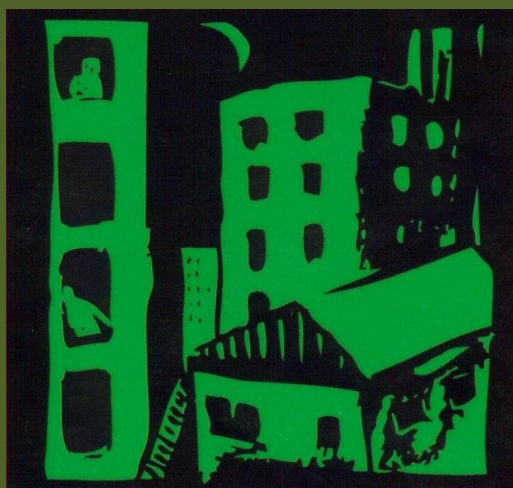


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# An overview of South Africa's institutional framework in promoting women's right to development

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## 1 INTRODUCTION

The article provides a succinct overview of the Chap 9 institutions<sup>1</sup> in the (Constitution)<sup>2</sup> in terms of promoting women's right to development. The particular emphasis is on the strengths of the South African Human Rights Commission (SAHRC)<sup>3</sup> and Commission

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<sup>1</sup> See also the Constitution's establishment of the following institutions: the Public Protector s 181(1)(a); the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities s 181(1)(c); Auditor General s 181(1)(e); and Electoral Commission s 181(1)(f).

<sup>2</sup> Section 181 of the Constitution.

<sup>3</sup> Section 181(1)(b) of the Constitution.

for Gender Equality (CGE).<sup>4</sup> The objective is to harness the inter-relationship of the right to development with other fundamental human rights entrenched in the Constitution – which are essential for the advancement of women’s rights. The identification of these institutions is motivated by the fact that the SAHRC carries a broader mandate for the protection of human rights. On the other hand, the CGE is specifically established to deal with issues relating to gender equality. The article argues that the two institutions should sharpen their constitutionally protected responsibility, by creating an environment that is conducive to the furtherance of the right to development amongst the various role players – in ensuring the advancement of the other protected rights in the Bill of Rights. These institutions are designed to strengthen the constitutional democracy which is essential for the promotion of women’s right to development. It will therefore be important for them to localise the level of awareness of the right to development as a human rights issue that will entail addressing the inequalities in accessing the rights, the empowerment of women, innovative strategies to reinforce gender equality, and the reduction of poverty.<sup>5</sup>

The focus on women is further borne out by the fact that they are the most vulnerable group in our society, as opposed to men, because they carry more burden in the social, political, legal and cultural spheres.<sup>6</sup> There are various challenges that compromise their right to development such as their vulnerability which makes them subject to the high risk of HIV/AIDS infections, the inadequate response of the security cluster to the implementation of legal reforms that are designed to promote gender equality and other related factors that subjugate women to development.<sup>7</sup> These challenges will not be espoused herein because they are already synthesised and in the public domain, except to note that the reports by CGE and Statistics South Africa (StatsSA)<sup>8</sup> highlight the enormous challenges faced by women in South Africa which have a direct and negative impact on their right to development.<sup>9</sup> For example, the

<sup>4</sup> Section 181(1)(d) of the Constitution.

<sup>5</sup> Bryan E & Varat J (eds) “Strategies for promoting gender equity in developing countries: lessons, challenges and opportunities” (2008) Woodrow Wilson International Center for Scholars. Available at <https://www.wilsoncenter.org/sites/default/files/Promoting%20Gender%20Equity%20in%20Developing%20Countries.pdf> (accessed 15 June 2016).

<sup>6</sup> Martin P “The experience of women in male-dominated occupations: a constructivist grounded theory inquiry” (2013) 39 (2) *South African Journal of Industrial Psychology* 1099. See also Bobo T “Challenges facing rural women”. Available at [https://www.google.co.za/webhp?sourceid=chrome-instant&rlz=1C1KYPA\\_enZA648ZA668&ion=1&espv=2&ie=UTF-8#q=Challenges+of+women's+in+south+afrika](https://www.google.co.za/webhp?sourceid=chrome-instant&rlz=1C1KYPA_enZA648ZA668&ion=1&espv=2&ie=UTF-8#q=Challenges+of+women's+in+south+afrika) (accessed 13 June 2016). Venter CM “The new South African Constitution: facing the challenges of women’s rights and cultural rights in post-apartheid South Africa” (1995) 21 (1) *Journal of Legislation* 1. Ntlama N *Gender equality in post-apartheid South Africa: a distant dream?* Saarbrücken: Lambert Academic Publishing 2011).

<sup>7</sup> Rarieya J “Women leaders in the workplace: the intangible barrier”. Available at <http://www.hsrc.ac.za/en/review/hsrc-review-july-2013/women-leaders-in-the-workplace-the-intangible-barrier> (accessed 12 June 2016).

<sup>8</sup> Established in terms of Act 6 of 1999.

<sup>9</sup> “The implementation of the Beijing Platform for action in South Africa” (2014). Available at <https://drive.google.com/file/d/0B43RY8hVdugGTHFoSzFnZzVwX28/view> (accessed 13 June 2016). See also StatsSA “Millennium Development Goals 3: promote gender equality and promote women 2015”. Available at [http://www.statssa.gov.za/MDG/MDG\\_Goal3\\_report\\_2015.pdf](http://www.statssa.gov.za/MDG/MDG_Goal3_report_2015.pdf) (accessed 13 June 2016).

research conducted by these institutions, and without dissecting the contents of their reports, has generally shown that there are continued manifestations of inequalities in education, employment, leadership and political participation, notwithstanding the reforms that have been adopted following the attainment of democracy in 1994. Hence the focus is more on the two institutions (SAHRC and CGE) to build South Africa's public confidence regarding the quest to uphold the values which are embedded in the Constitution and which will directly promote the development of women's socio-economic, political and legal empowerment.

The importance of women's right to development is borne out by the fact that the year 2015 was declared the "Year of Women's Empowerment and Development" by the African Union (AU).<sup>10</sup> Such a declaration by the AU – as the regional structure of the heads of States and governments in Africa – is much needed to ensure that women's right to development becomes a major point of discussion on the continent. In particular, its agenda places emphasis on African women's rights and urges African governments to do the same by adopting and implementing courses of action to address the plight of women in Africa.<sup>11</sup> In the South African context, the year 2015 was very pivotal as the country was required to submit its fifth report to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee<sup>12</sup> on the progress it has made to address women's human rights issues.<sup>13</sup> In this regard, South Africa invited public comments only on 28 August 2015 to be received before 31 December 2015.<sup>14</sup>

Notwithstanding the delay in the submission of the Report (and to date it remains unclear whether it was finally tabled before the Committee), South Africa's reporting duties are in line with the establishment of the Chap 9 institutions in the Constitution, which are important for the realisation of all human rights – including women's right to development. These institutions are designed to transform the country as they are specifically meant to investigate, monitor and evaluate the legal and socio-political obstacles that impede the realisation of all human rights.<sup>15</sup> Their role carries great significance for the affirmation of the right to development – which is akin to all

<sup>10</sup> Available at <http://summits.au.int/en/25thsummit> (accessed 10 June 2015).

<sup>11</sup> The Southern African Development Community Protocol on Gender and Development, which was signed in August 2008 and entered into force in February 2013, has also set up goals towards the attainment of gender equality. By 2015, Members have committed to enact and enforce laws to ensure equal access to justice, education and other rights entrenched in the Protocol. The Protocol gives effect to the African Charter on Human and People's Rights, which was also adopted in 1981 to ensure the promotion of human rights in Africa.

