

**THE ROLE OF HUMAN RIGHTS LAWYERS IN RIGHTS BASED
APPROACH TO REDUCTION OF POVERTY IN
SUB-SAHARAN AFRICA**

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DECLARATION

I, Akinola Ebunolu Akintayo, declare that the work presented in this dissertation is original. It has never been presented to any other University or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLM (Human Rights and Democratisation in Africa)

Signed.....

Date.....



Supervisor: Dr. Christopher Mbazira

Signature.....

Date.....

DEDICATION

I dedicate this work to the reverence of the glory and awesomeness of the Almighty God, the I am that I am, the Lord God of Hosts; Him from whom all things spring, the source of my being.

I also dedicate this work to the memory of my precious Mum and Dad, Mr and Mrs Marian, Oluwayoriola Oludotun.

I also dedicate this work to the poor and impoverished anywhere they are found in the world. Take heart, things will not always be like this.



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ABBREVIATIONS AND ACRONYMS

| | |
|-------|---|
| AHRLR | African Human Rights Law Report |
| AIDS | Acquired Immunodeficiency Syndrome |
| CEDAW | Convention for the Elimination of All Discrimination against Women |
| CRC | Convention on the Rights of the Child |
| ESR | Economic and Social Rights Review |
| HIV | Human Immunodeficiency Virus |
| SAJHR | South African Journal of Human Rights |



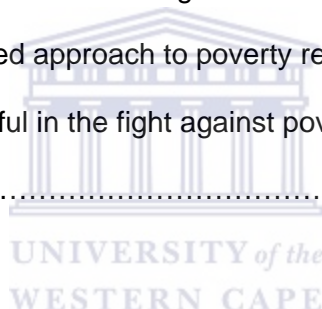
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Chapter One

1.1. Introduction

The poverty situation of Sub-Saharan Africa is at a crisis point and getting worse. Countries in the region were, once again, ranked the poorest in the world in the latest United Nations Development Programme (UNDP) *Human Development Index of 2006*.¹

What is more the Report indicates that:

Income poverty has fallen in all regions since 1990, except in Sub-Saharan Africa. The share of world's people living on less than \$1 a day has fallen from 28% to 21%, leaving over just 1 billion people over the threshold. High economic growth in China and India has been the most powerful motor for reducing income poverty. Sub-Saharan Africa is the only region that has witnessed an increase both in the incidence of poverty and in the absolute number of the poor. Some 300 million people there-almost half of the region's population-live on less than \$1 a day.²

Beyond income poverty, however, the region's poverty statistics are as follows:

- (i) Life expectancy in Sub-Saharan Africa is half that in developed countries;
- (ii) One child in five do not complete primary school;
- (iii) Less than half of Sub-Saharan Africa children make the transition from primary to secondary school;
- (iv) Of the forty-two million people infected with HIV/AIDS worldwide, Sub-Saharan Africa accounts for thirty-nine million;
- (v) One million die yearly in Sub-Saharan Africa from malaria, which is a forgotten disease in other parts of the world.³

From these statistics, it is clear that the poverty situation in the region is getting worse. This statistics also confirm the widely held view that Sub-Saharan Africa is the poorest region in the world.⁴

¹ UNDP Human Development Index of 2006 available at < www.undp.org> (accessed 17 May 2007)

² UNDP Human Development Index of 2006 (n 1 above) pp 268-269

³ UNDP *Human Development Index of 2006* (n 1 above) pp 263-273. See also World Bank *Can Africa Claim the 21st Century?* (2000) available at <<http://www.worldbank.org/html/extdr/canafricaclaim.pdf>> (accessed on 15 August 2007) and USAID 'Sub Saharan Africa' available at <http://www.usaid.gov/policy/budget/cbj2004/sub-saharan_africa/> (accessed on 12 August 2007)

⁴ See for instance J Mubangizi "Poverty production" and human rights in the African context' (2007)11 *Law Democracy and Development* 1

Freedom from extreme poverty is a human right founded upon human dignity and freedom. However, poverty is today one of human rights' biggest challenge. As pointed out by the UNDP in its 2000 edition of the world's *Human Development Report*, '[h]uman poverty is a major obstacle to attaining a decent standard of living and realising human rights'.⁵ Lifting the poor out of their valley of indignity and lack is not a question of charity or benevolence. It is a claim of the poor against the rest of the society which is founded in law and morality.⁶ The foregoing position is confirmed by the fact that the world community found it necessary to adopt the International Covenant on Economic, Social, and Cultural Rights (ICESCR) alongside the International Covenant on Civil and Political Rights (ICCPR) in 1966 to ensure not only civil and political, but also social and economic well being of persons.

Experience has shown that, often-times, legal rights are insufficient to realise human rights,⁷ a viewpoint confirmed by the 2000 edition of the *Human Development Report* when it states that: 'legal rights should not be confused with human rights-nor should it be supposed that legal rights are sufficient for the fulfilment of human rights'.⁸ Consequently, taking into consideration the link between poverty, under-development, insecurity, crime, wars and other societal ills, it is imperative to find urgent solutions to the poverty crisis in Sub-Saharan Africa not only through the application and enforcement of laws, but also through other legitimate methods of struggle to realise human rights which can be hinged upon a right based approach.

A human rights based approach to reduction of poverty has been sanctioned in many important quarters⁹ not least of which is the Office of the High Commissioner for Human

⁵ UNDP *Human Development Report* (2000) 33 available at <www.undp.org>(accessed 10 June 2007)

⁶ As above 73

⁷ As the case in South Africa has shown where in spite of a constitutionally justiciable socio-economic rights the benefits of such provisions are yet to be felt by majority of the poor and the vulnerable in South African society. See for instance, S Gloppen 'Social rights litigation as transformation: South African perspectives' in P Jones and K Stokke (eds) *Democratising development: The politics of socio-economic rights in South Africa* (2005) 153 at 174

⁸ UNDP Human Development Report 2000 (n 5 above) 25

⁹ See for instance, W Genugten and C Perez-Bustillo 'Human rights as a source of inspiration and instrument for the eradication of extreme poverty' in W Genuten and C Perez-Bustillo (eds) *The Poverty of Rights: Human Rights and the Eradication of Poverty* (2001) 184; C Jochnick 'The human rights challenge to global poverty' in *The Poverty of Rights* 159; C Perez-Bustillo 'Poverty as a violation of human rights: the Pinochet case and the emergence of a new paradigm' in L Williams, A Kjonstad & P Robson (eds) *Law and Poverty* (2003) 54; UNDP *Human Development Report 2000* (n 5 above); R Haug and E Rauan 'Operationalising the right to food in Africa' available at <<http://www.nlh.no/noragric/publications/reports/NoragricRep2B.pdf>> (accessed on 17 May 2007)

Rights (OHCHR)¹⁰. A human rights based approach to poverty reduction is an approach 'characterized by well-defined [human rights] principles, such as participation, accountability, transparency, equality, non discrimination, universality and indivisibility [of human rights]'.¹¹ A human rights based approach to poverty reduction adopts and uses the capability approach in the definition of poverty in a bid to develop appropriate strategy to combat the scourge. The capability approach to the definition of poverty defines poverty in terms of '...the absence or inadequate realisation of basic human freedoms, such as the freedom to avoid hunger or disease, among others;'¹² rather than in terms of the lack of or insufficient income. Rights based approach to poverty reduction, thus, adopt and utilises a strategy that seeks to reduce poverty through the promotion, protection, adjudication, and enforcement of these basic human freedoms. A rights based approach to poverty reduction is the only approach capable of a holistic and wide ranging view of the issue of poverty in Sub-Saharan Africa and therefore the most appropriate. Additionally, a rights based approach emphasises more the obligatory and non-charitable nature of the claim to adequate standard of living.¹³

No doubt, the legal profession occupies a unique place in regard to any approach which has the law as its foundation. A rights based approach to poverty reduction is no exception. As pointed out by Ibidapo-Obe '[t]he advancement and observance of the cherished rights of man has constituted the greatest singular obligation on the legal profession in modern society'.¹⁴ The legal profession composes of the Bench (the Judges) and the Bar (the Lawyers) of which human rights lawyers are a part. Thus, the legal profession in Sub-Saharan Africa have the greatest singular obligation to see to human rights based approach to reduction of poverty through the adjudication, application, and enforcement of human rights laws in Sub-Saharan Africa.

¹⁰ OHCHR 'Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water' A Background Paper presented at the World Summit on Sustainable Development in Johannesburg, 26 August-4 September, 2002 available at < www.ohchr.org > (accessed on 20 of June 2007); OHCHR *Human Rights and Poverty Reduction: A conceptual Framework* available at <www.ohchr.org> (accessed on 12 May 2007); OHCHR *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* available at <www.ohchr.org> (accessed 2 June 2007)

¹¹ Fourth Report of the UN Independent Expert on the Right to Development, A Sengupta, E/CN.4/2002/WG.18/2 20 December 2001 para 22 available at <www.unhchr.ch/Huridocda/Huridoca.nsf/0/42Fb12931fb5b561c1256b60004abd37/\$FILE/GO116402.pdf> (accessed on 15 September 2007)

¹² OHCHR *Human Rights and Poverty Reduction* (n 10 above) 9

¹³ Fourth Report of the UN Independent Expert on the Right to Development (n 11 above)

¹⁴ A Ibidapo-Obe *Essays on human rights law in Nigeria* (2002) 1 at 266

Of course, there are also non-curial methods of rights enforcement¹⁵ which can be employed side by side with court centred method of rights enforcements. Some of these non-curial methods of rights enforcement I have proposed in this paper for a more holistic and a more effective approach to poverty reduction in the Sub-Saharan African region. These methods will be fully discussed in Chapter Four of this paper.

1.2. Research question and objective

There is a legal basis for a rights based approach to poverty reduction in Sub-Saharan African countries. For one thing, all fifty-three countries in the region have ratified and are, thus, legally bound by the provisions of the African Charter on Human and Peoples Rights¹⁶ (African Charter), a treaty that approaches human rights in Africa in a holistic and wholesome manner by not making a distinction between civil and political, social and economic, or cultural rights. For another, constitutions¹⁷ and laws¹⁸ of countries in the region together with a plethora of international human rights instruments ratified by many countries in the region,¹⁹ provide for human rights in one form or another. In addition to these instruments, recent initiatives in Africa aimed at poverty eradication, such as the New Partnership for Africa's Development (NEPAD), also commits the countries in the region to uphold human rights. Poverty in the region is a negation of the rights guaranteed and recognised by these instruments and initiatives.²⁰

By seeking to describe the roles of human rights lawyers in using a rights based approach to poverty reduction in Sub-Saharan Africa, this paper is not implying that human rights lawyers have not, hitherto, been using rights based approach to tackle poverty in the region. However, efforts and emphasis of human rights lawyers in this

¹⁵ Like strikes, mass protests, among others

¹⁶ See the Status of Ratification/Accession to OAU/AU Human Rights Treaties available at <http://www.achpr.org/english/ratifications/ratification_charter_en.pdf> (accessed on 2 October 2007)

¹⁷ See for instance, the Constitution of the Republic of South Africa 1996

¹⁸ See for instance, the Nigerian African Charter (Ratification and Enforcement) Act Cap. A9 Laws of the Federation of Nigeria 2004

¹⁹ Notable among which are the ICCPR ratified by a significant number of countries in Sub-Saharan Africa. See the list of Sub-Saharan African Countries who have ratified this Covenant at <http://www.ohchr.org/english/countries/ratification/4.htm> (accessed on 2 October 2007); the ICESCR has also been ratified by many countries in the region. A list of countries in the region that have ratified this covenant is available at <<http://www.ohchr.org/english/countries/ratification/3.htm>> (accessed on 2 October 2007)

²⁰ See for instance OHCHR *Principles and guidelines* (n 10 above) iii, where the UN High Commissioner for Human Rights, L Arbour, states in the foreword that 'the denial of human rights forms part of the very definition of what it is to be poor'.

regard appear to have, largely, been based on the law and litigation alone. The law and litigation, on its own, is however not sufficient to realise human rights or reduce poverty.²¹ As rightly pointed out by Woodiwiss ‘...it remains the case that the law on its own is unable to secure respects for human rights’.²² Confirmation of this view can be found in South Africa where in spite of constitutionally justiciable socio-economic rights and relatively high litigation and adjudication in that regard, dividends or benefits accruing to the poor and other vulnerable groups in the country as a result of the litigation and adjudication have largely been minimal and disappointing.²³ This experience shows that in order to effectively use human rights as a tool for the reduction of poverty in Sub-Saharan Africa; something more than, and in addition to the law and court is needed. That is why I advocate, in this paper, for political and non-curial roles for human rights lawyers in form of strikes, party politics, lobbying, among others. As well as civil roles in form of the mobilisation of the poor for political action, mass education to create a poverty consciousness among the poor and the vulnerable, serving as the voice of the poor in the mass media, promoting socio-economic rights through seminars, conferences, among other things, in addition to traditional methods of rights enforcement²⁴ in using rights based approach to reduce poverty in the sub-region. The meaning of human rights lawyers contemplated in the essay is, thus, not restricted to court going lawyers but covers all persons with legal training who are working on human rights.

