



Examining the link between economic development and the enforcement of socio-economic rights in South Africa

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ABSTRACT

Economic development is a major issue in South Africa, with the country experiencing high levels of poverty, which are connected to the enforcement of socio-economic rights. There have always been calls for Africa to unite for it to prosper. Intra-African trade is a call that Africa must trade more with itself towards its prosperity. It is further said that intra-African trade will enhance sustainable development and economic growth, and it is important. The purpose of the paper is to establish that there is a link between economic development and the enforcement of socio-economic rights. Further, this article argues that there is an urgent need for economic development in South Africa to improve the enforcement of socio-economic rights. Through a qualitative desktop-based methodology, this paper argues that trade is the main factor of economic development. Further, South Africa must focus on intra-African trade. By dealing with this economic gap, South Africa will accelerate sustainable economic development and consequently the enforcement of socio-economic rights, which will in turn reduce poverty and better the lives of millions of South Africans who are in dire need of socio-economic rights to be enforced due to the living conditions they are in. The South African Constitution is examined, and it is noted that it fully protects socio-economic rights as it has socio-economic rights in its Bill of Rights. However, it is acknowledged that there are other factors that affect the enforcement of socio-economic rights, such as corruption and the separation of powers, which are identified.

Keywords: Constitution, Economic Development, Human Rights Obligations, Intra-African Trade, Policy Making, Poverty and Socio-Economic Rights

INTRODUCTION

Socio-economic rights are closely related to development and the eradication of poverty.¹ Socio-economic rights are comprised of economic, social, and cultural rights. Economic rights are “essential empowerment rights, they enable individuals to sustain a livelihood and achieve independence.”² Such

¹ Danwood Mzikenge Chirwa and Lilian Chenwi, *The Protection of Economic, Social and Cultural Rights in Africa*, ed. Danwood Mzikenge Chirwa and Lilian Chenwi (Cambridge: Cambridge University Press, 2016), 3.
<https://doi.org/10.1017/CBO9781316780251>.

² Lilian Chenwi and Danwood M. Chirwa, “Direct Protection of Economic, Social and Cultural Rights in International Law,” in *The Protection of Economic, Social and Cultural Rights in Africa* (Cambridge University Press, 2016), 42,
<https://doi.org/10.1017/CBO9781316780251.004>.

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rights include the right to work, the right to just and favourable conditions of work, the right to form and join trade unions, and the right to social security, including social insurance. Social rights are “rights whose purpose is to guarantee the basic means of subsistence, survival and development.”³ Such rights include the right to an adequate standard of living, including adequate food, clothing, and housing, continuous improvement of living conditions, the right to the highest attainable standard of physical and mental health, along with the right to family assistance.⁴

Cultural rights essentially protect and promote participation in certain forms of activities that are crucial to one’s individual or collective identity.⁵ Such rights are the right of everyone to take part in cultural life, enjoy the benefits of scientific progress and its applications, and benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he or she is the author.

Though South Africa has ratified the International Covenant on Economic, Social and Cultural Rights (hereinafter the ICESCR), the government has not ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (hereinafter the OP-ICESCR), which means that the complaint procedure is judicially unenforceable for South Africans. In a case where domestic remedies have been exhausted, South Africans will not be able to access remedies provided by the OP-ICESCR for violations of the rights enshrined in the ICESCR.⁶

The main objective of this article is to examine the link between economic development and the enforcement of socio-economic rights in South Africa. The article focuses on South Africa’s track record regarding the enforcement of socio-economic rights. The article evaluates how the South African government “respects”, “protects”, “fulfils”, and “promotes” socio-economic rights. The article also evaluates the status of the South African economy and the country’s economic development as factors that hinder the full enforcement of socio-economic rights. Further, the article examines other factors affecting the enforcement of socio-economic rights, namely corruption and the doctrine of separation of powers.

This article is divided into three main segments, namely: the enforcement of socio-economic rights in South Africa; economic development as a factor that impacts the enforcement of socio-economic rights; and two factors affecting the enforcement of socio-economic rights, which are corruption and the separation of powers.

METHODOLOGY

This study employed a qualitative, desk-based research method to examine the link between economic development and the enforcement of socio-economic rights in South Africa. In fact, the research design integrates doctrinal legal analysis together with constitutional evaluation, including evaluation of international laws, drawing on both primary and secondary sources to build a complete comprehension of each of the challenges posed.

Primary sources included several constitutional clauses (most particularly Chapter 2 of the South African Constitution, which enshrines socio-economic rights), relevant case law, international agreements, and certain specific domestic legislation. Relevant case laws were scrutinised to assess judicial interpretations of the state’s obligations under coalition-driven governance structures.⁷ Additionally, international human rights treaties that South Africa ratified, including the

³ Chenwi, Lilian, and Danwood M. Chirwa. “Direct Protection of Economic, Social and Cultural Rights in International Law.” In *The Protection of Economic, Social and Cultural Rights in Africa*, 41.