<sup>12</sup> South Africa signed the Convention on 29 January 1993 and ratified it on 15 December 1995. Available at [https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-8&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&lang=en) (accessed 10 June 2015).

<sup>13</sup> South Africa's Report was due on 1 February 2015. Available at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/MasterCalendar.aspx](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/MasterCalendar.aspx) (accessed 11 June 2015).

<sup>14</sup> Available at <http://www.polity.org.za/article/south-africas-5th-report-on-the-implementation-of-the-convention-on-the-elimination-of-all-forms-of-discrimination-against-women-cedaw-2009-2014-comments-invited-gazette-39131govt-notice-761---comment-by-31-dec-2015-2015-08-28> (accessed 11 June 2015).

<sup>15</sup> Murray C "The Human Rights Commission et al: what is the role of South Africa's Chapter 9 institutions?" (2006) 9 (2) *Potchefstroom Electronic Law Journal* 122 at 125.

other rights in the Constitution. The right to development is linked to many of the rights that are included in the Constitution, such as the rights to equality,<sup>16</sup> dignity,<sup>17</sup> life,<sup>18</sup> and freedom and security of the person.<sup>19</sup> These rights and freedoms are of great significance in that they are foundational for the equal protection, and beneficial for the advancement, of the rights of the general populace and not only limited to women *per se*. It goes without saying that these rights constitute the basis for the protection of the rights in the Bill of Rights which include the indirect protection of women's right to development.<sup>20</sup> Therefore, the linkage of the right to development to these rights is important for the advancement of women considering the socio-political and cultural ills, (which will not be canvassed in this article as noted above) that compromise their entire human rights framework. The interdependence supplements the importance of bridging the gap in promoting women's right to development, considering the impact of the pre-democratic system of governance which was more prejudicial to the position of women in South Africa.<sup>21</sup> In essence, the right to development encapsulates the realisation of all human rights, which is central to the economic empowerment and human development of women.

Although the Constitution is being widely regarded as a "beacon of hope",<sup>22</sup> the right of women to development has not as yet been implemented in a more meaningful way, which would be beneficial to them.<sup>23</sup> Even with the existence of institutional and legislative frameworks designed to transform the country based on its foundational principles of non-sexism and non-racialism,<sup>24</sup> the realisation of women's rights is still far from being translated into substantive reality.<sup>25</sup> There is an abundance of matters

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<sup>16</sup> Section 9 of the Constitution.

<sup>17</sup> Section 10 of the Constitution.

<sup>18</sup> Section 11 of the Constitution.

<sup>19</sup> Section 12 of the Constitution.

<sup>20</sup> See Botha H "Human dignity in comparative perspective" (2009) 2 *Stellenbosch Law Review* 171 at 171.

<sup>21</sup> Mokgoro J in *Minister of Finance & Other v Van Heerden* 2004 (11) BCLR 1125 (CC), at para 71 held "Apartheid was not merely a system that entrenched political power and socio-economic privilege in the hands of a minority nor did it only deprive the majority of the right to self-actualisation and to control their own destinies. It targeted them for oppression and suppression. Not only did apartheid degrade its victims, it also systematically dehumanised them, striking at the core of their human dignity. The disparate impact of the system is today still deeply entrenched".

<sup>22</sup> Ozoemena R & Hansungule M "Development as a right in Africa: changing attitude for the realisation of women's substantive citizenship" (2014) 18 *Law, Democracy and Development* 224 at 226. The term "beacon of hope" derived from Ozoemena who described the right to development as a beacon of hope.

<sup>23</sup> See CGE (2014) and StatsSA (2015).

<sup>24</sup> See s 1(c) of the Constitution. Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 74 held "Our constitutional order is committed to the transformation of our society from a grossly unequal society to one in which there is equality between men and women and people of all races. In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it". (footnotes omitted).

<sup>25</sup> Beall J "Decentralisation, women's rights and poverty: learning from India and South Africa" in Chant S (ed) *The international handbook of gender and poverty: concepts, research, policy* (Cheltenham: Edward Elgar Publishing Ltd 2010) 633. Similar views have also been expressed by the CGE in its Report to the

dealt with by the Chap 9 institutions (including those involving women), but there are concerns about the extent to which these institutions can monitor, evaluate and ultimately educate on, the importance of the right to development. The concerns drive the need for further discussion on strengthening the particular roles of these institutions. Furthermore, the realisation of South African women's civil, political, and socio-economic rights will ultimately ensure the realisation of their right to development. This means that lack of the meaningful implementation of women's right to development begs the question about the strength of the Chap 9 institutions in giving effect to South Africa's Constitution. The question is specifically aimed at determining the substantive translation of the constitutional strength of these institutions' mandate – in ensuring the complete realisation of women's right to development. In engaging in such a process, a need exists to trace the essence of the right to development from the international community as South Africa is a member of the family of nations as envisaged in the preamble of the Constitution.

## 2 THE INTERNATIONAL FRAMEWORK OF THE RIGHT TO DEVELOPMENT

### 2.1 The conception and scope of the right to development

The emergence of developing countries from the restraint and bondage of colonialism made them search for measures designed to cultivate the right to development in order to gain economic independence and thus the restructuring of their previous economic *status quo*.<sup>26</sup> This was driven by the eagerness to bridge the gap on economic development in relation to the unevenly balanced distribution of resources between developed and developing countries.<sup>27</sup> As a result of the ongoing debates between these countries, several conventions were drafted and conferences held to solicit and conceptualise the idea of the right to development. The overall context of these debates has been more focused and directed on economic emancipation than on a human centred, human rights and social justice approach. The quest for “development” as a “right” acknowledges the legal obligations of States to ensure the delivery of all fundamental rights which are classified into – notwithstanding their interdependence and interrelationship – first, second and third generation rights.

The traditional classification of rights should not be regarded as the unequivocal acceptance that first generation rights are more important than second or third generation rights.<sup>28</sup> The general argument is that all human rights are interlinked, interconnected and interrelated. However, despite this argument, many countries treat

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Committee on South Africa's Implementation of CEDAW 1998-2008 (July 2010). Available at [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT\\_CEDAW\\_NGO\\_ZAF\\_48\\_10367\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ZAF/INT_CEDAW_NGO_ZAF_48_10367_E.pdf) (accessed 11 June 2015).

<sup>26</sup> Ozoemena & Hansungule (2014) at 230.

<sup>27</sup> Ozoemena & Hansungule (2014) at 226.

<sup>28</sup> UN Declaration on the Right to Development UN GAOR 41<sup>st</sup> Session Doc A/RES41/128 (1986). Moreover, Article 6(2) of Declaration provides that “all human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights”.

these rights on an individual basis rather than seeking to ensure the collective realisation of all the rights. On the other hand, it has been argued that such rights are treated differently because each category imposes a different form of obligation on States. Thus, first generation rights or blue rights can be directly and immediately enforceable as they are generally not dependent on state resources.<sup>29</sup> Second generation rights, which are sometimes considered to be the “step-child” of human rights, obligate States to *take reasonable measures to implement these rights progressively within the limits of the available resources*<sup>30</sup> and to create an environment that is conducive to the realisation of these particular rights – which depends on financial considerations.

