

## **CHAPTER 6 INTEGRATION OF NEPAD INTO NATIONAL DEVELOPMENT POLICIES: THE CASE OF CAMEROON AND SOUTH AFRICA**

- 6.1 Introduction
- 6.2 NEPAD's policies on the integration of vulnerable groups and participation
  - 6.2.1 NEPAD's policies on vulnerable groups
  - 6.2.2 NEPAD's policies on participation
- 6.3 The Cameroonian subprogramme to integrate the vulnerable groups into the economy
- 6.4 NEPAD and the Cameroonian subprogramme to integrate vulnerable groups into the economy
- 6.5 The right to participation in Cameroon
  - 6.5.1 Participation through election processes
  - 6.5.2 Participation through decentralisation
- 6.6 NEPAD and the right to participation in Cameroon
  - 6.6.1 NEPAD and the right to participation through elections in Cameroon
  - 6.6.2 NEPAD and the right to participation through decentralisation in Cameroon
- 6.7 Integration of vulnerable groups through the New Growth Path (NGP) in South Africa
- 6.8 NEPAD and the integration of vulnerable groups in South Africa
- 6.9 The right to participation in South Africa
  - 6.9.1 The right to participation through electoral processes
  - 6.9.2 The right to participation through decentralisation in South Africa
- 6.10 NEPAD and the right to participation in South Africa
  - 6.10.1 NEPAD and the right to participation through election in South Africa
  - 6.10.2 NEPAD and the right to participation through decentralisation in South Africa
- 6.11 Concluding remarks

## 6.1 Introduction

The main question in this chapter is the following: To what extent is the NEPAD plan integrated into national frameworks for the realisation of the RTD? In this chapter, NEPAD will be looked at from a functionalist perspective. In other words, we will try to understand NEPAD in terms of its functioning and the impact thereof in ‘the larger social system’.<sup>1252</sup>

In providing a response to the question, the chapter analyses the implementation of the rights of vulnerable groups to be protected and the right to participation in Cameroon and South Africa before assessing to what extent governments’ action towards the realisation of these rights are informed by NEPAD. Cameroon is chosen because as mentioned earlier, it provides for the RTD in its Constitution. In addition, the author is very familiar with the concerned country and has a good personal knowledge of the legal system. South Africa is chosen because it is a NEPAD funding country, the author’s familiarity with its legal system, because of the very good reputation of its Constitution and because it is the place where the thesis is written from.

Before clarifying the structure of the chapter, it is important to substantiate why the rights of vulnerable groups and to participation are chosen within the framework of the RTD. Realising the RTD entails a ‘public action’<sup>1253</sup> in terms of human rights implementation. However, though all human rights are essential, it may be practicably difficult to fulfil all of them at the same time. It is consequently justifiable to start with the realisation a few ‘basic rights’<sup>1254</sup> without which the RTD will not be realised. The concept of vulnerable groups includes the elderly, people with disability and women who are generally marginalised, hence the need to render them visible through the protection of their rights.

The chapter also focuses on the right to participation because it is one the pre-eminent rights to be respected if the RTD is to be realised, though it is important to note that, participation in

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<sup>1252</sup> Landsberg (2008)218.

<sup>1253</sup> Sen (2004) 343.

<sup>1254</sup> Shue (1980).

a context of lack of resources is not enough for the realisation of the RTD. Hence the next chapter will focus on how NEPAD raises resources (through partnership).

In assessing to what extent NEPAD is integrated in national frameworks for the realisation of the rights listed above, the chapter will be divided in eleven sections including this introduction.

The second section will set out NEPAD's policies in terms of the protection of vulnerable groups and participation. This will assist in examining whether the countries chosen for the study (Cameroon and South Africa) comply or integrate NEPAD in their national frameworks.

The third and fourth sections will examine the protection of vulnerable groups in Cameroon (through the Cameroonian subprogramme to integrate the vulnerable groups in the economy) and how such a protection integrates NEPAD respectively..

The fifth and sixth sections will analyse the right to participation and assess how this right complies with the NEPAD's standards respectively.

Following the same trend, but with a special attention to South Africa, sections seven and eight will focus on the protection of vulnerable groups through the New Growth Path (NGP) and examine the place of NEPAD respectively and sections nine and 10 will follow the same model, but with special attention to the right to participation. Finally, section 11 will provide concluding remarks.

## **6.2 NEPAD's policies on integration of vulnerable groups and participation**

### **6.2.1 NEPAD's policies on vulnerable groups**

From a MDGs' perspective,<sup>1255</sup> NEPAD undertakes 'to reduce the proportion of people living in extreme poverty by half between 1990 and 2015'.<sup>1256</sup> In this process, vulnerable groups

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<sup>1255</sup> MDG No 1.

such as women and the poor should be empowered. In this vein, African states should take measures to support existing poverty reduction plans ‘at the multilateral level, such as the Comprehensive Development Framework of the World Bank and the Poverty Reduction Strategy approach linked to the debt relief initiative for Highly Indebted Poor Countries (HIPC’s)’.<sup>1257</sup> With a special attention to women, African governments should create a commission on gender to tackle particular problems encountered by poor women.<sup>1258</sup> Stressing the difference between other citizens and vulnerable citizens, not only should African leaders underline the importance of protecting ‘each individual citizen’, they should also emphasise the specific need to protect ‘the vulnerable and disadvantaged groups’.<sup>1259</sup>

Overall, NEPAD’s policies on vulnerable groups aim to ensure a better standard of living for all without discrimination. In this respect the rights of the poor and the vulnerable should be tackled seriously.

### **6.2.2 NEPAD’s policies on participation**

The NEPAD document emphasises the right to participation in the context of the RTD in its paragraph 43. In addition, the right to participation is enshrined in the NEPAD document under the heading of ‘Democracy and Political Governance Initiative’.<sup>1260</sup> Under this heading, African states agree to comply with the international principles of democracy which entails a political multipartism, workers’ unions, and periodical free and fair elections through which people can freely elect their representative.<sup>1261</sup> The right to participation to comply with in

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<sup>1256</sup> NEPAD 2001, para 68.

<sup>1257</sup> NEPAD 2001, para 115.

<sup>1258</sup> NEPAD 2001, para 116.

<sup>1259</sup> NEPAD Declaration on Democracy, Political Economic and Corporate Governance AHG/235 (XXXVIII) Annex I, para 10

<sup>1260</sup> NEPAD 2001, para (ii).

<sup>1261</sup> NEPAD 2001, para 79.

terms of NEPAD's commitment also entails strengthening the political and administrative framework of participating countries, in line with the principles of democracy, transparency, accountability, integrity, respect for human rights and promotion of the rule of law.<sup>1262</sup> More importantly, African states have the obligation to create a commission to foster implementation 'of participatory and decentralised processes for the provision of infrastructural and social services'.<sup>1263</sup> The prescriptions on the right to participation are reinforced by the NEPAD Declaration on Democracy, Political Economic and Corporate Governance<sup>1264</sup> which among others emphasises the need to insist on the<sup>1265</sup>

[e]quality of all citizens before the law and the liberty of the individual; individual and collective freedoms, including the right to form and join political parties and trade unions, in conformity with the constitution; equality of opportunity for all; the inalienable right of the individual to participate by means of free, credible and democratic political processes in periodically electing their leaders for a fixed term of office; and adherence to the separation of powers, including the protection of the independence of the judiciary and of effective parliaments.

Independently or prior to the advent of NEPAD, African countries decided to enshrine the principles of democracy in their national constitutions, encourage political representation, which enable all citizens to contribute in the political process through a free and fair election, support and, where needed, set up a suitable electoral commission and monitoring institutions in their individual countries and supply 'the necessary resources and capacity to conduct elections which are free, fair and credible'.<sup>1266</sup>

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<sup>1262</sup> NEPAD 2001, para 80.

<sup>1263</sup> NEPAD 2001, para 116.

<sup>1264</sup> AHG/235 (XXXVIII) Annex I

<sup>1265</sup> AHG/235 (XXXVIII) Annex I, para 7.

<sup>1266</sup> AHG/235 (XXXVIII) Annex I, para 13.

### 6.3 The Cameroonian subprogramme to integrate the vulnerable groups into the economy

Protecting the vulnerable groups is fundamental in realising the RTD. The vulnerable groups are generally forgotten and end up being marginalised by developmental initiatives, hence the need to incorporate and empower them through a legal protection of their rights. The international standards of human rights provide an adequate standard of living for all. In this regard, the UDHR provides for the right to social security<sup>1267</sup> and to a better standard of living<sup>1268</sup> which are also included in the ICESCR.<sup>1269</sup> In a similar vein, the CRC,<sup>1270</sup> CEDAW<sup>1271</sup> and CERD<sup>1272</sup> provide for the right to a better life under the concept of social security.

At regional level, though the ACHPR does not directly provide for the right to social security, this right could be read under the right of physical and mental health,<sup>1273</sup> under the obligation of the state to protect the family<sup>1274</sup> as well as the right of ‘aged and disabled for special measures of protection in keeping with their physical and mental needs’.<sup>1275</sup> In a similar vein,

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<sup>1267</sup> Art 22.

<sup>1268</sup> Art 26

<sup>1269</sup> Art 9 and art 11.

<sup>1270</sup> Art 23, and art 6.

<sup>1271</sup> Art 11, 13 and 14.

<sup>1272</sup> Art 2(1)(c) and 5(e).

<sup>1273</sup> Art 16.

<sup>1274</sup> Art 18(1).

<sup>1275</sup> Art 18(4). For more on the inclusion of social security right in art 16, 18(1) and 18(4) of the ACHPR, see L Jansen Van Rensburg and L Lamarche ‘the right o social security and assistance’ in D Brand and C Heyns (eds) *Socioe economic Rights in South Africa* (2005) 231.

the African Children's Charter caters for the children's social security through its provisions on the rights to survival, protection and development of the child,<sup>1276</sup> education,<sup>1277</sup> health and health services<sup>1278</sup> and the right to be protected against all types of economic exploitation.<sup>1279</sup>

Following the international and regional standards of better life for all, Cameroon provides for social protection in these terms: 'All persons shall have equal rights and obligation. The State shall provide all citizens with the conditions necessary for their development'.<sup>1280</sup> Though this provision does not directly refer to the protection of vulnerable groups through the concept of social security, it could be argued that it offers a complete social protection which integrates developmental plans and programmes intended to guarantee 'at least a minimum standard of living for all'.<sup>1281</sup>

Against this background, and in the context of the Cameroonian PRSP emphasising 'the integration of vulnerable groups into the economy',<sup>1282</sup> the government designed a poverty reduction subprogramme which was part of the 2003-2007 cooperative cycle between Cameroon and the UNDP. The subprogramme is basically a 'Support for Micro Schemes'. Its main objective is to address rural poverty by offering financial and technical assistance or support to the grassroots development initiatives which are pertinent in achieving the RTD.