⁴ Chenwi, Lilian, and Danwood M. Chirwa. “Direct Protection of Economic, Social and Cultural Rights in International Law.” In *The Protection of Economic, Social and Cultural Rights in Africa*, 41.

⁵ Chenwi, Lilian, and Danwood M. Chirwa. “Direct Protection of Economic, Social and Cultural Rights in International Law.” In *The Protection of Economic, Social and Cultural Rights in Africa*, 42.

⁶ Frans Viljoen and Nicolas Orago, “An Argument for South Africa’s Accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the Light of Its Importance and Implications,” *Potchefstroom Electronic Law Journal* 17, no. 6 (2014): 2554–99.

⁷ Republic of South Africa., “Constitution of the Republic of South Africa Act 108 of 1996, Schedule 4(B).” (Government Gazette, 1996).

International Covenant on Economic, Social and Cultural Rights (ICESCR), were examined to contextualise the nation's commitments within wider normative frameworks.⁸

Scholarly books, peer-reviewed journal articles, as well as policy reports formed several secondary sources, which would interrogate the link between economic development and the enforcement of socio-economic rights. Works by many leading constitutional and economic development academics were used to situate the South African experience within theoretical debates on democratic stability and institutional design. Quantitative data emanating specifically from South Africa's National Treasury, as well as from other relevant reports, were duly incorporated where they were relevant to substantiate any claims regarding the link between economic development and the enforcement of socio-economic rights.

The desk-based method eased an exhaustive, systematic analysis of legal texts, policy documents, and empirical findings whilst upholding strict academic standards. This methodology was particularly well-suited for the study's specific objectives. It allowed a complete critical evaluation of exactly how legal and political frameworks interact within the process of shaping service delivery under coalition governments. The paper integrated many sources, whilst giving a subtle evaluation of shortfalls within existing regulatory frameworks. Furthermore, it rigorously puts forward further evidence-based recommendations with respect to institutional reform.

DISCUSSION

The Enforcement of Socio-Economic Rights in South Africa

In South Africa, the Constitution of the Republic of South Africa, 1996 (hereinafter RSA Constitution) is the supreme law of the land.⁹ The RSA Constitution undertakes the improvement of the "quality of life of all citizens and freeing the potential of each person" as one of its objectives.¹⁰ Thus, the RSA Constitution guarantees the progressive realisation¹¹ of socio-economic rights, such as the rights to housing,¹² health care, food, water, social security¹³ and education,¹⁴ within the State's available resources.¹⁵ The RSA Constitution has been lauded as the "world's best constitution" for the manner in which it addresses issues of governance and human rights.¹⁶ United States Supreme Court Justice Ginsburg described it as "a great piece of work",¹⁷ and American jurist Sunstein characterised it as "the world's leading example of a transformative constitution."¹⁸

In terms of the RSA Constitution, section 231, which addresses international agreements, states as follows:

- (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative, or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National

⁸ Sandra Liebenberg, "The International Covenant on Economic, Social and Cultural Rights and Its Implications for South Africa," *South African Journal on Human Rights* 11, no. 3 (January 2, 1995): 359–78, <https://doi.org/10.1080/02587203.1995.11827571>.

⁹ Constitution of the Republic of South Africa, 1996, sec 2.

¹⁰ Constitution of the Republic of South Africa, 1996, sec 2.

¹¹ Constitution of the Republic of South Africa, 1996, sec 26(2).

¹² Constitution of the Republic of South Africa, 1996, sec 26.

¹³ Constitution of the Republic of South Africa, 1996, sec 27.

¹⁴ Constitution of the Republic of South Africa, 1996, sec 29.

¹⁵ Constitution of the Republic of South Africa, 1996, sec 27(2).

¹⁶ Brand of South Africa, "Eighteen Years of the World's Best Constitution," December 11, 2014, <https://brandsouthafrica.com/4103/history-heritage/eighteen-years-of-the-world-s-best-constitution-2/>.

¹⁷ Ruth Bader Ginsburg, "Advocating the Elimination of Gender-Based Discrimination," Iowa State University, 2006, <https://awpc.cattcenter.iastate.edu/communication/advocating-elimination-gender-based-discrimination-feb-10-2006>.

¹⁸ Cass Sunstein, "Social and Economic Rights? Lessons from South Africa," 2001, 125.

Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

- (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
- (5) The Republic is bound by international agreements that were binding on the Republic when this Constitution took effect.¹⁹

Section 231, simply put, regulates the application of the international treaties. Customary international law is only considered to be law in South Africa if it is not inconsistent with the RSA Constitution or legislation.²⁰

Section 233, which specifically deals with the application of international law, states that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.²¹

To reaffirm the protection of socio-economic rights, in 1995, before the adoption of the Final RSA Constitution of 1996, the South African government signed the ICESCR. However, it was only twenty years later, in 2015, that South Africa ratified the ICESCR.²² The ratification then provided further obligations to South Africa, in addition to the obligations given by the RSA Constitution, which include the progressive realisation of socio-economic rights to the maximum of its available resources.²³

The ICESCR imposes an obligation on governments to move as expeditiously and effectively as possible towards the goal of realising socio-economic rights.²⁴ However, despite the numerous provisions that protect socio-economic rights, the South African government has claimed that it does not have sufficient resources to meet its legal obligations in terms of enforcing socio-economic rights as required in terms of the RSA Constitution and international treaties which South Africa has ratified.²⁵

The RSA Constitution covers a number of socio-economic rights, which are discussed in detail below. The purpose of explicitly including socio-economic rights in the Bill of Rights is to address the prejudices of the past.²⁶ The RSA Constitution is considered a tool for transforming a society, from one with significant socio-economic challenges to one where resources are equally accessible to its people.²⁷ The most critical factor in the attainment of socio-economic equality was the inclusion of fully justiciable socio-economic rights, which are equal to other rights in the RSA Constitution. Further, the National Development Plan (NDP) offers a long-term goal of eliminating poverty and reducing inequality by 2030 and also includes the enforcement of socio-economic rights.²⁸

In addition, the number of international instruments protecting socio-economic rights, both at the global level (United Nations) and the regional level (African Union) have been ratified by South Africa, which include, International Covenant on Economic, Social and Cultural rights, the African

¹⁹ Constitution of the Republic of South Africa, 1996 sec 231.

²⁰ Constitution of the Republic of South Africa, 1996 sec 232.

²¹ Constitution of the Republic of South Africa, 1996 sec 233.

²² Thandiwe Matthews and Daniel McLaren, *Budget Analysis for Advancing Socio-Economic Rights* (Studies in Poverty and Inequality Institution (SPII), 2016), 1.

²³ S. Liebenberg, *The International Covenant on Economic, Social and Cultural Rights in South African Law* (SUN Press, 2021), 2.

²⁴ CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) at para 9.

²⁵ Thandiwe Matthews and Daniel McLaren, *Budget Analysis for Advancing Socio-Economic Rights* (Studies in Poverty and Inequality Institution (SPII), 2016), 1.

²⁶ Eric C. Christiansen, "Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court," *Colum. Hum. Rts. L. Rev.* 38 (2006): 321.

²⁷ Edgar Pieterse and Mirjam Van Donk, "Incomplete Ruptures: The Political Economy of Realising Socio-Economic Rights in South Africa," *Law, Democracy & Development* 6, no. 2 (2002): 193–229.

²⁸ South African ICESCR State Report (2017) at para 8.

Charter on Human and Peoples' Rights and other special treaties which include the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, among others.

During the drafting of the RSA Constitution, those who were not in agreement with the inclusion of socio-economic rights in the Bill of Rights argued that it would be equally erosive to the legitimacy of the RSA Constitution if unachievable commitments were made.²⁹ They further argued that rights imposed corresponding duties, and the RSA Constitution would lose its credibility if it communicated that people had certain rights in respect of which the government could not deliver, due to the lack of resources.

It is submitted that this line of argument clearly did not have the best interests of those who live in extreme poverty and solely rely on the enforcement of socio-economic rights for survival. Further, this line of argument did not take into account the fact that South Africa has considerable resources. Therefore, with commendable policies and treaties, South Africa has the ability to enforce the socio-economic rights of all its people.

According to Liebenberg, the socio-economic rights in the RSA Constitution have been categorised into three.³⁰ Liebenberg states that the socio-economic rights found in the RSA Constitution, Bill of Rights in particular, follow three main drafting styles, namely, qualified socio-economic rights, unqualified socio-economic rights, and prohibition socio-economic rights.