These second generation rights are further classified as “qualified” or “unqualified rights”, which may only be “progressively realised”. It is true that some rights are enjoyed individually while others, such as the rights to self-determination and freedom to form and join a trade union, are to a great extent enjoyed collectively. Due to this classification, one can to some extent comprehend the rationale for the treatment of the right to development, since it is difficult to argue for the place of the right to development when the current discourse on human rights (classification of human rights especially) is actually the reason for the dissimilar manner in which rights are regarded. However, the right to development should be able to bridge this argument, since it can be exercised individually and collectively. The argument that human rights are interrelated, interdependent and indivisible should be used to further this view, because the overall notion is that all rights are equal, and that no right is superior to any other right; they are therefore related to and dependent on one another.

The interrelationship of these rights is the cornerstone of the right to development, which is classified as a third generation right. This right is further characterised as an “umbrella right” – in which all other internationally recognised human rights are taken into account.<sup>31</sup> Hence the United Nations Working Group and the High-Level Task Force were mandated to define the “right to development” and identified three core elements of this right as comprising “comprehensive and human-centered development policy, participatory human rights process and social justice in development”.<sup>32</sup> The latter factors inspired the first formal recognition of the right to development as a human right when the UN Commission on Human Rights adopted a resolution,<sup>33</sup> which was further supplemented by a Secretary General Report, that recognised that “development is the condition of all social life, the international duty of

<sup>29</sup> Macklem P “Human rights in international law: three generations or one?” (2014). Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2573153](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2573153) (accessed 13 June 2016).

<sup>30</sup> Mubangizi JC “Towards a new approach to the classification of human rights with specific reference to the African context” (2004) 4 (1) *African Human Rights Law Journal* 93.

<sup>31</sup> Banda F “women, human rights and development” in realizing the right to development: essays in commemoration of 25 years of the United Nations declaration on the right to development: United Nations New York & Geneva” (2013) 149 at 153. Available at <http://www.ohchr.org/documents/issues/development/rtdbook/partiichapter11.pdf> (accessed 16 February 2015).

<sup>32</sup> Ozoemena & Hansungule (2014) at 226.

<sup>33</sup> In 1977 there was the formal recognition of the right in Resolution 4(XXXIII) of the UN Commission on Human Rights. The Thirty-third Session was presided over by Keba M’Baye, a Senegalese jurist.

solidary, the duty of reparation for colonial and neo-colonial exploitation, increasing moral interdependence, and the cause of world peace, which is threatened by underemployment".<sup>34</sup>

The acknowledgement of development as a pre-condition of social life led to the adoption of the UN Declaration on the Right to Development<sup>35</sup> – which unambiguously defined the “right to development” within the broad spectrum of human rights in Article 1, as:

[A]n inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.<sup>36</sup>

This definition emphasises the holistic nature of the right as enabling social, cultural, and political – and not necessarily only economic-development. It further shows the support, especially for developing countries, for recognition of the right to development as being a human right.<sup>37</sup> It puts forward that the right to development recognises that development is progressive in nature, and, as such, that this process involves individual and collective co-operation amongst States and individuals, and the equitable distribution of resources.<sup>38</sup>

Furthermore, UNDRD calls for the involvement of both national and international dimensions of State responsibilities, including the creation of an enabling environment for development, and favourable conditions for all human rights.<sup>39</sup> States are required to ensure that the measures adopted encompass the human rights principles of equality, non-discrimination, participation, transparency, accountability, and international co-operation in an integrated manner.<sup>40</sup> They are further obligated to strengthen the basis for pro-poor growth measures or plans with due attention to the

<sup>34</sup> UN Doc E/CN 4/1334 (1979) (accessed 14 July 2015). This point was also stressed in Tadeg, MA “Reflections on the right to development: challenges and prospects” 2010 (10) *AHRLJ* 325 at 329.

<sup>35</sup> Took place on 4 December 1986 at the 97<sup>th</sup> plenary meeting. Available at <http://www.un.org/documents/ga/res/41/a41r128.htm> (accessed 15 February 2015).

<sup>36</sup> This right was first proclaimed by the Organisation of African Unity (OAU) and included in 1981 in the African Charter on Human and Peoples’ Rights. Piron L “The right to development: a review of the current state of the debate for the Department of International Development” (April 2002). Available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2317.pdf> (accessed 1 June 2015). Also, the Arab Charter on Human Rights re-affirmed the right to development in several instruments, including the 1992 Rio Declaration on Environment and Development, the 1993 Vienna Declaration and Programme of Action (Vienna Declaration), the Millennium Declaration, the 2002 Monterrey Consensus, the 2005 World Summit Outcome Document, and the 2007 Declaration on the Rights of Indigenous Peoples. Available at [http://www.un.org/en/events/righttodevelopment/pdf/rtd\\_at\\_a\\_glance.pdf](http://www.un.org/en/events/righttodevelopment/pdf/rtd_at_a_glance.pdf) (accessed 3 March 2015).

<sup>37</sup> Tadeg (2010) at 329.

<sup>38</sup> Tadeg (2010) at 329.

<sup>39</sup> Article 3 of UNDRD.

<sup>40</sup> “The right to development at a glance”. Available at [http://www.un.org/en/events/righttodevelopment/pdf/rtd\\_at\\_a\\_glance.pdf](http://www.un.org/en/events/righttodevelopment/pdf/rtd_at_a_glance.pdf) (accessed 3 March 2015).

rights of the most marginalised – which will include women.<sup>41</sup> Hence, the right to development comprises the wide spectrum of factors which incorporates not only the different aspects of human rights but also current dialogue on development.

The UN's commitment to the promotion of human rights is also evidenced by its adoption of the 2030 Agenda on Sustainable Development on 25 September 2015<sup>42</sup> which attests to the global need to address the root causes of inequalities, and development for all the people.<sup>43</sup> The 2030 Agenda, traceable to the 8 Millennium Developmental Goals,<sup>44</sup> is comprised of 17 Goals which are, generally, focused on ending poverty, and inequality, and good governance.<sup>45</sup> It is deduced from the 2030 Agenda that it encapsulates the right to development which encompasses all human rights – civil, political, social, economic and cultural rights, and requires “active, free and meaningful participation in development”,<sup>46</sup> while demanding effective co-operation and thus implanting responsibility on all States to foster comprehensive and human centred development policy. The 2030 Agenda therefore, envisions what Zaid and Manzoor buttress, particularly in the context of women in relation to development, as an emphasis on their “sense of self-worth, the rights to have and make choices, access to opportunities and resources, and the right to have ability to influence the direction of social change to create a more just social and economic order, nationally and internationally”.<sup>47</sup>

Drawing from this objective, since the right to development is a composite right that incorporates other rights, it may be said that it was “implicitly recognised in the International Bill of Human Rights”.<sup>48</sup> The UDHR is a classic example of the understated recognition of the link between human rights and development. In fact, the UNDRD states:

[C]oncerned at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, inter alia, by the denial of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and

<sup>41</sup> See CGE (2014) and StatsSA (2015).

<sup>42</sup> UN Resolution of the General Assembly adopted at the Seventeenth Session. Available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E) (accessed 10 June 2016).

<sup>43</sup> UN “Sustainable development goals”. Available <http://www.undp.org/content/undp/en/home/sdgoverview/post-2015-development-agenda.html> (accessed 10 June 2016).

<sup>44</sup> Adopted in September 2000 at the UN Headquarters in New York with a deadline of the year 2015, meant to commit world leaders to combat poverty, hunger, disease, illiteracy, environmental degradation, and discrimination against women. Available at [http://www.who.int/topics/millennium\\_development\\_goals/en/](http://www.who.int/topics/millennium_development_goals/en/) (accessed 12 June 2016).