Among other things, the subprogramme supports community-based income generating micro-projects based on the sustainable use of natural resources, reinforces the technical and

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<sup>1276</sup> Art 5.

<sup>1277</sup> Art 11.

<sup>1278</sup> Art 14

<sup>1279</sup> Art 15.

<sup>1280</sup> Paragraph 6 of the Preamble of the Constitution.

<sup>1281</sup> Jansen Van Rensburg and Lamarche (2005) 210.

<sup>1282</sup> The 6<sup>th</sup> priority is strengthening human resources, the social sector and facilitating the integration of vulnerable groups into the economy.

organisational capacity of women and contributes to the fight against HIV and AIDS. Beneficiaries of the subprogramme should be rural populations organised in groups such as village development committees or cooperatives for example. The subprogramme intervenes in agriculture and live- stock production such as integrated fish farming, bee keeping, forestry and agro-forestry. In addition, the subprogramme caters for storage, processing and marketing of agriculture products as well as production and marketing of off-farm products. Interestingly, support structures are set up to assist rural populations who lack capacity to formulate and implement their projects. Most importantly, a support structure is not allowed to directly apply either on its own behalf or on behalf of a community, but receives 10 % of the total grant if the project is eligible. The project should be finalised within 3 to 6 months and exceptionally within 12 months. The applicant for the grant should contribute at least 20% of the total amount applied for.

Finally, if the project budget is higher than the grant expected from the subprogramme, the applicant should approach other donors and provide a proof that the additional support is available before receiving the grant from the subprogramme. At face value, this subprogramme looks like the solution for rural Cameroonians and one can argue that Cameroon complies with article 22(2) of the ACHPR stating that ‘States shall have the duty, individually or collectively, to ensure the exercise of the right to development’.

From a different angle, the shortage in education in rural communities affects the feasibility of the poverty reduction subprogramme and constrains the prospects for the RTD. Even though there is a support structure to assist peasants, a strong basic education is needed to be able to produce a draft to be perfected by the support structure. Growing up in an environment of ‘schools without teachers’ does not help to equip the rural poor with the minimum knowledge required to address the marketing of agricultural products or discuss forestry and agro-forestry issues before taking them to support structures that end up grabbing 10% of the budget needed for the realisation of the project. Not only should the state support structures from a different budget, it should not ask rural groups to finance up to 20% of the entire project because generally, members of these groups are very poor.

However, it can be argued that the 20% to be deposited by the applicant is not a bad thing because it shows how serious the entrepreneur is; it testifies to the level of responsibility of

the applicant and above all, the idea is to teach ‘people how to fish but not to give them fish’. In fact, this practice is in line with article 27(1) of the ACHPR which reads: ‘Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international communities’. In other words, through his or her 20% contribution, the applicant recognises his or her duties and takes his responsibilities towards his or her family, society, community, the state and even the international community, keeping in mind that the UNDP was involved in financing the subprogramme. In addition, individual contributions in development initiatives echo article 2(2) of the 1986 UNDRTD according to which

[a]ll human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedom as well as their duties to the community, which alone can ensure the free and complete fulfillment of the human being and they should therefore promote and protect an appropriate political, social, and economic order for development.

Put differently, the 20% contribution should not be viewed as a financial burden, but as the contributor’s chance to exercise his right to participation, his chance to play a role in realising his RTD, that of his community as well as of the whole country. In fact, this should be viewed as the exercise of the natural right to participation of a citizen in the development of the land.

The duration of the project which is normally three to six months and in exceptional cases one year is not realistic. Three to six months is a bit short to realise a sustainable project unless rural groups are encouraged to think very small, and if this is the case, there is a need to revise such a mindset.

Finally, referring an applicant to other donors when his project is more ambitious does not ease things. Applying and acquiring funds from many donors is never easy and the mere thought for an uneducated person to be running around for funds is enough to kill his or her ambitions. The government should review cases requiring more money on a case by case basis and find a way to support such applicants where necessary. This will boost the image of Cameroon, since the country will be complying with article 8(1) of the 1986 UNDRTD according to which

[s]tates should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their accesses to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

All in all, initiatives like the poverty reduction subprogramme should be encouraged and sustained. However, the quality of their fruits will depend on how well their garden of education is watered. In other words, it is important to provide quality education in communities that will be called upon to design or administer microfinance and other projects. This approach, at national level will transform the society and transform the RTD into reality. More importantly, Cameroon should follow the example of South Africa<sup>1283</sup> in providing for the right to social security in its constitution even if the realisation of this right should happen progressively upon the availability of resources.

After an assessment of the protection of vulnerable groups through the Cameroon subprogramme, the next section will assess the place of NEPAD in this subprogramme.

#### **6.4 NEPAD and the Cameroonian subprogramme to integrate the vulnerable groups in the economy**

Following NEPAD's objectives, the subprogramme intends reducing the proportion of poor people; it addresses the difficulties of vulnerable groups such as women and rural people; furthermore, the Cameroonian government cooperates with the UNDP in the implementation of the subprogramme. In addition, the latter is directly connected to the Poverty Reduction Strategy approach linked to the debt relief initiative for Highly Indebted Poor Countries (HIPC) as recommended by NEPAD.<sup>1284</sup>

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<sup>1283</sup> To be discussed below.

<sup>1284</sup> NEPAD 2001, para 115.

The subprogramme however, does not refer to NEPAD framework or policies. In the same vein, Cameroon's PRSP report addresses infrastructural human development, health, trade, agriculture and various other issues without pointing out what was done in connection with NEPAD. Nevertheless, it could be argued that what matters is the implementation of NEPAD and not referring to it. However, beyond referring to NEPAD or not the truth is that very little on NEPAD benefits the needy people. In this regard, Rukato the former NEPAD CEO observes 'very little on NEPAD activities reaches the grassroots; NEPAD is about workshops, conferences and other events, but without any real benefit for rural folks'.<sup>1285</sup> She even said 'thanks to NEPAD, I travelled the world, but poverty keeps growing in Africa'.<sup>1286</sup>

However, Cameroon should not be the only guilty party for not incorporating NEPAD into its national development plan because though Cameroon did not have a strategy to domesticate NEPAD, the institution itself did nothing to solve the problem. In this regard, Rukato explains:<sup>1287</sup>

Sectoral ministers and official experts participated in NEPAD meetings at regional/continental level and made decisions. However, these decisions were not followed up by implementation strategies for domesticating them at national level. This resulted in a wide disjuncture between the national level strategy and those at the regional/continental level. In many cases there was no reporting or accountability by member states on actions taken to implement decisions made at the regional/continental level.

In other words, the continental institution failed to provide guidance on how to domesticate its plan. However, to reduce the impact of this mistake, in 2007, the NEPAD secretariat undertook several actions aiming to educate national governments on how to domesticate NEPAD. Among others, NEPAD helped countries to identify with its plan and methods through the establishment of a shared national goals and national development strategy that highlights NEPAD's priorities, ideals and standards through discussions and debates with

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<sup>1285</sup> Rukato's presentation (2009).

<sup>1286</sup> Rukato's presentation (2009).

<sup>1287</sup> Rukato (2010) 98.

stakeholders in order to stimulate national ownership; and educating national governments on avenues for financial support for national priorities.<sup>1288</sup>

Overall, given the circumstances described above, it could be argued that the Cameroonian subprogramme for the integration of vulnerable groups in the economy captures NEPAD priority in terms of seeking solutions for the empowerment of the poor. Any improvement in such initiative would enhance the prospects for the RTD on the continent.

## **6.5 The right to participation in Cameroon**

In chapters 2, 3 and 4, it was argued that the right to participation was the cornerstone of the RTD. Indeed, the right participation, like the right to education and the right of vulnerable groups to be protected is an empowering human right. It gives the opportunity to people to be involved in all matters affecting their lives.

How does Cameroon, which provides for the RTD in its Constitution, ensure the right to participation of its people? More importantly, are national initiatives on the right to participation informed by NEPAD?

As already highlighted, the international standards of the right to participation are secured in the Universal Declaration,<sup>1289</sup> the ICCPR,<sup>1290</sup> and the ICESCR.<sup>1291</sup> At the regional level, the ACHPR<sup>1292</sup> and the 1990 African Charter for Popular Participation in Development and

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<sup>1288</sup> Rukato (2010) 98 - 99.

<sup>1289</sup> Art 21.

<sup>1290</sup> Art 1 & 25.

<sup>1291</sup> Art 1; the General Comment no 25 of the Committee on ESCR.

<sup>1292</sup> Art 13.

Transformation<sup>1293</sup> underscore the right to participation in Africa.<sup>1294</sup> In Cameroon, the right to participation is addressed through national elections and political decentralisation.

### 6.5.1 Participation through elections processes

Informed by the UN Committee on Human Rights General Comments No 25 ‘the right to participate in public affairs, voting right and the right to equal access to public service’, the government of Cameroon enshrined the right to participation in the 1996 Constitution in these terms:<sup>1295</sup>

Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

In the same perspective, article 13 of the same instrument reads as follows:

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<sup>1293</sup> The African Charter for Popular Participation in Development and Transformation; UN doc. A/45/427 of 22 August 1990; art 3 & 4 for example.

<sup>1294</sup> Art 3 reads: ‘The Conference was organized out of concern for the serious deterioration of the human and economic conditions in Africa in the decade of the 1980s, the recognition of the lack of progress in achieving popular participation and the full appreciation of the role popular participation plays in the process of recovery and development’. According to article 4, the objectives of the African Charter for Popular Participation for Development and Transformation were to:

- a) Recognise the role of people’s participation in Africa’s recovery and development efforts
- b) Sensitise national governments and the international community to the dimensions, dynamics, processes and potential of a development approach rooted popular initiatives and self –reliant efforts
- c) Recommend actions to be taken by governments, the United Nations system as well as the public and private donors agencies in building environments for authentic popular participation in the development process and encourage people and their organizations to undertake self-reliant development initiatives.’

The African Charter for Popular Participation for Development and Transformation will be further discussed in chapter 5 of this study.

<sup>1295</sup> Art 27(1).

- (1) Every citizen shall have the right to participate freely in the government of his country either directly or through freely chosen representatives in accordance with the provisions of the law.

Accordingly, participation could be exercised directly or indirectly through chosen representatives. It could be argued that direct representation can be exercised through referendum as provided for by article 2 of the Constitution which vests the sovereignty of the country to the people. However, as correctly observed by Fombad, ‘the decision whether or not a referendum is to be resorted to depends entirely on the discretion of the President of the Republic as provided for by article 64 (3) of the Constitution’.<sup>1296</sup>

As for the indirect participation through chosen representatives, the latter should derive their mandate ‘from people through election by direct or indirect universal suffrage’.<sup>1297</sup> More importantly, the vote shall be equal, and secret,<sup>1298</sup> and political parties and groups that shall be bound to respect the principles of democracy, national sovereignty and unity have the obligation to assist the electorate in making a meaningful decision.<sup>1299</sup>

In order to foster popular participation and democracy, in 1990 the government enacted ‘liberty laws’ recognizing multipartyism officially.<sup>1300</sup> The liberty law included:

- Law No. 90/046 to revoke the Ordinance No 62-OF-18 of 12 March 1962 that has been used to keep all dissenters to the regime at bay.
- Law No. 90-52 on Freedom of Mass Communication that provided for the protection of freedom of expression.

