlamini Zuma, who agreed to urgently make the necessary amendment. The Human Tissue Act has since been changed and single unmarried women are now able to receive in-vitro fertilisation and married women no longer require the consent of their husbands before they can receive in-vitro fertilisation.¹²⁷

Social security is also provided for those who have children that are less than six years and cannot cater for them. A sum of R120 (about US\$18) per child is paid by the Welfare Department. Recently a 28-year-old woman drowned her one-year old triplets in a bucket of water and later hanged herself due to her inability to cater for the triplets.¹²⁸ The Department of Welfare is currently running an advertisement to educate people on their rights. In the advertisement a mother abandoned his child at the railway station because of her inability to provide for the child. The advertisement was concluded by informing people that they do not have to abandon their children and that the Department

¹²⁴ 65 of 1983 as amended by Human Tissue Amendment Act 51 of 1989

¹²⁵ S. 9(3) Act 108 of 1996.

¹²⁶ S. 9(1) Act 108 of 1996.

¹²⁷ Human Tissue Amendment Act 51 of 1989.

¹²⁸ See "Triplets die in tragedy" *Sowetan*, 19 October 1999.

should be contacted for assistance. It is suggested that a food coupon be issued instead of the cash payment. This will ensure that the money is utilised for the purposes meant for. A new Maintenance Act¹²⁹ has been passed which gives women better rights to claim maintenance.¹³⁰

There is also a pension scheme whereby people over 50 years of age claims pension from the government whether or not they have worked for the government in the past or not and even where they have never worked before.¹³¹ A disability allowance is also paid to disabled people.¹³²

Section 27 also recognises the right to have access to sufficient food and water.¹³³ The state is not required to provide food and water for the people but only to ensure that enough food of sufficient quality is available at sufficient prices, so that ordinary people can reasonably have access to food. Only where individuals or groups of people are objectively unable to acquire food themselves, for example in the case of natural disaster or famine or other forms of destitution, does the state become responsible for the actual provision of food. What is protected is “access”. There is, in other words, at least in the first instance, no absolute entitlement to the provision of food, free of charge and on demand from the state.

4.4.2.3 Children's rights

Section 28 of the South African Constitution makes certain socio-economic rights available specifically to children. The right of children to basic nutrition, shelter, basic

¹²⁹ Act 99 of 1998.

¹³⁰ The Maintenance Act No 99 of 1998 recognises the duty of parents to support their children (S.15) and provides for attachment of emoluments towards payment of maintenance (S. 28).

¹³¹ Aged Persons Act 81 of 1967.

¹³² *Ibid.*

¹³³ S. 27(1)(b) Act 108 of 1996.

health care services and social services are preserved by the Constitution.¹³⁴ The state already provides free medical services to children under six and there is also free nutrition feeding in primary schools.¹³⁵

It should be noted that unlike in the other sections where only “right of access” is protected, the section dealing with children’s rights confer full rights on children as this right is fully justiciable. It is therefore submitted that all children under eighteen¹³⁶ have the right to basic nutrition, shelter and basic health care services from the state especially where their parents or legal guardians cannot provide for them.¹³⁷ It is the opinion of this writer that all street children under the age of eighteen years are entitled to free basic nutrition, shelter and basic health care services from the state.

South African has ratified the CRC and an initial report has been submitted to the Committee on the Rights of the Child.¹³⁸ South Africa has also ratified the African Charter on the Rights and Welfare of the Child. All these clearly show the commitment of the South African government to improve the welfare of children within its jurisdiction.

¹³⁴ S. 28(1)(c) Act 108 of 1996. For Children’s Rights under the South African Constitution See De Vos (1995) *SA Public Law* 233; Pantazis (1996) 33-1.

¹³⁵ First South African Report to the UN Committee on the Rights of the Child.

¹³⁶ S. 28(3) of the Constitution defines a “child” as a person under the age of 18 years.

¹³⁷ See *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C) and *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

¹³⁸ As provided for under Article 44(1) of the CRC.

4.4.2.4 Right to education

The South African Constitution provides everyone with the right to basic education including adult basic education¹³⁹ and to further education, which the state, through reasonable measures, must make progressively available and accessible.¹⁴⁰

While everyone has the right to basic education, including adult education, only “access” to further education is protected. This leads to the question as to what constitutes “basic” education.

In *Re The School Education Bill of 1995, (Gauteng)*,¹⁴¹ the Constitutional Court, dealing with the right to basic education enshrined in Section 32(a) of the interim Constitution, held that this right imposes positive obligations on the state to provide education of a certain standard to every person, and not merely a negative obligations allowing a person to pursue his or her own education. In *Motala v University of Natal*,¹⁴² the Supreme Court discussed the meaning of the term “basic education” as used in section 32(a) of the interim Constitution and held that basic education does not include education at tertiary institutions or other forms of higher education.