<sup>45</sup> UN “Sustainable development goals”.

<sup>46</sup> Articles 2(3) and 6 UNDRD. See, also, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v. Kenya*, 276/2003, African Commission on Human and Peoples' Rights (4 February 2010). Available at <http://www.refworld.org/docid/4b8275a12.html> at para 283 (accessed 9 July 2015).

<sup>47</sup> Zaidi NA & Manzoor S “Empowering the disempowered: contesting masculinities and tradition” (2016) 6 (2) *American International Journal of Contemporary Research* 71 at 73.

<sup>48</sup> Tadeo (2010) at 327.



that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms.<sup>49</sup>

Akin to the underlying purpose of the UNDRD are the International Covenant on Civil and Political Rights (ICCPR)<sup>50</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>51</sup> As a starting point, it is trite that the UDHR is a non-binding instrument.<sup>52</sup> Nevertheless, it imposes an obligation on Member States to promote universal respect for, and observance of, human rights and fundamental freedoms.<sup>53</sup> As such, the UDHR laid the foundation for the argument that Member States had a duty to promote, respect and fulfil civil, political and socio-economic rights – which is akin to the right to development. This argument is also taken further by Tadeg who contends that “by incorporating all categories of rights, the indivisibility and universality of human rights are articulated”.<sup>54</sup> He further points out that the UDHR “aspired to create an international order where human rights of individuals may be enjoyed to the fullest extent”.<sup>55</sup> In essence, the alignment of the right to development within the UN framework was an ingenious move made by those in favour of advocating its inclusion because it is indeed a human right, and a quest for the promotion of the rights of women in relation to the right in question in the regional sphere is of great significance.

The uniqueness of the African Charter on Human and People's Rights (ACHPR) lies in it being the only regional human rights instrument that incorporates the right to development – and in which the right is legally binding.<sup>56</sup> Further, the position of the right to development is consolidated by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,<sup>57</sup> as it also provides for a right of African women to “sustainable development”.<sup>58</sup> Article 22 of the ACHPR encapsulates the unique regional approach to the right to development, by emphasising:

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<sup>49</sup> Preamble of UNDRD at para 10.

<sup>50</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966; came into force 23 March 1976, in accordance with Article 49 of the ICCPR.

<sup>51</sup> Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966; came into force 3 January 1976, in accordance with Article 27 of the ICESCR.

<sup>52</sup> Vrancken P “Historical background, international context and constitutional environment” in Govindjee A & Vrancken P (eds) *Introduction to human rights law* Durban Lexis Nexis 2009) 8.

<sup>53</sup> The UDHR's primary purpose was to interpret the Charter of the United Nations, which is generally not viewed as a human rights instrument.

<sup>54</sup> Tadeg (2010) at 328.

<sup>55</sup> Tadeg (2010) at 327.

<sup>56</sup> Tadeg (2010) at 331.

<sup>57</sup> It has been signed and ratified by 36 states; 15 have signed but not ratified it and 3 have not yet signed or ratified it. Available at <http://www.achpr.org/instruments/women-protocol/> (accessed 17 August 2015).

<sup>58</sup> Article 19. According to the Brundtland Report, sustainable development is defined as “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*”. Available at <https://www.iisd.org/sd/> (accessed 10 June 2015).

- 1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
- 2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Thus, all people (including women) have a right to their economic, social and cultural development. The ACHPR imposes a duty on African Member States to collectively or individually enable their entire people to enjoy the right to development. The right implies the fulfilment of internationally and regionally recognised principles of self-determination<sup>59</sup> and full sovereignty over natural wealth and resources – as evidenced by the African Commission on Human and People’s Rights (African Commission) in *Endorois*. In this case – decided by the African Commission in 2010 – the justiciability of the right to development was tested for the first time.<sup>60</sup> Of relevance to this discussion is that the African Commission also emphasised the individual and collective nature of the right, and that such right imposed a duty and included a procedural element. Tadeg opines that:

[I]n coming to this finding, the African Commission reiterated the importance of the right to be consulted and the importance of participation in the development process as key components of the right to development which the respondent state failed to meet in accordance with the requirements of article 22.<sup>61</sup>

This position is also postulated by Article 8(2) of the UNDRD, which calls for States to encourage popular *participation* in all spheres, as an important factor in development, and the full realisation of all human rights. Kamga further notes that the right to development is “underpinned by empowerment and freedom of the beneficiaries”.<sup>62</sup> It is deduced from *Endorois*, that an argument can be raised that it imposes a legal obligation on States to ensure the realisation of all human rights. It is further inferred from this case that the right to development can be indirectly invoked in the enforcement of other rights in South Africa. It reinforces the interdependence of rights, such as, rights to freedom of religion, property, health, culture, religion and natural resources, as considered by the African Commission under the ACHPR which are of direct relevance to development.<sup>63</sup> Without any express mention of *Endorois*, the judgment in *South African Informal Traders Forum and Others v City of Johannesburg and Others, South African National Traders Retail Association v City of Johannesburg and Others*<sup>64</sup> attests to the interrelationship that exists between rights which are of fundamental importance to the right of women to development. In this case, the City of

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<sup>59</sup> The principle of self-determination enjoys importance as being the first Article of both the ICCPR and the ICESCR.

<sup>60</sup> Kamga S “The right to development in the African human rights system: the *Endorois case*” (2011) *De Jure* 381 at 382. The case is also discussed in Ozoemena & Hansungule (2014) at 230.

<sup>61</sup> Tadeg (2010) at 332.

<sup>62</sup> Kamga (2011) at 382.

<sup>63</sup> Williams R “The African Commission *Endorois case* – towards a global doctrine of customary tenure”. Available at <https://terra0nullius.wordpress.com/2010/02/17/the-african-commission-endorois-case-toward-a-global-doctrine-of-customary-tenure/> (accessed 13 June 2016).

<sup>64</sup> 2014 (6) BCLR 726 (CC).

Johannesburg forcibly removed informal traders, who were mainly women, from the streets of the City alleging an increase in the levels of crime in the inner city.<sup>65</sup> Without a deeper analysis of the case, the Court reasoned and linked the socio-political rights as it held:

The ability of people to earn money and support themselves and their families is an important component of *the right to human dignity*. Without it they faced “humiliation and degradation”. Most traders, we were told, have dependants. Many of these dependants are children, who also have suffered hardship as the City denied their breadwinners’ lawful entitlement to conduct their businesses. ... The City’s conduct has a direct and ongoing bearing on the rights of children, including their direct rights to basic nutrition, shelter and basic health care services. The harm the traders were facing was immediate and irreversible”.<sup>66</sup> (authors’ emphasis).

*Endorois*, without being explicitly relied on and mentioned by the South African courts, has set a great precedent for the African continent in the area of the right to development. At face value, its impact might seem limited but it has cast the light for other States to conform to the prescripts of the international community, especially for Africa that has to give credence to its own institutions in order for the citizens to have what the authors may refer to as, “socio-political legal homes” within which to enforce their rights without hindrance.

In a nutshell, the judgement was a “spring board” for the substantive realisation of women’s right to development. It calls not only for the domestication of international and regional instruments, but also for their harmonisation at national level – to ensure that women are brought back from the legal blankness which subjects them to prejudice and subordination.