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<sup>1296</sup> Fombad (2003) 34.

<sup>1297</sup> Art 2(2) of the Constitution.

<sup>1298</sup> Art 2(3) of the Constitution.

<sup>1299</sup> Art 3 of the Constitution.

<sup>1300</sup> For more on this, see Fombad (2003) 73.

- Law No. 90-53 concerning the freedom of association which empowered Cameroonians to exercise their right to participation in the affairs of their country.
- Law No. 90-56 that provides for the formation and registration of political parties.

These laws saw the proliferation of political parties and by 2009, Cameroon had more than two hundred political parties. Nevertheless, perhaps the explosion of political parties is motivated by the national policy of granting funds to political parties for financing their activities,<sup>1301</sup> though the funds should not be used for personal benefit.<sup>1302</sup> It could therefore be argued that the enactment of laws and the ensuing explosion of political parties are not enough to ensure appropriate participation. What matters most is the desire, the political will to ensure alternation of power in the country. In fact, notwithstanding the enactment of the so called ‘liberty laws’, the following should be noted:<sup>1303</sup>

Besides the fact that the ruling CPDM party and its candidates have with monotonous regularity been declared winners in [numerous] elections, it is significant that all national and international election monitoring bodies that observed these elections have always reported widespread fraud, electoral rigging and other irregularities that had rendered these elections neither free no fair.

Put differently, the adoption of laws to enhance the right to popular participation will not reach its objective if the appropriate implementation of such laws does not follow.

In an attempt to enhance the credibility of elections and therefore improve the right to participation, a National Elections Observatory (NEO)<sup>1304</sup> was established through Law No.

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<sup>1301</sup> See the Law No. 2000-15 of 19 December 2000 relating to the Public Funding of Political Parties and Election Campaigns which sets down the conditions for granting public funding to political parties generally and public funding of election campaign.

<sup>1302</sup> Law No. 2000-15 of 19 December 2000 relating to the Public Funding of Political Parties and Election Campaigns, section 12(2).

<sup>1303</sup> Fombad (2003) 74.

<sup>1304</sup> For more on the NEO, see generally A D Olinga ‘L’ONEL réflexions sur la Loi Camerounaise du 19 Décembre 2000 portant Création d’un Observatoire National des Elections (2002); A D Olinga ‘Politique et droit electoral au Cameroun : Analyse juridique de la politique elettorale ‘ *Polis* 6

2000-16 of 19 December 2000. Nonetheless, the NEO that was supposed to be an independent institution mandated to monitor and control elections and referendums<sup>1305</sup> in ‘order to ensure regular, impartial, objective, transparent and fair elections, and to guarantee voters and candidate the free exercise of their rights [to participation]’,<sup>1306</sup> had its members appointed only by the President of the Republic.<sup>1307</sup> The latter could appoint only his personal friends who will be on mission to ensure his or his party’s victory, hence the public outcry which led to the replacement of the NEO by the establishment of Election Cameroon (ELECAM) by Law No. 2006/011 of 29 December 2006 which is mandated to organise and oversee elections in the country.

However, ELECAM, just like the NEO, is criticised for being the instrument of the ruling party.<sup>1308</sup> In fact, in violation of the Law No. 2006/011 alluded to above, several of ELECAM’s electoral council members are also influential members of the ruling party in Cameroon where members of the other political parties and civil society are forgotten.<sup>1309</sup> Condemning election management in Cameroon, the EU declared:<sup>1310</sup>

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(2002) D N Tshiyoyo ‘CAMEROON: EMB case Study’ available at <http://aceproject.org/ero-en/regions/africa/CM/case-study-cameroon.doc/view> (accessed 13 June 2010).

<sup>1305</sup> Sec 1 of Law No 2000-16 of 19 December 2000; Also C M Fombad ‘Cameroon’s “National Elections Observatory” and the prospects of constitutional change of government’ in F Colombus (eds) *Politics and economics of Africa* (2002) 71-92.

<sup>1306</sup> Sec 2 of Law No 2000-16 of 19 December 2000.

<sup>1307</sup> Sec 3 of Law No 2000-16 of 19 December 2000.

<sup>1308</sup> J P Nguemegne ‘Cameroun : ELECAM ou « ELECTION CAMEROON » une institution electorale vouée a l’echec’ (2010) available at <HTTP://WWW.CAMER.BE/INDEX1.PHP?ART=9569&RUB=6:1> (accessed 20 June 2010).

<sup>1309</sup> Nguemegne (2010); also *Décret N° 2008/463 du 30 décembre 2008 portant nomination des membres du Conseil électoral d’ «Elections Cameroun »* (ELECAM).

<sup>1310</sup> ‘EU Condemns Election Management Transfer in Cameroon’ *Newstime Africa* (2009) available at <http://www.newstimeafrica.com/archives/6216> (accessed 25 June 2010)

We were very disappointed this year when the authorities appointed the 12 board members of ELECAM and 11 of them were members of the central committee and political bureau of the ruling party. In other words, this simply meant transferring (sic) the task of elections organisation from MINAT [Ministry of Territorial Administration] admin to one of the parties in contest, actually making it a player and referee at the same time. This was a missed opportunity to advance the democratisation process. This is regrettable. It's a pity. It is already a false start for the 2011 presidential poll which is just by the corner. That election has already lost its credibility (sic).

Indeed, the appropriation of ELECAM by the ruling party negates the independence of the institution and casts serious doubts on any election managed by such institution. The government of Cameroon should remedy this situation by appointing independent individuals as members of ELECAM.

The other constraint to the efficiency of ELECAM seems to be its lack of human and financial resources. In terms of human resources, it could be argued that the institution is young and its members lack experience in dealing with electoral mechanisms.<sup>1311</sup> In terms of financial shortage, the 2009-2010 budget does not allocate any money to ELECAM and this is a sign of an ill-prepared institution.<sup>1312</sup> It is argued that ELECAM is simply rejected by Cameroonians who do not see it fit to ensure their right to participation as they were not consulted for its establishment.<sup>1313</sup>

As alluded to earlier, there is a need to have a political will to ensure popular participation and this does not start by a constitutional revision to ensure the entrenchment of the President of the Republic as it was recently the case in Cameroon. This happened in violation of the

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<sup>1311</sup> Nguemegne (2010).

<sup>1312</sup> Nguemegne (2010).

<sup>1313</sup> D Mandeng (2010) 'Cameroun : ELECAM, Un Organe Chargé de Redonner sa Confiance au Corps Electoral Boycotte' available at [www.Podcastjournal.net](http://www.Podcastjournal.net) (accessed 20 June 2010).

constitution, which forbids any amendment that is contrary to ‘democratic principles which govern the republic’.<sup>1314</sup>

Though in its PRSP 2006 progress report, Cameroon claimed that the establishment of ELECAM was a positive achievement in strengthening democracy,<sup>1315</sup> it could be argued that the mere fact that several stakeholders such as political parties from the opposition as well as civil society were not involved is problematic.

### **6.5.2 Participation through decentralisation**

In an attempt to ensure the right to participation, Cameroon has institutionalised political decentralisation. The success of this system is conditioned by the people’s right to choose their local leaders and the institution of a mechanism to ensure the transfer of decision-making from central authorities to the local ones and from the latter to the communities.<sup>1316</sup> In other words, appropriate political decentralisation entails a vertical decentralisation with the power flowing from the central authority to local representatives, and a horizontal representation with the power flowing from the local representatives to the grass roots that decide on their priority and are empowered to hold their representatives at local and national level fully accountable.<sup>1317</sup>

In addressing political decentralisation, the Cameroonian Constitution provides in its article 1(2) ‘The Republic of Cameroon shall be a decentralized unitary State. It shall be one and indivisible, secular, democratic and dedicated to social services’. In the same vein, article 55 of the same instrument provides for national decentralisation as follows:

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<sup>1314</sup> Art 64 of the Constitution.

<sup>1315</sup> PRSP 2006 Cameroon Progress Report ‘Strategic area No. 7: Improvement of the institutional framework and governance’ para xxxvi.

<sup>1316</sup> J-M Kauzya ‘Political decentralisation in Africa: Experience of Uganda, Rwanda, and South Africa’ (2007) 4 Discussion paper available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan028411.pdf> (accessed 15 July 2010).

<sup>1317</sup> Kauzya (2007) 5.

- 1) Regional and local authorities of the Republic shall comprise Regions and Councils.  
Any other such authorities shall be created by law.
- 2) Regional and local authorities shall be public law corporate bodies. They shall be freely administered by councils elected under conditions laid down by law. The duty of the councils of regional and local authorities shall be to promote the economic, social, health, educational, cultural and sports development of the said authorities.
- 3) The State shall exercise supervisory powers over regional and local authorities, under conditions laid down by law.
- 4) The State shall ensure the harmonious development of all the regional and local authorities on the basis of national solidarity, regional potentials and inter-regional balance
- 5) The organization, functioning and financial regulations of regional and local authorities shall be defined by law.
- 6) The rules and regulations governing councils shall be defined by law.’

Though according to article 55(2) which states that local authorities or councils shall in principle be headed by elected officials (Mayors and Municipal Councilors for example), the decentralisation laws give too much power to the executive. According to decentralisation laws<sup>1318</sup> passed on 22 July 2004 by the Parliament through a decree, the President of the Republic can amend the geographical boundaries of local authorities, rename or decide on the temporary regrouping of local authorities.<sup>1319</sup> The President’s power to change the geographical boundaries of local authorities, rename or regroup them without consultation of the local people casts a doubt on the real aim of decentralisation. It is like allowing the President to regroup five different villages with different languages and cultures under the

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<sup>1318</sup> Law No. 2004/017 on the orientation of decentralisation; No 2004/018 laying down rules applicable to councils, Law No. 2004/019 laying down rules applicable to regions.

<sup>1319</sup> Law No. 2004/017 of July 22, 2004 on the orientation of decentralisation, chapters 1-3. Council numbers 360 as 2007, art 6.

same administration without consulting their peoples. Moreover, the regional council may be suspended by the President of the Republic:

Where such organ carries out activities contrary to the Constitution  
undermine the security of the state or public law and order;  
endangers the state territorial integrity.<sup>1320</sup>

It is contended that the President has a super power over regional councils and this cannot enhance the right to participation of people on the ground. In the same vein, in the Cameroonian decentralisation laws, there is no constitutional provision sharing power between the central power and the local authorities that have only the amount of power given to them by the central authority<sup>1321</sup> in exercising its 'supervisory powers'.