The term “basic education” is open-ended, giving the Courts wide latitude to decide what constitutes basic education as enshrined in the Constitution. “Basic” generally connotes a base, or foundations. Basic therefore means minimal and foundational or fundamental.¹⁴³ International instruments and foreign jurisprudence tend to accord public education a role in three areas: first as a developer of human potential;¹⁴⁴ secondly, as a foundation for

¹³⁹ S. 29(1)(a) of the Constitution.

¹⁴⁰ S. 29(1)(b) of the Constitution.

¹⁴¹ *Re The School Education Bill of 1995* 1996 (4) BCLR 537 (CC).

¹⁴² *Motala v University of Natal* 1995 (3) BCLR 374 (D) See also Kriel (1998).

¹⁴³ Kriel *op. cit.*

¹⁴⁴ The United Nations World Declaration on Education for All (1990) gives the clearest expression to the connection between education and human development. Article 1 of the Declaration provides

good citizenship;¹⁴⁵ and thirdly, as a provider of functional efficacy in the labour market.¹⁴⁶

The term “basic education” is not static and should change from time to time. “Basic education” should include computer literacy as technology advances. It is suggested that in South Africa basic education should be standard 10 (Grade 12), that is free and compulsory education should be provided up to *Matric*, though standard eight is presently being regarded as basic education. This would ensure that persons especially children have the benefit of education up to Matric level, thereby improving their chances of getting employment in the future.

Presently in South Africa, there is the controversy whether pregnant schoolgirls should be allowed to remain in school. The SAHRC is of the view that keeping such girls away from school amounts to discrimination on the basis of pregnancy, which is a prohibited ground in the Constitution.¹⁴⁷ The SAHRC actually intervened to ensure that a pregnant schoolgirl is retained in school.¹⁴⁸

that “Every person – child, youth and adult shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy and problem solving) and the basic learning content (such as knowledge, skills, values and attitudes required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decision and to continue learning.

¹⁴⁵ See e.g. *Brown v Board of Education* 347 US 483 at 493, 74 S Ct 686 (1954);

San Antonio Independent School District v Rodriguez 411 US 1 (1973 particularly the dissenting judgment of Marshall J; *Serrano v Priest* 487 P2d 1241 (1971) at 1258 and *Abbott v Burke* 575 A 2d 359 (1990) at 397

¹⁴⁶ *Abbott v Burke* (*supra*); *Serrano v Priest* (*supra*)

¹⁴⁷ S. 9(3) of the Constitution of the Republic of South Africa Act 108 of 1996

¹⁴⁸ See “Pregnant girl is allowed back to school” *The Citizen*, 7 November 1997. The same story is also carried in the *Sowetan*, 7 November 1997 under the heading “Pregnant pupil reinstated”.

Some people are however of the opinion that keeping such girls in school will affect the morality of the other students and that such students should be kept out of school.¹⁴⁹ The controversy reinforces the fact that pregnancy has a much deeper impact on women/girls than on men/boys. Boys who impregnate fellow students are allowed to remain in school.¹⁵⁰

In a similar case, a College of Education student was de-registered because she was an unmarried pregnant mother.¹⁵¹ The College denied she was forced to de-register, and stated that they had tried to offer alternative educational arrangements, especially in the light of her low achievements academically. They are concerned over morality codes and ethical integrity, and claimed she had broken rules she was well aware of. However, married women are not excluded from the College under similar circumstances, and men are not excluded who may be responsible for impregnating fellow students. The SAHRC intervened on the grounds of discrimination and an agreement was reached whereby the College set aside the young woman's de-registration.¹⁵²

In yet another case, a school principal barred an unmarried schoolgirl from writing her Standard 9 examination. She was told to "go home and look after your baby". The Catholic Justice, Development and Peace Commission intervened on her behalf and referred the case to the SAHRC. The SAHRC wrote to the principal pointing out the violations of the girl's rights – discrimination on the grounds of gender, sex and the right to basic education and requested urgent reinstatement and the opportunity for the girl to resit the examinations. The principal acceded to this request and the girl was re-admitted to school.¹⁵³

¹⁴⁹ See Siluma "Even a democracy must have rules" Sowetan Wednesday 12 November 1997, 13

¹⁵⁰ See Ba (1989) This book uses fiction to tell the plight of women and girls. The book chronicles the life of Muslim women in Senegal.

¹⁵¹ See Paper presented by the SAHRC at the National Conference on Women organised by NIPILAR (National Institute for Public Interest Law and Research) 9-10 December 1997.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

The move to re-admit the pregnant pupil was criticised in the *Sowetan*¹⁵⁴ as follows:

... At the same time it must be appreciated that in enforcing rules which define acceptable conduct, teachers and principals have to resort to forms of punishment which may deny guilty pupils certain rights and privileges.