The purpose of this research is therefore to describe the role of human rights lawyers (as defined above) in a rights based approach to poverty reduction in Sub-Saharan Africa. The objective is to inform these role players of their proper functions and powers in using human rights regime to fight poverty in the region. This research, it is believed, will increase the tempo and quality of the fight against poverty in the region through its contribution to the human rights knowledge base, which will ultimately lead to the

²¹ See A Woodiwiss ‘The law cannot be enough: Human rights and the limits of legalism’ in S Meckled-Garcia and B Cali (eds) *The legalisation of human rights: Multidisciplinary perspectives on human rights and human rights law* (2006) 32

²² As above 34

²³ See for instance D Davis ‘Adjudicating the socio-economic rights in the South African Constitution: Towards “deference lite?”’ (2006) 22 *SAJHR* 301; S Rosa and M Dutschke ‘Child rights at the core: The use of international law in South Africa cases on children’s socio-economic rights’ (2006) 22 *SAJHR* 224; J Dugard ‘Court of first instance? Towards a pro-poor jurisdiction for the South African Constitutional Court’ (2006) 22 *SAJHR* 261

²⁴ By traditional method of human rights enforcement I mean public interest litigation

reduction of the poverty level in the sub-region and a better life for the poor, powerless, and forgotten masses of Sub-Saharan African countries.

1.3. Methodology of the research

The methodology of this research will be mainly analytical. I will interrogate and analyse the meaning of poverty from a human rights perspective. This is in addition to the analysis of the causes and impact of poverty on Sub-Saharan African countries. I will also be determining in Chapter Three, from the analysis of relevant literatures, whether human rights is relevant to the poverty reduction project in the region. However, the methodology of this research will also be descriptive in that, I will in Chapter Four, be describing additional rights enforcement methods and the roles of human rights lawyers in utilising these methods in a rights based approach to poverty reduction in the region.

1.4. Literature review

A plethora of literatures exist linking poverty to violations of human rights. According to Arzabe, the dissociation of civil and political rights from social, economic and cultural rights 'legitimizes a view of human rights which contributes to the maintenance of social exclusion and extreme poverty....'²⁵ She argues further, citing Piovesan²⁶ that 'civil and political rights are reduced to formal categories without the effective realisation of economic, social and cultural rights, and that without the fulfilment of civil and political rights, economic, social and cultural rights will have no real significance'²⁷. Furthermore, Perez-Bustillo has also argued that the destruction of civil and political rights were the necessary prelude to the dismantling of economic, social and cultural rights in Pinochet's Chile.²⁸ He submits further that Pinochet's macro economic and social policies resulted in deliberate and massive violations of 'international law of poverty', as gathered from internationally recognised economic, social and cultural rights. He therefore, concludes that Pinochet ought to have been charged for social, as well as political genocide.²⁹ In

²⁵ P Arzabe 'Human Rights: A new paradigm' *The Poverty of Rights* (n 9 above) 29. See also UNDP *Human Development Report 2000* (n 5 above) and E Rauan 'Operationalising the right to food in Africa' (n 9 above)

²⁶ F Piovesan *Direitos Humanos e o Direito Constitucional Internacional* (1996)

²⁷ P Arzabe (n 25 above) 32

²⁸ C Perez-Bustillo (n 9 above) 54 at 58

²⁹ As above 72 - 78

Ochoa's opinion, '[h]uman rights lose their meaning and force if we separate them from each other'.³⁰ He goes on to state that extreme poverty is the single greatest violator of human rights today, and that if the scourge of poverty is to be tackled there is need for a new conceptualisation of poverty from a human rights angle which emphasises the indivisibility and interdependence of human rights.³¹

The recognition of the linkage between violations of human rights and extreme poverty informed the recent shift in focus to a rights based approach to reduction of poverty.³² As Genugten and Perez-Bustillo point out:

The convergence of civil and political rights on the one hand and economic, social and cultural rights on the other forms, for several author, the cornerstone of what a decent, human rights-based society is all about. Without such a convergence been taking into consideration and realised in practice, there will be no human dignity.³³

The main thesis of the rights based approach to reduction of poverty is, thus, that poverty will cease to exist if all human rights are enforced and observed as a single whole.

As it has been pointed out earlier,³⁴ the legal profession occupies a unique place in regard to any approach which has the law as its foundation. Thus, the duty to see to the effectiveness and success of the rights based approach to reduction of poverty rests, primarily, on the legal profession of which human rights lawyers are a part.

It should be noted, however, that literature sanctioning the rights based approach to reduction of poverty referred to above³⁵ neither tells us how to go about the enforcement of these rights in aid of poverty reduction or nor does it specify the role of human rights lawyers in such endeavour. The literature that exists on curial enforcement of human rights³⁶ does not consider additional methods of rights enforcements or specify the role

³⁰ M Ochoa 'Poverty and human rights in the light of the philosophy and contributions of Father Joseph Wresinski' in *The Poverty of Rights* (n 9 above) 51 at 61

³¹ As above 60 - 61

³² See notes 9 and 10 above and the authorities cited therein

³³ W Genugten and C Perez-Bustillo (n 9 above) 184 at 186

³⁴ Section 1 above

³⁵ Footnotes 9 and 10 above

³⁶ See Prof. C Scott 'Social Rights: Towards a principle, pragmatic judicial role' (March 1999) Vol.1, No 4 *ESR Review* 7 – 10; B Majola 'A response to Craig Scott: A South Africa perspective' March 1999 *ESR Review* 10 – 13; Adv. W Trengove 'Judicial remedies for violations of socio-economic rights' (March 1999) Vol.1, No 4 Vol.1, No 4 *ESR Review* 8 – 11; N Haysom 'Giving effects to socio-economic rights: The role of the judiciary' (March 1999) Vol.1, No 4 *ESR Review* 18 – 21; A An-Naim 'To affirm the full human rights

of human rights lawyers therein. The few scholars that recognise additional methods of rights enforcement outside of the court either do not tell us what these methods are or they do not deal with the role of human rights lawyers in utilising them in aid of poverty reduction in the region.³⁷ These gaps in knowledge are what this paper is set out to fill. Therefore, other effective methods of rights enforcement and the role of human rights lawyers in utilising these methods to reduce poverty in Sub-Saharan Africa are fully set out and discussed in Chapter Four of this essay.

1.5. Outline of chapters

Chapter I Introduction

Chapter II Meaning of and impact of poverty in Sub-Saharan Africa

This chapter defines poverty. It is argued in this chapter that the underlying theme of the poor is their powerlessness. The causes and impacts of poverty in Sub-Saharan Africa are also examined. It is argued that the general view of the poor as lazy and morally deficient has no application to the poor in the region because the causes of poverty in the region are beyond them. It is also established that the poverty level in the region is indeed extreme and getting worse by the day. Something drastic, therefore, needs to be done about it.

Chapter III Relevance of human rights to reduction of poverty in Sub-Saharan Africa

This chapter examines the arguments against and the arguments for the relevance and applicability of human rights to the poverty reduction project in the region. It is argued

standing of economic, social and cultural rights' in Jill Cottrell & Yash Ghai (eds) *Economic, social & cultural rights in practice: The role of judges in implementing economic, social & cultural rights* (2004) 7; Jill Cottrell & Yash Ghai 'The role of the courts in the protection of economic, social & cultural rights' Jill Cottrell & Yash Ghai (eds) *Economic, social & cultural rights in practice: The role of judges in implementing economic, social & cultural rights* (2004) 58 - 89

³⁷ K Roth 'Defending economic, social and cultural rights: Practical issues faced by an international organisation' (2004) Vol. 26 No.1 *Human Rights Quarterly* 63; L Rubeinstein 'How international human rights organisations can advance economic, social and cultural rights: A response to Kenneth Roth' (2004) Vol. 26 No.4 *Human Rights Quarterly* 845; M Robinson 'Advancing economic social and cultural rights: The way forward' (2004) Vol. 26 No.4 *Human Rights Quarterly* 867

that human rights are indeed relevant to the poverty reduction process in the region, and that a rights based approach has three major advantages over other poverty reduction strategies. It empowers the poor for action, gives sustained attention to the plight of the poor and the powerless, and approach the issue of poverty in a holistic manner.

Chapter IV The roles of human rights lawyers in using rights based approach to reduce poverty in Sub-Saharan Africa

It is pointed out in this chapter that other effective methods of rights enforcement exist outside of litigation. These methods are set out and their effectiveness discussed. It is argued that these methods can also be applied in a rights based approach to reduction of poverty. The role of human rights lawyers in utilising these methods as poverty reduction strategies are also discussed. The hazards associated with the utilisation of these methods of rights enforcement in the region are also pointed out.

Chapter V Conclusion and recommendations

This Chapter concludes the thesis and makes necessary recommendations.



Chapter Two

Meaning of , causes, and impact of poverty in Sub-Saharan Africa

2. 1. Introduction

The meaning and concept of poverty has changed over the century. In medieval times, poverty was not associated with material deprivation as such; it was rather regarded as an ideal condition, a pure state of being with the rich venerating the poor.³⁸ Poverty became associated with material deprivation from the eighteenth century onward with the poor blamed for their own unwholesome condition and regarded as the vermin of the Earth.³⁹ This view of the poor changed, again, in the late nineteenth century when poverty was regarded as a negative effect of prevailing economic system and condition and, thus, not the fault of the poor themselves.⁴⁰ The latter viewpoint gave birth to the welfare state in the West. However, societal view of the poor has degenerated in modern times than ever before. As explained by Hanson '[t]he concept of human nature has returned to the view of people as lazy and corrupt, willing to turn to productive labor only if circumstances require of it of them'.⁴¹

The stereotypical view of the poor as lazy and corrupt has serious implications on the success of efforts aimed at alleviation of poverty in poor societies.⁴² The seriousness of the implication is aptly summarised by Hanson as follows: 'My suggestion is that current notions about the nature of poverty foreclose all possibilities of doing something

³⁸ A Hanson 'How poverty lost its meaning' available at <<http://www.cato.org/pubs/journal/cj17n2-5.html>> (accessed 20 July 2007)

³⁹ A Hanson (as above). A distinction is however made in this regard between the deserving poor and the undeserving poor. The deserving poor are those unable to engage in productive work as a result of age, infirmity, or sickness while the undeserving poor are able-bodied poor persons who for whatever reason are not working. See also T Ross 'Rhetoric of poverty: Their immorality, our helplessness' (1990-199)179 *Georgetown Law Journal* 1499

⁴⁰ A Hanson (as above)

⁴¹ A Hanson (as above). The conception of the poor as lazy and corrupt is inaccurate. It has been found that the poor actually dedicate a whole lifetime to the struggle to satisfy basic needs. See M Ochoa (n 30 above) 58

⁴² See for instance Tristal Resources 'Poverty- A short history' available at <http://www.shillington.ca/poverty/Poverty_a_short_history.pdf> (accessed on 20 July 2007) where the author states that '[a]ttitudes towards the poor are shaped by stereotypes, mollified by contemporary economic conditions but are important because they shape social support programmes'

constructive about it. This contrasts sharply with the earlier conceptualizations of poverty, each of which included appropriate courses of action for dealing with it'.⁴³

As a result of the importance of societal view of the poor on the success or failure of efforts to tackle poverty, I will interrogate, in the next sub-section, whether the contemporary view of the poor is applicable to the poor of Sub-Saharan Africa. But first, what does poverty mean?