According to the 2004 laws, however, local authorities have a legal personality and an administrative autonomy. More importantly, their administration is conducted by individuals elected through a direct universal suffrage. Nevertheless, the strong hand of the executive power reaches and controls the elected body of the local authority through articles 46 to 57 of Law No. 2004/017 which allows the governor or a senior divisional officer to oversee the elected local authority.

However, by Decree No 2002/216 of 24 August 2002, the Cameroon government created the Ministry of Territorial Administration and Decentralisation (MINATD). This institution seeks ways to harmonise the decentralisation process in the country, hence the argument that it is 'taking into account imperatives of preserving national unity and social cohesion in a country characterized by social and cultural diversity'.<sup>1322</sup> Under the auspices of MINATD, local governments' staffs are trained at the Local Government Training Centre (CEFAM) based in Buea in South West Cameroon. In addition, it administers the Special Inter-communal Equipment and Support Fund (FEICOM), which collects and reallocates the additional

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<sup>1320</sup> Art 59(1) of the constitution.

<sup>1321</sup> Art 55(3) of the constitution.

<sup>1322</sup> C Cheka 'The state of the process of decentralisation in Cameroon' (2007) No 2, XXXII *Africa Development* 186.

council surtax and supplies financial grants and loans to councils. Nonetheless, as Fombad, correctly observes:<sup>1323</sup>

The criteria for benefiting from state grants have never been clearly defined and councils run by opposition parties have often alleged that they usually receive little or no subsidies from these state grants.

Notwithstanding some good initiatives of MINATD, the right to participation of many Cameroonians is hindered by Law No.2004/018 of July 22 2004 which established ‘city councils’ with special status. According to article 115(1) of the law in question, the government can appoint a delegate to head a city council with ‘special status’. In other words, after elections are over with officials and municipal councilors chosen by direct universal suffrage, a Presidential Decree can choose their boss. Though the government policy is informed by article 58 of the constitution which empowers the President of the Republic to appoint such delegates and aims to protect minorities in the country, it violates the right to participation of the people who vote the municipal councilors and other mayors, hence the correctness of the argument that article 115(1) of the law ‘contradicts the principle of the free administration of local authorities by locally elected officials’.<sup>1324</sup> Yaounde, Douala, Bafoussam and Garoua that are the most important towns in the country are ‘city councils’ with special status and are therefore headed by non-elected ‘Government Delegates’. Again, where is the ‘real people’s will in the process? The so called ‘decentralisation’ seems to be in reality a ‘*deconcentration*’ of power whereby the real power belongs to the executive.<sup>1325</sup> This is evidenced by the fact that in 2005, the Minister of Finance ordered all local councils to close their financial account and transfer money into the national treasury for the implementation of a ‘single till’ policy.<sup>1326</sup> As a result, the financial status of councils becomes uncertain and depends on the availability of funds in the national treasury or on the

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<sup>1323</sup> Fombad (2003) 159.

<sup>1324</sup> Cheka (2007) 191.

<sup>1325</sup> J Manor *The political economy of democratic decentralisation* (1999) 5.

<sup>1326</sup> Cameroon, Decision No 05-232/MINEFI/CAB of 16 May 2005.

good will of the authority responsible for resource allocation. This practice undermines the ability of elected local councils or local community to administer their locality freely.

There is therefore a need to harmonise the decentralisation process with a special attention on peculiarities of each region, especially if the true aim of decentralisation is to enhance popular participation. Surrounded by various cultures, one of the challenges of the government is to strike a balance by respecting all tendencies in the decentralisation process. The first step is to review the notion of ‘city council with special status’ and encourage bottom-up participation through the creation and support of peasant organisations, self-help associations, human rights movements and trade unions. It is about empowering people on the street by allowing them to be fully involved in the affairs of the land.

Overall, the right to participation is operationalised through direct participation (referendum) or indirect participation (elections processes) and through decentralisation. On the direct representation through referendum, the President of the Republic is the only one who can initiate a referendum. On the indirect participation through elected representatives, unfortunately, it is difficult to have free and fair elections in the country where members of ELECAM in charge of the whole electoral process are influential members of the ruling party.

The right to participation through decentralisation is hindered by the superpower of the central authority or the President who can suspend regional council, and has the power to appoint a delegate to head a city council with ‘special status’, which should normally be headed by an elected official. Now, what is the role of NEPAD in shaping the right to participation Cameroon?

## **6.6 NEPAD and the right to participation in Cameroon**

This section looks at the extent to which the right to participation in Cameroon is compatible to participation as understood by NEPAD. In other words, has the NEPAD plan addressing the right to participation become part of Cameroonian’s governance plan? How does Cameroon integrate NEPAD in its governance and democracy strategies?

### 6.6.1 NEPAD and the right to participation through elections in Cameroon

In term of participation through elections, though the Cameroonian government complies with NEPAD's request to set up multipartism and organise periodic elections to allow the people to choose their representatives, unfortunately the organisation and monitoring of the elections cannot yield fair results. As described earlier, the dependence of ELECAM on the ruling party hinders the freedom and fairness of elections. Indeed, NEPAD's provision urging African states to establish a suitable electoral Commission is simply ignored in Cameroon. There is therefore a need to have a real national independent electoral commission in Cameroon if the 'inalienable right of the individual to participate by means of free, credible and democratic political processes in periodically electing their leaders for a fixed term of office'<sup>1327</sup> is to be respected.

Though the Cameroonian PRSP's strategy area 7 aims to 'Improving governance, the efficiency of administrative services, and the institutional framework' or aims at 'Promoting governance and curbing corruption, reinforcing transparency and accountability, improving the delivery of basic social services, strengthening the rule of law and the legal and judicial security of investments',<sup>1328</sup> if there is no independent monitoring institution, the whole policy on the question of participation remains doubtful. Until this happens, it could be argued that Cameroon does not integrate NEPAD in its national framework on the right to participation through elections.

Nevertheless, Cameroon's willingness to integrate NEPAD in its national development plans including elections processes is highlighted by its accession to the APRM. Cameroon signed the MOU for its accession to the APRM back in 2003 and on 5 June 2008, it received a delegation led by Graca Machel, the representative of the APRM Panel of Eminent Persons in charge of reviewing Cameroon. The aim of the meeting was to discuss the establishment of the National Governing Council as well as the identification of the ministry that will be the

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<sup>1327</sup> NEPAD Declaration on Democracy, Political, Economic and Corporate Governance AHG/235 (XXXVIII) Annex I, para 7, 8, 11 and 13.

<sup>1328</sup> Cameroon PRSP, strategy 7.

National Focal Point.<sup>1329</sup> After the meeting, Graca Machel seemed optimistic and told the media that Cameroon is ready to undergo the APRM process.<sup>1330</sup>

However, Cameroon's readiness for the process will be clarified by the extent to which the process will be transparent, especially for a country ruled by the same man for 29 years. In any case, the mere fact that Cameroon will undergo the APRM process is a good step in looking for ways to integrate NEPAD in its national development policies.

Nonetheless, will the review of Cameroon really make a difference? In general, after the review, everyone closes shop and goes home, in other words, there is no follow up of the review process. The result is not brought back in the NEPAD process; what happened after the review is nobody's business.<sup>1331</sup>

NEPAD should therefore develop a mechanism to follow up and keep track on what happens in the country after the review, and to ensure that the country implements its Programme of Action in general and addresses issues related to free and fair election in Particular.

After an assessment of the role of NEPAD in implementing the right to participation in Cameroon through election processes, the following section will focus on the role of NEPAD in implementing the right to participation through decentralisation.

## **6.6.2 NEPAD and the right to participation through decentralisation in Cameroon**

NEPAD calls upon African states to strengthen their political and administrative frameworks in line with the principles of democracy, transparency, accountability, integrity, respect for human rights and promotion of the rule of law.<sup>1332</sup>

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<sup>1329</sup> E Kendemeh 'Cameroon: governance-Cameroon's performance under review' *Cameroon Tribune*, 5 June 2008 available at <http://allafrica.com/stories/200806050922.html> (accessed 27 June 2008).

<sup>1330</sup> Kendemeh (2008)

<sup>1331</sup> Rukato (2009 presentation).

<sup>1332</sup> NEPAD 2001, para 80.

It could be argued that this prescription is not captured in the Cameroonian decentralisation plans which are characterised by a heavy control of the central authority. The fact that there is no constitutional provision sharing power between the central power and the local authorities undermines the principles at the heart of NEPAD.

Whereas NEPAD urges African states to establish a commission to foster implementation ‘of participatory and decentralised processes for the provision of infrastructural and social services’,<sup>1333</sup> the Cameroonian decentralisation framework empowers the President to appoint non elected delegates at the head of city councils with ‘special status’. This practice negates the right to participation through decentralisation as provided for by NEPAD.

After an assessment of the integration of NEPAD in Cameroonian policies on the protection of vulnerable groups and the right to participation, the following sections will provide similar analysis with special attention to South Africa.

## **6.7 Integration of vulnerable groups through the New Growth Path in South Africa**

In an attempt to comply with international law requirements that everyone including the vulnerable persons have the right to a better standard of living, the Constitution provides for the right to health care, food, water and social security in these terms:

- (1) Everyone has the right to have access to-
  - (a) health care services, including reproductive health care;
  - (b) sufficient food and water; and
  - (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

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<sup>1333</sup> NEPAD 2001, para 116.

Though these ‘well-being rights’ should be realised progressively within the confines of resources available, they are not less justiciable within the South African context. The *TAC*<sup>1334</sup> and *Grootboom*<sup>1335</sup> cases discussed earlier are illustrations of the protection social security rights. Furthermore, in the 2006 case of *Centre for Child Law and Others v The MEC for Education and Others*,<sup>1336</sup> the Witwatersrand High Court rendered a judgment protecting the right of children to adequate social services when removed from their families.

However, far from discussing social security rights in general in South Africa, and following the trend set in examining the protection of vulnerable groups in Cameroon through a national programme, this section will look at the protection of vulnerable groups in South Africa through the NEP which was created on the ashes of previous development policies know as the Reconstruction and Development Programme, AsgiSA (renewed government’s commitment to addressing joblessness and poverty and identified infrastructure needs), and The Growth, Employment and Redistribution (GEAR) which characterised Mbeki’s administration.

The NGP was approved by the Zuma’s cabinet in October 2010. It seeks to protect the vulnerable through a “comprehensive response to the structural crises of poverty, unemployment and inequality... based on solidarity across society”.<sup>1337</sup> To realise this objective, the government will focus on ‘Job drivers’ which entails:

1. Substantial public investment in infrastructure both to create employment directly, in construction, operation and maintenance as well as the production of inputs, and indirectly by improving efficiency across the economy.
2. Targeting more labour-absorbing activities across the main economic sectors – the agricultural and mining value chains, manufacturing and services.
3. Taking advantage of new opportunities in the knowledge and green economies.

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<sup>1334</sup> The *TAC* case.

<sup>1335</sup> The *Grootboom* case.

