

CHAPTER 12

THE ROLE OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION IN ENSURING STATE ACCOUNTABILITY TO ADDRESS POVERTY

Rachael Adams*

Overcoming poverty is not a gesture of charity. It is an act of justice. It is the protection of fundamental human rights.

Nelson Rolihlahla Mandela (1918-2013)

Abstract

Since its inception at the dawn of South Africa's new democracy the South African Human Rights Commission has focused much of its efforts in securing the human rights of the country's poor and marginalised citizens. As part of its work, the Commission has engaged with government in order to ensure that the necessary priority is afforded to the realisation of the Constitution's Bill of Rights, and that government is held accountable to the people of South Africa for their obligations under the Constitution. As will be discussed in this chapter, it often is those most marginalised by society, such as those living in poverty, who face structural and other barriers to the realisation of their human rights and who most require a responsive government to address such issues. This chapter therefore briefly examines the relationship between human rights and poverty in South Africa, before providing an account of the Commission's work on poverty alleviation, and ensuring state accountability to the poor. While the important mandate of the SAHRC must be acknowledged, the Commission is also faced by limitations, such as the location of its offices in only the main metro cities, significantly impacting its reach and effectiveness.

1 Introduction

The term 'poverty' has been used historically to refer to a lack of resources necessary for leading an adequate and comfortable life.¹ Therefore, it is a relative term, based upon what a particular society recognises to be the resources necessary for leading a particular kind of life. Yet, in South Africa it is well recognised that poverty persists in extreme and worrisome ways across the country. It is evident in the extreme divide between those whose rights, citizenship, homes and lives are secure, and those for whom these fundamentals are not.

* Senior Research Specialist at the Human Sciences Research Council, South Africa.

1 For a discussion on the concept and history of poverty see, eg, Studies in Poverty and Inequality Institute 'The measurement of poverty in South Africa project: Key issues' Working Paper 1, <http://www.treasury.gov.za/publications/other/povertyline/SPII%20document.pdf> (accessed 18 August 2017).

The (near) universal acceptance of international human rights has come to stand as a benchmark for what constitutes a humane and dignified life in contemporary times.² In particular, socio-economic rights – enshrined in international human rights law in the International Covenant on Economic, Social and Cultural Rights (ICESCR) – pertain to the tangible resources necessary for a decent standard of living, including water, housing and education. The universal realisation of socio-economic rights has been broadly accepted, and particularly in South Africa where these rights enjoy a justiciable status,³ as constituting an integral step in overcoming poverty. However, the ways in which poverty intersects with human rights, and not only socio-economic rights, are numerous and complex.

One of these ways is in the affiliation between notions of poverty and notions of inequality, which human rights so fundamentally seek to eradicate. Indeed, by definition poverty is related to inequality insofar as it denotes a lack of wealth and points to the disparities between rich and poor, the ‘haves’ and the ‘have nots’. Moreover, the standards of poverty that have been developed globally – absolute poverty where a household income is not enough to meet basic needs, and relative poverty where a household’s income is 50 per cent below that of the country’s medium income – remain subject to critical circumstances of structural inequality.⁴ As Liebenberg has noted:⁵

In the context of development policy and the realisation of socio-economic rights, a focus on capabilities highlights how unequal social structures can undermine people’s abilities to convert access to resources and services into valuable functionings even where absolute poverty has been eliminated.

To elaborate, the promotion and defence of equality and non-discrimination are central tenets of the human rights project, with article 1 of the Universal Declaration of Human Rights (Universal Declaration) firmly reiterating that ‘[a]ll human beings are born free and equal in dignity and rights’, a principle that is also echoed in article 2 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). This intersection of poverty and inequality is particularly important for examining the poverty situation in South Africa and the role of human rights in working towards its alleviation.

2 See, eg, the definition ‘human rights is those basic standards without which people cannot live in dignity’, published on the University of Minnesota’s Human Rights Resource Centre webpage, <http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-1/whatare.htm> (accessed 18 August 2017).

3 SM Kende ‘The South African Constitutional Court’s embrace of socio-economic rights: A comparative perspective’ (2003) 6 *Chapman Law Review* 137.

4 S Fredman ‘The potential and limits of an equal rights paradigm in addressing poverty’ (2011) 22 *Stellenbosch Law Review* 566; S van der Berg ‘Ensuring proportionate state resource allocation in socio-economic-rights cases’ (2017) 3 *South African Law Journal* 576 587.

5 S Liebenberg ‘Toward an equality promoting interpretation of socio-economic rights in South Africa: Insights from the egalitarian liberal tradition’ (2015) 132 *South African Law Journal* 411 423.

In South Africa poverty is marked by race, with over 93 per cent of South Africa's poor being black.⁶ In addition, a study conducted by the South African Human Rights Commission (SAHRC) and the United Nations Children's Fund (UNICEF) revealed that children of black or African descent constituted 95 per cent of all children in South Africa living in poverty.⁷ Under South Africa's Constitution of 1996 a formal commitment was made to 'improve the quality of life of all citizens and free the potential of each person'⁸ through the enactment of the Bill of Rights in chapter 2. As part of the institutional mechanisms created to promote human rights, the SAHRC was founded under Chapter 9 of the Constitution. Accordingly, this chapter considers the role of the SAHRC as the national human rights institution of South Africa in poverty alleviation, and specifically the ways in which it works to promote government accountability to the poor.