The exclusion of pupils for unacceptable conduct should be an acceptable form of upholding values or discipline. By forcing a reversal of the expulsion, the SAHRC seems to have effectively placed the individual right of the pupil above the school's responsibility to enforce discipline.

It is submitted that in all the criticisms, the future of the pregnant-school girl is never considered.¹⁵⁵ It is further submitted that a pregnant pupil's right to basic education should be unlimited.

The solution to this controversy lies in having separate schools for pregnant schoolgirls where they can continue their education. The Pretoria Hospital in Pretoria, has established a school for pregnant schoolgirls. At this school, pregnant girls are able to continue their education until they give birth.¹⁵⁶ Although the Gauteng Schools Act¹⁵⁷ states that "no pupil can be discriminated against because of pregnancy and that a pregnant pupil may stay at School until the end of that year" most pregnant pupils leave because of the way they are treated.

In addition to normal curricula in schools, pupils should be taught sex education to reduce the incidence of teenage pregnancy and AIDS and other sexually transmitted diseases. HIV and AIDS are highly prevalent among the youth in South Africa. Family

¹⁵⁴ See the *Sowetan* Editorial of 10 November, 1997.

¹⁵⁵ Teenage pregnancy is a main cause of poverty among women. Most teenagers who have children do not return to school to complete their education. Thereby missing an opportunity to improve their status.

¹⁵⁶ See "School for Pregnant Pupils" DRUM Magazine 12 August 1999 No. 362, 17.

¹⁵⁷ School Education Act (Gauteng) 6 of 1995.

planning methods should also be taught in schools. More than 8 000 teachers have been trained countrywide to teach on integrated life skills and HIV/AIDS education programmed from 1998.¹⁵⁸

4.5 A COMPARISON OF SOCIO-ECONOMIC RIGHTS OF WOMEN IN NIGERIA AND SOUTH AFRICA

In Nigeria, socio-economic rights are not justiciable. This follows the traditional international human rights dichotomy of dividing rights into socio-economic rights and civil and political rights. This gives the impression that there is a hierarchy of rights, reinforcing the impression that the socio-economic rights are inferior to civil and political rights.

Socio-economic rights have limited justiciability in South Africa. Civil and political rights, on the one hand, and economic social and cultural rights, on the other, are contained in the same chapter of the Constitution. The South African position maintains the present idealised position in international human rights where all rights are indivisible, interdependent and interrelated. Even though socio-economic rights are not fully justiciable due to limited resources, rights of access are preserved in the South African Constitution. The South African position is preferred.

In Nigeria there are no social security of any form. South Africa has limited assistance to pregnant women and children under the age of six by giving free medical services. Welfare assistance is also paid to those who could not cater for their children. South African also has a pension scheme for people who are 50 years of age and above irrespective of sex. Under this scheme all persons who are 50 years and above and who are not working are paid a sum of R520 (about US\$65) monthly.¹⁵⁹ Most households

¹⁵⁸ Paper presented by the Department of Education at the National Conference on CEDAW organised by NIPILAR 9 – 10 December, 1997, 6.

¹⁵⁹ Aged Persons Act 81 of 1967.

depend solely on this amount. This is highly commendable, as Nigerian government has no welfare scheme.

There is very high unemployment rate in both jurisdictions even though certain social security payments are made in South Africa. There are no unemployment benefits in both countries. The level of unemployment in South Africa is presently put at above twenty-five per cent. In Nigeria, there is also a very high level of unemployment. The level of unemployment in Nigeria is put at about fifteen per cent. These figures cannot be relied on as data collection in Nigeria is very poor.

Most women in Nigeria are employed in the informal sector. Women in South Africa also need to organise themselves and create jobs for themselves. Most women in Nigeria are self-employed, with majority of them doing petty trading and selling food products in open markets. In Nigeria, women also organise themselves into co-operative societies and are able to borrow money from the government. Several training schemes are also available to teach women skills in various areas such as tailoring, catering, secretarial studies, especially typing and shorthand and agricultural extension.

Women in Nigeria have learnt to look inward as governments (both military and civilian) have failed to meet their needs. Women in South Africa should also form themselves into co-operative societies. These societies can then get loans as an association for onward distribution to their members.

It is also observed that the cost of education is very high in South Africa. This was also the concern of the African Commission.¹⁶⁰ The African Commission wanted to know how education could be compulsory when it is not free.¹⁶¹ Black people especially are disadvantaged. This is due to the apartheid regime, which lasted for more than 40 years.

¹⁶⁰ When the Initial Report of South Africa to the African Commission was being considered. See Chapter 3 above.