2. 2. Meaning of poverty

The definition of poverty in terms of material deprivation is confirmed by the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) as follows: '[i]n the recent past, poverty was often defined as insufficient income to buy a minimum of goods and services'.⁴⁴ The *South African Concise Oxford Dictionary*⁴⁵ defines poverty as 'the state of being extremely poor'⁴⁶. It defines the term 'poor' as 'lacking sufficient money to live at a standard considered comfortable or normal'.⁴⁷ The *American Heritage Dictionary* on its part, defines poverty as '[t]he state of being poor; lack of the means of providing material needs or comforts'.⁴⁸ The term 'poor' is defined by the *American Heritage Dictionary* as '[h]aving little or no wealth and few or no possessions'.⁴⁹ Both the World Bank⁵⁰ and the UNDP in its *Human Development Reports*,⁵¹ still uses income as a yardstick for measuring poverty.

⁴³ Allan Hanson (38 above)

⁴⁴ Committee on Economic, Social, and Cultural Rights 'Substantive issues arising in the implementation of the International Covenant on Economic, Social, and Cultural Rights: Poverty and the International Covenant on Economic, Social, and Cultural Rights' Statement adopted by the Committee on 4 May 2001 E/C.12/2001/10, 10 May 2001

⁴⁵ *South African Concise Oxford Dictionary* (2002)

⁴⁶ As above 915

⁴⁷ As above 908

⁴⁸ *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004. 09 Aug. 2007. <Dictionary.com <http://dictionary.reference.com/browse/poverty>>.

⁴⁹ *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004. 09 Aug. 2007. <Dictionary.com <http://dictionary.reference.com/browse/poor>> (accessed on 30 August 2007)

⁵⁰ See the World Bank *Can Africa Claim the 21st Century?* (n 3 above) 89

⁵¹ See the UNDP's Human Development Reports available at <www.undp.org> (accessed on 17 May 2007)

Poverty is, today, defined in terms of the absence of basic freedoms or capabilities.⁵²

According to Sen:

[I]n analyzing social justice, there is a strong case for judging individual advantage in terms of the capabilities that a person has, that is, the substantive freedoms he or she enjoys to lead the kind of life he or she has reason to value. In this perspective, poverty must be seen as the deprivation of basic capabilities rather than merely as lowness of income, which is the standard criterion of identification of poverty.⁵³

Sen's capability approach has, however been criticised as overbroad, lacking in detail, and not specific enough to inform public policy as to which priorities to set.⁵⁴

In a bid to answer the above criticism, Nussbaum came up with a list of capabilities she considered central to human flourishing.⁵⁵ To Nussbaum, a capability will merit the status of centrality only if its presence or absence '...is typically understood to be a mark of the presence or absence of human life'.⁵⁶ Capabilities that merit the status of centrality and should inform public policy, in Nussbaum opinion, include: adequate nourishment, opportunity to realise one's aesthetic, artistic, musical, and religious potentials, among other things.

The list drawn up by Nussbaum has been criticised by Blichitz as being too general and tending toward the trivial.⁵⁷ Blichitz, after a review and criticism of previous postulates of how to determine what capability is of value to all human beings, is of the view that there are two sources of value in individual lives: 'experiences with a positive phenomenological content...' and 'the fulfilment of a being's purposes'.⁵⁸ According to Blichitz '[o]ne clear precondition for having experiences or purposes at all is survival'.⁵⁹ Thus, those goods and resources which are necessary for the survival of the individual and those required for the fulfilment of the individuals' purposes are only those that are of value and thus merit consideration. He is however of the view that for an individual's

⁵² An approach made popular by A Sen. See for instance, *Development as Freedom* (2001)

⁵³ As above 87

⁵⁴ S Fukuda-Parr 'Rescuing development concept from the HDI: Reflections on a new agenda' available at <http://www.hdr.undp.org/docs/training/oxford/readings/fukuda-parr_Rescuing.pdf>(accessed on 12 August 2007)

⁵⁵ M Nussbaum *Women and human development* (2000)

⁵⁶ As above 72

⁵⁷ D Blichitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 12-13

⁵⁸ As above 38

⁵⁹ As above 39

purpose to be of value and merit priority, it must be such that is shared with the rest of the community.⁶⁰

In addition to the foregoing, the UNCESCR, taking a human rights approach to the definition of poverty, defined poverty thus:

In the light of the International Bill of Rights, poverty may be defined as a human condition characterised by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.⁶¹

Building upon the definitions put forward by Sen and the UNCESCR, the OHCHR in 2006 made the meaning of poverty from a human rights perspective clearer. In the *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*⁶² poverty is defined by the OHCHR as follows:

From a human rights perspective, poverty can be described as the denial of a person's rights to a range of basic capabilities—such as the capability to be adequately nourished, to live in good health, and to take part in decision-making processes and in the social and cultural life of the community. In the language of rights, one may say that a person living in poverty is one for whom a number of human rights remain unfulfilled—such as the rights to food, health, political participation and so on.⁶³

From the foregoing definitions, it is clear that the denial or deprivation of freedoms (rights) or capabilities⁶⁴ considered basic to meaningful existence or to the realisation of the kind of existence an individual has reason to value will qualify as poverty. In this regard, not all rights will qualify as basic rights for the purposes of the definition of poverty. 'Since poverty denotes an extreme form of deprivation, only those capability failures would count as poverty that are deemed to be basic in some order of priority'.⁶⁵ Like '...being adequately nourished, being adequately clothed and sheltered, avoiding preventable morbidity, taking part in the life of a community, and being able to appear in public with dignity'.⁶⁶ However, it must be emphasised here that while all human rights are not relevant to the definition of poverty, all human rights are relevant for any effective strategy aimed at combating the scourge.⁶⁷

⁶⁰ As above 39 - 46

⁶¹ UNCESCR (n 44 above) para 8

⁶² OHCHR *Principles and Guidelines* (n 10 above) 9

⁶³ As above 2

⁶⁴ To use Sen's word

⁶⁵ OHCHR *Human Rights and Poverty Reduction* (n 10 above) 7

⁶⁶ Same above

⁶⁷ Same above 10-11

2. 3. Causes of poverty in Sub-Saharan Africa

In section 2.1 above, I mentioned that I will be interrogating the causes of poverty in Sub-Saharan Africa in order to determine whether the general stereotype of the poor as lazy and morally deficient is applicable to the poor of the region. That interrogation is the subject-matter of this section.

Powelson identifies four factors responsible for under-development and poverty in Africa: wars, slavery, colonialism, and law.⁶⁸ It will however amount to burying one's head in the sand if globalisation as a cause of poverty in modern day Sub-Saharan Africa is ignored. These factors as causes of poverty in Sub-Saharan Africa will now be discussed in turn.⁶⁹

War was and continues to be a major cause of poverty in Africa. Before the Kellogg-Briand Pact of 1928, which outlawed war as a means of dispute settlement, war was a legitimate policy of state and an accepted means of dispute settlement all over the world.⁷⁰ Africa was no exception to this universal trend. Therefore, before 1928, internecine wars predominated in much of the African continent.⁷¹ Wars were waged to acquire territories, to take captives for slave labor and sale, and to settle inter-communal disputes. The destructive effect of warfare on Africa's economy is aptly summarised by Powelson as follows: '[b]y continuing to rely on warfare to resolve conflicts, Africans approached a dead end. Economic development lay on a different path, which they had not taken'.⁷²

⁶⁸ J Powelson 'Africa: Warfare, Slavery, Colonialism, and Law' in a *History of Wealth and Poverty: Why a Few Nations are Rich and Many Poor* available at <<http://www.quaker.org/clq/wealth-and-poverty/08africa.htm>> (accessed 21 July 2007)

⁶⁹ I do not pretend that the factors listed above are exhaustive. More modern factors like diseases, especially HIV/AIDS; illiteracy, bad governance, corruption, among others, have also been implicated as productive of poverty in Africa. See J Mubangizi (n 4 above) However, I chose to focus more on the factors listed above because my emphasis is more on the factors that could be said to have set the process of poverty in motion in Sub-Saharan Africa; rather than those factors that came about as a result of poverty, produces more poverty, and created a vicious circle. My treatment of globalisation as a cause of poverty is because of its pervasive influence and monumental impact on Africa and my consequent fascination with the concept

⁷⁰ See for instance D Harris *Cases and Materials on International Law* 6 ed (2004) 888

⁷¹ See J Powelson (n 68 above) for a detailed account

⁷² Same above

Warfare and conflicts in Africa accounted for and continue to be a major cause of economic impoverishment, social upheaval, and poverty in modern day Africa. The destruction in the Darfur, the instability and insecurity that continue to persist in the Democratic Republic of Congo, the unending chaos and shortages of essential commodities in northern Uganda; the extreme poverty, displacements, and squalor that continue to persist in countries like Eritrea, Ethiopia, and Somalia all testify to the harmful effect of war and civil strife in the region. The situation is aptly put by Kofi Annan, the former United Nations Secretary-General as follows:

[O]ne thing is indisputable: Development has no worse enemy than war. Prolonged armed conflicts don't only kill people: They destroy a country's physical infrastructure, divert scarce resources⁷³ and disrupt economic life, including food supplies. They radically undermine education and health services.⁷⁴

War, thus, was and continues to be a major cause of poverty in Africa.

In addition to war, slavery is also identified as one of the causes of poverty in Africa. Slavery, however, existed in a different form on the continent long before the advent of Europeans.⁷⁵ Ownership of slaves in earlier times represented a status symbol; slaves were kept mainly to serve as domestic servants. They were not kept at the time for material gains or commercial purposes.⁷⁶ The story however changed with the advent of the Atlantic Slave Trade in the 1440s.⁷⁷ Slavery and the Atlantic Slave Trade had two contrary outcomes for the beneficiary on the one hand and for the victims on the other hand. The impacts of slavery on the beneficiaries' economies and societies are aptly recounted by Wiecek thus:

[S]lavery and the slave trade played a vital role in the development of European capitalism.... The development of British and French banking, insurance, and heavy industry, to say nothing of the merchant marine and the navy, was made possible through the sweated labor of Africans in the Caribbean and in continental North America.⁷⁸

⁷³ It is common cause that most states in Sub-Saharan Africa spend a larger chunk of their resources on defence. See C Mbazira 'A path to realising economic, social and cultural rights in Africa? A critique of the New Partnership for Africa's Development' (2004) Vol.4 No.1 *AHRLJ* 35 at 44 where the author points out that '...Uganda spends two per cent of its GDP on defence and less than one per cent on education'.

⁷⁴ K Annan 'Peace and development – One struggle, two fronts' in Heyns and Stefiszyn (eds) *Human rights, peace and justice in Africa* (2006) 149

⁷⁵ See the BBC World Service 'The story of Africa: Slavery' available at <<http://www.bbc.co.uk/worldservice/africa/features/storyofafrica/9chapters2.shtml>> (accessed 25 July 2007)

⁷⁶ Same above

⁷⁷ See the BBC World Service 'The Atlantic Slave Trade' available at <<http://www.bbc.co.uk/worldservice/africa/features/storyofafrica/9chapters4.shtml>> (accessed 25 July 2007)

⁷⁸ W Wiecek 'The origins of the law of slavery in British North America' (1995-1996) 17 *Cardozo Law Review* 1711 at 1738 (footnotes omitted)

Slavery was thus responsible for the accelerated social and economic developments of today's industrialised countries.

While benefiting the industrialised countries, the slave trade on the other hand, disrupted and permanently destroyed Africa's socio-economic existence and growth. The forcible removal and sale of Africa's most productive population, over a five hundred year period, dealt a deathly blow to the social and economic capacities of Africa from which it has not yet recovered.⁷⁹

While slavery ensured the death of Africa's socio-economic development, colonialism ensured its burial. The massive despoliation of Africa's human and material resources by the colonists decapitalised Africa and ensured the perpetual dependency of the continent on foreign resources. This view is supported by the forceful submission of Justice on the same point as follows:

Africa's problems are embedded in its deep-rooted history. From apartheid to slavery, Africa has experienced some of the worst human tragedies known to man. Of these events, the two centuries of European colonialism, however, have had the most monumental impact on African society. Colonialism's domination and persistence in African history are one of the main reasons why Africa is in the condition it is in today. In fact, the legacy of colonialism remains steadfast, and continues to manifest itself in all facets of African society.⁸⁰

The appropriation of much of Africa's natural wealth, the brutal suppression of Africa's competition economically, and the strangulation of educational opportunities for Africans have fostered the continent's economic and social dependence on the former colonial masters who have, in turn, continued to utilise that opportunity to keep Africa in the throes of poverty by unfair and hypocritical trade practices and policies.