Against this background this chapter contextualises poverty within the human rights discourse, before presenting an overview of the role and work of the SAHRC in ensuring state accountability to the poor. The chapter considers the relationship between poverty in South Africa and the Bill of Rights, paying specific attention to the socio-economic rights and the right to equality. Before unpacking the constitutional and legislative mandate of the SAHRC, the chapter provides an analysis of state accountability. In presenting the work of the SAHRC in relationship to poverty and the responsibilities of the state, the chapter examines the different mechanisms available to the SAHRC to hold the state to account for the realisation of human rights, and looks at two recent examples of SAHRC campaigns and projects in this regard. Finally, the chapter will draw on lessons learnt from the experience of the SAHRC in order to inform an opinion on the role of government with regard to poverty alleviation and accountability to the poor.

2 Poverty and human rights

2.1 International human rights law

Although the links between poverty and human rights are considered relatively apparent, whether or not poverty alleviation constitutes an actual human right has been a somewhat more contentious issue.⁹ Article 25(1) of the Universal Declaration is seen to lay the foundations for a

6 Statistics SA 'Poverty trends in South Africa: An examination of absolute poverty between 2011 and 2015' 57-58, <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf> (accessed 11 June 2019).

7 South African Human Rights Commission and United Nations Children's Fund 'South Africa's children: A review of equity and child's rights' March 2011, 21, www.sahrc.org.za (accessed 11 June 2019).

8 Constitution of the Republic of South Africa, 1996, Preamble.

9 See T Pogge 'Severe poverty as a human rights violation' Philosophy Seminar at All Souls College, Oxford, March 2003.

specific right to be free from poverty,¹⁰ in so far as it protects the right to an adequate standard of living:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

If there is a human right to be free from poverty contained in the right to an adequate standard of living (a right that is further protected under article 11 of ICESCR¹¹ and article 27 of the Convention on the Rights of the Child (CRC)),¹² this also means that there is a corollary obligation upon states to realise this right. This conceptualisation of human rights as containing a relationship between rights holders (individuals)¹³ and duty bearers (which under international human rights law primarily is the state) was put forward by, among others, Hohfeld, a legal theorist.¹⁴ Hohfeld developed a typology for rights that drew out the correlation between duties and rights (or claims),¹⁵ which has a direct relevance to the contemporary conceptualisation of human rights as developed in

10 SAHRC & UNICEF (n 7).

11 Art 11 ICESCR: '1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent. 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.'

12 Art 27 of the International Convention on the Rights of the Child (CRC): '1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. 3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing. 4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.'

13 Notably the African human rights system differs somewhat from this traditional concept of individuals as the rights holders as it provides for community or collective rights. See art 19-24 of the African Charter.

14 WN Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 *Yale Law Journal* 63.

15 Hohfeld's typology was somewhat more complex, relating also to privileges (or liberties), power, liability, immunity and disability. See n 12.

international law, which places an obligation upon the state to protect, respect and promote the attainment of rights.¹⁶

Thus, conceiving of a human right to be free from poverty would place an obligation upon the state to *protect* individuals against impoverishment and to *promote* access to the resources necessary to an adequate standard of living. In addition, if a state has a specific obligation to do something, it can be held accountable for this. A United Nations (UN) publication justifies human rights as a means to alleviate poverty in the form of the realisation of the Millennium Development Goals (MDGs) for this very reason by stating that ‘the *raison d’être* of the rights-based approach is [to ensure state] accountability’.¹⁷

Indeed, whether or not there is a firm right to be free from poverty, the human rights discourse – which places obligations upon the state for which the state can in turn be held accountable – provides an ideal framework for poverty alleviation, grounded in the human rights principles of equality and human dignity, principles that are of particular importance in South Africa as founding values of the Constitution.¹⁸

2.2 Poverty and human rights in South Africa

Poverty intersects with human rights in many direct and substantial ways. It is well recognised that those living in poverty frequently suffer from violations of their human rights, or face difficulties in accessing their rights.¹⁹ These violations are caused both by structural factors and power imbalances that so often are the cause of social injustices. In addition, persons living in poverty often are without the resources or ability to seek redress or remedies where human rights violations occur.

For this reason, poverty is fundamentally connected to inequality and injustice, which, as discussed above, are central elements of the human rights endeavour. An oft-quoted maxim by Nelson Mandela lays out these fundamental links between poverty, human rights, justice and equality.²⁰

Overcoming poverty is not a gesture of charity. It is an act of justice. It is the

16 See, eg, the United Nation’s Office of the High Commissioner for Human Rights’ website, <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx> (accessed 18 August 2017).

17 United Nations Office of the High Commissioner for Human Rights ‘Claiming the Millennium Development Goals [MDGs]: A human rights based approach’ (2008) 15, http://www.ohchr.org/Documents/Publications/Claiming_MDGs_en.pdf (accessed 18 August 2017).

18 ‘Chapter 1 Founding Provisions Republic of South Africa The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.’

19 See T Pogge ‘Poverty and human rights’, summary document, http://www2.ohchr.org/english/issues/poverty/expert/docs/Thomas_Pogge_Summary.pdf (accessed 18 August 2017).

20 Nelson Mandela, Amnesty International Conference, 2006.

protection of fundamental human rights. Everyone everywhere has the right to live with dignity, free from fear and oppression, free from hunger and thirst, and free to express themselves and associate at will.

Mandela connects poverty with the numerous specific rights enshrined in the Bill of Rights, including the right to the inherent dignity of all persons (section 10); the right to food and water (section 27); the right to freedom of expression (section 16); and the right to freedom of association (section 18). By so doing, he points to the fact that the alleviation of poverty is a constitutional imperative, and a central element of South Africa's nation-building efforts.