<sup>1336</sup> *Centre for Child Law and Others v The MEC for Education and Others*, case No 19559/06 (T).

<sup>1337</sup> ‘Patel Outlines Implications of New Growth Path for Provinces’ available <http://www.sabinetlaw.co.za/provincial-local-and-traditional-government/articles/patel-outlines-implications-new-growth-path-pro> (accessed 1 March 2010).

4. Leveraging social capital in the social economy and the public services.
5. Fostering rural development and regional integration.<sup>1338</sup>

To achieve its objectives, the government made several policies' commitments including in rural development, competition policy, stepping up education and skills development, Enterprise development, developmental trade policy, promoting small business and entrepreneurship; eliminating unnecessary red-tape and reviewed Broad-based Black Economic Empowerment (BBBEE) to empower the most vulnerable people. In addition commitments to regional growth through policies for African development and social partnership are also made.

The implementation of NGP will be in two phases: the first one happens in two steps; the first step currently happening (2010/2011) lays the framework including monitoring mechanisms and implementation forums; and the second step 2012/13 characterised by the review of progress and adjustment of policies as required.

The second phase characterised by the consolidation of the NGP also happens in two steps: The first step, by 2014 the reflection of changes in the structure of production and ownership should be perceptible in national statistics, and the state should be perceptibly more capable and responsive to economic needs. The second step, 2015-2020 should be the continuation of NGP in consideration of successes and needed adjustments, with efficient monitoring and evaluation against clear targets.<sup>1339</sup>

In general, this policy provides guidance to provinces and municipalities on how to successfully implement the programme without accumulation of backlogs and unnecessary delays and they also highlight conditions of employment under the project. It is hoped that this policy will yield 10 million jobs in the next 10 years.

However, the sceptics such as the Congress of South Africa Trade Union (Cosatu) reject NGP on the ground that it is

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<sup>1338</sup> The New growth path: the framework' 9-10 available at <http://www.info.gov.za/view/DownloadFileAction?id=135748> (accessed 28 February 2011).

<sup>1339</sup> The New growth path: the framework' 32-33 available at <http://www.info.gov.za/view/DownloadFileAction?id=135748> (accessed 28 February 2011).

[t]oo interventionist, too statist, too market friendly, no different from Gear, too prescriptive, that the state is too weak to make it work, that calls for wage moderation for workers are unfair, that the government should not set private sector wages and that BEE has gone too far to start again.<sup>1340</sup>

Sharing this view, Harris argues that '[e]conomically, the document is something of a curate's egg: part good and part bad, but as a result, entirely spoiled',<sup>1341</sup> though he also acknowledges that it is useful to review the BEE, the competition policy, and small business regulation and financing.<sup>1342</sup> Among proponents of NGP, experts such as Stiglitz, the Nobel Laureate in economics are of the view the policy is conducive to the eradication of poverty.<sup>1343</sup>

In its 'strategy to address the current crisis of poverty and skills shortage'<sup>1344</sup> and job creation the NGP should be commended for attempting to depart from the 'welfare system to workfare system'.<sup>1345</sup> This policy is expected to tackle poverty, 'empower people to access economic

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<sup>1340</sup> K Davie 'New growth path more like a jungle' *Mail and Guardian* online

<http://www.mg.co.za/article/2010-12-06-new-growth-path-more-like-a-jungle> (accessed 28 February 2011).

<sup>1341</sup> T Harris 'The document is something of a curate's egg'

<http://www.moneyweb.co.za/mw/view/mw/en/page292681?oid=518529&sn=2009+Detail#> (accessed 28 February 2011).

<sup>1342</sup> T Harris 'The document is something of a curate's egg'

<http://www.moneyweb.co.za/mw/view/mw/en/page292681?oid=518529&sn=2009+Detail#> (accessed 28 February 2011).

<sup>1343</sup> Stiglitz backs government's new growth path (excerpt): Professor Joseph Stiglitz - Nobel Laureate, economics

<http://www.moneyweb.co.za/mw/view/mw/en/page295799?oid=525024&sn=2009+Detail#> (accessed 28 February 2011).

<sup>1344</sup> S Liebenberg 'Making a difference: human rights and development – reflecting on the South African experience' in Andreassen & Marks (eds) *Development as a human right. Legal, political and economic dimensions* (2006) 190.

<sup>1345</sup> D Plaatjies & K Nicolaou-Manias 'Government Employment Creation Programme: Budgeting for job creation in social welfare services – Exploring EPWP opportunities (2005) 7 available at [http://www.hsrc.ac.za/research/output/outputDocuments/4254\\_Plaatjies\\_Budgetingforjobcreation.pdf](http://www.hsrc.ac.za/research/output/outputDocuments/4254_Plaatjies_Budgetingforjobcreation.pdf) (accessed 15 July 2010).

opportunities, while creating a comprehensive social safety net to protect the most vulnerable in our society'.<sup>1346</sup> Notwithstanding the controversy on the evolving policy, this thesis contends that the NGP is an attempt to start a new dialogue about improving vulnerable people's lives and only time will tell if it was worth the trial.

In terms of comparison with the Cameroonian subprogramme for the integration of vulnerable groups in the economy, it is important to note that though the NGP is broader and located in a more developed country, both plans are multifaceted schemes 'directed at the very roots of poverty and unemployment'<sup>1347</sup> and should therefore be recommended for the realisation of the RTD.

## **6.8 NEPAD and the integration of vulnerable groups in South Africa**

Similar to the Cameroonian subprogramme to integrate vulnerable groups in the economy, the NGP is informed by NEPAD's objective of reducing the proportion of poor people and addressing the difficulties of vulnerable groups such as women and rural people. In so doing the programme follows NEPAD's goal of realising the MDGs of eradicating poverty by 2015.

In addition, though the NGP five years reports says nothing on NEPAD, it is clear that the

[o]bjectives [of the NGP] were closely aligned with those defined in the African Union Plan of Action for the Promotion of Employment and Alleviation of Poverty, adopted at the Third Extraordinary Session on Employment and Poverty Alleviation in September 2004. In terms of the plan, each member of the Union committed to reverse the current trends of pervasive and persistent poverty, unemployment

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<sup>1346</sup> Budget Vote speech by the Minister of Social Development, Dr Zola Skweyiya to the National Assembly, Cape Town, 30 May 2008.

<sup>1347</sup> W D Thwala 'Challenges Facing Labour-Intensive Public Works Programmes and Projects in South Africa' *The International Journal of Construction Management* (2007) 4-5 available at <http://repository.lib.polyu.edu.hk/jspui/bitstream/10397/466/6/THWALA%201-9.pdf> (accessed 15 July 2010).

and under-employment on the African continent, and to improve the general standard of living at individual, community and national level.<sup>1348</sup>

The objectives of the AU highlighted in the quote above are well those of NEPAD which is the economic hand of the AU, hence the argument that the NGP is an integration of the NEPAD framework in the South African development policy. President's Zuma's recent commitment to give more attention to NEPAD<sup>1349</sup> illustrates how South Africa integrates the continental plan in its national policies.

The integration of NEPAD into South African policies was also underlined by the 2009 report on the measures taken by the government to deal with the challenges pointed out in the Country Self Assessment and Country Review Reports. In the report, the Public Service and Administration Minister, Masenyani Richard Baloyi<sup>1350</sup>

[r]esponded to the 23 issues raised in country review report that includes the issues of poverty and inequality; capacity constraints and poor service delivery; land reform; violence against women and children; HIV and AIDS pandemic; corruption; crime; racism and xenophobia and management of diversity'.

He also emphasised that<sup>1351</sup>

[a]s an on-going debate on issues emanating from the Country Review Report, the NGC [National Governing Council] took a decision to further engage on some of the cross-cutting issues that we believe require more so as to give a clear meaning to those issues, such as xenophobia, corruption, racism, the role of media as well as the role of civil society in a democratic dispensation. This will enable the country robust debate, arrive at a consensus and take action on these cross cutting issues.

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<sup>1348</sup> Quinton Michael Doidge Minister of Public Works (Expanded Public Works Programme Programme 5 years report, 2004/ 05-2008/09).

<sup>1349</sup> 'Zuma, Bouteflika renew commitments to NEPAD' available at [http://www.nepad.org/News/lang/en/sector\\_id/6/news/114](http://www.nepad.org/News/lang/en/sector_id/6/news/114) (accessed 30 May 2010).

<sup>1350</sup> Media Statement 'South Africa sets standard of accountability on the APRM' 4 February 2009, available at <http://et-ee.facebook.com/topic.php?uid=42742847059&topic=7088> (accessed 1 July 2010).

<sup>1351</sup> Media Statement 'South Africa sets standard of accountability on the APRM' 4 February 2009, available at <http://et-ee.facebook.com/topic.php?uid=42742847059&topic=7088> (accessed 1 July 2010).

In view of the measures taken to integrate the vulnerable groups in the economy, it could be argued that in Cameroon and in South Africa, NEPAD is integrated in the national frameworks ensuring a better standard of living for vulnerable groups.

## **6.9 The right to participation in South Africa**

This section will discuss the right to participation in South Africa before focusing on the role of NEPAD in its implementation. The first part divided in two subsections will discuss the right to participation through electoral processes and political decentralisation and the final part will investigate the role of NEPAD in implementing the right to participation in the country.

### **6.9.1 The right to participation through electoral processes**

After cleaning the ashes of apartheid characterised by the exclusion of black people from effective political and other forms of participation, the South African government has, since 1994, committed itself to ensure the right to participation of all. The first step towards ensuring the right to participation is visible through the very first chapter of the 1996 which reads as follows:

- 1) The Republic of South Africa is one, sovereign, democratic state founded on the following values:
  - (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
  - (b) Non-racialism and non-sexism.
  - (c) Supremacy of the constitution and the rule of law.
  - (d) Universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

The underlining concepts of 'democratic state', 'achievement of equality', 'non-racism and non sexism' clearly show that the government at the early stage of the transformation of the country intended to fix the wrongs of the past. Most importantly, this intention is highlighted by paragraph 1(d) that stresses the importance of 'Universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government,

(and the need) to ensure accountability, responsiveness and openness'. Put differently, free and fair elections seem to be the road map to ensure the right to participation in the country.

Beside the right to use 'indigenous' languages,<sup>1352</sup> which entails participating in national affairs using indigenous languages, the constitution through the Bill of Rights<sup>1353</sup> clearly underlines the right to participation through its provision on political rights which reads as follows:<sup>1354</sup>

- (1) Every citizen is free to make political choices, which includes the right-
  - (a) to form a political party;
  - (b) to participate in the activities of, or recruit members for, a political party; and
  - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right-
  - (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
  - (b) to stand for public office and, if elected, to hold office.