## **2.2 Women and the right to development: Brought back from the legal cold zone?**

There are several other elements that warrant explanation in terms of the definition of the “right to development”. One is, that the definition advances that all persons (including women) have the right to participate in, contribute to and enjoy the different spheres of the right to development – to ensure that their rights and freedoms are fully realised. For example, paragraph 13 of the Preamble and Article 2 of the UNDRD encapsulate the argument that the human person – which is the *central subject of development* – should be able to actively participate and benefit from the right without there being a distinction of any kind, such as sex or gender. The inclusion of these terms link the UNDRD to the United Nations Charter,<sup>67</sup> the ICESCR and the ICCPR – to name but a few. These Conventions are “presented as precursors to the right to development”<sup>68</sup> and do in fact impose legal obligations on State Parties to resolve

<sup>65</sup> *Forum* at paras 1-12.

<sup>66</sup> *Forum* at para 31 (footnotes omitted).

<sup>67</sup> Signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945.

<sup>68</sup> Oduwole OO “International law and the right to development: a pragmatic approach for Africa”. Inaugural lecture as Professor to the Prince Claus Chair in Development and Equity, delivered on 20 May

problems of a civil, political, economic, social, cultural or humanitarian nature.<sup>69</sup> Thus, it is through them that it can be argued that the legal obligations imposed by the UNDRD are mandatory for the promotion of the right of women to development. It is conceived that the realisation of the right to development is a comprehensive economic, social, cultural and political process – which should be aimed at the constant improvement of the wellbeing of the entire population and of all individuals, including women.

The linkage of the international and regional spheres in the protection of the right to development of women at domestic level is essential for its affirmation as a fundamental principle of the human right of women to development. The link endorses the right to development as a “universal and inalienable right and an integral part of fundamental human rights”.<sup>70</sup> It is a proclamation of a collective responsibility for the realisation of the right to development within the broad framework of all human rights where, for example, States:

- undertake a shared responsibility in global and regional partnerships;
- act individually as they adopt and implement policies that affect persons not strictly within their jurisdictions; and
- act individually as they formulate national development policies and programmes affecting persons within their jurisdictions.<sup>71</sup>

This is the “*alpha* and *omega*”<sup>72</sup> of the human rights system, which encompasses the right to development and dispels the myths about the impact of its added value to the existing human rights framework because of “its composite nature which underscores many of the fundamental rights”.<sup>73</sup> The view is similarly expressed by Sengupta et al, as they argue that:

[T]he right to development can then be described as a “vector”, of all the different rights and supposing that this right protects a particular set of goods and values, which are realized in a way consistent with a rights-based approach. The value of the vector improves, if at least one right improves and no right deteriorates. If any right is violated then the vector deteriorates and the right to development is violated.<sup>74</sup>

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2014 at the International Institute of Social Studies, The Hague, The Netherlands. Available at [http://www.iss.nl/fileadmin/ASSETS/iss/Documents/Academic\\_publications/PCC\\_Inaugural\\_Lecture\\_20\\_May2014.pdf](http://www.iss.nl/fileadmin/ASSETS/iss/Documents/Academic_publications/PCC_Inaugural_Lecture_20_May2014.pdf) (accessed 9 July 2015).

<sup>69</sup> Aligning the right to development with these Conventions which are legally binding disperses the critique about the lack of legal obligation of the UNDRD, which is viewed as being a non-binding instrument.

<sup>70</sup> Tadeg (2010) at 326.

<sup>71</sup> Vandenbogaerde A “The right to development in international human rights law: a call for its dissolution” (2013) 31 (2) *Netherlands Quarterly of Human Rights* 187 at 200.

<sup>72</sup> Vandenbogaerde (2013) at 206.

<sup>73</sup> Ozoemena & Hansungule (2014) at 238.

<sup>74</sup> Sengupta A, Eide A, Marks SP & Andreassen BA “The right to development and human rights in development” at 4. A background paper prepared for the Nobel Symposium organized in Oslo from 13-15 October 2003 (Nobel Symposium 125). Available at

The value of the right to development as a “vector” contextualises its scope and content in foregrounding the systemic domestic violations of human rights, and thus highlighting State responsibilities.<sup>75</sup> This is essential, especially for women who had in the South African context long been the subject of prejudice and marginalisation in all spheres of social, political and cultural life – notwithstanding the formal conception of the progress that led to the attainment of democracy in South Africa.

This shared responsibility towards advancing women's development was also expected at the regional level in the SADC through the SADC Protocol on Gender and Development (the Protocol), which came into force in 2008. The Protocol comprises a number of objectives which are envisaged to be met in 2015. These objectives aim at, for example, empowering women through the development of gender responsive legislation, policies, programmes and projects by eliminating discrimination and achieving equality<sup>76</sup> and addressing emerging gender specific issues and concerns.<sup>77</sup> In accordance with Article 35, to determine State compliance with the Protocol, State Parties are required to collect and submit data that will reveal the extent to which the objectives have been realised – and of course whether any progress has been made in promoting the rights of women in the SADC. This is similarly expressed by Munalula, who notes that the positive aspect of the Protocol is that the large number of its substantive provisions contain clear imperatives and time bound targets.<sup>78</sup>

In essence, the Protocol seeks to harmonise the implementation of the various instruments, such as, CEDAW and the AU Women's Protocol. Since, the Protocol is titled “Gender and Development”, it created an expectation that it would devise concrete measures aimed at the development of women – *and bring them back from the legal cold zone and ensure their advancement within the context of their human right to development*.<sup>79</sup> According to Forere and Stone, despite the euphoria surrounding the drafting of the Protocol, “a large majority of its provisions are unfortunately *an exact replica* of the Women's Protocol (with some minor exceptions) and it equally omits some vital provisions”.<sup>80</sup> This is indeed unfortunate, as regional instruments in conjunction with international instruments are a strategic means of advancing the development of women. The alleged duplication of the UNDRD and the Protocol has a negative effect on the right to development, which requires closer scrutiny and thus we now examine its place within the broader framework of rights.

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<http://www.jus.uio.no/smr/forskning/publikasjoner/arkiv/rn/2004/0704.pdf> (accessed 20 February 2015).

<sup>75</sup> Vandenbogaerde (2013) at 202.

<sup>76</sup> The Protocol Art 3(a).

<sup>77</sup> The Protocol Art 3(c).

<sup>78</sup> Munalula MM “SADC Protocol on Gender and Development: road map to equality” (2011) 1 *SADC Law Journal* 189 at 192.

<sup>79</sup> Forere M & Stone L “The SADC Protocol on Gender and Development: duplication or complementarity of the African Union Protocol on Women's Rights?” (2009) 9 *African Human Rights Law Journal* 434 at 447.

<sup>80</sup> Forere & Stone (2009) at 454.

### 2.3 The right to development: an invader of the rights framework?

Notwithstanding the significant changes within the international landscape, the recognition of the right to development remains highly contested.<sup>81</sup> The ostensible disagreement amongst scholars is leading to the denigration of the right. Like Vandenbogaerde, who questions not only the value of the right to development to current human rights discussions, but also calls for its dissolution.<sup>82</sup> Donnelly also criticises the legal significance of the right.<sup>83</sup> Donnelly argues that the right to development is baseless as there is no legal or even moral reason for a right to development.<sup>84</sup> But at the same time the author concedes that there are “vital relationships” between existing human rights and development discourse.<sup>85</sup> Mubangizi also argues that there is “an undisputed and critical link between human rights and development”.<sup>86</sup> Mubangizi further alludes thereto that there is “a golden thread in the literature”, in respect of the interdependence and mutually reinforcing nature of the two concepts.<sup>87</sup> In essence, his point is one that lies at the heart of the argument of the link between human rights and development, as he contends that: “you can’t achieve one without a reasonable level of achievement of the other. In fact, it could be argued that the attainment of human rights should be seen as one of the standards by which to measure development”.<sup>88</sup>

The link between the two is essential for the respect of women’s right to development. By ensuring the promotion, protection and fulfilment of their human rights, effect is given to the right to development. It makes no sense to converse on human rights and development as if they are two abruptly distinct concepts – as there is an undeniable link between them. The two have the aptitude for being a force to be reckoned with.