2.3 Socio-economic rights²¹

Socio-economic rights are important for poverty alleviation, insofar as they provide individuals and communities with claims against the state for accessing certain material and social resources necessary for achieving an adequate standard of living.²² Socio-economic rights are particularly significant in South Africa. Section 27 of the Constitution enshrines the rights of access to health care, food, water and social security. Section 26 enshrines the right to adequate housing. Section 24 enshrines the right to an environment that is not harmful to one's health and well-being, and section 29 enshrines the right to education. These rights collectively constitute the body of socio-economic rights protected in the South African Constitution. These rights are further subject to progressive realisation by the state.²³

The inclusion of socio-economic rights in the South African Constitution was globally considered progressive and distinctive.²⁴ When the Constitution was promulgated in 1996, socio-economic rights generally were considered within the international human rights discourse as non-justiciable given both their unspecific nature, and the fact that they are subject to progressive realisation by state parties, depending on available resources. However, the South African Constitution enshrined a significant catalogue of socio-economic rights and, in so doing, made a clear statement of intent to the people of South Africa of what they could expect from government and, therefore, for what government could be held accountable. In addition, South Africa's inclusion of these rights demonstrated that socio-economic rights were also fundamental

21 This part of the chapter examines the link between poverty and the socio-economic rights guaranteed under the South African Constitution. This is not a detailed discussion as chs 5-8 of this volume contain a more comprehensive discussion on this issue.

22 From an international perspective, socio-economic rights derive from art 25 of the Universal Declaration on an adequate standard of living.

23 The 'progressive realisation' clause of the Constitution has been deliberated by the Constitutional Court, most notably in the case of *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC).

24 See, eg, A Sachs 'The creation of the Constitution' (1996-1997) 41 *New York Law School Law Review* 669.

to rebuilding a nation and eradicating the poverty and inequality that characterised apartheid. Indeed, the SAHRC's Socio-Economic Rights Report of 1997-1998 states that 'by recognising these [socio-economic] rights, the eradication of poverty becomes not merely a policy choice for the state, but a legally-binding responsibility for which it is accountable'.²⁵

In consideration of the positive duties upon the state to realise the socio-economic rights enshrined in the Bill of Rights, and the necessity of the implementation of these rights for the eradication of poverty across South Africa, it is important to first lay out what is meant by state accountability and, therefore, how the SAHRC can contribute to ensuring the realisation of rights by scrutinising government's policy efforts and interventions to alleviate poverty.

3 What do we mean by state accountability?

3.1 State accountability

Poverty also is a political term that speaks to the distribution of resources across a particular society.²⁶ It is partly for this reason that assessing the role of the state in poverty alleviation and promoting state accountability on this issue is critical, in addition to the human rights typology laid out above which places an obligation upon the state to protect, respect and promote the fulfilment of rights. As highlighted above, poverty alleviation is a constitutional imperative and, as such, the state bears the primary responsibility²⁷ for allocating resources and ensuring access. The extent to which the state progressively commits policies and resources towards the realisation of socio-economic rights, in particular, constitutes an empirical demonstration of its commitment to poverty alleviation and, indeed, the Constitution. Indeed, Philip Alston as UN Special Rapporteur on Extreme Poverty and Human Rights notes that tax is a fundamental human rights issue and calls for international human rights obligations to shape the tax reforms of states.²⁸

The World Bank provides a useful definition for understanding what is meant by state accountability, particularly with regards to the issue of poverty:²⁹

Accountability ensures actions and decisions taken by public officials are

25 South African Human Rights Commission, Socio-Economic Rights Report 1997-1998, www.sahrc.org.za (accessed 18 August 2017).

26 n 1 above.

27 Although the state bears the primary responsibility for securing access to the rights laid out in the Bill of Rights, the Constitution has horizontal application (enshrined in sec 8), which binds all persons.

28 P Alston & N Reisch (eds) *Tax, inequality and human rights* (2019).

29 World Bank 'Accountability in governance', <http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf> (accessed 18 August 2017).

subject to oversight so as to guarantee that government initiatives meet their stated objectives and respond to the needs of the community they are meant to be benefitting, thereby contributing to better governance and poverty reduction.

In short, accountability signifies a relationship between the state and its people. It demands a responsive state that is able to respond to the needs and concerns of its citizens. Further, to be an accountable state requires the necessary capacity and will to execute its mandate, obligations and functions, particularly as derived from the Constitution. Lastly, the World Bank's definition highlights the need for oversight as a form of guarantee for ensuring action by the state. Within South Africa's constitutional democracy, Parliament enacts direct oversight over government in addition to the constitutionally-established independent institutions, such as the SAHRC, which hold a specific mandate in respect of the realisation of human rights.

In addition, accountability has been closely linked to transparency³⁰ and the right of access to information.³¹ In broad terms, this link between transparency and accountability posits that by allowing access to information regarding the decision making, policies and budget allocation of the state, its citizens can hold the state accountable for its actions (and, indeed, non-actions) as well as participate in policy and decision making. However, this requires the availability of information that is timely, accurate, relevant and accessible to citizens.³²

For Yamin, who writes on the role of accountability in a human rights approach to health care, 'true accountability requires processes that empower and mobilise ordinary people to become engaged in political and social action'³³ and, further, that 'accountability in a human rights framework also requires effective and accessible mechanisms for redress in the event of violation'.³⁴

Certainly, then, there are a number of factors that need to be present in order for a state to be truly accountable to its citizenry. As has been pointed out, a human rights-based approach encompasses notions of redress and remedy for victims where violations occur and, as such, is a just approach.³⁵ Yet, access to such remedies and justice notably is more

30 S van der Berg 'Strengthening access to information institutions to promote a culture of transparency' (2017) 33 *South African Journal on Human Rights* 167.