Qualified Socio-Economic Rights

Liebenberg elaborates that this category establishes the right of 'everyone' to 'have access to' those rights that are 'in respect of which the positive obligation imposed on the state are expressly limited' and such rights include the rights to have access to 'adequate housing',³¹ 'health care services, including reproductive health care',³² 'sufficient food and water', and 'social security',³³ including, if they are unable to support themselves and their dependants, appropriate social assistance.³⁴

These rights are limited by the fact that the state is required to take only 'reasonable legislative and other measures, within its available resources, to achieve 'progressive realisation' of each of those rights.³⁵

Unqualified Socio-Economic Rights

Liebenberg³⁶ explains that this category of rights establishes a set of 'basic' rights and is for those rights 'without internal limitations' and such rights include the right of every child to 'basic nutrition, shelter, basic health care services, and social services'³⁷ and 'to be protected from maltreatment, neglect, abuse or degradation',³⁸ the right to basic education, including adult basic education';³⁹ and the right of detained persons to 'conditions of detention that are consistent with human dignity, including at least exercise and provision at the state expense, of adequate accommodation, nutrition, reading material and medical treatment'.⁴⁰

Prohibiting Socio-Economic Rights

According to Liebenberg, this category is for those rights that are in the form of a prohibition against certain conduct by the State and private parties, arguably. These rights include the prohibition on

²⁹ Christof Heyns and Danie Brand, "Introduction to Socio-Economic Rights in the South African Constitution," *Law, Democracy & Development* 2, no. 2 (1998): 154.

³⁰ Sandra Liebenberg, "The Interpretation of Socio-Economic Rights," in *Constitutional Law of South Africa*, ed. Stuart Woolman and Michael Bishop (Revision Service 5, 2017), 33-5.

³¹ Constitution of the Republic of South Africa, 1996 sec 26(1).

³² Constitution of the Republic of South Africa, 1996 sec 27(1) (a).

³³ Constitution of the Republic of South Africa, 1996 sec 27(1) (b).

³⁴ Constitution of the Republic of South Africa, 1996 sec 27(1) (c).

³⁵ Constitution of the Republic of South Africa, 1996 sec 25(8), 26(2) & 27(2).

³⁶ Liebenberg, "The Interpretation of Socio-Economic Rights," 33-5.

³⁷ Constitution of the Republic of South Africa, 1996 sec 28(1) (c).

³⁸ Constitution of the Republic of South Africa, 1996 sec 28(1) (d).

³⁹ Constitution of the Republic of South Africa, 1996 sec 29(1) (a).

⁴⁰ Constitution of the Republic of South Africa, 1996 sec 35(2) (e).

evictions and demolitions without a court order made after considering all the relevant circumstances, the prohibition of arbitrary evictions,⁴¹ the prohibition on refusal of emergency medical treatment,⁴² and the prohibition of activities that have harmful consequences for health and well-being.⁴³

Some of the Socio-Economic Rights in the RSA Constitution

It is the researchers' argument that those without access to socio-economic rights and who desperately need access to those rights, those without food, clothing, and/or shelter, are equally being denied the democratic values enshrined in the RSA Constitution, namely, human dignity, freedom, and equality.⁴⁴ Despite the numerous rights that the RSA Constitution protects, the scope of this article is limited to the right of access to adequate housing, the right to health, the right to food, water and social security, and the right to education.

The right of access to adequate housing is protected in the RSA Constitution.⁴⁵ Section 26(1) states that "[e]veryone has the right to have access to adequate housing."

The right to health is guaranteed by the RSA Constitution. Section 27(1)(a) states that "[e]veryone has the right to have access to health care services, including reproductive health care".⁴⁶ In addition, section 27(3) states that "[n]o one may be refused emergency medical treatment".⁴⁷

Both right of access to adequate housing and the right to health include the term 'access', one can observe that these rights are not an unqualified obligation or duty on the state to provide adequate housing on demand, that is, for instance, the state is not obliged to provide adequate housing when there are individuals who need adequate housing.⁴⁸

The right to food, water and social security is protected under the RSA Constitution, which states as follows:

- (1) Everyone has the right to have access to—
 - (a) ...
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.⁴⁹

The right to education is another of the socio-economic rights protected by the RSA Constitution. Everyone has the right—

- (a) to a basic education, including adult basic education; and
- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.⁵⁰

Education plays a crucial role in improving the lives of people, because:

Literacy is a bridge from misery to hope. It is a tool for daily life in modern society. It is a bulwark against poverty and a building block of development, an essential complement to investments in roads, dams, clinics and factories. Literacy is a platform for democratisation and a vehicle for the promotion of cultural and national identity. Especially for girls and women, it

⁴¹ Constitution of the Republic of South Africa, 1996 sec 26(3).

⁴² Constitution of the Republic of South Africa, 1996 sec 27(3).

⁴³ Constitution of the Republic of South Africa, 1996 sec 24.

⁴⁴ Thandiwe Matthews and Daniel McLaren, *Budget Analysis for Advancing Socio-Economic Rights* (Studies in Poverty and Inequality Institution (SPII), 2016), 1.

⁴⁵ Constitution of the Republic of South Africa, 1996 sec 26.