The role of the inherited colonial legal system in Africa, on the other hand, have mainly, been to perpetuate inequalities engendered by wars, slavery, and colonialism in Africa. This fact can be seen, for instance, in laws dispossessing Africans of their land and mineral resources and vesting such in the central government to be made use of by the politicians as they see fit.⁸¹ African politician have not, however, utilised these immense

⁷⁹ J Powelson (note 68 above)

⁸⁰ E Justice 'The African Union: Building a dream to facilitate trade, development, and debt relief' (2003) 12 *SUM Currents: International Trade Law Journal* 127

⁸¹ Examples of these types of laws are the Nigerian Petroleum Act of 1969 and the Land Use Act of 1970. The Petroleum Act vests ownership of petroleum found anywhere in Nigeria in the

wealth to benefit the larger society but only themselves. The effects of these types of laws have, therefore, been the denial of opportunity and capacity to Africans to fend for themselves and the foreclosure of the future development of such capacity or opportunity.

Nobody today will seriously dispute the fact that globalisation has had and continues to have a negative impact on poor people in Africa. The foregoing fact is confirmed by the Preliminary Report on the impact of Globalisation in Africa submitted by Oloka-Onyango and Udagama to the United Nations in 2000.⁸² The negative impact of globalisation on developing countries is aptly summarised by Chunakara thus: '[g]lobalization has substantially contributed to the intensification of debt, poverty and economic crisis in the developing world'.⁸³ Globalisation has occasioned poverty in Africa through the unsustainable exploitation of Africa's natural resources; pollution of the environment and acts of brigandage against host communities by transnational corporations;⁸⁴ and the marketisation of human rights norms,⁸⁵ thus, rendering it impotent to protect those at the margins of society against the ills of globalisation, among others. Globalisation has, thus far, brought to Africa the deepening of poverty, marginalisation, and exclusion instead of the promised socio-economic development.

The causes of poverty in relation to the whole of Africa discussed above apply with the same force to Sub-Saharan Africa. Thus, it can be seen, from the foregoing, that Sub-Saharan Africa's under-development and poverty is beyond the ordinary Africans. The conclusion is, therefore, that causes of poverty been external to the region; the modern worldview of the poor as lazy and weak is not applicable to the region. The poor, in the region are, thus, entitled to all efforts and assistance that can be rendered to get them out of externally imposed poverty and misery.

Federal Government. While the Land Use Act vests all land in the territory of a State in the Governor of that State

⁸² UN *The realisation of economic social and cultural rights: Globalisation and its impact on the full enjoyment of human rights*. Preliminary report submitted by J. Oloka-Onyango and D Udagama E/CN.4.Sub.2/2000/13 of 15 June 2000

⁸³ M Chunakara 'Globalization and its Impact on Human Rights' available at <<http://www.religion-online.org/showchapter.asp?title=1559&C=1398>> (accessed on 22 July 2007). See also J Mubangizi (n 4 above)

⁸⁴ See *SERAC and Anor v Nigeria* (2001) AHRLR 60 where the African Commission held Nigeria liable for the pollution of Ogoni land and destruction of the Ogoni Peoples'homes by Shell, a transnational corporation

⁸⁵ U Baxi 'Voices of suffering and the future of human rights' (1998) 8 *Transnational and Contemporary Problems* 125 where the author points out that 'the paradigm of the Universal Declaration of Human Rights is being steadily supplanted by a trade-related, market-friendly, human rights paradigm'.

2.4. Effects of poverty in Sub-Saharan Africa

Effects of poverty in the region are manifold. Only the following will, however, be discussed in this section.

(i) Vulnerability

One of the most conspicuous effects that poverty has had on the region is vulnerability. This falls into two categories: vulnerability of the region as a geographical entity and vulnerability of the poor inhabiting the region. Poverty makes the region susceptible to every world's bad turn because of the region's lack of resources to adequately and appropriately respond to adverse turns of events. Be it epidemic, global warming, environmental pollution, trade depressions, conflicts, natural disasters, among others; Sub-Saharan Africa is always at the receiving end. Take the case of HIV/AIDS for instance. Of the forty-two million people infected with the disease world-wide, thirty-nine million of them are in Sub-Saharan Africa alone.⁸⁶ The rest of the world shared the other three million among themselves. The prevalence of the disease in the region has been linked to poverty.⁸⁷ It has also been found that the current global water crisis is affecting and will affect the region more as times go by because of poverty.⁸⁸

On the individuals' side, Partha Dasgupta has established a clear linkage between intakes of balanced nutrition and cognitive and motor capacity and ability of the body to fight diseases.⁸⁹ According to the writer, 'low nutritional intake depresses activity, and this isolates the infant (or child) [and even adult] from contact with the environment, and from sources of stimuli of vital importance to both cognitive and motor development'.⁹⁰ Poor people lack the wherewithal to eat properly; they have no access to potable water,

⁸⁶ UNDP (*Human Development Reports*) 'Do you know that' (Quotable quotes facts from HDR 2003) available at <http://hdr.undp.org/reports/global/2003/know_that.html#8> (accessed on 10 August 2007)

⁸⁷ See D Cohen 'Poverty and HIV/AIDS in Sub Saharan Africa' available at <<http://www.undp.org/hiv/publications/issues/english/issue27e.html>> (accessed on 01 August 2007). Also in UNAIDS '2006 AIDS Epidemic Update' 10 available at <http://data.unaids.org/pub/EpiReport/2006/04-Sub_Saharan_Africa_2006_EpiUpdate_eng.pdf> (accessed on 27 October 2007) it is stated that [i]n 2006, almost two thirds (63%) of all persons infected with HIV are living in Sub-Saharan Africa.... AIDS death in Sub-Saharan Africa represents 72% of the global AIDS deaths

⁸⁸ See the UNDP *Human Development Index of 2006* (n 1 above)

⁸⁹ P Dasgupta *An Inquiry into Well-Being and Destitution* (1993) 1 at 401

⁹⁰ As above 429

or good shelter and are additionally unemployed or under-employed. The above elements combined make poor people vulnerable to opportunistic diseases, predatory politicians and bosses; and unfavourable working conditions where they are lucky to get something to do, among other things.

(ii) *Economic retardation/stagnation*

No doubt, the Sub-Saharan African region has one of the worst economies in the world and the least able to benefit from the globalization process because of poverty.⁹¹ The region cannot compete on the same level with more developed trade partners because it lacks the necessary infrastructure and technology, a resultant effect of its poverty. The region is, therefore, forced to accept less than beneficial trade terms, and is, thus, unable to trade its way out of poverty. On the other hand, the necessary resources cannot even be provided from elsewhere because of the region's debt burden, another effect of its lack of means.⁹² As pointed out by Udombana:

The heavy debt burden and debt-servicing obligation has debilitated the socio-economic structure of many African countries "through a forced retrenchment of general budgetary expenditures and the curtailment of essential imports." Africa's debt has also constrained its prospects for economic growth as well as its ability to fulfill socio-economic and cultural rights to its citizens. The budgets of most African countries are annually overstretched, like butter that has been scraped over too much bread.⁹³

Poverty has, thus, brought to the region a vicious circle of poverty, low economic development, and more poverty.

(iii) *Diseases*

While the cause of HIV/AIDS in the region may be controversial, the fact that poverty is hindering efforts of the region to effectively tackle the HIV/AIDS pandemic is not open to controversy. This is because, for instance, the region lacks the technology to

⁹¹ See for instance, UN General Assembly 'Globalisation and its impact on the full enjoyment of all human rights: Replies of the United Kingdom of Great Britain and Northern Ireland to the report of the Secretary General'.A/57/205 para33 available at <<http://daccessdds.un.org/doc/UNDOC/GEN/NO2/480/21/PDF/NO248021.pdf?OpenElement>> (accessed on 3 September 2007) where the United Kingdom traces the woes bedeviling the region: HIV/AIDS pandemic, terrorism, violations of human rights, environmental degradation, among other, to poverty

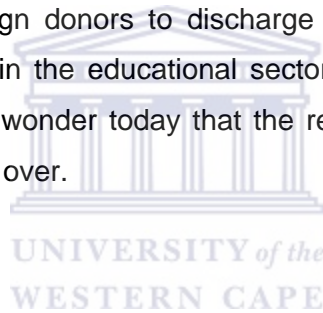
⁹² The loans were taken because the region lacks the resources to develop requisite infrastructure for development

⁹³ N Udombana 'How should we live then?: Globalisation and the new partnership for Africa Development' (2002) 20 *Boston University International Law Journal* 293 at 316 (footnotes omitted)

manufacture anti-retroviral for its citizens. The fund to purchase this drug from the developed countries is also lacking. Thus, while the threats of the epidemic have been, somewhat, neutralised in other parts of the world, it is still raging in Sub-Saharan Africa and efforts to stem the tide of the pandemic in the region might actually fail because of poverty if care is not taken.⁹⁴ Additionally, about a million people die yearly from malaria in the region. This is as a consequence of resource scarcity which is hindering the requisite steps the region should have taken to eradicate malaria from the region. It is noteworthy to point out that Sub-Saharan Africa is the only region in the whole world where malaria is still a threat of such a magnitude because of poverty.⁹⁵

(iv) *Illiteracy*

Sub-Saharan Africa has one of the lowest literacy levels in the world.⁹⁶ Huge resources, lacking in Sub-Saharan Africa, are needed to educate people. The region, has, therefore, had to rely on foreign donors to discharge its educational obligation to its citizens. Requisite investment in the educational sector having not been made by the region over the years, it is no wonder today that the region is infamous as one of the most illiterate regions the world over.



2.5. Conclusion

It has been established in this chapter that Sub-Saharan Africa is not only the poorest region in the world; the human poverty of the region is deepening daily. It has also been established that the poverty of the region is not the fault of the poor therein. It has also been shown that the impacts of poverty in the region are very serious indeed. Poverty in the region has created a vicious circle of poverty resulting in economic and social woes; economic and social woes in turn occasioning more poverty. The survival and future prosperity of the region is, undoubtedly, in jeopardy unless something drastic is done to reverse this trend. A process to lift the poor in the region out of poverty and reduce the poverty level of the region must be set in motion urgently. Since the countries in the

⁹⁴ D Cohen (n 87 above)

⁹⁵ See AAAS 'Malaria and development in Africa: A Cross-Sectoral approach' available at <<http://www.aaas.org/international/africa/malaria91/background.html>> (accessed on 12 August 2007)

⁹⁶ See the UNDP *Human Development Reports* (2003) Chapter 2, available at <<http://www.undp.org>> (accessed on 14 August 2007)

region subscribed to the ideals of human rights by their ratifications and domestications of numerous international and regional human rights instruments, as pointed out in section 1.2 above, and since extreme poverty as found in the region is a negation of all that human rights stands for, and since the remedy proposed in this paper is a rights based approach to the reduction of the region's poverty. I will, on this basis be investigating the relevance of human rights to the process of poverty reduction in the region in the next chapter.



Chapter Three

Relevance of human rights to reduction of poverty in Sub-Saharan Africa

3.1. Introduction

The human rights philosophy can be likened to the proverbial cat with nine lives.⁹⁷ From its early conception as the divine rights of man as a counterpoise to state powers during the time of the Greek sophist philosophers;⁹⁸ down to medieval Christian philosophers.⁹⁹ Up until the Age of Enlightenment when the human rights philosophy reached its peak;¹⁰⁰ to the nineteenth century when it lost its glory to positivism; to the revival, re-emergence, and renewed importance of the philosophy in the period after the Second World War. The human rights philosophy has refused to die.¹⁰¹

Since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, human rights have been touted by the world community as panacea for all problems, especially the third worlds'. Yet, ordinary men in the streets, especially Sub-Saharan Africans, have not seen changes in their poverty situation. As earlier pointed out,¹⁰² things are in fact getting worse. As pointed out by Bertrand Ramcharan, the UN Acting High Commissioner for Human Rights, '[h]uman rights may seem distant ideals if your family is starving, if you cannot protect yourself or them from preventable illnesses or provide your children with basic education'.¹⁰³ The foregoing quote illustrates two things. One, the concern and argument of some jurists who contended that the human rights system is irrelevant to any human problem, the problem of poverty inclusive; two, it explains the ambivalence of Africans who doubts the relevancy and applicability of the law, especially, human rights law to their situation. Of course, other jurists exist also,

⁹⁷ The proverbial cat in African mythology is believed to be immortal

⁹⁸ *Aristotle's Politics*

⁹⁹ St. T Aquinas *Summa Theologica* Lib.II, Pt.II (1475); *et al*

¹⁰⁰ Through the writings of jurists like John Locke *Two Treatises of Government* (1689); *et al*

¹⁰¹ See also generally, J Shestack 'The philosophic foundations of human rights' (1998) 20 *Human Rights Quarterly* 201

¹⁰² Section 2.4 above

¹⁰³ Bertrand Ramcharan Foreword to *Human Rights and Poverty Reduction* (n 10 above) iii

who daily extol the virtues, applicability and relevance of the human rights system to human problems, the problem of poverty inclusive.¹⁰⁴

Since this paper is advocating a rights based approach to reduction of poverty, it is necessary to investigate, in this chapter, the relevance of human rights to the poverty reduction project in Sub-Saharan Africa. This will be done by considering some of the arguments against and those for the relevance and applicability of human rights in this regard.¹⁰⁵ Thereafter a conclusion will be reached as to whether or not human rights are relevant to the poverty situation in the region.