31 In South Africa the right of access to information is enshrined in sec 32 of the Constitution.

32 Issues of accessibility further include the language in which information is made available. See C Darch & PG Underwood 'Freedom of information legislation, state compliance and the discourse of knowledge: The South African experience' (2005) 37 *The International Information and Library Review* 77.

33 AE Yamin 'Beyond compassion: The central role of accountability in applying a human rights framework to health' (2008) *Health and Human Rights Journal* 2.

34 World Bank (n 29).

35 As above.

difficult for those living in poverty.³⁶

In South Africa the right to justice (and to seek remedy and redress) is implicitly protected in sections 33 and 34 of the Constitution. Section 33 protects the right to just administrative action, placing an obligation on the state to provide written reasons for any administrative action taken against an individual. Section 34 enshrines the right of access to the courts and to a fair trial. Despite the protection of these rights in the Constitution, various barriers exist to accessing justice for many South Africans, and particularly those living in poor and marginalised communities. Such barriers include a lack of awareness of the Constitution and individual rights; a fear of stigmatisation and reprisal by community members or other social groups for taking legal action and any findings thereof; inadequate capacity of the judicial system and legal aid services to deal with matters in a timely manner; societal prejudices and stereotypes against the poor which may also influence laws, court proceedings and judicial decision making; inadequate redress and remedy mechanisms; as well as financial constraints in travelling to courts or other tribunals and paying the necessary legal fees.³⁷

The SAHRC is one institution in South Africa where redress and remedies for violations of rights may be sought, since the Commission is constitutionally mandated to 'take steps to secure appropriate redress where human rights have been violated'.³⁸ Although the Commission annually receives an estimated 10 000 complaints,³⁹ many people living in rural parts of South Africa experience limited access to the SAHRC due to the fact that the Commission's nine provincial offices are located in urban areas. Indeed, Jacob writes that 'the SAHRC remains a limited urban-based institution; its services are largely inaccessible to an overwhelming majority of the people who live in the rural and semi-rural communities', and calls for it to 'decentralise its presence'.⁴⁰

4 South African Human Rights Commission

4.1 Mandate and functions

The SAHRC is an independent institution established in terms of the Constitution. The SAHRC derives its enabling powers from the South

36 See also the Report of the Special Rapporteur on Extreme Poverty and Human Rights (2012), <http://www.ohchr.org/Documents/Issues/Poverty/A-67-278.pdf> (accessed 15 April 2015).

37 Darch & Underwood (n 32).

38 Sec 184(2) of the Constitution. See also part 5 on the SAHRC's mandate below.

39 SAHRC Annual Report 2014, www.sahrc.org.za (accessed 18 August 2017).

40 BA Jacob 'The role and effectiveness of national human rights commissions in advancing domestic implementation of socio-economic rights in Commonwealth Africa' University of Pretoria (2014) 220.

African Human Rights Commission Act 40 of 2013 (SAHRC Act).⁴¹

Section 184(1) of the Constitution sets out the mandates of the Commission as follows:⁴²

The Human Rights Commission must

- (a) promote respect for human rights and a culture of human rights;
- (b) promote the protection, development and attainment of human rights; and
- (c) monitor and assess the observance of human rights in the Republic.

The Commission's mandate is achieved through its legal, advisory, advocacy and research programmes, which derive their mandate from section 184(2) of the Constitution:

The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power –

- (a) to investigate and to report on the observance of human rights;
- (b) to take steps to secure appropriate redress where human rights have been violated;
- (c) to carry out research; and
- (d) to educate.

As a national human rights institution (NHRI) the SAHRC is additionally guided by the Principles Relating to the Status of National Institutions (Paris Principles) adopted by United Nations General Assembly Resolution 48/134 in 1993, to direct NHRIs in their duties and responsibilities. These principles include submitting reports to Parliament and to the public 'on any matters concerning the promotion and protection of human rights'; making recommendations on legislative and administrative laws and agreements; cooperating with the UN and other international and regional instruments; and assisting in the formulation and teaching of education and research programmes.⁴³ The SAHRC has been awarded 'A' status under the Paris Principles, meaning that it is granted speaking rights at the UN as it is considered sufficiently independent.

The SAHRC is further endowed with specific mandatory duties in relation to various rights and right groups in the Constitution. As well as holding responsibilities under the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),⁴⁴ the Commission also

41 This Act repeals the original Human Rights Act 40 of 1994.

42 Ch 9, sec 184 of the Constitution of the Republic of South Africa 1996.

43 Principles Relating to the Status of National Institutions, <http://www.jus.uio.no/smr/om/nasjonal-institusjon/docs/paris-principles.pdf> (accessed 18 August 2017).

44 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

currently holds a mandate under the Promotion of Access to Information Act.⁴⁵ With respect to PEPUDA, the SAHRC is mandated to promote the right to equality and report to Parliament therein on the enjoyment of the right to equality in South Africa. Given the recent judgment at the Equality Court in the case of *Social Justice Coalition v Minister of Police*, which demonstrated that poverty was a ground of discrimination under PEPUDA, this finding will augment the responsibilities of the SAHRC under the Act.⁴⁶

4.2 Reporting requirements

The SAHRC holds a number of mandates with respect to reporting and gathering information with respect to the status of compliance with the Constitution. Section 184(3) of the Constitution requires the Commission to gather information from government with regard to the realisation of socio-economic rights:

Each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights, concerning housing, health care, food, water, social security, education and the environment.