⁴⁶ Constitution of the Republic of South Africa, 1996 sec 27(1)(a).

⁴⁷ Constitution of the Republic of South Africa, 1996 sec 27(3).

⁴⁸ Iain Currie and Johan De Waal, *The Bill of Rights Handbook* (Juta and Company Ltd, 2013).

⁴⁹ Constitution of the Republic of South Africa, 1996 sec 27.

⁵⁰ Constitution of the Republic of South Africa, 1996 sec 29(1).

is an agent of family health and nutrition. For everyone, everywhere, literacy is, along with education in general, a basic human right.⁵¹

South African Government's Duties to 'Respect', 'Protect', 'Promote' and 'Fulfil' Socio Economic Rights

The RSA Constitution stipulates that '[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights'.⁵² First, in terms of the 'duty to respect', the state is required not to interfere with people's enjoyment of socio-economic rights, either directly or indirectly.⁵³ For example, unlawful evictions. Secondly, the 'duty to protect' places a duty on the state to take legislative and other measures, including the provision of effective remedies, to protect vulnerable groups against violations of their rights by more powerful private parties, for example, landlords abusing their tenants in a form of unlawful eviction. The obligation to protect means that, for instance, the deficient implementation, application, and enforcement of effective anti-corruption measures essentially constitute an omission by the government, as human rights give rise to the above-mentioned obligations to become active; omissions may violate human rights.⁵⁴ Thirdly, the 'duty to promote' is about creating awareness and educational measures concerning the socio-economic rights.⁵⁵ Lastly, the duty 'to fulfil' requires the state to take positive measures to ensure that those who currently lack access to the socio-economic rights gain access.⁵⁶

Economic Development as a Factor that Impacts the Enforcement of Socio-Economic Rights

According to SAHRCW Commissioner Mohamed Ameerma:

Unfortunately, as we approach twenty years since the Constitution was signed into law at Sharpeville by President Nelson Mandela, a huge disjuncture between human rights rhetoric and human rights reality continues to exist in our society. It is a sad reality that our country is ranked as one of the most unequal societies in the world....the obligation of the government to respect, protect, promote and fulfil the rights contained in the Bill of Rights calls on the State to devise sound macroeconomic, fiscal and monetary policies so as to maximise the revenue pool earmarked for socio-economic rights, and to manage public finances in an efficient and accountable manner....⁵⁷

The above statement is a summation of how economic development affects the enforcement of socio-economic rights.

The 2019 Budget Review⁵⁸ projected real economic growth of 1.5 per cent for that year; however, South Africa only achieved 0.3 per cent growth. The 2019 Budget Review also projected 1.7 per cent growth in 2020, but unfortunately, the economy only experienced a 0.9 per cent growth.⁵⁹ The economic situation in South Africa is dire. In the second half of 2019, the unemployment rate was at 29.1 per cent, and real GDP is expected to grow at 0.9 per cent in 2020, 1.3 per cent in 2021, and 1.6 per cent in 2022.⁶⁰

These figures prove that South Africa's current economic trajectory is unsustainable, that economic growth has stagnated, unemployment is rising, and inequality remains high. The National

⁵¹ Kofi Annan's speech delivered on International Literacy Day 1997, available at <https://www.un.org/press/en/1997/19970904.SGSM6316.html> (accessed 31-05-2023).

⁵² Constitution of the Republic of South Africa, 1996 sec 7(2).

⁵³ Liebenberg, "The Interpretation of Socio-Economic Rights," 33-6.

⁵⁴ Anne Peters, "Corruption as a Violation of International Human Rights," *European Journal of International Law* 29, no. 4 (2018): 1259.

⁵⁵ Liebenberg, "The Interpretation of Socio-Economic Rights," 33-6.

⁵⁶ Liebenberg, "The Interpretation of Socio-Economic Rights," 33-6.

⁵⁷ Thandiwe Matthews and Daniel McLaren, Budget Analysis for Advancing Socio-Economic Rights (Studies in Poverty and Inequality Institution (SPII), 2016), 1.

⁵⁸ National Treasury, 'Budget Review 2019'.

⁵⁹ National Treasury, 'Budget Review 2019', i.

⁶⁰ National Treasury, 'Budget Review 2019', iii.

Treasury's Economic Policy urges that the government urgently implement a series of reforms that can boost South Africa's growth in the short term, while also creating the conditions for higher long-term sustainable growth.⁶¹ Further, the 2020 Budget Review showed that South Africa's key trading partners have weakened in recent months despite the global outlook having been marginally improved.⁶² This was the case before the COVID-19 pandemic, which resulted in the national lockdown.