These arguments might be exacerbated by the lack of enforcement of, for example, the African Commission’s Recommendations. Mubangizi similarly states that “there are no provisions requiring enforcement of the Commission’s recommendations, and therefore compliance primarily depends on the will of the member states”.<sup>89</sup> It is especially because of this deficiency that national institutions must be equipped to fill these particular lacunae. It is against this background that South Africa’s Chap 9 institutions must be discussed – to ascertain their possible role in respect of the realisation of women’s right to development. The right to development should be

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<sup>81</sup> Kamga (2011) at 384. In addition, the idea to formulate such a right was conceived in 1972 by Keba M’Baye – then head of the United Nations High Commission on Human Rights.

<sup>82</sup> Vandenbogaerde (2013) at 187.

<sup>83</sup> Donnelly J “In search of the unicorn: the jurisprudence and politics of the right to development” 1985 *California Western International LJ* 473 at 477.

<sup>84</sup> Donnelly (1985) at 477.

<sup>85</sup> Donnelly (1985) at 477.

<sup>86</sup> Mubangizi JC “A human rights-based approach to development in Africa: opportunities and challenges” (2014) 39 (1) *J Soc Sci* 67 at 67.

<sup>87</sup> Mubangizi (2014) at 69.

<sup>88</sup> Mubangizi (2014) at 69.

<sup>89</sup> Mubangizi (2014) at 72.

viewed not only as becoming a human rights baton, but that there is a need to determine the extent to which the constitutionally established institutions have sharpened their teeth for the comprehensive implementation of all the fundamental freedoms.

### 3 WOMEN'S RIGHT TO DEVELOPMENT: AN OVERVIEW OF NATIONAL INSTITUTIONS' CONSTITUTIONAL RESPONSIBILITY

Ozoemena fittingly points out that the UDHR “urges all nations of the world to promote all rights and freedoms contained therein and to ensure effective recognition and observance through progressive national and international measures”.<sup>90</sup> The AU has also called on Member States in 2015 specifically – to address the plight of women by realising their rights and ensuring gender equality in their respective countries and regions.

South Africa is a transitional society,<sup>91</sup> and adherence to this appeal resonates in section 181 of the Constitution, which establishes State institutions to support constitutional democracy. These institutions were established with a view to ensuring the furtherance of the values and rights identified in the Constitution and other legislative measures.<sup>92</sup> Generally, they are set out to be “independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their function without fear, favour or prejudice”.<sup>93</sup>

As mentioned above, of particular importance to this discussion are the SAHRC<sup>94</sup> and the CGE.<sup>95</sup> These institutions are sometimes regarded as the “watchdogs” which must keep not only government but also private individuals in check – by ensuring that all relevant parties are committed to constitutional values. The functions of these institutions are twofold. First, they must maintain an advisory relationship with government by monitoring government performance, but secondly, they must also be viewed as bodies that are effective and accessible to the public.<sup>96</sup> These institutions – on paper, at least – are the best suited to ensure the implementation and realisation of women's right to development. The rationale behind this argument is that these bodies are armed with a constitutional and legislative mandate and are internationally recognised. They are also regarded as the link between government and the citizens.<sup>97</sup>

<sup>90</sup> Ozoemena & Hansungule (2014) at 229.

<sup>91</sup> Mubangizi JC “Protection of human rights in South Africa: public awareness and perceptions” (2004) 29 (1) *Journal for Juridical Science* 62 at 63.

<sup>92</sup> See, for example, the foundational values as entrenched in s 1 of the Constitution.

<sup>93</sup> Section 181(2) of the Constitution.

<sup>94</sup> The SAHRC was inaugurated on 2 October 1995, under the Human Rights Commission Act 54 of 1994 (repealed by the South African Human Rights Commission Act 40 of 2013).

<sup>95</sup> The Gender Commission was established in terms of s 187 of the Constitution. The Commission on Gender Equality Act 39 of 1996 provides for the composition, powers, functions and functioning of the CGE, and matters connected therewith.

<sup>96</sup> Langeveldt V “The chapter 9 institutions in South Africa”, Southern African Catholic Bishops Conference Parliamentary Liaison Office Briefing Paper 287 April 2012 at 2.

<sup>97</sup> Langeveldt (2012) at 1.

That said, the mandates of the SAHRC and CGE are sometimes misunderstood (such as when they are labelled a “toothless watchdogs”).<sup>98</sup> As such, in the context of this article, the question to be answered is whether these bodies through their respective mandates (SAHRC broad v CGE specific) could be considered as being a stimulus in promoting women’s right to development in South Africa – thus answering the call from the international and regional institutions to implement programmes and policies geared towards the realisation of this right. On this point, both institutions have recognised that their constitutional mandate must be exercised to have regard for the international and regional instruments.

### 3.1 The South African Human Rights Commission

Internationally, the SAHRC is recognised by the United Nations Office of the High Commissioner for Human Rights (OHCHR) as an ‘A’ status national human rights institution (NHRI).<sup>99</sup> This suggests that the SAHRC is adhering to the international principles and standards that seek to serve as the benchmark for the establishment and functioning of national institutions for the promotion and protection of human rights.<sup>100</sup> The SAHRC – as an independent NHRI – was established in terms of 181(1) (b) of the Constitution, and is tasked to transform South African society, secure rights and restore dignity, and support constitutional democracy through promoting, protecting and monitoring the attainment of everyone’s human rights in South Africa – without fear, favour or prejudice.<sup>101</sup> Section 184(1) of the Constitution encapsulates the functions of the SAHRC by stipulating that it 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”. Furthermore, the institution has the mandate to investigate, monitor and evaluate, research, educate and secure appropriate redress where there are human rights violations.<sup>102</sup> This means that the institution bears a constitutionally embedded legal obligation to promote respect for human rights and to ensure the development and attainment of *all* human rights.

Of relevance is that the functions of the SAHRC are not aligned to a particular group of human rights – but the institution has a duty to protect, promote and monitor *all* human rights (including civil, political, and socio-economic rights). The obligation is endorsed in section 184(3), which provides that each year, relevant organs of State are

<sup>98</sup> Langeveldt (2012) at 4.

<sup>99</sup> Khayundi F “The South African Human Rights Commission’s role in the promotion, protection and monitoring of the right to education in South Africa” (2014) 4 *Speculum Juris* 228 at 229. Khayundi opines that it is “An institution that is specifically established by the Constitution or legislation to promote and protect human rights within the local jurisdiction”. See also Smith A “The unique position of national human rights institutions: mixed blessing?” (2006) 28 (4) *Human Rights Quarterly* 904 at 909 in Khayundi (2014).

<sup>100</sup> SAHRC 17<sup>th</sup> Annual Report 2013. Available at <http://www.sahrc.org.za/home/21/files/Annual%20Report%202012-13.pdf%20October.pdf> (accessed 10 June 2015).