Again, this is the illustration of the fundamental place of the right to vote in South Africa. Apart from including the right to vote in the Bill of Rights, the South African government enacted several policies to ensure popular participation through free and fair elections. These policies include the Electoral Act 73 of 1998, dealing with the Municipal Electoral Act 27 of 2000, the Electoral Laws Amendment Act 34 of 2003 and the Electoral Laws Second Amendment Act 40 of 2003 all dealing with the regulation of elections of the National Assembly, the provincial legislatures and municipal councils; and to address related matters.

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<sup>1352</sup> The 1996 Constitution, Sec 6(2).

<sup>1353</sup> The 1996 Constitution, chap 2.

<sup>1354</sup> The 1996 Constitution, Sec 19.

Among others, these laws address issues such as registration of voters and voters' roll,<sup>1355</sup> proclamation and preparation for the election,<sup>1356</sup> the election *per se*,<sup>1357</sup> elections agents.<sup>1358</sup> Still to ensure a meaningful participation in the country, the government adopted the Electoral Commission Act<sup>1359</sup> which establishes the Electoral Commission,<sup>1360</sup> its powers, duties, functions and composition.<sup>1361</sup> Furthermore, it provides for the accountability of the commission and its staff,<sup>1362</sup> the conditions of registration and cancellation of political parties<sup>1363</sup> and more importantly the establishment of an electoral court<sup>1364</sup> to handle electoral disputes.

Interestingly, the 'Electoral Commission is independent and subject only to the Constitution and the law',<sup>1365</sup> and of its five members, one shall be a judge appointed by the President of the Republic.<sup>1366</sup> Nevertheless, this is not a condition ensuring the victory of the president because not only should his colleagues not have a high party-political profile,<sup>1367</sup> they should

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<sup>1355</sup> Electoral Act No 73 of 1998, chap 2.

<sup>1356</sup> Electoral Act No 73 of 1998, chap 3.

<sup>1357</sup> Electoral Act No 73 of 1998, chap 4.

<sup>1358</sup> Electoral Act No 73 of 1998, chap 5.

<sup>1359</sup> Act No 51 of 1996.

<sup>1360</sup> Act No 51 of 1996, chap 2; also Sec 190 of the Constitution.

<sup>1361</sup> The 1996 Constitution, Sec 191.

<sup>1362</sup> Act No 51 of 1996, chap 3.

<sup>1363</sup> Act No 51 of 1996, chap 4.

<sup>1364</sup> Act No 51 of 1996, chap 5.

<sup>1365</sup> Act No 51 of 1996, Sec 3(1).

<sup>1366</sup> Act No 51 of 1996, Sec 6(1).

<sup>1367</sup> Sec 6(2)(b).

also be recommended by the National Assembly by a resolution adopted by a majority of the members of that Assembly.<sup>1368</sup> More importantly, the five members of the Electoral Commission should be appointed by a committee of the National Assembly, proportionally composed of members of all parties represented in that Assembly, from a list of recommended candidates submitted to the committee <sup>1369</sup> by a panel made of:<sup>1370</sup>

- (a) the President of the Constitutional Court, as chairperson;
  - (b) a representative of the Human Rights Commission established by section 115(1) of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993);
  - (c) a representative of the Commission on Gender Equality (now called Commission for Gender Equality) established by section 119 (1) of the said Constitution; and
  - (d) the Public Protector established by section 110 (1) of the said Constitution.
- (4) The panel shall submit a list of no fewer than eight recommended candidates to the committee of the National Assembly referred to in subsection (2)(d).
- (5) The panel shall act in accordance with the principles of transparency and openness and make its recommendations with due regard to a person's suitability, qualifications and experience.

The involvement of numerous independent authorities in the constitution of the Electoral Commission should be applauded as it ensures its independence and legitimacy.

Overall, not only does the South African fundamental law <sup>1371</sup> provides extensively to ensure the right to participation, it also establishes several other national institutions<sup>1372</sup> to give the

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<sup>1368</sup> Sec 6(2) (c).

<sup>1369</sup> Sec 6(2) (d).

<sup>1370</sup> Sec 3.

<sup>1371</sup> The 1996 constitution, Sec 17, 18, 23, 30, 105, 118, 128, 151, 157, 211, and 214.

<sup>1372</sup> See chapter 9 on state institution supporting constitutional democracy; art 181(1)

opportunity to claim human rights including the right to participate in case of violation. All these measures are strengthened by the Electoral Code of Conduct<sup>1373</sup> which aims to establish an environment appropriate for free and fair elections.

Notwithstanding the apparent solidity of the legal framework catering for the right to participation in South Africa, this right was undermined by the practice of ‘floor crossing’ institutionalised through the Constitution of the Republic of South Africa Fourth Amendment Bill of 2002 which was passed into law in February 2003. Floor crossing allowed elected representatives to change their political affiliation without losing their seats at the national, provincial and local levels. Such a practice distorts people’s will and constitutes a serious loophole in the enjoyment of the right to participation. In an attempt to clarify the situation, Faull explains:<sup>1374</sup>

The South African system of representative democracy is premised on proportional representation. In national and provincial elections the total number of valid votes cast, constitutes 100% of the vote. Subsequent to elections, the votes accruing to each party are tallied proportionately, and seats are assigned accordingly in line with a formula for representation. When an individual MP crosses the floor it distorts the balance of representation as determined by citizens through the ballot box.

Put differently, floor crossing ignores public opinion and as correctly observed by Faull referring to the 2004 elections at the National Assembly, ‘a 2% shift toward a party through floor-crossing does not necessarily reflect a concurrent shift in voter intention towards that party’.<sup>1375</sup>

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- (a) The Public Protector.
  - (b) The South African Human Rights Commission.
  - (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
  - (d) The Commission for Gender Equality.
  - (e) The Auditor-General.
  - (f) The Electoral Commission.

<sup>1373</sup> The Electoral Act of 1998, Schedule 2.

<sup>1374</sup> J Faull ‘Floor crossing is bad news for democracy’ IDASA, 12 September 2005, available at <http://www.idasa.org.za/> (accessed 15 June 2010).

<sup>1375</sup> Faull (2005).

Another reason to abolish floor crossing is that, it poses a serious challenge for the fundamentals of participatory democracy as prescribed by the founding provision of the South African Constitution in the sense that elected delegates change the party without consulting the grassroots and without an avenue to be held accountable.<sup>1376</sup> As a result, it could be argued that floor crossing invalidates and weakens the constitutional provision guaranteeing ‘the equality of all votes and voters, and the right to representation’.<sup>1377</sup>

Furthermore, the practice of floor crossing had to be abandoned because it transformed the elections into a circus which ends up keeping people away from the ballot box as they choose to stay home instead of going out to cast votes that are neglected when the floor crossing takes place. In this respect, Faull notes:<sup>1378</sup>

In 2004, turnout of voters in Kwa Zulu Natal and the Western Cape, the two provinces most effected by the 2003 national and provincial defection period, registered the lowest levels of voter turnout for polls across the country, 73.51% and 73.05% respectively.

In the *United Democratic Movement v President of South Africa*,<sup>1379</sup> the court observed the danger of floor crossing of in these terms:<sup>1380</sup>

There is a close link between the voter and party in proportional representation systems than may be the case in constituency-based electoral systems, and that for this reason the argument against defection may be stronger than would be the case in constituency-based electoral systems, and that for this reason the argument against defection may be stronger than would be the case in constituency-based elections. But even in constituency based election, there is a close link between party membership and election to

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<sup>1376</sup> Faull (2005).

<sup>1377</sup> Faull (2005).

<sup>1378</sup> Faull (2005).

<sup>1379</sup> *United Democratic Movement v President of South Africa* 2003(1) SA 495 (CC), 2002 (11) BCLR (CC).

<sup>1380</sup> *United Democratic Movement* case, para 34; also G Fick ‘Elections’ in S Woolman *et al* (eds) *Constitutional Law of South Africa* (2004) 29-13.

a legislature. Floor crossing in the absence of a meaningful link between the voter and the political party he or she votes for under a closed list PR [proportional representation], system has the potential to make a relatively unresponsive system even less responsive.

In the same vein, a commentator observed that ‘floor-crossing was a travesty of democracy’.<sup>1381</sup> The shortcomings of floor crossing led to the abolition of the practice in South Africa. This was done in 2008 when the National Council of Provinces unanimously passed three bills<sup>1382</sup> ‘that scrapped floor-crossing at all levels of government’.<sup>1383</sup>

The South African electoral system, however, continues to suffer from many pitfalls. For instance, the shortage of financial resources which are unequally distributed across the country creates a situation where well-funded voting stations face less challenges than their counterparts that have more money.<sup>1384</sup>

In addition, it is compulsory to have a bar-code identification document to register and vote. Nevertheless, the Department of Home Affairs mandated to issue the document is not always up to the task as its work is constrained by numerous backlogs which become a hindrance to the right to participate.<sup>1385</sup> Nevertheless, it is important to note that the identification document and the registration process are mechanisms aiming to ensure free and fair

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<sup>1381</sup> ‘Floor-crossing scrapped’ <http://www.news24.com/SouthAfrica/Politics/Floor-crossing-scrapped-20081119> (accessed 20 June 2010).

<sup>1382</sup> The Constitution 14<sup>th</sup> and 15<sup>th</sup> Amendment Bills and the General Laws Amendment Bills which were gazetted on 9 January 2009.

<sup>1383</sup> ‘Floor-crossing scrapped’ <http://www.news24.com/SouthAfrica/Politics/Floor-crossing-scrapped-20081119> (accessed 20 June 2010).

<sup>1384</sup> D Pottie and J S Saul ‘Normalization? The South African election’ 14 *Southern Africa Report* (1999) available in *Africa files* available at <http://www.africafiles.org/article.asp?ID=5169&ThisURL=./sar.asp&URLName=SAR> (accessed 20 June 2010).

<sup>1385</sup> Pottie and Saul (1999).

elections.<sup>1386</sup> These mechanisms ensure that only people entitled to vote cast their ballots and do so only once.<sup>1387</sup> Fick<sup>1388</sup> correctly argues that in the *New National Party* case,<sup>1389</sup>

[t]he court was satisfied that a bar-coded identity document constituted a rational means of realizing the legitimate government purpose of enabling the effective exercise of the right to vote.

The other hindrance to the right to participation however is that though the Constitution<sup>1390</sup> and the Public Funding of Represented Political Parties Act of 1997 compel the state to fund ‘political parties participating in national and provincial legislatures on an equitable and proportional basis’, smaller parties are bogged down by the registration fees of R 5 000 for elections and R 150 000 for participation in elections. These fees are imposed on political parties by the Independent Electoral Commission.<sup>1391</sup>

Still on the funding of political parties, the latter are allowed to seek private funding to conduct their electoral campaign. Nevertheless, such funding is yet to be regulated. This lacuna hinders people’s ability to monitor how parties are funded; information is kept away from those who need it in order to participate meaningfully.<sup>1392</sup>

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<sup>1386</sup> *New National Party of South Africa v Government of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC).

<sup>1387</sup> Fick (2004) 29-3.

<sup>1388</sup> Fick (2004) 29-3.