Policy interventions are very important and, in the long-run, the National Treasury estimates that the policy interventions could raise average GDP growth by 2.3 percentage points over ten years and create just over one million jobs compared with a scenario without the policy interventions.⁶³ In order for the socio-economic rights to be fully enforced and to eliminate poverty and reduce inequality, the economy must grow and benefit all South Africans.⁶⁴

Close cooperation among African countries, firms, and people would deepen economic and social integration, contributing to higher rates of growth and development in the African continent.⁶⁵ Studies have indicated that a huge number of people in South Africa have suffered and continue to suffer from poverty and socio-economic deprivation and exclusion, and the human rights situation in the country is deteriorating, as seen from the increasing poverty rate.⁶⁶ For example, in 2015, over 30.4 million South Africans were living in poverty.⁶⁷

Progressive Realisation

The concept of 'progressive realisation' means that the realisation of socio-economic rights by the state occurs over time.⁶⁸ Chirwa and Chenwi argue that the concept of progressive realisation recognises various factors, which means that socio-economic rights must then be realised over time.⁶⁹

This is because socio-economic rights are both context and resource-dependent.⁷⁰ Even though there can be a number of challenges in the process of progressive realisation, such as the availability of resources, states remain obligated to take steps that are 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.'⁷¹ This also applies to the socio-economic rights, as found in the RSA Constitution.

In the 2018 national budget speech, the flat-rate Value Added Tax (VAT) was increased from 14% to 15% so that the government could 'generate an additional R36 billion in tax revenue for 2018/19'.⁷² However, this increase in VAT negatively impacted the poor, as this meant that the cost of living also went up. While the R36 billion gained from the VAT increase can contribute towards the enforcement of socio-economic rights (since it is part of the revenue divided among different departments, some of which enforce socio-economic rights, such as the Department of Human Settlements), the government needs to find ways to generate revenue as opposed to directly affecting the poor negatively by increasing VAT.

⁶¹ National Treasury Economic Policy, *Economic Transformation, Inclusive Growth, and Competitiveness: Towards an Economic Strategy for South Africa*, 2019, 3.

⁶² National Treasury 'Budget Review 2020' iii.

⁶³ Economic Policy, *Economic Transformation, Inclusive Growth, and Competitiveness: Towards an Economic Strategy for South Africa*, 60.

⁶⁴ National Planning Commission, "National Development Plan 2030: Our Future-Make It Work," 2012, 24.

⁶⁵ National Planning Commission, "National Development Plan 2030: Our Future-Make It Work," 32.

⁶⁶ Mawethu Nkosana Nkolomba and Vuyokazi Futshane, "South Africa's Rising Poverty Rates Are Indicators Of A Deteriorating Human Rights Situation," Huffpost, August 17, 2017, https://www.huffingtonpost.co.uk/entry/south-africas-rising-poverty-rates-are-indicators-of-a-deteriorating-human-rights-situation_uk_5c7e8bc6e4b048b41e393305.

⁶⁷ Statistics South Africa, "Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015," *Pretoria: Statistics South Africa*, 2017.

⁶⁸ Rory O'Connell et al., *Applying an International Human Rights Framework to State Budget Allocations* (Routledge, 2014), <https://doi.org/10.4324/9780203797839>.

⁶⁹ Chenwi, Lilian, and Danwood M. Chirwa. "Direct Protection of Economic, Social and Cultural Rights in International Law." In *The Protection of Economic, Social and Cultural Rights in Africa*.

⁷⁰ Audrey R Chapman, "A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights," *Human Rights Quarterly* 18, no. 1 (February 1996): 28, <https://doi.org/10.1353/hrq.1996.0003>.

⁷¹ CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) at para 2.

⁷² Malusi Gigaba, *Budget Speech* (Pretoria: Communications Directorate National Treasury, 2018).

Although the government has considered VAT zero-rating certain goods and services, this may not be the best option for the poor.⁷³ The government must ensure that a significant number of individuals have access to minimum essential levels of the rights in the ICESCR.⁷⁴

Maximum Available Resources

Maximum available resources (hereinafter MAR) require states to show that they have used all of their available resources towards enforcing socio-economic rights, given current economic conditions, including international aid, when needed.⁷⁵ When any 'significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education,' then there is a violation of socio-economic rights.⁷⁶

As alluded to earlier, the RSA Constitution places the onus on the government to advance socio-economic rights 'within its available resources', which is not similar to the ICESCR, which requires a 'maximum of its available resources';⁷⁷ these terms are not different conceptually, and the courts in South Africa have not interpreted these terms differently.⁷⁸

The notion of MAR is to generally give an obligation to the government to generate maximum resources to progressively realise socio-economic rights.⁷⁹ As the present study suggests, for this to be realised, the government must work on and support the argument that African will be able to enforce socio-economic rights if it unites and trades with itself. The Agreement Establishing the African Continental Free Trade Area (hereinafter AfCFTA) is a step in the right direction.