<sup>101</sup> SAHRC (2013).

<sup>102</sup> Section 184(2) of the Constitution.



required to provide the SAHRC “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 duty bound to ensure that the rights of women (again as a vulnerable group in society) are protected.<sup>103</sup>

This obligation towards the realisation of women's right to development is twofold. First, the institution must recognise that the constitutional provisions and the South African Human Rights Commission Act<sup>104</sup> (which prescribes further powers and functions in section 13) are powerful measures to ensure women's right to development. By promoting and protecting all human rights, this broad mandate will give heed to women's right to development. Secondly, this broad mandate in terms of 184(2) empowers the SAHRC to perform its functions and ensure that it is able to address not only human rights violations – but also be informed of the progress (or lack thereof) of the realisation of women's rights and ultimately the right to development. As such, the SAHRC is constitutionally obligated to ensure that where there are claims of violations of specifically women's human rights; that they are investigated and evaluated without using the formal judicial processes.<sup>105</sup>

The importance of these bodies in respect of women's rights has, in recent years, come to the fore owing to the SAHRC's constitutionally mandated obligation. It has investigated and intervened as *amicus curiae* on particular issues involving women.<sup>106</sup> One such matter was the *Bhe and Others v Khayelitsha Magistrate and Others; Shibi v Sithole and Others*,<sup>107</sup> where the SAHRC acted as litigant. In this matter, the SAHRC – together with the Women's Legal Centre Trust – ensured that the principle of male primogeniture in the customary law of intestate succession was held to be unconstitutional. This decision was held at the time to be momentous for a number of reasons. However, the implementation and enforcement of this judgment has been questioned, as women may in fact be unaware that they can inherit, especially in the rural parts of the country. Another case which involved the SAHRC was the issue of learner pregnancies.<sup>108</sup> Here the SAHRC again acted as *amicus curiae*, and it was found that the schools in question (Harmony and Welkom High Schools) had violated various provisions that seek to protect the learner's ability to enjoy their right to access education. Accordingly, the SAHRC wrote a letter to the schools regarding the complaint

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<sup>103</sup> SAHRC “Report on the right to sufficient water and decent sanitation in South Africa: 2014”. Available at [http://www.sahrc.org.za/home/21/files/FINAL%20th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20\(2\).pdf](http://www.sahrc.org.za/home/21/files/FINAL%20th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20(2).pdf) (accessed 9 July 2015).

<sup>104</sup> Act 40 of 2013.

<sup>105</sup> Ntlama N “Monitoring the implementation of socio-economic rights in South Africa: some lessons from the international community” (2004) 8 (2) *Law Democracy and Development* 207 at 207. Ntlama notes that it is not exclusively through the courts that rights can be realised.

<sup>106</sup> In 2006, due to the many complaints it received, the SAHRC initiated a public hearing to explore the content of the right to basic education.

<sup>107</sup> 2005 (1) BCLR 1 (CC).

<sup>108</sup> *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2013 (9) BCLR 989 (CC).

received and informed them that the expulsion or exclusion of a pregnant learner amounted to a violation of their right to basic education.<sup>109</sup> According to its investigation, the schools violated sections 9(1) and 9(3) of the Constitution.<sup>110</sup> As such, the SAHRC's involvement resulted in a suspended pregnant learner being reinstated by the school concerned.<sup>111</sup> Due to concerns regarding other affected pregnant learners, the institution also initiated an investigation into the impact of the policy on such learners who might have been affected – but had not sought its intervention.<sup>112</sup>

Ntlama notes that “the real test for commitment to human rights lies in the mechanisms that are put in place for their enforcement”.<sup>113</sup> In addition, the strength of these mechanisms which mandate ensuring the realisation of women's right to development, is a determining factor. Constant challenges include the lack of accessibility by ordinary citizens<sup>114</sup> and their effectiveness in truly acting as an enforcer of their constitutional mandate.<sup>115</sup> These are valid concerns, because there is recognition of the aptitude of the institution. Notwithstanding its intervention, there unfortunately continues to be a disjuncture between the SAHRC (and other Chap 9 institutions) and the general public.

Despite its decisions not being binding, and bearing the disparaging term “soft mechanism”, the SAHRC through its rapid response to claims of human rights violations, has acquired an effective position, and, as such, its recommendations should not be viewed as being without legal force. It has the powers to subpoena witnesses and apply for search and seizure warrants.<sup>116</sup> To ensure compliance with the SAHRC's recommendations, the Act provides – amongst other things – that persons who contravene any provision of section 4(2) or 13(4) by failing to afford it the necessary assistance, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.<sup>117</sup> Further to this, the SAHRC has a number of positive elements to aid its role in the realisation of women's right to development. First, as mentioned earlier, it has a wide mandate (which allows access to a number of parties); secondly, it is not bound by stringent procedural requirements; and thirdly, it can hold public hearings to deter current or future violations of human rights.<sup>118</sup>

<sup>109</sup> *Welkom and Harmony* at para 17.

<sup>110</sup> The SAHRC's Intervention resulted in a suspended pregnant learner being reinstated by her school (dated 5 November 2010). Available at <http://www.sahrc.org.za/home/index.php?ipkArticleID=31> (accessed 11 June 2015).

<sup>111</sup> Available at <http://www.sahrc.org.za/home/index.php?ipkArticleID=31> (accessed 11 June 2015).

<sup>112</sup> Available at <http://www.sahrc.org.za/home/index.php?ipkArticleID=31> (accessed 11 June 2015).

<sup>113</sup> Ntlama (2004) at 207.

<sup>114</sup> Langeveldt (2012) at 2.

<sup>115</sup> Langeveldt (2012) at 2.

<sup>116</sup> Sections 15 and 16 of the South African Human Rights Commission Act 40 of 2013.

<sup>117</sup> Section 22 of the South African Human Rights Commission Act 40 of 2013.

<sup>118</sup> SAHRC “Report of the SAHRC investigative hearing: monitoring and investigating the systemic challenges affecting the land restitution process in South Africa, 5 November-12 December 2013”. Available at [http://www.gov.za/sites/www.gov.za/files/Report%20-%20Investigative%20Hearing%20on%20Issues%20and%20Challenges%20Affecting%20the%20Land%](http://www.gov.za/sites/www.gov.za/files/Report%20-%20Investigative%20Hearing%20on%20Issues%20and%20Challenges%20Affecting%20the%20Land%20)

### 3.2 The Commission for Gender Equality

Gender equality is an internationally, regionally and nationally recognised undertaking. In the South African context, the country has gained international recognition for its relatively good performance in terms of measures on gender equality – by its ratification of a number of conventions and instruments primarily focused on gender issues.<sup>119</sup> Regionally, due to the adoption and implementation of gender based laws, policies and gender-specific institutions, it appears as though gender parity has been reached – to an extent. Selegbo and Ojakorotu consider that the institutional mechanisms to promote gender equality are well developed in South Africa.<sup>120</sup> The Constitution recognises gender, sex, and pregnancy as grounds for unfair discrimination.<sup>121</sup> The creation of the CGE captures the ideals of our society (as well as internationally and regionally) of being based on equality and dignity. As such, the CGE's directive is to “promote respect for gender equality and the protection, development and attainment of gender equality”.<sup>122</sup> The mandate of the CGE is specifically to address the rights and needs of women. It works with other bodies such as the Public Protector, the Office on the Status of Women (OSW) which is located within the Presidency, the Joint Committee on Improvement of Quality of Life and Status of Women in Parliament, and the SAHRC.<sup>123</sup>

Chengadu writes that “women are the largest ‘minority’”.<sup>124</sup> Despite representing 51 per cent of the population of the country, female representation in the public and private sphere is miniscule. Even in well-established professions there are claims that women experience gender bias and inequality.<sup>125</sup> The “firm belief that more needs to be done in order to ensure that there is acceleration in terms of gender balance”, has been resoundingly stated throughout different spheres.<sup>126</sup> Unquestionably, South African women have contributed and continue to contribute to the transformation and

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20Restitution%20Process%20in%20South%20Africa%20December%202013\_a.pdf (accessed 29 June 2015).