The SAHRC is one of the only NHRIs worldwide to hold a specific mandate to monitor the realisation of socio-economic rights,⁴⁷ a mandate that translates into a duty to enact oversight over the activities of the state in implementing these rights, and to hold it accountable for its responsibilities. Thus, in fulfilment of the constitutional obligation noted above, the SAHRC collects information from relevant government departments relating to specific socio-economic rights and compiles this information, which is verified against independent research and data produced by the Commission itself, into an annual section 184(3) report which is tabled at Parliament.⁴⁸ In recent years the SAHRC has published various research and policy briefs on the status of realisation of socio-economic rights.⁴⁹

Jacob highlights how this special monitoring function of the SAHRC

is about ensuring the practical implementation of socio-economic rights for the benefit of all South Africans, particularly the poor and the vulnerable, by determining the extent to which state organs have implemented these rights;

45 Promotion of Access to Information Act 2 of 2000.

46 *Social Justice Coalition & Others v Minister of Police & Others* (EC03/2016) [2018] ZAWCHC 181 (14 December 2018).

47 A Corkey 'NHRIs as monitors of economic, social and cultural rights' Centre for Economic Social Rights, <http://www.cesr.org/downloads/NHRIs%20as%20Monitors%20of%20ESC%20Rights.pdf> (accessed 18 August 2017).

48 All the SAHRC's sec 184(3) reports are available online at www.sahrc.org.za (accessed 18 August 2017).

49 See www.sahrc.org.za (accessed 18 August 2017).

determining the reasonability of the measures which state departments and agencies have adopted to ensure that these rights are realised; and making relevant recommendations for the development and realisation of these rights.⁵⁰

Further, in providing guidance to NHRIs the Paris Principles recommend that such institutions should regularly report on the realisation of human rights and provide recommendations therein. Moreover, the SAHRC Act requires the Commission to report on the implementation of the Bill of Rights by relevant government departments, and levels of compliance with international human rights standards and treaties.⁵¹ To this end the Commission is required to make recommendations to all levels of government to strengthen the realisation of human rights, to review government policies relating to human rights, and to comment on the human rights concerns of new legislation and policy, particularly with regard to the impact on equality and the realisation of rights for marginalised groups.⁵²

5 Structures of accountability

The SAHRC works to promote state accountability to the poor on a number of levels. This part aims to provide an overview of the Commission's structures for promoting accountability and examples of its work in this regard. First, this part discusses the SAHRC's complaints-handling procedure as a tool for promoting state accountability at the micro-level. As an example, one case is discussed which sheds light upon the ways in which poverty intersects with other human rights concerns, particularly inequality and discrimination.

The second leg of this part moves on to provide an account of the SAHRC's reporting practices and the way in which this encourages state accountability to the poor on a macro-level. In this regard, this part examines two reports developed by the Commission, the first entitled 'Poverty traps and social exclusion among children in South Africa', and the second entitled 'Report on the right to access sufficient water and decent sanitation in South Africa 2010-2013'. These reports are selected as they illustrate both the overlapping concerns with respect to poverty and inequality, and the SAHRC's processes for promoting accountability.

5.1 Complaints

The SAHRC has the power (under its investigative functions laid out in the Constitution and the SAHRC Act) to investigate complaints related to violations of human rights. Any group or individual can bring a human

50 Darch & Underwood (n 32) 238-239.

51 SAHRC Act 40 of 2013 sec 13.

52 Promotion of Access to Information Act 2 of 2000.

rights-related inquiry to the SAHRC, and the Commission is also able to consider matters of its own volition. The procedure for handling complaints is provided under the gazetted complaints handling procedure. Matters investigated are sometimes finalised by means of a report which may include specific findings and recommendations for the concerned parties. The Commission regularly deals with cases regarding service delivery of socio-economic rights, where the respondent is an organ of state, typically local government, and the complainant is an indigent community.⁵³ The recommendations in such matters provide specific indicators and timeframes by which the Commission can monitor their implementation and also ensure accountability.

A recent case handled by the Commission is demonstrative both of the increasing number of cases received relating to violations of socio-economic rights – particularly matters relating to health care, basic education and water and sanitation – and their link to poverty and discrimination. In 2014 the SAHRC concluded its investigation into human rights violations at the Alex Women's Hostel in the Johannesburg area.⁵⁴ The Commission opened this investigation when it received a wide-ranging complaint relating to the conditions and access to services at the Alex Women's Hostel, including issues with insufficient potable water, sanitation and sewage services; insufficient electricity supply; the removal of male children over seven years of age from their mothers; and general issues regarding, among others, gender discrimination in respect of access to the hostel and occupancy levels. The respondent was the City of Johannesburg Metropolitan Municipality, cited in its capacity as the local government authority that owns and manages the hostel.

In this matter the complainant alleged that these and the other issues noted in the complaint constituted violations to her protected rights to equality; dignity; the environment; access to health care, food, water and social security; housing; the welfare of her children; access to information; and just administrative action. Administering the complaint in terms of the Commission's complaints handling procedures, the SAHRC gathered information by conducting two *in loco* inspections of the hostel, holding several consultative meetings with the complainant and the respondent, and exchanging numerous correspondences with the relevant parties. The investigative team also undertook desktop research of applicable international and domestic law and standards.⁵⁵

A number of the issues that the Commission catalogued during its investigation and in drafting its subsequent report related, directly or indirectly, to the yet-to-be-completed redevelopment of the hostel.

53 Details on how to lay a complaint with the SARHC as well as the reports of SAHRC complaints are available at the Commission's website www.sahrc.org.za (accessed 18 August 2017). See also the SAHRC's Trends Analysis Reports which provide an overview of cases handled by the SAHRC, <https://www.sahrc.org.za/index.php/sahrc-publications/trends-analysis> (accessed 18 August 2017).

54 Alex Women's Hostel Report, www.sahrc.org.za (accessed 18 August 2017).

55 n 48.