3.2. Arguments against and for the relevance of human rights

The arguments against and for the relevance of human rights to poverty reduction are divisible into two broad categories: the general argument against the applicability of human rights to any human problem and the objections to socio-economic rights as human rights strictly so called. These arguments will be discussed briefly in turn.

3.2.1. General arguments

A good place to launch this enquiry will be from the arguments of Jeremy Bentham, who vehemently denied the existence of rights outside of positive law. Bentham conceived the idea of rights, as 'dangerous nonsense'.¹⁰⁶ In his analysis of the Declaration of Rights of Man 1791, issued after the French revolution, he said that

[I]n proportion to the want of happiness resulting from the want of rights, a reason exists for wishing that there were such things as rights. But reasons for wishing there were such things as rights, are not rights; -a reason for wishing that a certain right were established, is not that right – want is not supply – hunger is not bread'.¹⁰⁷

¹⁰⁴ Some of these jurists and their arguments will be discussed below

¹⁰⁵ I will here be considering what I consider the modern controversy concerning the applicability and relevance of human rights to human problems. I will therefore not be discussing the early developments of natural rights or the theses of classical writers like Locke, Rousseau, *et al* and their critics because I think that subject-matter has been over-discussed

¹⁰⁶ J Bentham 'Anarchical fallacies' in Jeremy Waldron (ed) *Nonsense upon stilts: Bentham, Burke and Marx on the Rights of Man* (1987) 52

¹⁰⁷ As above 53

To Bentham, therefore, human right is, simply, non-existence outside of positive law.¹⁰⁸

Predictably, Karl Marx on his part saw human rights as a capitalist contraption put together to further *bourgeois* interests.¹⁰⁹ To Marx, the main purpose of human rights is the removal of all restraints and responsibility from the capitalist entrepreneur, notwithstanding the fact that they are couched in a universal character.

To Burke, it is eminently better that man should be content with his class and condition of life rather than rise against established authority in the name of human rights.¹¹⁰ The idea that human rights confer a right of revolt on ordinary men is, to Burke, a scandal.

As for Pollis and Schwab, human rights is a Western construct which is irrelevant or at best of limited applicability in Africa.¹¹¹ In these writers view, the individualist bent of human rights is alien to African culture where the individual is conceived as part of a greater whole. Additionally, while economic development is the sole pre-occupation of the leaders of the newly independent African states, civil and political rights is the pre-occupation the West. Human rights philosophy of the West therefore holds no attraction for African leaders.

Karen van Marle, in her critique of the South African post-apartheid law, politics, and constitutional order; is of the view that monumental constitutionalism [human rights philosophy] tends to treat the achievement of a written constitutional text as an end in itself: an end to politics, an end to struggle to realise human rights, and an end to agitation.¹¹² To her, post-apartheid South Africa has gone the way of monumental constitutionalism by treating the constitution and the entrenched Bill of Rights as an end itself.

¹⁰⁸ Bentham was subsequently proved wrong in this regard when the Nuremberg tribunal set up to try Nazi criminals after the Second World War invoked natural law and rights doctrine to invalidate obnoxious Nazi laws. See J Dugard 'Human Rights' *International Law: A South African Perspective* 3rd Edition (2005) 308 at 309-10

¹⁰⁹ K Marx 'On the Jewish question' in Jeremy Waldron (ed) *Nonsense upon stilts* (n 106 above) 119

¹¹⁰ E Burke 'Edmund Burke's Reflections on the revolution in France' in Jeremy Waldron (ed) *Nonsense upon stilts* (n 106 above) 77

¹¹¹ Pollis A and Schwab P 'Human rights: A Western construct with limited applicability' in Pollis A and Schwab P (eds) *Human rights: Cultural and ideological perspectives* (1979) 1

¹¹² K Van Marle 'Lives of action, thinking and revolt – A feminist call or politics and becoming in post-apartheid South Africa' (2004) 19 *SAPR/PL* 605

The foregoing are just some of the criticism that have been levelled against the human rights philosophy.¹¹³

Jeremy Waldron¹¹⁴ summarises the charges laid by the trio of Bentham, Burke, and Marx against the relevance of human rights into four major categories. The first is the charge of abstraction: that human rights extrapolates from social and political norms of a particular epoch and society and distil them into norms of universal validity and applicability. The second is the charge of rationalism: that human rights conceive of politics and political practice as a matter of rational thought and principles, devoid of feelings of loyalty, devotion, and respect for authority; the third charge is that of individualism: that human rights have the individual as its focus; and the fourth charge is that of egoism: that the application of human rights introduces selfishness and self-concern into social life and moral discussion to the detriment of the society at large. This summary adequately reflects the general nature of the criticism levelled against the human rights philosophy.

In replying to these charges, Waldron is of the view that the charge of abstraction is not peculiar to human rights theory. He says: '[i]t is true that there is a long tradition of universalist moralizing in the west: Aristotle's search for the final good for man, not just for the Athenian; Christ's ministry to the Gentiles; Kant's imperatives that purported to cut categorically across all contingent concerns and circumstances'.¹¹⁵ He however goes on to say that there are no distinct societies and cultures as such. But that every society and culture on Earth is open to interaction and influence by others. He concluded by saying '[w]hether we like it or not, there is a legitimate *subject-matter* for moral evaluation that has to transcend local practices, narrowly understood'.¹¹⁶

To Waldron, therefore, the charge of abstraction made against human rights principles is not made out.

¹¹³ One of the most recent and comprehensive criticisms against the human rights philosophy is the one by Kennedy who examined ten different criticism against the human rights movement. D Kennedy 'The international human rights movement: Part of the problem?' (2002) 15 *Harvard Human Rights Journal* 101. He, however, merely repeats most of the criticism that have been mentioned above

¹¹⁴ J Waldron 'Nonsense upon stilts? – a reply' in Jeremy Waldron (ed) *Nonsense upon stilts* (n 106 above)

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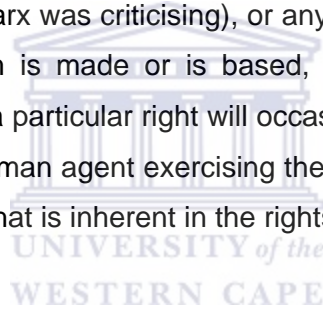
¹¹⁵ J Waldron (as above) 168

¹¹⁶ As above 169-170

As regards the second charge of rationalism, Waldron says that 'the philosophy of human rights is quite capable of generating an aura of feeling of its own when it is realised in the constitution and life of a nation'¹¹⁷ Thus, while conceding that human rights philosophy is 'austere and rationalistic'¹¹⁸ Waldron asserts that the human rights philosophy is however capable of feelings.

On the third charge of individualism, Waldron is of the view that granted that some rights are strictly individualistic in character but others are also geared towards the protection of man in community.¹¹⁹ According to Waldron, human rights focus on the individual 'shows only that certain forms of individual security may be preconditions for communal engagement'.¹²⁰

The last charge defended by Waldron is the charge of egoism levelled by Karl Marx against human rights philosophy. According to Waldron, there is nothing in the Declaration of Rights (which Marx was criticising), or any other human rights instruments for that matter, where a claim is made or is based, solely, on selfish action. Thus, whether or not the exercise of a particular right will occasion selfishness is dependent on the motive and action of the human agent exercising the right. Selfishness or egoism, as Marx calls it, is not something that is inherent in the rights themselves.



3.2.2. The objections against socio-economic rights as human rights

Of more importance to our discussion is the controversy surrounding the conception of socio-economic rights as human rights strictly so called. This importance is underlined by the fact that socio-economic rights are the main vehicle of rights based approach to poverty reduction.¹²¹ Thus, if socio-economic rights are found not to be proper human rights, then rights based approach to reduction of poverty will appear to be nothing but rhetoric only.

¹¹⁷ As above 182

¹¹⁸ As above

¹¹⁹ As above 184. It is noteworthy also that the International Bill of Rights and the African Charter expressly recognizes and protects communal rights in their various provisions. See for instance, article 27 (1) of the UDHR; common articles 1 of the ICESCR and the ICCPR; articles 20 - 24 of the African Charter

¹²⁰ As above 185

¹²¹ See for instance, UNDP *Human Development Report 2000* (n 5 above) 73

The controversy surrounding the status of socio-economic rights as human rights and the distinctions between civil and political rights and socio-economic rights is not of recent origin. It dates back to the 1960s, and resulted in the adoption of two different covenants for the two sets of rights with different enforcement mechanisms.¹²² Objections raised against the conception of socio-economic rights as proper rights can be classified into four types as follows: the nature of the rights, the nature of the duty they impose, the indeterminacy argument, the question of the institutional competence and legitimacy of courts to enforce socio economic rights.¹²³ These objections will be examined in turn:

(i) *The nature of the rights:* Critics of the concept of socio-economic rights contend that the rights are polycentric in nature: its enforcement has implications far beyond the immediate parties before the court, and thus not suited for judicial enforcement because all affected parties cannot be heard by the court.¹²⁴ As far as the critics of these rights are concerned, any right that is not amenable to judicial enforcement does not qualify to be called a fundamental right because it will bring the law into disrepute. They, thus, argued that socio economic rights are only fit for inclusion in a Bill of Rights as directive principles of state policy.¹²⁵

(ii) *The nature of the duty imposed:* There is the conception that human rights, as deriving from natural law, are negative in nature; whereas socio economic rights are positive. Critics further contend that the rights impose positive obligations on the state which entails expenditure by the state. They assert that this is problematic because judges are ill suited to determine how state money is expended or determine the correct priorities for state expenditure.¹²⁶

(iii) *The indeterminacy argument:* This argument relates to the indeterminacy of the substantive obligation that the rights give rise to. Critics argue that socio economic rights lack precise content because the rights are formulated to be realised progressively within

¹²² N Haysom 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *SAJHR* 451

¹²³ See also K Oregan J. 'Introducing socio economic rights' (March 1999) Vol.1, No.4 *ESR Review* 3

¹²⁴ L Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353 at 394 - 397

¹²⁵ See for instance, D Davis 'The case against the inclusion of socio economic demands in a Bill of Rights except as directive principles' (1992) 8 *SAJHR* 475

¹²⁶ See E Mureinik 'Beyond a charter of luxuries: Economic rights in the constitution' (1992) 8 *SAJHR* 464

states' available resources. Critics further contend that rights like adequate standard of living and phrases like reasonable measures remain vague and imprecise. These facts, they contend, is fatal to the recognition or adjudication of such rights as human rights.

(iv) *The institutional competence and legitimacy of court argument:* Critics of socio economic rights also objects to judicial enforcement of socio economic rights on the ground that the court lacks the competence and legitimacy to adjudicate on such rights. They argued that if the court were to start enforcing these rights, having regard to the nature of socio economic rights, it will give rise to a situation of an unelected organ of a state: the court, thwarting the will of the elected representatives of the people: the legislature and executive. This argument is otherwise referred to as the counter-majoritarian argument.¹²⁷

The above objections are, however, misconceived and not sustainable for the following reasons. Polycentricity is not a problem that is exclusive to socio economic rights. All judicial decisions have an inherent quality of being polycentric; they often have impacts and consequences far beyond the immediate parties before the court. Judicial decisions which establish a precedent is a case in point.