The rights that are discussed in this study must be prioritised and given the 'minimum core' obligation, such as the rights to education, shelter, food and healthcare, in order to comply with the requirements of MAR. A government that fails to meet at least these 'minimum core' obligations, based on an argument of lack of available resources,⁸⁰ which this study has argued against because Africa has enough resources to feed its people, the government must show that they did their best to use all the resources in their territory.

The courts do not want to be prescriptive in the enforcement of socio-economic rights. In *Mazibuko & Others v City of Johannesburg & Others* (hereinafter *Mazibuko*),⁸¹ the Court was cautious about overstepping into the roles of executive and the legislature, and was unwilling to specify what the 'minimum core' of socio-economic rights ought to be.⁸²

In order to meet the concept of MAR, the government must show that the expenditure towards the enforcement of socio-economic rights is not only to the minimum, but that the state must show that it is doing its best and that these rights are given maximum protection.⁸³ The government must make sure that programme design and implementation are accessible to intended beneficiaries.⁸⁴

Funds allocated by the government for the realization of socio-economic rights must be spent fully and on the enforcement of socio-economic rights, and if there is under-spending, the government

⁷³ Joint Submission to the United Nations Committee on Economic, Social and Cultural Rights, 64th Session, 24 September - 12 October 2018 Economic, Social and Cultural Rights in South Africa 15 August 2018 para 14.

⁷⁴ CESCR, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) (14 December 1990), UN Doc No E/1991/23 at para. 10.

⁷⁵ Ann Blyberg and Helena Hofbauer, *Article 2 Governments' Budgets* (ICESCR, 2014).

⁷⁶ International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997, available at <http://www.refworld.org/docid/48abd5730.html>. (accessed 30-08-2023).

⁷⁷ Thandiwe Matthews and Daniel McLaren, *Budget Analysis for Advancing Socio-Economic Rights* (Studies in Poverty and Inequality Institution (SPII), 2016).

⁷⁸ Thandiwe Matthews and Daniel McLaren, *Budget Analysis for Advancing Socio-Economic Rights* (Studies in Poverty and Inequality Institution (SPII), 2016).

⁷⁹ Blyberg and Hofbauer, *Article 2 Governments' Budgets*.

⁸⁰ CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) at para 10.

⁸¹ *Mazibuko & Others v City of Johannesburg & Others* CCT 39/09 [2009].

⁸² *Mazibuko & Others v City of Johannesburg & Others* CCT 39/09 [2009].

⁸³ Blyberg and Hofbauer, *Article 2 Governments' Budgets*.

⁸⁴ Blyberg and Hofbauer, *Article 2 Governments' Budgets*.

must give an account and remedy that.⁸⁵ Government is required to achieve socio-economic rights progressively and effectively as expeditiously as possible.⁸⁶ The government must not merely increase state allocation and expenditure.⁸⁷

Other Factors Affecting the Enforcement of Socio-Economic Rights

There are a number of factors that affect the enforcement of socio-economic rights, including corruption and the separation of powers. The reason the study focuses only on the two factors is that these factors are considered more significant in terms of negatively affecting the enforcement of the socio-economic rights.

Corruption

Corruption is a crisis that affects many countries in the world, and it appears to be much worse in Africa.⁸⁸ Corruption, regardless of its magnitude, must be considered a violation of the socio-economic rights.⁸⁹ Against this background, Human Rights Treaty Bodies have 'identified mismanagement of resources and corruption as obstacles to the allocation of resources to promote equal rights'.⁹⁰ With regards to corruption, the Constitutional Court has held that:

Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality, and the advancement of human rights and freedoms.⁹¹

The Constitutional Court again arrived at a similar conclusion when it held that:

Endemic corruption threatens the injunction that government must be accountable, responsive, and open; that public administration must not only be held to account but must also be governed by high standards of ethics and efficiency, and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance development and service to the public....In turn, the national prosecuting authority bears the authority and indeed the duty to prosecute crime, including corruption and allied corrupt practices.⁹²

The National Development Plan indicates as follows:

South Africa suffers from high levels of corruption that undermine the rule of law and hinder development and socioeconomic transformation. Defined as the misuse of an official position for personal gain, corruption occurs in both the public and private sectors. The costs of corrupt practices fall most heavily on the poor because they degrade the quality and accessibility of public services. State systems of accountability have been uneven, enabling corruption to thrive. This is not specific to the public sector. It is a broader societal disease. To address this comprehensively, anti-corruption efforts should target the bribe-maker, as well as the bribe-taker.⁹³

⁸⁵ Blyberg and Hofbauer, *Article 2 Governments' Budgets*.