However, the Commission ultimately found that, in light of ‘the failure of ill-conceived interim and *ad hoc* measures, the reasonableness of steps already taken and still to be taken and [the] unreasonably long period of time that [had] elapsed since plans for redevelopment were first conceived’, the respondent had violated several human rights of the residents of the hostel.

The Commission specifically found violations with respect to the rights to dignity; access to health care, food, water and social security; housing; the welfare of children; the environment; and just administrative action (and, by implication, access to information).⁵⁶ According to the analysis in the report,

the respondent is alleged to have violated the rights mentioned above by failing to ensure that the hostel constituted adequate accommodation as per international and domestic standards. The reasonableness of steps taken by the respondent must be considered against the particular vulnerability of those affected by the conditions of the hostel, being women and children from poor economic backgrounds, often with little or no support systems.⁵⁷

This analysis is derived from the oft-quoted *Grootboom* judgment which developed the reasonability test to include prioritising the provision of socio-economic rights for the most vulnerable members of society and, notably, children.⁵⁸ The development of this test marked a significant shift from the traditional poverty-rights discourse which centres primarily on socio-economic rights, by including equality and discrimination into its analysis.

The Commission concluded its investigative report into the Alex Women’s Hostel by issuing recommendations with respect to four key issues – consultation and information sharing, audits, violation-specific recommendations and hostel development – and emphasised ‘the need for full and meaningful consultation and active participation throughout the implementation of its recommendations by the respondent’.⁵⁹

These recommendations are notable in that they all stress active involvement by both the Commission and those affected by the respondent’s actions. This underlying theme demonstrates a key capacity of the Commission to foster awareness and participation by the public and, specifically, those directly involved with a matter. Only by creating and maintaining this pressure on human rights violators can the Commission facilitate meaningful change for those affected, and thereby fulfil its constitutional mandate to ‘secure appropriate redress where human rights have been violated’, and encourage state accountability to the poor.

56 As above.

57 n 48, 51.

58 As above.

59 As above.

5.2 Reporting

As noted above, the SAHRC holds a number of reporting requirements. Reports consist of research undertaken by the Commission on a particular right or rights grouping, or are the culmination of evidence received from national hearings on a particular issue, and serve a number of purposes with regard to promoting state accountability. First, by reporting to Parliament, the Commission encourages Parliament to enact its oversight role over government and bring about increased government responsiveness and accountability to the poor. Second, the SAHRC's reports, which synthesise complaints, research and independent information, are publically available and are often used at international forums, including being submitted to international review mechanisms such as UN committees, to bring the attention of the international community to domestic issues, thereby placing diplomatic pressure upon the South African government to fulfil their constitutional obligations.

Third, by disseminating information on the action or non-action, as the case may be, of government with regard to human rights, the SAHRC provides information to the South African citizenry which they can use to hold government to account.

5.2.1 *Poverty traps and social exclusion among children in South Africa*

In 2014 the SAHRC, together with UNICEF, commissioned a study on poverty traps and social exclusion among children in South Africa. The study was aimed at examining the structural factors that cause and impact upon children living in poverty and their social exclusion. The report examined the impact of five interrelated and multidimensional categories – health, education, wealth, social networks and family and geography – on poverty and social exclusion suffered by a child. These categories were explored in relation to understanding the major poverty traps for children in South Africa, with 'poverty trap' being defined as a 'self-reinforcing mechanism which causes poverty to persist'.⁶⁰

The study found that with regard to health, poverty traps included exposure to disease during childhood which impacts upon the growth and long-term well-being of the child; and nutrition deficiencies which similarly affected a child's growth and ability to perform at school. The study further noted the extent to which poverty-stricken households were more susceptible to contracting disease. With regard to education, the report demonstrated how a lack of access to education constituted a significant poverty trap for children in South Africa and had a disproportionate effect on the girl child. The report revealed that single-

60 South African Human Rights Commission and United Nations Children's Fund 'Poverty traps and social exclusion among children in South Africa', www.sahrc.org.za (accessed 18 August 2017).

parent and child-headed households formed another considerable poverty trap. The report estimated that only a third of children in South Africa reside with both their biological parents, while 24 per cent of children have neither parent.⁶¹ In addition, the report noted the effect upon social exclusion and poverty of children who live in rural areas in South Africa, and those whose parents migrate for work.

The report constituted a major study on the issue of child poverty in South Africa. It included an in-depth analysis of the policy choices available to government in an effort to provide recommendations to address structural issues that create and perpetuate poverty traps for children. The report was tabled at Parliament and, in addition, has been used as an advocacy tool by civil society both nationally and internationally in the fight for government accountability to the issue of child poverty in South Africa.

Although the SAHRC has developed a number of monitoring and evaluation mechanisms, it may be too soon to assess the impact of this particular report. However, it is worth noting that issues have been raised with regard to the capacity, or political will, of Parliament to adequately address SAHRC reports that are tabled, and to ensure oversight on the recommendations made in such reports to government ministers. Indeed, Jacob has specifically noted ‘the failure of Parliament to debate the report and invite relevant state departments to respond to allegations of maladministration and lack of service delivery clearly undermines the SAHRC’s influence on public accountability through the section 183(4) mechanism’.⁶² The lack of effective engagement by Parliament on the reports tabled by the SAHRC frustrates the SAHRC’s ability to enforce high-level state accountability to the poor.