As regards the argument that socio economic rights impose positive rather than negative duties, it is to be noted that civil and political rights also impose positive duties on occasions. Mureinik¹²⁸ illustrates this fact very well with the civil and political right to fair trial. He argues that fair trial includes the right of the accused person to counsel provided by the state where the accused cannot afford one for himself. He argues further, that for this right to be realised courts must be built, judges and other judicial officers must be employed and paid well, among other things. He therefore concludes, rightly in my view, that there is no difference in this regard between the two classes of rights in question.

As regards the indeterminacy objection, this objection is not exclusive or peculiar to socio-economic rights. Some civil and political rights also lack content. The right of the accused person to be taken before a competent court upon arrest within a reasonable time is one example. What is reasonable time in such cases is often determined by the

¹²⁷ See N Haysom (n 122 above)

¹²⁸ E Mureinik (n 126 above) 465 - 467

court on a case by case basis taking all the circumstances of a particular case into consideration. As rightly pointed out by Schwartz: 'constitutional rights are usually written in general terms and we depend on the courts to give them specific substance'.¹²⁹ It is also important to point out that the vagueness of civil and political rights has been cleared away, overtime, through repeated judicial application of the rights. Socio economic rights should be given the same opportunity. The objection of vagueness and imprecision of socio-economic rights is, therefore, not made out and is not a valid ground for denying the status of human rights to socio economic rights.

The fourth objection relates to the institutional competence and legitimacy of courts to enforce socio-economic rights. The institutional competence objection relates more to the argument that courts are ill suited to direct state expenditure. While it is asserted here that enforcement of some civil and political rights also have resource implications,¹³⁰ adjudication of socio economic rights need not involve the determination of state expenditure by the courts in all cases.¹³¹ The role of the court could mainly be that of reviewing the expenditure of the executive to see whether it complies with human rights norms.¹³² And regarding the institutional legitimacy argument, it suffices to state here that courts often invalidate laws that are contrary to constitutionally guaranteed civil and political rights. If objections are not raised against the exercise of jurisdiction by the courts in those instances one wonders why such objections when raised against socio-economic rights should be considered valid. On the whole, objections raised against the status of socio economic rights as enforceable human rights have no merit.

3.3. The relevance of rights based approach to poverty reduction

Having examined the more general arguments against and for human rights in the foregoing paragraphs, I will now turn to specific justifications or relevance of rights based approach to the reduction of poverty. A convenient starting point in this regard is UNDP's *Human Development Report of 2000*.¹³³

¹²⁹ H Schwartz 'Economic and social rights' (1992-1993) 8 *American University Journal of International Law and Policy* 551 at 562

¹³⁰ See the illustration of the right to fair trial given above

¹³¹ Although I am of the opinion that courts should determine how state money is expended in appropriate cases. There is nothing that inherently makes the judiciary less qualified than other organ of state to determine state budget

¹³² See also E Mureinik (n 126 above)

¹³³ UNDP *Human Development Report 2000* (n 5 above)

The main thesis of the UNDP's *Human Development Report 2000* is that human rights empower the poor for action; '[r]ights make human beings better economic actors'.¹³⁴ According to the Report, the recognition of the interdependence and indivisibility of civil and political rights and economic and social rights and the observance and application of same will empower the poor to fight against poverty. The Report states that '...the diverse human rights-civil, political, economic, social and cultural-are causally linked and thus can be mutually reinforcing. They can create synergies that contribute to poor people's securing their rights, enhancing their human capabilities and escaping poverty'.¹³⁵

With the UNCESCR, the main challenge facing the fight against poverty is 'to connect the powerless with the empowering potential of human rights'.¹³⁶ The relevance of rights based approach to poverty reduction was stated by the UNCESCR to be the provision of

[A] framework of norms or rules upon which detailed global, national and community-level poverty eradication policies can be constructed. While poverty raises complex multi-sectoral issues that are not amenable to simple solutions, the application of the international human rights normative framework to these issues helps to ensure that essential elements of anti-poverty strategies, such as non-discrimination, equality, participation and accountability, receive the sustained attention they deserve.¹³⁷

In the UNCESCR's view, rights based approach to poverty reduction will not only empower the poor but will also direct sustained attention to the issue of poverty.

The theme of the UNDP's *Human Development Report 2000* was restated by the OHCHR in 2002 that '[a] human rights approach to poverty is about empowerment of the poor'.¹³⁸ This message was again re-echoed by the OHCHR in 2006.¹³⁹ According to the OHCHR:

A major contribution of a human rights approach to poverty reduction is the empowerment of poor people, expanding their freedom of choice and action to structure their own lives. While the common theme underlying poor people's experiences is one of powerlessness, human rights empower individuals and communities by granting them entitlements that give rise to legal

¹³⁴ As above iii

¹³⁵ As above 73

¹³⁶ UNCESCR (n 44 above) para 6

¹³⁷ Same above para 9

¹³⁸ OHCHR 'Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water' (n 10 above)

¹³⁹ OHCHR *Human Rights and Poverty Reduction* (n 10 above)

obligations on others. Provided the poor are able to access and enjoy them, human rights can help to equalize the distribution and exercise of power both within and between societies. In short, human rights can mitigate the powerlessness of the poor.¹⁴⁰

More recently, in *Principles and guidelines for a human rights approach to poverty reduction strategies* published by the OHCHR to help countries, international organisations, and development practitioner devise pro-poor policies and strategies, it is stated as follows:

One reason why the human rights framework is compelling in the context of poverty reduction is that it has the potential to empower the poor. As is now widely recognized, effective poverty reduction is not possible without the *empowerment* of the poor. The human rights approach to poverty reduction is essentially about such empowerment.¹⁴¹

Thus, the main thread running through all the views sampled above is that rights based approach to poverty reduction can empower the poor, if properly conceived and applied. This is in agreement with the concept of the capabilities approach to poverty articulated by Sen and others discussed in section 2.2 above.

3.4. Has human rights been useful in the fight against poverty?

Whether human rights is relevant or irrelevant in the fight against poverty can only be determined, ultimately, not by arguments, postulations or theories, but by its practical usefulness in the fight against poverty. I will therefore proceed to examine some instances where the invocation and application of the philosophy of rights have been useful in the fight against poverty in South Africa, India, and Nigeria.¹⁴² Although India is not in Sub-Saharan Africa but it shares many characteristic with countries in the region. More will be said on this below.

South Africa is a country beset with widespread poverty and a yawning gap between the have and have-nots.¹⁴³ The country also has a unique legal system in Africa: it is the legal system with the most comprehensive array of constitutionally guaranteed socio-

¹⁴⁰ As above 14

¹⁴¹ OHCHR *Principles and Guidelines* (n 10 above) para 18

¹⁴² What informed the choice of the countries selected is the fact that they, collectively, represent *all* the different legal systems in Sub-Saharan Africa as far as the justiciability or the enforcement of socio-economic rights is concerned. South Africa represents a constitutionally justiciable socio-economic rights jurisdiction in Sub Saharan Africa. India represents non justiciable socio-economic rights jurisdiction. While Nigeria shares the characteristics of both India and South Africa.

¹⁴³ This fact was adverted to by Yacoob J. in *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC)

economic rights in its Bill of Rights. Consequently, fundamental rights contained in the country's Bill of Rights, in the form of entrenched socio-economic rights, have been invoked a number of times in an attempt to come to grips with the high poverty level in the country.¹⁴⁴ Thus, in *Government of the Republic of South Africa v Grootboom*,¹⁴⁵ section 26 (1) provision of access to adequate housing of the Constitution of the Federal Republic of South Africa (the Constitution) was invoked in favour of the homeless respondents in that case. The South African Constitutional Court made a declaration that that government's housing programmes did not pass the test of reasonableness and ordered the government to endeavour to make housing accessible to the respondents.

Additionally, in *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*,¹⁴⁶ human rights activists successfully invoked sections 27 (1) and 28 (1) of the Constitution of the Federal Republic of South Africa (the Constitution) to force the government to provide Nevirapine to pregnant HIV/AIDS positive patients and their new born babies in order to stop the mother- to – child transmission of HIV/AIDS. The number of lives saved by this legal intervention can only be imagined, considering the prevalence of HIV/AIDS in South Africa at the time.

Also, in *Khosa v Minister of Social Development*¹⁴⁷ human rights philosophy once again came to the aid of the poor and the down-trodden. Applicants in this case were indigent permanent residents and children born in South Africa who ordinarily would have been entitled to social assistance. They were, however, denied social assistance on ground that they are not South African citizens. This is in contravention of section 27 (1) (c) of the Constitution which provides that everyone who is unable to support himself and his dependants is entitled to social security. The law excluding the applicants from social assistance was declared unconstitutional by the South African Constitutional Court when the case came before it, and the government was ordered to provide social assistance to the applicants.

¹⁴⁴ In my examination of the relevant cases, I will not be delving into the analysis of the jurisprudence of the South African Constitutional Court as I consider such an endeavour outside the immediate ambit of the discussion in this section

¹⁴⁵ (N 143 above)

¹⁴⁶ 2002 (10) BCLR 1059 (CC)

¹⁴⁷ 2004 (6) BCLR 569 (CC)

Furthermore, research has shown that all hope is not lost for Sub-Saharan African countries without constitutionally justiciable socio-economic rights like South Africa. India is a vivid illustration of this point. Although not an African country, it shares many characteristics with many Sub-Saharan African countries as I adverted to above. For instance, poverty is prevalent and acute in India like almost all of Sub-Saharan Africa countries.¹⁴⁸ The country does not also have justiciable socio-economic rights. Its socio-economic rights are contained in the Directive Principles of State Policy part of its Constitution which is not enforceable in court, just like many other countries in Sub-Saharan Africa. However, with the instrumentalities of public interest litigation and a dynamic and activist judiciary, human rights principles and philosophy have been used to combat inhumane prison conditions,¹⁴⁹ fight the scourge of bonded labour,¹⁵⁰ establish the rights to a speedy trial,¹⁵¹ to legal aid,¹⁵² to a livelihood,¹⁵³ and to human dignity,¹⁵⁴ among others.¹⁵⁵

Lastly, Sub-Saharan African countries without a constitutionally justiciable socio-economic rights and a passive judiciary, like the case in Nigeria, are also not left out of the saving and redeeming powers of human rights. The Nigerian Labour Congress in coalition with human rights activists and the civil society in Nigeria have, in spite of unenforceable socio-economic rights provisions of its Constitution¹⁵⁶ and a passive judiciary, been able to ensure that socio-economic rights of Nigerians are not unnecessarily trampled upon. This has mainly been through the instrumentalities of national strikes.¹⁵⁷ The effectiveness of the strikes was attested to by an opinion writer as follows '[b]ut for those efforts, [the national strikes to protest the incessant increases

¹⁴⁸ India is in fact reputed to have '...the world's largest number of poor people in a single country. Of its nearly 1 billion inhabitants, an estimated 350-400 million are below the poverty line, 75 per cent of them in the rural areas'. Indianonestop 'Poverty in India' available at <<http://www.indianonestop.com/povertyindia.htm>> (accessed 20 September 2007)

¹⁴⁹ *Sunil Batra v Delhi Administration* 1978 AIR SC 1675

¹⁵⁰ *People's Union for Democratic Rights v Union of India* AIR 1982 SC 1473

¹⁵¹ *M H Hoskot v State of Maharashtra* (1978) 3 SCC 544

¹⁵² *Suk Das v Union Territory of Arunchal Pradesh* (1986) 4 SCC 401

¹⁵³ *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545

¹⁵⁴ *Upendra Baxi v State of Uttar Pradesh* (1986) 4 SCC 106

¹⁵⁵ See J Cassels 'Judicial activism and public interest litigation in India: Attempting the impossible?' (1989) 37 *American Journal of Comparative Law* 495. See also G Peiris 'Public interest litigation in the Indian Sub-continent: Current Dimensions' (1991) 40 *International and Comparative Law Quarterly* 67

¹⁵⁶ Socio-economic rights are, however, enforceable in Nigeria via the provisions of the African Charter which the country domesticated in 1980

¹⁵⁷ The government of Nigeria had, between 2000 and 2007, increased the prices of petroleum products over eight times to the detriment of the poor masses. See for instance, the Editorial of *Vanguard Newspaper* 'Nigeria: Another avoidable strike' *Vanguard* 21 June 2007 available at <<http://allafrica.com/stories/200706210788.html>> (accessed on 30 August 2007)

of petroleum products] petroleum products would have gone far beyond the reach of most people'.¹⁵⁸ The legal basis for this strikes are asserted by the actors to be the non-justiciable, socio-economic; and the justiciable, civil and political human rights provisions of the 1999 Constitution of the Federal Republic of Nigeria (the Nigerian Constitution). These are section 14 (2) (b),¹⁵⁹ section 16 (2) (d),¹⁶⁰ section 39,¹⁶¹ and section 40¹⁶² of the Nigerian Constitution, among others¹⁶³.