⁸⁶ CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23) at para 9.

⁸⁷ Thandiwe Matthews and Daniel McLaren, *Budget Analysis for Advancing Socio-Economic Rights* (Studies in Poverty and Inequality Institution (SPII), 2016), 6.

⁸⁸ Ajepe Taiwo Shehu, "The Enforcement of Social and Economic Rights in Africa: The Nigerian Experience," *Journal of Sustainable Development Law and Policy (The)* 2, no. 1 (2013): 117.

⁸⁹ Peters, "Corruption as a Violation of International Human Rights," 1262.

⁹⁰ Human Rights Treaty Bodies, *Contributions to the 2030 Agenda for Sustainable Development*, May 2016 at 7.

⁹¹ *South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77 (28 November 2000) at para 4.

⁹² *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011) at para 176.

⁹³ National Development Plan at 446.

The Doctrine of Separation of Powers

The separation of powers doctrine generally means that specific functions, duties, and responsibilities are allocated to distinctive institutions with defined areas of competence and jurisdiction. Separation of public powers is, in short, the separation of public institutions (legislature, executive, and judiciary) and of public functions, for example, “the making of law, law application and execution, and dispute resolution.”⁹⁴

According to French jurist Montesquieu, ‘in every government there are three sorts of powers: the legislative; the executive in respect of things dependent on the law of nations; and the executive in regard to matters that depend on civil law.’⁹⁵ Montesquieu argued that, unless each power only exercises its own function, ‘there can be no liberty...and there would be an end of everything, were the same man or the same body...to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the cause of individuals.’⁹⁶

In South Africa, the principle of separation of powers has been a point of debate even before the adoption of the RSA Constitution, especially for those who were debating against the inclusion of socio-economic rights.⁹⁷ The court’s reluctance to overstep the boundaries of the executive and legislature and specify what the minimum core of socio-economic rights ought to be was reflected in *Mazibuko & Others v City of Johannesburg & Others*.⁹⁸ Based on this, one can argue that the interpretation and application of the separation of powers principle can hinder the full enforcement of socio-economic rights, as the Courts cannot give their full views in relation to the enforcement of socio-economic rights.

In addition, checks and balances are included in the RSA Constitution, and its aim was and still is to create links between the different branches of government, to make government in general and the doctrine of separation of powers in particular more efficient. The basic idea of a division of functions remains and is only modified by the fact that each of the branches may assert some specifically defined authority in the field of the others.⁹⁹

CONCLUSION

There is no doubt that the RSA Constitution is one of the best in Africa and the world. Also, the courts have handed down commendable judgments in enforcing the socio-economic rights as they are found in the Bill of Rights. The government must also be applauded for the number of programs it has put in place, such as the social assistance program, the housing program, and the school feeding program, to name a few. However, as this article has shown, more still needs to be done. This article has shown that the enforcement of socio-economic rights still remains a challenge, as many South Africans continue living under poverty lines, with over 27 percent unemployed, and many South Africans without housing. It is the researchers’ submission that more still needs to be done.

The study argues that Africa uniting and facilitating intra-African trade can address this lack of full enforcement of socio-economic rights. It is submitted that the newly formed African Continental Free Trade will aid in this aspect. The South African government needs to work with other governments towards a free-trade agreement that will not only open borders for trade but will also see states working together, supporting each other, and seeing each state do well, due to the support they will be giving to each other. The regional trade agreements that South Africa belongs to have not yielded good results as far as the economic development that South Africa needs to enforce socio-economic rights fully.

⁹⁴ S. Seedorf and S. Sibanda, “Separation of Powers,” in *Constitutional Law of South Africa*, ed. Stuart Woolman and Michael Bishop, 2013, 12.

⁹⁵ De Secondant CL *The Spirit of Laws*, translated by Nugent T (1899) Book 11, s.6, 151.

⁹⁶ De Secondant CL *The Spirit of Laws*, translated by Nugent T (1899) Book 11, s.6, 151.

⁹⁷ Heyns and Brand, “Introduction to Socio-Economic Rights in the South African Constitution,” 154.

⁹⁸ *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009).

⁹⁹ S. Seedorf and S. Sibanda, “Separation of Powers,” in *Constitutional Law of South Africa*, ed. Stuart Woolman and Michael Bishop, 2013, 12.

It is the argument of this study that rapid and sustainable economic development is required in Africa. Should South Africa and all other African states fail to develop or adjust to the free trade agreement, it would leave millions suffering due to a lack of socio-economic rights enforcement.

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