5.2.2 Water and sanitation: Accountability to people who are poor

In 2010 the SAHRC received two cases concerning open toilets in the Free State and the Western Cape. Both cases were brought to the Commission by the opposing political party in the respective provinces, with the Democratic Alliance (DA) bringing the case regarding the African National Congress (ANC)-led area of Rammalutsi in the Free State, and the ANC bringing the case regarding the DA-led area of Makhaza in the Western Cape. Both cases were taken to court where the findings demonstrated that there were clear violations of the rights of the community members to inherent human dignity, as well as the rights of access to water and sanitation. The SAHRC interpreted the findings as a demonstration of the

61 South African Human Rights Commission and United Nations Children’s Fund ‘Poverty traps and social exclusion among children in South Africa: Summary report’ 15, www.sahrc.org.za (accessed 18 August 2017).

62 n 36.

interdependence of all human rights.⁶³

Recognising the widespread lack of enjoyment of the right of access to sufficient water and decent sanitation that these two cases demonstrated, the SAHRC called upon the Department of Planning, Monitoring and Evaluation (DPME) to conduct a nationwide report on the status of sanitation and to develop a plan to address the backlogs. The report was presented to the SAHRC at its national hearing on water and sanitation in March 2012. The report spoke of the considerable backlog facing government to implement sanitation services across particularly rural and remote areas of South Africa, as well as those parts that once were demarcated as homelands under the apartheid system. The report indicated that 1,4 million households had no sanitation services, and 3,8 million households had services that did not meet the required standards. The report also indicated that the provision of sanitation services in 23 municipalities was in a crisis state, with an acute risk of disease outbreak. In addition, the report demonstrated that there was an inadequate involvement of communities in the planning and implementation of service delivery projects.⁶⁴

The national hearing in March 2012 where the DPME presented their report marked the beginning of a series of provincial hearings in all nine provinces. The hearings were designed to be a public platform where government officials and communities were brought together to discuss levels of access to water and sanitation. The hearings were held in rural and peri-rural areas, and the experiences of local residents were held up against the DPME's findings. At the provincial hearings community members were able to directly request information from the various government representatives and, in this way, to hold government to account for their responsibilities and commitments made. Other parties present at the hearings included local non-governmental organisations (NGOs), community-based organisations, academics and other Chapter Nine bodies, including the Public Protector and the Commission for Gender Equality.⁶⁵

In March 2013 the SAHRC held its annual national human rights month event, where the draft findings and recommendations from the hearings were presented. These findings and recommendations were then sent to all relevant government departments for consideration, and responses were requested from government to provide their commitment to fulfilling the recommendations set out in the draft report. Some departments responded directly to the SAHRC and others requested further engagement on the matter. Those departments that did not respond substantively or at all were summoned to the SAHRC's public hearing.

63 South African Human Rights Commission *Report on the Right to Access Sufficient Water and Decent Sanitation*, www.sahrc.org.za (accessed 18 September 2017).

64 As above.

65 As above.

For those departments that requested further engagement on the findings and recommendations, the SAHRC hosted a roundtable discussion with over ten departments at the Union Buildings, Pretoria, in July 2013. Finally, in March 2014 the Report on the Right to Access Sufficient Water and Decent Sanitation was launched. At its launch various community representatives and organisations were present, as well as relevant government departments. The report was formally presented to the government officials, including the Deputy Minister of Water Affairs, and was later tabled in Parliament. Through this course of action the final recommendations which were included in the SAHRC's report were developed through a consultative process with government departments, which encouraged their buy-in and support to the full realisation of the rights to access water and sanitation.⁶⁶

In addition, a monitoring brief was published by the SAHRC on the implementation of the recommendations of the water and sanitation report in 2018. The monitoring brief, which was based on information received from key stakeholders to which recommendations had been directed, notes:⁶⁷

Perhaps one of the most telling outcomes of this research process is that despite repeated requests for information from the Commission to the Department of Water and Sanitation (DWS), Department of Cooperative Governance and Traditional Affairs (COGTA) and the Department of Mineral Resources (DMR), they failed to respond. Government bears a constitutional and statutory obligation to provide information to the Commission, and non-responsiveness is thus highly concerning. Furthermore, a lack of responsiveness contradicts the foundational values of openness, responsiveness and accountability of the Constitution and state and negates the significant right to access to information. Of particular concern is the lack of response by the custodian for the fulfilment of the right to access water and sanitation, which has denied the DWS a valuable opportunity to engage on the issues which challenge delivery and could possible enhance service delivery, if addressed.

These telling remarks are critical for understanding the limitations of the SAHRC to actively hold government bodies to account for their human rights commitments.

That being said, the work of the SAHRC on water and sanitation provides an illustrative example of the mechanisms through which the SAHRC can work to promote state accountability to the poor. These mechanisms were prompted by an exercise of the right to justice through the courts when the two cases were brought before the courts in the Western Cape and Free State. The SAHRC's decision to then hold

66 As above.

67 South African Human Rights Commission Water and Sanitation Research Brief (2018) 5, <https://www.sahrc.org.za/home/21/files/The%20Right%20to%20Water%20&%20Sanitation%20-%20Monitoring%20the%20Implementation%20of%20the%20SAHRCs%202014%20Recommendations%2020117-2018.pdf> (accessed 11 June 2019).

the DPME responsible as a result of the court judgment to conduct a nationwide survey on the status of sanitation constitutes another means by which it was working to hold the state accountable. Further to this, the SAHRC set up public hearings, which facilitated direct communication between community members and government officials.

At these hearings government officials were called upon to make commitments to the various communities with regard to the realisation of the rights to water and sanitation. Such commitments were recorded by the SAHRC in order to monitor their implementation. The final report emanating out of all the SAHRC's work on water and sanitation included a series of recommendations which were developed in conjunction with the government departments to which they were directed in order to secure buy-in. In 2014 this report was tabled at Parliament, as the ultimate institution responsible for government oversight.