<sup>1389</sup> *New National Party of South Africa v Government of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC), para 16.

<sup>1390</sup> Sec 236.

<sup>1391</sup> APRM Country Report South Africa (September 2007) 86, para 137.

<sup>1392</sup> APRM Country Report South Africa (September 2007) 86, para 138.

The South African electoral system is also bogged down by the system of proportional representation in which elected representatives are drawn from a party's list of candidates. This system does not advance the right to participation as members of Parliament (MPs) are elected through a tiny list by party dignitaries to whom they are faithful or accountable and not to the grassroots.<sup>1393</sup> Even the establishment of constituency offices did not silence some critics of the system.

Proportional representation, however, seems to be the solution for a country like South Africa that has to involve all its citizens in its affairs after the apartheid regime. In fact, proportional representation provides room for the participation of all including the smallest parties that have a say in the affairs of the land;<sup>1394</sup> it empowers vulnerable groups such as women and children,<sup>1395</sup> hence the correctness of the view that proportional representation<sup>1396</sup>

[h]as achieved the objectives for which it was designed, including fair distribution of votes cast, fair representation of parties in the National Assembly, reconciliation and harmony, containment of conflict, and enhancement of women's participation in the democratic process.

In fact, the right to participation of all, including prisoners is guaranteed. The voting rights of prisoners were protected by the Constitutional Court in *August v Electoral Commission*.<sup>1397</sup> According to the court, notwithstanding the provision of the Electoral Act, which empowers the chief electoral officer 'not to register a person as a voter if that person is serving a sentence of imprisonment without the option of a fine',<sup>1398</sup> prisoners had the right to register

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<sup>1393</sup> APRM Country Report South Africa (September 2007) 85, para 133.

<sup>1394</sup> APRM Country Report South Africa (September 2007) 85, para 131.

<sup>1395</sup> APRM Country Report South Africa (September 2007) 85, para 131.

<sup>1396</sup> APRM Country Report South Africa (September 2007) 84, para 132.

<sup>1397</sup> *August v Electoral Commission* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC).

<sup>1398</sup> Electoral Act 73 of 1998 S 8(2) (f).

and vote, they ‘could not be disenfranchised’ to use the words of Fick.<sup>1399</sup> In motivating its decision the court referred to *Haig v Canada*<sup>1400</sup> to highlight the vital place of the right to vote in a democracy.<sup>1401</sup> Quoting the *Haig* case, the court declared:<sup>1402</sup>

All form forms of democratic government are found on the right to vote. Without that right democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is the proud badge of freedom. While the Charter guarantees certain electoral rights, the right to vote is generally granted and defined by statutes. That statutory right is so fundamental that a broad liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely, every care should be taken to guard against disenfranchisement.

The court was of the view that there was no reasonable justification under section 36 of the Constitution to limit the prisoners’ right to vote.<sup>1403</sup> The *August* decision was upheld by the constitutional court in *Minister of Home Affairs v National Institute of Crime Prevention and the Re-Integration of Offenders*<sup>1404</sup> where it was decided that provisions that withdraw the right to vote from convicted prisoners who had no option of a fine violated the Constitution and were therefore unlawful.

Overall, unlike Cameroon, South Africa provides for a right to free and fair elections characterised by a genuine independent electoral commission.

## 6.9.2 The right to participation through decentralisation in South Africa

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<sup>1399</sup> Fick (2004) 29-3.

<sup>1400</sup> *Haig v Canada* 105 DLR (4th) 577, 613 (SCC).

<sup>1401</sup> For more on the democracy in South Africa, see T Roux ‘Democracy’ S Woolman *et al* (eds) Constitutional Law of South Africa (2004) 10-i.

<sup>1402</sup> The *August* case, para 18.

<sup>1403</sup> The *August* case, par 16; also Fick (2004) 29-4.

<sup>1404</sup> *Minister of Home Affairs v National Institute of Crime Prevention and the Re-Integration of Offenders* 2004 (5) BCLR 445 (CC).

The first measure in terms of decentralisation was the adoption of the Local Government Transition Act of 1993 which was the result of consultations between the Local forums and the National Local Government Negotiating Forum. This was translated in chapter 7 of the Constitution dealing with to local government.<sup>1405</sup> Amongst others, local governments are expected:<sup>1406</sup>

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in the matters of local government.

In other words, the local government is a tool through which people should realise the political, economic, cultural empowerment which are the cornerstones of the RTD. The constitutional provisions on local government were strengthened by the Local Government Municipal Structure Act of 1998,<sup>1407</sup> which among others provides for the regulation of the internal systems, structures and office-bearers of municipalities; for adequate electoral systems; and problems in connection therewith. Similarly, the Local Government Municipal Demarcation Act of 1998 provided for the reorganisation of all municipalities within the country. This is also reinforced by the Local Government Municipal System Act of 2000<sup>1408</sup> which calls upon municipalities to work in order to improve the socio economic status of local communities and deliver services to all while ensuring a strong collaboration with all its structures to ensure popular participation.<sup>1409</sup>

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<sup>1405</sup> Sec 151-164 of the Constitution.

<sup>1406</sup> Sec 152.

<sup>1407</sup> Act No 117 of 1998, Government Gazette, 18 December 1998.

<sup>1408</sup> Act No 32 of 2000, Government Gazette 20 November 2000.

<sup>1409</sup> Introductory paragraph of the Act.

Unlike in Cameroon the Constitution provides for ‘functional areas of concurrent national and provincial legislative competence’<sup>1410</sup> which include education, housing health and indigenous law and customary law. In addition, the South African fundamental law delineates exclusive areas for municipalities.<sup>1411</sup> For example the central authority is excluded from legislations related to beaches, cemeteries and dog licences. Such laws limit the power of the central authority. As a result, unlike in Cameroon the President cannot unilaterally change the nature of a particular province or municipality. This cannot happen in South Africa without a constitutional amendment to be considered by the Constitutional court. This practice deters against the super power phenomenon of the president as studied in the case of Cameroon.

The Constitution also provides for the equitable shares and allocations of revenue in the following terms:<sup>1412</sup>

- (1) An Act of Parliament must provide for-
  - (a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;
  - (b) the determination of each province's equitable share of the provincial share of that revenue; and
  - (c) any other allocations to provinces, local government or municipalities from the national government’s share of that revenue, and any conditions on which those allocations may be made.

This provision was reinforced by the Intergovernmental Fiscal Relations Act 97 of 1997, enacted ‘[t]o promote co-operation between the national, provincial and local spheres of government on fiscal, budgetary and financial matters; to prescribe a process for the determination of an equitable sharing and allocation of revenue raised nationally; and to provide for matters in connection therewith’.<sup>1413</sup> This provision is also strengthened by the

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<sup>1410</sup> Constitution, Schedule 4, part A.

<sup>1411</sup> Constitution, Schedule 4, part A.

<sup>1412</sup> Sec 214.

<sup>1413</sup> Act No 97 of 1997, Government Gazette, 17 December 1997.

Division of Revenue Act No 12 of 2009<sup>1414</sup> that shields municipalities against the manipulation of the central authority.

Unlike in Cameroon where the central authority solely controls the amount and the criteria to allocate the money to municipalities, the South African financial framework ensures that municipalities are all treated equally. The question of equitable share of revenue had been at the centre of a lawsuit. The Uthukela district council lodged an application in the Pietermaritzburg High Court against the national government claiming its equitable ‘Institutional capacity grant’.<sup>1415</sup> Though the National Treasury claimed that the district did not qualify for the grant, the national government lost the case and decided to appeal. However, the matter was amicably settled and the district qualified for the grant.<sup>1416</sup> This outcome is interesting as it tackles governance and transparency issues. Wittenberg correctly notes that laws on equitable shares and allocations of revenue are ‘enormous step forward in breaking patronage networks’.<sup>1417</sup>

The decentralisation also catered for the right of individual to participate through the legislative process at provincial level. Through its judgment of 17 August 2006 in *Doctors for Life International v The Speaker of the National Assembly and Others*,<sup>1418</sup> the constitutional court emphasised the right of individual to participate in law making.

As a matter of fact, the applicant Doctors for Life International (DFL) lodged a complaint directly to the Constitutional Court, challenging the constitutionality of four Bills: the Sterilisation Amendment Bill; the Traditional Health Practitioners Bill; the Choice on Termination of Pregnancy Amendment Bill; and the Dental Technicians Amendment Bill. It

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<sup>1414</sup> Act No 12 of 2009, Government Gazette, 3 April 2009.

<sup>1415</sup> Pietermaritzburg High Court (NW 7 February 2002b).

<sup>1416</sup> M Wittenberg ‘Decentralisation in South Africa’ (2003) 46 (paper on file with author).

<sup>1417</sup> M Wittenberg ‘Decentralisation in South Africa’ (2003) 46 (on file with author).

<sup>1418</sup> *Doctors for Life International v The Speaker of the National Assembly and Others CCT 12/05*

is important to note that at the time of launching the complaint, DFL was under the mistakenly belief that all the health legislation was still in bill form. But, in reality, all of the legislation except the Sterilisation Amendment Act had been promulgated when these proceedings were launched on 25 February 2005.<sup>1419</sup>

Nevertheless, DFL's complaint was based on the process followed by the National Council of Provinces (NCOP) that did not give the complainant the possibility to participate in the elaboration of the Bills; indeed, the NCOP failed to invite written submissions and conduct public hearings on these Bills as required by its duty to facilitate public involvement in its legislative processes and those of its committees.<sup>1420</sup>

Though the constitutional challenge was primarily directed at the Speaker of the National Assembly and the Chairperson of the NCOP, the Speakers of the nine provincial legislatures and the Minister of Health were subsequently joined as further respondents in the matter.

The respondents stood against the charges and argued that they did comply with their respective duties to facilitate public involvement in the passing of the Bills. In addition, they claimed that the obligation to facilitate public involvement only requires that the public be given an opportunity to make either written or oral submissions sometime during the process of making laws.<sup>1421</sup>

The issues before the court were the following:

- Whether the Constitutional Court is the only competent court to hear such a matter;
- Whether the court is competent to grant a declaratory relief in respect of the proceedings of Parliament;
- The nature and scope of the constitutional obligation of a legislative organ of state to facilitate public involvement in the law-making process; and

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<sup>1419</sup> *Doctors for Life*, para 10.

<sup>1420</sup> *Doctors for Life* case, para 7.

<sup>1421</sup> *Doctors for Life* case, para 1 and 4.

- Whether on the facts of the case the NCOP complied with that obligation when passing the health legislation under challenge, and, if it did not, the consequences of its failure.

On the first point, the exclusive jurisdiction was not contested by respondents and this was established on the ground that the issue under discussion questioned whether Parliament had failed to fulfill a constitutional obligation and this is a constitutional matter to be addressed by the Constitutional court.<sup>1422</sup>

On the second point, it was held that the court is competent to issue a declaratory relief only after a Bill has been signed into law and before it is brought into operation;<sup>1423</sup> in such a situation, the court can grant relief and declare the enacted law invalid. In the case under discussion, the court found that the Traditional Health Practitioners Act, the Choice on Termination of Pregnancy Amendment Act, and the Dental Technicians Amendment Act which had already been signed into law could be under consideration by the court.