It is noteworthy; also, to refer to the impact that human rights has had at the African regional level. The provisions of the African regional human rights instrument, the African Charter, have been severally invoked by victims of human rights violations who otherwise will not have obtained redress domestically. Relevant to this essay are three cases dealing specifically with socio-economic rights adjudicated upon by the African Commission on Human and Peoples' Rights (the Commission)¹⁶⁴

The first of these cases is the case of *SERAC and Another v Nigeria*¹⁶⁵ where the Commission held the government of Nigeria liable for the violation of the Ogoni Peoples' of Niger-Delta's sundry civil and political and socio-economic rights by Shell, a transnational oil corporation exploring for petroleum in the region, which includes right to food and housing which are not expressly contained in the African Charter.¹⁶⁶

In *Purohit and Another v The Gambia*,¹⁶⁷ the African Commission held that the government of Gambia is in violation of article 16 right of the complainants, who are mental patients in its mental hospital, to enjoy the best attainable state of physical and

¹⁵⁸ Opinion 'Nigeria: Oshiomole-Exit of a labour icon' *This Day* 15 February 2007 available at <<http://allafrica.com/stories/200702160071.html>> (accessed on 30 August 2007)

¹⁵⁹ Which provides that 'the security and welfare of the people shall be the primary purpose of government'. This section is contained in Chapter II Fundamental Objectives and Directive Principles of State Policy part of the Constitution which is non-justiciable in terms of section 6 (6) (c) of the Constitution

¹⁶⁰ Which provides that "[t]he State shall direct its policy towards ensuring: that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens'. This section is also contained in Chapter II of the Constitution

¹⁶¹ This section guarantees freedom of expression. It is contained in Chapter Four (Fundamental Rights) enforceable part of the Constitution

¹⁶² The section guarantees freedom of association and is also in Chapter Four of the Constitution

¹⁶³ See also M Olaniyi 'Nigeria: Workers strike not political, says Gani' *Daily Trust* 22 June 2007 available at <<http://allafrica.com/stories/200706220568.html>> (accessed on 30 August 2007)

¹⁶⁴ The African Commission is the body vested with the interpretation and enforcement of the African Charter

¹⁶⁵ (2001) AHRLR 60

¹⁶⁶ The Commission implied these two rights into the Charter by reading the right to family life, property and environment together

¹⁶⁷ (2003) AHRLR 96

mental health and article 18 (4) right of the aged and disabled to special measures and protection in accordance with their physical and moral needs, among other civil and political rights.

Finally, in *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*,¹⁶⁸ the African Commission held the respondents countries in violation of Congolese peoples' article 16 right to enjoy the best attainable state of physical and mental health and article 17 right to education, among others; for their acts of raping, looting, killings, and wanton destruction during the respondents' countries occupation of eastern Congo.

3. 5. Conclusion

Arguments against and for the relevance of human rights to the poverty reduction project in Sub-Saharan Africa have been examined in this chapter. It has been established that a rights based approach to the reduction of poverty have three major advantages over other approaches. One, it empowers the poor for action. Two, it gives sustained attention, which it deserves, to the issues of poverty and the plight of poor people; and three, it approaches the issue of poverty in a holistic manner through the interdependence and indivisibility of human rights.

Rights based approach to the issue of poverty does lead to policy changes in favour of the poor sometimes as the TAC's case have shown in South Africa. The Nigerian Federal Government, in fact, suspended further increases in the prices of petroleum products for the whole of 2006 principally because of the national strikes and protests masterminded by the NLC in conjunction with the civil society in opposition to the increases. Even where rights based methods do not lead to immediate policy changes, it at least focuses sustained attention on the plight of poor people. In the three regional cases discussed in this section, assuming nothing else was achieved in terms of reparation to the victims, the cases, at least, brought the plight of the victims to the attention of the international community and serves as an instrument of naming and shaming the countries concerned. This kind of international exposure have the potential of constraining the future conducts of the states concerned, even, if the what has been done by them cannot be undone.

¹⁶⁸ Communication 277/99 – 20th Activity Report

Jeremy Waldron,¹⁶⁹ in answering the charges laid by the trio of Bentham, Burke, and Marx against the human rights philosophy has answered most of the more damaging charges laid against the human rights philosophy by critics, as discussed in the third section of the present chapter. I will not repeat his answers here. He has, however, not answered the charges laid by Karin van Marle,¹⁷⁰ among others, that we treat human rights as end in itself and foreclose further struggle to make the lives of the poor better. This objection, in my opinion, is unanswerable. Additionally, as pointed out in section 2.1 above, judicial enforcement of human rights over the years have not done much to better the lot of those at the margins of society. That is why in this essay I have endeavoured to recommend, in addition to judicial enforcement of human rights, some other effective methods of enforcement and the role of human rights lawyers in the employment of these methods to reduce poverty in the region. These additional methods of enforcement and the role of human rights lawyers in their utilisation in aid of poverty reduction is the focus of the next chapter.



¹⁶⁹ J Waldron (n 114 above)

¹⁷⁰ K van Marle (n 112 above)

Chapter Four

Other Methods of Rights Enforcement and the Role of Human Rights Lawyers

4. 1. Introduction

The fact that other effective methods of enforcing human rights apart from litigation exist have been conceded by some writers.¹⁷¹ However, none of these writers had discussed these other methods from the perspective of what the role of human rights lawyers are to be in the employment of these methods to reduce poverty in Sub-Saharan Africa. Thus, as pointed out in section 3.5 above, the examination of these other methods of rights enforcement; in addition to litigation, and the role of human rights lawyers in employing them to reduce poverty in the region is the subject matter of this chapter.

As pointed out in Chapter Two, all human rights are relevant for any effective strategy aimed at combating the scourge of poverty.¹⁷² The OHCHR¹⁷³ has identified eight core rights that are, in my view, fundamental to any poverty reduction strategy as follows: right to work, right to food, right to adequate housing, right to health, right to education, right to personal security and privacy, right of equal access to justice, and political rights and freedoms.¹⁷⁴ The recommendation here is therefore that while all human rights are relevant for rights based approach to poverty reduction, the rights identified above should be singled out for special attention. Thus, in any case where any of the identified rights are implicated, the human rights lawyer should swing into action and perform the roles suggested below for the protection and enforcement of these rights. These I believe will effectively aid and fulfil the goal of poverty reduction through the instrumentality of the human rights system.

¹⁷¹ See for instance, K Roth (n 37 above); L Rubeinstein (n 37 above); M Robinson (n 37 above)

¹⁷² Section 2.2 above

¹⁷³ OHCHR *Principles and Guidelines for a Human Rights Approach* (n 10 above)

¹⁷⁴ Same above 23 – 49 for a detailed discussion of the importance and scope of these rights for poverty reduction purposes

4. 2. Methods of rights enforcement and the role of human rights lawyers in their utilisation to reduce poverty

(i) *Public Interest Litigation*: The features of Public Interest Litigation (PIL) have been set out by Trengove¹⁷⁵ as follows: PIL is brought in the interest of communities or classes of people and not that of individuals; these people are often poor and lack the requisite political and social capacity to help themselves; and they, thus, have an interest in enforcing the positive duties owed them by their governments. In spite of the myriad of objections trailing the use of (PIL) as a mode of rights enforcement,¹⁷⁶ PIL remains an indispensable tool of enforcement of human rights and a very strong weapon in a rights based approach to poverty alleviation. As rightly submitted by Peiris, PIL ‘...represents a daring, and in some respects unique, response to a problem of unparalleled proportion’.¹⁷⁷ None will doubt the seriousness of the problem of poverty in Sub-Saharan Africa. The merits of PIL as an instrument of rights based approach to poverty reduction are many. Perhaps, the most important of its advantage is that it will create the necessary jurisprudence and establish the much needed precedents in the socio-economic rights sphere in the region and beyond.¹⁷⁸ It also focuses domestic and international attention on the issues raised in the litigation.

The role of the human rights lawyer, in this regard, is to endeavour to bring PIL in any situation where, especially, any of the rights mentioned in section 4.1 are implicated. And if a strict rule of standing will not permit such PIL in particular jurisdiction, then the duty of the human rights lawyer is to locate the victims of the violation and assist them to bring the case.

(ii) *Strikes*: As already pointed out in section 3.4 above, strikes have been put to very effective use in Nigeria. It has been used as a weapon to constrain the excesses and the anti-poor policies of the Nigerian government. The role of the lawyer in this regard is to

¹⁷⁵ W Trengove ‘Judicial remedies for violations of socio economic rights’ (n 36 above) 8

¹⁷⁶ These include the charge that it will encourage frivolous litigation, it is expensive and time consuming, it requires technical skills which the poor do not have, it focuses only on the parties before the court, it benefits only those with resources who are able to litigate, among others. See J Cassels (n 155 above) 509 - 517

¹⁷⁷ G Peiris (n 155 above) 89

¹⁷⁸ It is often stated that civil law jurisdictions do not have a system of precedents. Too much cannot, however, be made of this distinction nowadays because civil law courts do not ordinarily depart from their earlier decisions nowadays, too. See A Mameli ‘Judicial review, social antagonism and the use of litigation as a tool for combating poverty’ in *Law and Poverty* (n 9 above) 139 at 155 - 156

inform the poor people who are in a position to use strikes as a tool¹⁷⁹ of agitation that strikes are a legitimate and legal vehicle of pressing home their demands and realising their human rights and to organise them in that regard.

(iii) *Mass protests*: This is another potentially potent weapon for enforcement and realisation of human rights and reduction of poverty in the region. Mass protests in Nigeria led to the down fall of the dictatorial regime of General Babangida in 1993. In Argentina in 2001, mass protests also toppled the corrupt government of President De Larua.¹⁸⁰ Additionally, in 2004 in Ukraine, non violent mass protests, nicknamed the 'Orange Revolution', resisted electoral fraud in Ukraine and brought the government of Ukraine down.¹⁸¹ The effectiveness of this method of making demands cannot, therefore, be doubted. The role of human rights lawyers in this regard is to organise and lead the poor in their numbers¹⁸² to protests anti-poor policies and programmes and compel positive action from recalcitrant governments in the region.

(iv) *Ensuring a vibrant civil society*: There are two approaches to the definition of civil society: the inclusive and the restrictive approaches. As Peter Lewis pointed out:

Inclusive treatment defines civil society as a diverse intermediate realm of organisations, occupying the domain between family and state. Consequently, a broad array of local, ethnic, cultural, and economic associations are covered in the concept.... Restrictive approaches to civil society...insists that civil society constitutes part of a civic realm or public sphere in which state and society interact over issues of common concern. Civil society, in this view, constitutes the domain of associations that are engaged with the state (in cooperative or adversarial relations) over nominally public issues.¹⁸³

The restrictive meaning of civil society is adopted in this paper.

Civil society pressures have been proven to be indispensable in effecting government and policy changes. A vibrant civil society is identified by Wilkinson as one of the essential ingredients in the democratisation of Bangladesh, while its absence is

¹⁷⁹ This would of course be workers

¹⁸⁰ BBC News 'The events that triggered Argentina's crisis' available at <<http://news.co.uk/1/hi/business/1721103.stm>> (accessed on 15 October 2007)

¹⁸¹ A Karatnycky 'Ukraine's Orange Revolution' available at <<http://www.foreignaffairs.org/20050301faessay84205/adrian-karatnycky/ukraine-s-orange-revolution.html>> (accessed 15 October 2007)

¹⁸² Large number is one of the strongest weapon of the poor

¹⁸³ P Lewis 'Civil society, political society & democratic failure in Nigeria' in Marina Ottaway (ed) *Democracy in Africa: The hard road ahead* (1997) 137

identified as responsible for the non-democratisation of Pakistan.¹⁸⁴ Additionally, as pointed out above, a coalition of civil society in Nigeria were responsible for organising and staging the mass protests that forced Babangida's dictatorial regime in Nigeria to step down from power after annulling the June 12 Presidential Election in 1993. These mass protests eventually, also led to the down fall of the illegally installed Interim National Government put in place by Babangida after his forced exit from power.¹⁸⁵

It is my opinion that this protective potential of civil society can also be deployed in the realisation of socio-economic rights and reduction of poverty in Sub-Saharan Africa. The role of the human rights lawyers in this regard is to form Non-Governmental Organisations (NGOs) whose aim will be the defence of the poor and reduction of poverty in the region. These NGOs will liaise with and organise the poor for action in relevant circumstances.