6 Inequality and intersectional discrimination

Through the execution of its mandate the SAHRC has observed a noticeable trend with regard to intersecting forms of discrimination. Women, in particular, can face multiple forms of discrimination on the basis of their gender, race, class, sexual orientation, and other categories. Such multiple and intersecting forms of discrimination render persons more vulnerable and susceptible to human rights abuse, including the impairment of access to remedy or redress when violations occur. Within the Commission's own work, it has observed how women who are black and poor tend to experience greater difficulties in accessing their rights to water and sanitation.⁶⁸ In addition, in the report by the SAHRC and UNICEF entitled *A Review of Equity and Child Rights (2011)* it was noted that children who face vulnerability and discrimination on multiple levels, including children with disabilities and children in conflict with the law, require special treatment and protection by the state.⁶⁹

Therefore, it is of significant importance that the government takes into account the varying levels of enjoyments of rights for certain groups of people, and recognises that those people living in rural and impoverished areas of South Africa experience disproportionately less access to their constitutional rights and entitlements. In addition, the government must be aware of the gendered impact of a lack of access to rights, and of intersectional forms of discrimination. Accordingly, the government should ensure that the most vulnerable groups – such as women, children and persons with disabilities – are afforded priority for the implementation of their rights, as discussed above with regard to the Alex Women's Hostel report.

68 n 62.

69 https://www.unicef.org/southafrica/SAF_resources_factschildrens11.pdf (accessed 18 September 2017).

6.1 Interdependence of rights and the role of government

In addition to emphasising the need to centre policy choices around the needs of society's most vulnerable, the SAHRC has sought to promote the indivisibility and interdependence of all human rights. With regard to the work of the SAHRC on water and sanitation, one of the key findings was that limited access to these rights caused the potential for other human rights violations to occur. For example, children who were not afforded water and sanitation provisions at their schools often were doubly denied their right to education – more so for girl children who tended to drop out of school once they hit puberty.⁷⁰

As a result the SAHRC has called for the holistic realisation of the Bill of Rights by government across its work. Further, the SAHRC encourages that government take a human rights-based approach to policy design and implementation, and are cognisant of the gendered and discriminatory impact of rights. A paper developed by the Centre for Economic and Social Rights provides an illustrative description of the importance of a human rights-based approach to poverty alleviation:⁷¹

Poverty is not simply inevitable, nor can it only be blamed on the poor ... poverty is created by human actions or policy choices, rather than by nameless economic forces. A human rights approach views poverty not as a question of fate, but rather as an issue of justice. It demands that we reject the view that poverty is inevitable, but rather look at why poverty persists. With a human rights approach, we must investigate, and demand accountability for, the actions (or failures to act) that produce, perpetuate and exacerbate poverty.

A human rights approach to poverty therefore calls for a paradigm shift in how poverty is understood and addressed. Human rights provide a powerful discourse and mechanism through which to address the issue of poverty and to work towards a better life for all.

7 Conclusion: The role of the South African Human Rights Commission

The SAHRC is an independent and constitutionally-established institution of the state, designed to promote South Africa's constitutional democracy through monitoring the implementation of the Bill of Rights. Therefore, holding government accountable for their constitutional obligations is at the core of the design of the SAHRC. More recently, the scope of the SAHRC's mandate as a Chapter 9 institution has been brought to the fore in the recent *Nkandla* judgment.⁷² While the judgment highlighted

⁷⁰ n 57.

⁷¹ Centre for Economic and Social Rights Briefing – Human Rights and Poverty, (<http://www.cesr.org/downloads/CESR%20Briefing%20-%20Human%20Rights%20and%20Poverty%20-%20Draft%20December%202009.pdf>) (accessed 18 August 2017).

⁷² *Economic Freedom Fighters v Speaker of the National Assembly & Others; Democratic Alliance v Speaker of the National Assembly & Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016).

the critical value of Chapter 9 institutions in promoting South Africa's constitutional democracy, it also spoke of the importance of taking seriously the mandate and powers of these institutions. To this end, while the judgment specifically related to the Public Protector, it has implications for all Chapter 9 institutions. Thus, where the judgment found that the recommendations of the Public Protector are binding, the SAHRC has similarly interpreted this to mean that the SAHRC's recommendations are also binding, as an institution with a comparable – if not broader – mandate to that of the Public Protector.⁷³ Accordingly, this chapter has sought to demonstrate the inextricable link between poverty and human rights and the role of the SAHRC as a national human rights institution in the fight against poverty.

Although the SAHRC plays a key role in seeking to understand the nature and causes of poverty, as well as assisting persons to access remedies and redress where violations of their rights occur, one of the key functions of the SAHRC overall is to bring these issues to the attention of both government and Parliament in order to promote state accountability in this regard. Further, the SAHRC's collaboration with civil society and community-based organisations is critical to ensuring that the Commission plays its role as an intermediary between the government and society, and such relationships will continue to inform and strengthen the work of the SAHRC going forward. However, in order to strengthen the reach and effectiveness of the SAHRC it would be hugely beneficial for the Commission to have a permanent presence in the rural and semi-urban areas where many of those living in poverty reside. In addition, the SAHRC is consistently under-resourced and under-staffed. Without adequate capacity, the SAHRC is critically limited in what it can achieve in respect of its mandate. Ensuring that the SAHRC is provided with a sufficient budget by Parliament is a key first step towards the realisation of human rights in South Africa, and extending the SAHRC's reach beyond urban centres. This is consistent with the *Nkandla* judgment which noted that if the constitutional institutions, including the SAHRC, were not given the powers to promote constitutional democracy, the constitutional safeguards would be meaningless.⁷⁴

73 As above.

74 Para 49.

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