¹⁶¹ See Chapter 3 above.

An Employment Equity Act ¹⁶² was enacted to give people who are disadvantaged in the past special advantage over and above others. The special categories of people favoured by the Act are black people (including Coloureds and Indians), women (both black and white) and people that are disabled. All companies employing 50 or more persons are required to have certain percentage of women, black people and disabled persons in their employment. The Act is yet to yield the expected dividends, only time will tell as to the effectiveness of the Act.

The South African government should increase funding to universities, reduce school fees or make bursaries and scholarships more available to the people. This is an area where the Nigerian government is better than its South African counterparts as education (including tertiary) is highly subsidised by the government in Nigeria. Although the right to education is not a justiciable right, education remains cheap and attainable in Nigeria. It costs on average about R800 (US\$120) to pay tuition, accommodation and living expenses in Nigeria.

It is observed that there are many universities in both countries. In Nigeria, there is at least one university in each of the 36 states. There are also many universities in South Africa, but it is observed that there is no university in Mpumalanga and the Northern Cape provinces.

There is a high level of poverty in both jurisdictions. Both countries are committed to poverty alleviation. The Nigerian government has set up a committee on poverty alleviation and there is also some budgetary allocation. The South African government is however more committed to poverty alleviation as it is more transparent in its approach and more stakeholders are involved in poverty alleviation projects. There are also poverty hearings in all the provinces where people are interviewed and are encouraged to discuss their problems and areas of needs are identified.

¹⁶² Act 55 of 1998.

It is suggested that Nigeria emulate this approach by having similar poverty hearings and involving the various stakeholders.

Both countries must focus attention on job creations in order to alleviate poverty. Both countries are among the most disproportionate countries in the world in terms of access to national resources. While the history of apartheid in South Africa has helped to concentrate wealth in the hands of a few, the military dictatorship and non transparent contract policy in Nigeria has also helped to create few billionaires while the bulk of the population remain poor.

It is recommended that efforts should be made to increase women's access to capital. In Nigeria, there is the Family Economic Advancement Programme, which is designed to help women's groups and other groups to have access to capital for trading and agricultural purposes. In South Africa, a Bill is being proposed to compel banks and other financial institutions to lend money to small-scale businesses and those involved in the informal sectors. The object of this Bill is to make capital available for small-scale industry and people in informal sectors, majority of who are poor and are from the previously disadvantaged group. The Nigerian National Assembly should also pass an Act with similar objective.

Finally, in order to assist women, a Women Economic Development Bank should be established in both countries. These banks should cater mainly for the interests of women. All constraints and impediments should be removed and give women better access to funds. The consents of husbands and other male relatives should not be made a condition precedent to granting of facilities.

¹⁹⁹ What the Initial Report of South Africa to the African Development Bank

Chapter 3 above

²⁰⁰ See Chapter 3 above.

CHAPTER FIVE

Access to health care services is better in South Africa than Nigeria. There is need to improve health care services in Nigeria especially reproductive health care. In South Africa there is free medical services for pregnant women in government hospitals. The amount charged for deliveries in South Africa is affordable irrespective of method of birth. Reproductive health care services in Nigeria are a matter of grave concern. Nigeria has one of the highest maternal mortality rates in the world.¹⁶³ Most women die because of their insistence to give birth naturally even when these are not practicable. This is due to the fact that a caesarean cost much more than most people could afford. There is also the superstitious belief that it is not good to give birth through caesarean sections. Most women believe that giving birth naturally shows that they are real women. There is need to improve health care services generally in Nigeria. In South Africa, there are emergency health care services for people in need and ambulance service in South Africa is just a phone call away for the vast majority of the people.

Corruption exists in both jurisdictions however the level of corruption in Nigeria is unprecedented. Corruption has eaten deep into the fabric of the Nigerian society. Successive governments both military and civilians have failed to meet the socio-economic needs of the people. Apart from payment of salaries to civil servants and payment of subvention to government parastatals, government in Nigeria have not done much for the people. The present civilian government of Olusegun Obasanjo has set up a Poverty Alleviation Committee. It is too early to assess the impact of this committee. It can only be hoped that this committee will perform its functions.

In conclusion, while both countries still have to do a lot to meet the needs and aspirations of the people, South Africa fared better than Nigeria in the provision of socio-economic rights to its citizens. The Constitution of Nigeria should be amended to make socio-economic rights fully justiciable rights. Non-government organisations in Nigeria should also focus more on socio-economic rights rather than the traditional civil and political rights, especially now that Nigeria has a democratic government in place. Researches

¹⁶³ See Chapter 6 below.

should be undertaken on ways of improving the standard of living of the vast majority of people in Nigeria. Women's rights should also be the focus of the NGOs.