(v) *Lobbying*: The usefulness and potency of lobbying as an alternative method of rights enforcement should not be under-estimated. The effectiveness of this method was confirmed by the drafting and eventual entry into force of the Protocol to the African Charter on Human and Peoples' Rights Relating to the Right of Women (2003/2005),¹⁸⁶ which came into being, principally, through lobbying by women advocacy groups and NGOs.¹⁸⁷

As pointed out by Budlender '[o]nce the constitutional rights are translated into statutory rights, many of the difficult legal problems about enforcement of constitutional socio-economic rights will fall away, as the statute, invariably deals with the detailed content of the right, the means of enforcement, and with the ambit of justifiable limitations to the right'.¹⁸⁸ The foregoing observation is also true of all categories of rights, be it treaty

¹⁸⁴ S Wilkinson 'Democratic consolidation and failure: Lessons from Bangladesh and Pakistan' (2000) Vol.7, No.3 *Democratisation* 203 at 205

¹⁸⁵ See NigeriaBusinessInfo.com 'Shonekan's Interim National Government. ING' (August 27, 1993 – November 1, 1993) available at <<http://www.nigeriabusinessinfo.com/nigeria-elections2003/shonekan-ing.htm>> (accessed on 14 October 2007)

¹⁸⁶ Adopted in Maputo in July 2003 and entered into force in November 2005

¹⁸⁷ See also V Von Struensee 'The contribution of polygamy to women's oppression and impoverishment: An argument for its prohibition' available at <<http://www.austlii.edu.au/au/journals/MurUEJL/2005/2.html#Heading430>> (accessed on 15 October 2007). Lobbying as mode of rights enforcement is recognised by some writers. See L Rubeinstein (n 37 above); M Robinson (n 37 above)

¹⁸⁸ G Budlender 'Socio-economic rights in the new millennium: The challenges of implementation in SA' (March 1999) Vol.1, No 4 *ESR Review* 24 at 26

based, or constitutional. The role of the human rights lawyers, in this regard, is to lobby the organ of state responsible for the domestication of treaties to domesticate the African Charter; and ratify and domesticate international human rights instruments relevant to the alleviation of poverty.¹⁸⁹ Additionally, the human rights lawyers should also lobby members of the legislature to enact pro-poor legislations. Members of the executive should also be lobbied by the human rights lawyers to adopt pro-poor policies.

(vi) *Promotion of socio-economic rights*: It was pointed out earlier¹⁹⁰ that socio-economic rights are the rights more germane to the poverty reduction project. The promotion of socio-economic rights will highlight its importance and the legitimate claims of the poor thereto. Thus, human rights lawyers engaged in rights based approach to reduction of poverty must, therefore, make the promotion and enunciation of the content of socio-economic rights and its relevance to the poor and poverty reduction his focus. This can be achieved through the mass media, seminars, and conferences, among others.

(vii) *Education*: Education under this heading falls into two categories. Education of the society; and education of the poor themselves. The society has got to be educated about the nature of poverty. Poverty has got to be humanised. As aptly put by Ochoa: '[t]he magnitude of poverty in our societies demands a new conceptualisation stressing its human dimensions, enabling a vision of the poor not as ciphers or statistical data but rather as human beings, with a story to tell and a dignity that must be respected'.¹⁹¹ Education of the society about poverty is also very important in order to remove the stereotype the society has about poor people which is affecting efforts to tackle the scourge of poverty, as pointed out in section 2. 1 above.

Poor people must themselves be educated. A consciousness, a realisation that they constitute a distinct group of people must be ingrained in them. The poor must be assisted to assume a distinct identity. Consciousness of poverty and a distinct identity is fundamental to the creation of a movement of the poor without which nothing of significance in the fight against poverty will be achieved.¹⁹² It is only when the poor has

¹⁸⁹ Examples of these are ICESCR, ICCPR, CRC, CEDAW, among others

¹⁹⁰ Section 3.2 above

¹⁹¹ M Ochoa (n 30 above) 54

¹⁹² Creation of poverty consciousness will serve as a prelude to the formation of movements to press for the rights of the poor to better standard of living. This view point is confirmed by M Ochoa (n 30 above) 51 where

been able to organise themselves into a movement that they will constitute a force strong enough to be reckoned with in the society. Otherwise, it will be rhetoric and business as usual. The role of the lawyer in this regard is as an educator of both the society in general and the poor people in particular. The mode of such an education is as explained in sub-section (vi) above and include the mass media, grassroots programmes, among others.

(viii) *Involvement in party politics*: None will doubt the fact that political power is the most important vehicle of change, be it positive or negative. Political power holders control the destiny of a country, determine governmental priorities, and determine resource allocations. It cannot also be seriously contested that the way to political power in a democracy is through the ballot box. And the only way to get elected is through involvements in party politics. Intellectuals in Africa have generally shied away from this most important mode of effecting positive change in Africa. They have hitherto conceived politics as dirty and unbefitting of a gentleman.

However, if positive changes are to be brought to the continent this ambivalent attitude must change. Politics should no longer be left in the hands of illiterates and semi-illiterates members of our society. Intellectuals, lawyers, especially those committed to poverty reduction in the continent, and all those who want to effect positive change in the region must aspire to public office by joining party politics. However, not any kind of party or politics will suffice. Human rights lawyers should float the poor peoples' parties in all the countries of the region and mobilise the poor to join and be active members of such parties. Overtime, these parties will gain enough momentum to become opposition parties where they will have a stronger say in what goes on in the body politics. And ultimately, I believe, these parties will win elections to form the respective governments of their countries. It is only then that real change will come to the poor.

the author states that in order to force the society and international organisations to assume responsibility for poverty in the struggle to eradicate it the poor will have to constitute themselves into a movement

4. 3. Conclusion

It is apposite to sound a serious note of warning here. Any human rights lawyer desirous of employing some of these additional means of rights enforcement must be ready for incessant arrests and detention; and may be a term or two in prison as well. Such a lawyer must be ready for charges of treason, treasonable felony, sedition, among others, under the criminal and penal codes of countries in the region. Human rights lawyers desirous of rights based approach within the context described in this essay, are to be prepared for the eventualities referred to above not because of the illegality of these methods of rights enforcement;¹⁹³ but because those benefiting from this ugly state of things: the appalling poverty in the region, will not give up their privileges without a stiff fight. Beneficiaries of appalling poverty in the region know that it is in their best interest to keep the poor busy eking out a living. Since, that is the only way they ensure that the poor, who constitutes the majority, will not become a threat and a challenge to their power base in times to come.

One may want to ask why anyone should leave himself open to such hazards as enumerated above. There are three major reasons. One is that the continued peace and security of the region is dependent on reducing the appalling poverty level in the region. No society can be sustained on such inequality, hardship and sufferings occasioned by abject poverty in the region.¹⁹⁴ In other words, we are only fighting for self-preservation. The second reason is that more than six decades of rhetoric and curial enforcements of human rights have not achieved much, if anything at all. The third reason is that we are all demeaned by the appalling poverty in the region.¹⁹⁵ In the final analysis, as Heyns

¹⁹³ These methods are in fact bottomed on rights like equality, non-discrimination, dignity, and political participation among others; rights which are entrenched norms of the human rights system. See for instance, articles 1, 2, 7, and 21 of the UDHR; articles 2 (1), 25, and 26 of the ICCPR; articles 2 (2) and 3 of the ICESCR; and articles 2, 3, 5, and 13 of the African Charter

¹⁹⁴ This conclusion is confirmed by Agbakwa who argued that continued deprivation of socio economic rights in Africa could to popular insurrections and civil wars. S Agbakwa 'Reclaiming humanity: Economic, social and cultural rights as the cornerstone of African human rights' (2002) 5 *Yale Human Rights and Development Journal* 177 at 205-206

¹⁹⁵ As pointed out Sachs J. in *Port Elisabeth Municipality v Various Occupiers* 2004 (12) BCLR 1266 at 1278 – 279 when pronouncing on the plight of the homeless in South Africa '[i]t is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when State action

would say, 'the history of human rights is the history of human struggle'.¹⁹⁶ There is no free ride to freedom.



intensifies rather than mitigate their marginalisation'. This observation applies outside the restricted context of homelessness, it is equally applicable to the situation of extreme poverty to which homelessness is just a dimension

¹⁹⁶ C Heyns 'A "struggle approach" to human rights' in Heyns and Stefiszyn (eds) *Human rights, peace and justice in Africa* (2006) 15

Chapter Five

Conclusion and recommendation

5.1. Conclusion

Extreme poverty is an assault on the inherent dignity and equality of all men: core values of the human rights philosophy;¹⁹⁷ it is thus a negation of all that human rights stands for. On the other hand, Sub-Saharan Africa is a region where extreme poverty is prevalent in spite of the regions' apparent commitment to the philosophy of human rights, in that all fifty- three countries in the region ratified the African Charter¹⁹⁸ in addition to several international human rights instruments ratified by countries in the region. This state of affairs is traceable to the lack of or ineffective enforcement mechanism of the human rights obligations of countries in the region. Too much attention had, hitherto, been given to *post facto* intervention of human rights in form of judicial enforcement of these rights to the neglect of other effective methods of enforcement which can be employed in addition to curial enforcement of the rights for a more effective result. This neglect and the ensuing increase in poverty level prompted this research which is aimed at identifying additional methods of pro-active rights enforcement mechanism and the roles of human rights lawyers in their utilisation to reduce poverty in the region.

In a bid to fulfil the goal of this paper, I started out by ascertaining the precise meaning of poverty and debunking the widely held view that the poor are poor because they are not morally strong in Chapter Two of this essay. In Chapter Three, I interrogate the question of whether human rights is relevant to poverty reduction and concluded that, indeed, human rights have been useful in redressing the issues of poverty, powerlessness, and oppression in the region in the past. However, based on the recognition of the fact that the traditional method of rights enforcement, judicial enforcement, has not gone far or move fast enough to confront appalling poverty in the region, I identified and examined, in Chapter Four, other effective methods of rights

¹⁹⁷ See article 1 of the UDHR

¹⁹⁸ Some have even domesticated it. Nigeria and Namibia are examples

enforcement which can be used together with curial enforcement in rights based approach to poverty reduction in the region. The roles of human rights lawyers in this regard are also clearly set out. I strongly believe that if human rights lawyers play their roles effectively in utilising a rights based approach to tackle poverty in the region through the methods discussed here; poverty will soon be on its way out of the region.

Finally, the present level of poverty in Sub-Saharan Africa is an eyesore. It is not befitting of any society. Also, persons living in extreme poverty are only half citizens. While such persons might have political citizenship, they are denied social citizenship which goes to make up the full citizenship of a country.¹⁹⁹ And in the context of the region, this means majority of the persons in the region are disenfranchised by poverty. Additionally, Sub-Saharan African society as a whole is demeaned by the extreme poverty in the region. Finally, as pointed out in Chapter Four,²⁰⁰ the peace and security of the region is in the balance. Therefore, all available legal means ought to be employed in combating extreme poverty and deprivation in the region.

5. 2 Recommendations

Thus, in the light of the foregoing, the following recommendations are made:

- (i) countries in the region who have not domesticated the African Charter should be pressured to do so;
- (ii) countries in the region who have either not ratify or domesticate relevant international human rights instruments should be encouraged to do so;
- (iii) human rights lawyers should, without delay, start the litigation of socio economic rights in the region on the basis of the relevant provisions of the African Charter and the civil and political rights recognised by the particular legal regimes of countries in the region;

¹⁹⁹ E Bustelo 'Expansion of citizenship and democratic construction' in *The Poverty of Rights* (n 9 above) 3 -

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²⁰⁰ Section 4.3 above

(iv) formation of poor peoples' parties should also be commenced by human rights lawyers in all the countries of the region without delay.

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