On the third point, questioning whether the NCOP and the provincial legislatures facilitate public involvement in their respective legislative processes as required by the Constitution, the court observes that though the Parliament and the provincial legislatures have a broad discretion to determine how best to fulfill their constitutional obligation to facilitate public involvement in a given case, measures taken to ensure public participation should be reasonable.<sup>1424</sup>

Answering the question whether the NCOP has complied with its obligation to facilitate public involvement in relation to the Traditional Health Practitioners Act, and the Choice on Termination of Pregnancy Amendment Act, Justice Ngcobo, found that these two Bills generated public interest and the NCOP promised to hold public hearing on the issues at

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<sup>1422</sup> *Doctors for Life* case, para 30.

<sup>1423</sup> *Doctors for Life* case, para 66.

<sup>1424</sup> *Doctors for Life* case, para 127 and 128.

provincial levels.<sup>1425</sup> He also found that most of the provinces as well as the NCOP did not hold public hearings on Traditional Health Practitioners Act<sup>1426</sup> and the Choice on Termination of Pregnancy Amendment Act,<sup>1427</sup> hence the conclusion that the NCOP did not comply with its obligation to facilitate public involvement in relation to these two Acts as contemplated by section 72 (1) (a) of the Constitution.

As far as the Dental Technicians Amendment Act was concerned, the lack of public interest on the Bill, led the court to conclude that the NCOP did not act unreasonably in not holding public hearings on this statute, hence the dismissal of the claim relating to the Dental Technicians Amendment Act.

The *Doctors for life* case is the operationalisation of the right to participation and should be emulated by other African countries.

However, decentralisation does not solve all problems related to the right to participation. The concerns raised by the shadow Report to the South Africa's first periodic state report to the African Commission<sup>1428</sup> included the '[i]naccessibility of and lack of civil society involvement in preparation of periodic report'.<sup>1429</sup> According to the shadow report, the South

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<sup>1425</sup> *Doctors for Life* case, para 158.

<sup>1426</sup> *Doctors for Life* case para 170, 171, 173 and 181.

<sup>1427</sup> *Doctors for Life* case para 183, 186.

<sup>1428</sup> Shadow Report to the South Africa's first periodic state report to the African Commission presented at the 38<sup>th</sup> Session of the Commission, 21 November – 5 December 2005, Banjul, The Gambia. The report was prepared by the Centre for Human Rights, University of Pretoria; Socio-economic rights project, Community Law Centre, University of the Western Cape, the Human Rights Institute of South Africa, Lawyers for Human Rights, Central and Gauteng Mental Health Society, Gauteng Children's Rights Committee, Community Law and Rural Development Centre. The shadow Report is available on the Centre for Human Rights, University of Pretoria website [http://www.chr.up.ac.za/hr\\_docs/countries/docs/Shadow%20report.doc](http://www.chr.up.ac.za/hr_docs/countries/docs/Shadow%20report.doc) (accessed 25 June 2010).

<sup>1429</sup> Shadow Report to the South Africa's first periodic state report to the African Commission presented at the 38<sup>th</sup> Session of the Commission, 21 November – 5 December 2005, para 2.

African government prepared the reports secretly and informed the civil society only a few weeks before the tabling of the report at the African Commission. This maneuver did not allow the civil society to have a say in the elaboration of the report.<sup>1430</sup>

The secrecy around the elaboration of the report was also criticised by the African Commission which also raised its concerns ‘at the lack of involvement of civil society participation in the preparation of the report’<sup>1431</sup> and called upon the South African government to share the reports ‘with all sectors of the society to give them an opportunity to contribute in its preparation or to react thereto’.<sup>1432</sup>

Notwithstanding the problems discussed above, South Africa offers several good practices in terms of implementing the right to participation. Initiatives towards ensuring a meaningful public participation include:

- The establishment of ward committees composed of a maximum of ten elected individuals, representing diverse interest in the ward and chaired by a ward councilor. These elected individuals are mandated to guarantee full participation of the grassroots in all government’s activities.<sup>1433</sup>
- The *Imbizo* and the ‘Citizen forum’ which is a public participation scheme allowing citizens and their leaders at national, provincial and local levels to discuss various topics through which the grassroots can air their views and address issues related to their communities;<sup>1434</sup>

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<sup>1430</sup> Shadow Report to the South Africa’s first periodic state report to the African Commission presented at the 38<sup>th</sup> Session of the Commission, 21 November – 5 December 2005, para 2.

<sup>1431</sup> Thirty Eighth Ordinary Session of the African Commission, Concluding observations and recommendations on the First Periodic Report of the Republic of South Africa, para 17.

<sup>1432</sup> Thirty Eighth Ordinary Session of the African Commission, Concluding observations and recommendations on the First Periodic Report of the Republic of South Africa, para 17.

<sup>1433</sup> APRM Country Report South Africa (September 2007) 88 para 149.

<sup>1434</sup> APRM Country Report South Africa (September 2007) 89 para 149.

- The Presidential *Imbizo* through which the President of the Republic goes to the communities to monitor what is happening on the ground and to listen to the people;
- The *Batho Pele* scheme which compels service delivery institutions and staff to ‘set and adhere to standards and practices when engaging with the public and conduct their work in a professional and transparent manner’;<sup>1435</sup> and
- finally the recent establishment of a hotline through which people can directly contact the President’s office to air their views and concerns; though the efficiency of this line is yet to be shown since it was established.

Overall, though the implementation of the right to participation has few challenges such as the expensive fees imposed on political parties by the Electoral Commission, the lack of transparency on the private funding of political parties and the secrecy around the preparation of the South Africa’s first periodic state report to the African Commission, the country enacted several policies such as the establishment of ward committees, the *Imbizo* and the ‘Citizen forum’ the Presidential *Imbizo*, and the *Batho Pele* schemes to ensure public participation in the affairs of the land. Furthermore the judiciary is tireless at work in ensuring the right to participation of all including prisoners as discussed through the *Doctors for Life* case, the *August* case and *Minister of Home Affairs v National Institute of Crime Prevention and the Re-Integration of Offenders* case. Indeed, South Africa is an example of good practice in terms of ensuring the right to participation. Nevertheless, to what extent is the South Africa’s implementation of the right to participation informed by NEPAD? This question will be the focus of the next section.

## **6.10 NEPAD and the right to participation in South Africa**

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<sup>1435</sup> APRM Country Report South Africa (September 2007) 101 and 106, para 216.

This section assesses whether NEPAD is integrated in the national framework for participation through elections on the one hand and participation through decentralisation on the other hand.

### **6.10.1 NEPAD and the right to participation through elections in South Africa**

In term of participation through elections, similar to Cameroon, South Africa complies with NEPAD's request to set up multipartism and organise periodic elections to allow the people to choose their representatives. Nevertheless, the difference appears in the institution in charge of organising and monitoring the elections where contrary to the case of Cameroon, South Africa has a genuine Independent Electoral Commission in line with the NEPAD's provision urging African states to establish a suitable electoral Commission.

Furthermore, it could be argued that the completion of the South African peer review in 2006 is another indication of South Africa's willingness to integrate participatory democracy as prescribed by NEPAD in its national framework. In this respect, this thesis contends that the abolition of the floor crossing shows that the country complies with the African Peer Review Panel's (APR Panel) recommendation which emphasised the need to 'address adverse effect of floor crossing on the long-term development, vitality, vibrancy and sustainability of multiparty constitutional democracy in a post-apartheid South Africa'.<sup>1436</sup>

### **6.10.2 NEPAD and the right to participation through decentralisation in South Africa**

Whereas Cameroon disregards NEPAD's request to reinforce national political and administrative frameworks in line with the principles of democracy in terms of decentralisation, South Africa complies. In doing so, the central authority has a limited power of control over municipalities; the Constitution establishes 'functional areas of concurrent national and provincial legislative competence'<sup>1437</sup> and exclusive areas for municipalities.<sup>1438</sup>

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<sup>1436</sup> APRM Country Report South Africa (September 2007) 90, para 152.

<sup>1437</sup> Constitution, Schedule 4, part A.

<sup>1438</sup> Constitution, Schedule 4, part A.

The control over the central authority is also ensured by the equitable division of revenue raised nationally between the national, provincial and local governments.

On another positive note, people have ownership of affairs affecting their community and the courts do not hesitate to take actions in ensuring the right to participation of all. In a similar vein, schemes such as *imbizo*, presidential *imbizo* and *Batho Pele* show how people can have ownership of power in the context of decentralisation. Based on the examples discussed above, it is contended that South Africa integrates NEPAD's policies on participation through decentralisation in its national framework.

### **6.11 Concluding remarks**

The aim of the chapter was to explore the extent to which NEPAD is integrated into national development policies pertaining to the protection of vulnerable groups and the right to participation in Cameroon and South Africa.

As far as the protection of vulnerable groups is concerned, both countries strive to eradicate poverty as requested by NEPAD. The Cameroonian subprogramme to integrate vulnerable groups in the economy and the NGP in South Africa are empowering mechanisms targeting the vulnerable groups. These programmes in both countries fully incorporate NEPAD into national development frameworks.

In terms of the right to participation, the chapter shows that though Cameroon provides for the right to participation through direct and indirect participation (referendum and elections respectively) as well as regional decentralisation, the efficiency of these mechanisms is hindered by the absolute power of the President who is the only person who can initiate a referendum. In addition, the lack of an independent electoral monitoring institution is another hindrance to the free and fair elections in Cameroon.

As far as the right to participation through regional decentralisation is concerned, the implementation of this right is hampered by the extensive power of the central authority on the regional council, the lack of constitutional provisions sharing command between the

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central power and the local authorities who have only the amount of power given to them by the central authority as well as the capacity of the President to appoint delegates to head a city council with ‘special status’, which should normally be headed by an elected official. Notwithstanding the Cameroonian move towards being peer reviewed, it is contended that the country disregards NEPAD’s standards on the right to participation.

South Africa, on the other hand has an Independent Electoral Commission, a decentralisation with equitable sharing of resources between local governments, a constitutional sharing of power between the central authority and the local government, national programmes to allocate power to the grass roots and more importantly a strong judiciary which does not hesitate to enforce the right to participation, hence the contention that NEPAD framework on the right is fully integrated in the South African agenda on implementing the right to participation.

Overall there is some hope for the RTD through the protection of vulnerable groups in both countries where NEPAD is well integrated, though on the right to participation, Cameroon should integrate NEPAD’s standards as South Africa does. It is However important to note that participation without resources will not be enough to realise the right under study, hence the next chapter investigates whether partnership as understood by NEPAD can bring in resources and what factors are determinant in accessing them.