<sup>119</sup> These include the CEDAW; Declaration on the Elimination of Violence Against Women; the Discrimination (Employment and Occupation) Convention; and the Protocol.

<sup>120</sup> Selegbo MYP & Ojakorotu V “SADC Gender and Development Protocol: an evaluation of equality, empowerment and gender based violence in South Africa (2008-2012)” (2013) 11 (1) *Gender & Behaviour* 5175 at 5189.

<sup>121</sup> See section 9(3) and (4) of the Constitution.

<sup>122</sup> See section 187(1) of the Constitution.

<sup>123</sup> Selegbo (2013) at 5189. In 2014, the Ministry for Women in the Presidency was established as a way of elevating women's issues and interests.

<sup>124</sup> Chengadu S “Quota systems will not lead to genuine transformation for women” (2 March 2015). Available at <http://www.bdlive.co.za/opinion/2015/03/04/quota-systems-will-not-lead-to-genuine-transformation-for-women> (accessed 7 June 2015).

<sup>125</sup> Sadie Y “Gender policy and legislation during the first 20 years of democracy” (2014) 36 (2) *Strategic Review for Southern Africa* 111. See also Rasool S “The role of the women's movement in putting women's issues, and violence against women, on the policy agenda in South Africa”. Available at <http://www.uj.ac.za/faculties/humanities/sociology/PublishingImages/Pages/Seminars/the%20role%20of%20womens%20movements%20in%20putting%20gender%20issu> (accessed 10 June 2016).

<sup>126</sup> CGE media statement “Commission for Gender Equality on redressing judicial gender injustice” (8 July 2015). Available at <http://www.gov.za/speeches/nominations-4-women-justices-huge-step-redressing-judicial-gender-injustice-8-jul-2015-0000> (accessed 10 July 2015).

development of the country. Notwithstanding the plethora of laws and institutions and the overall good performance of the CGE, just as with the SAHRC the implementation and enforcement of gender matters linger. Duplication of activities (especially between the CGE and SAHRC), lack of resources and inaccessibility by the public are growing apprehensions.<sup>127</sup> The increase in gender violence, high teenage pregnancy rates and lack of health facilities which have been identified in the Millennium Development Goal Report of 2013,<sup>128</sup> continue to be just some of the challenges faced by the CGE. The lacklustre approach of government in terms of addressing challenges faced by women and giving heed to the recommendations of the CGE, is also concerning. The recent spat over the Women Empowerment and Gender Equality Bill<sup>129</sup> and the subsequent announcement in May 2015 that the Bill had lapsed,<sup>130</sup> should raise apprehensions about the actual and perceived understanding of the plight of women in our society. Some of the concerns about the Bill were that it did not “recognise the multi-levels of discrimination based on race, class, gender identity and sexual orientation that women face, and how these intersect to create embedded disadvantage for women...”.<sup>131</sup> Of concern was that the Bill was simply replicating/duplicating functions and provisions of existing legislation,<sup>132</sup> such as the Employment Equity Act<sup>133</sup> and the *Promotion of Equality and Prevention of Unfair Discrimination Act*.<sup>134</sup>

The advantage of this specialised institution is that it can assist in developing tailored policies and interventions in terms of addressing and giving prominence to the needs of women.<sup>135</sup> It also plays a vital role in influencing attitudes towards women in society.<sup>136</sup> Consequently, it has been prolific in creating awareness among relevant stakeholders about the plight of women. Constructing an understanding of the link between the realisation of women’s human rights and the right to development, should innately be the focus of the CGE. At the public hearing on the aforementioned Bill, the CGE appreciated its ideals and its intended role in promoting the economic position of women in South Africa – but also submitted the institution’s concern over the Bill’s

<sup>127</sup> Kapindu RE “A comparative analysis of the constitutional frameworks of democracy building institutions in Malawi and South Africa” (2008) 2 (2) *MLJ* 226 at 229. Kapindu argues that the amalgamation of the CGE and the SAHRC may be appropriate.

<sup>128</sup> StatsSA “Millennium Development Goals – Country Report 2013” at 12. Available at [http://www.statssa.gov.za/MDG/MDGR\\_2013.pdf](http://www.statssa.gov.za/MDG/MDGR_2013.pdf) (accessed 16 July 2015).

<sup>129</sup> Published in GG 35637 of 29 August 2012.

<sup>130</sup> Hartley W “Parliament allows bill for 50% women staff to lapse” *Business Day Live* 14 May 2015. Available at <http://www.bdlive.co.za/national/law/2015/05/14/parliament-allows-bill-for-50-women-staff-to-lapse> (accessed 17 June 2015).

<sup>131</sup> Open letter to the Minister for Women, Children and Persons with Disabilities, on the Women Empowerment and Gender Equality Bill 2013 97/27.3 *Agenda: empowering women for gender equity* at 151. Available at: <http://www.tandfonline.com/loi/ragn20> (accessed 06 August 2016).

<sup>132</sup> Women Empowerment and Gender Equality Bill [B50-2013]: Public hearings with Minister (dated 29 January 2014). Available at <https://pmg.org.za/committee-meeting/16819/> (accessed 10 July 2015).

<sup>133</sup> Act 55 of 1998.

<sup>134</sup> Act 4 of 2000.

<sup>135</sup> Hicks J & Masefako S “A gendered review of South Africa’s implementation of the Millennium Development Goals” (2011) 12 (4) *ESR Review* 13 at 14.

<sup>136</sup> Mubangizi JC “The role of national human rights institutions in the promotion and protection of human rights in Uganda and South Africa: a comparative evaluation” (2006) *Obiter* 454 at 460.

shortcomings which would have impacted on the functioning of the CGE. This institution, in its gender analysis of the progress made by South Africa with regard to its Millennium Development Goal commitment, reiterated the stance that women's empowerment and gender equality are key ingredients for sustainable development.<sup>137</sup>

The CGE has a difficult but not impossible task of developing respect for women's right to equality (specifically) – and in so doing ensuring the realisation of their right to development. The recent investigation into the awards of bursaries to young women by the uThukela District Municipality in KwaZulu-Natal on condition that they remain virgins until the completion of their education, attests to the boldness of the institution in dealing with issues of gender equality and the use of its constitutional strength to overcome challenges that it may be faced with in the process. The CGE established that the scheme is unfair and unconstitutional because it is putting a greater burden on young women than young men and entrenches a systemic discrimination that reinforces a harmful stereotype that is totally unrelated to the academic potential of the maidens and the substantive translation of the right to education into reality which is interdependent with women's right to development.<sup>138</sup> The bone of contention in this investigation was not an attack on the cultural practice of virginity testing as the proponents of the custom including the Municipality seemed to suggest. They misplaced the major issue which was of great concern, namely, that the criteria that were used to access bursaries based on the sexuality of women propagated patriarchy and inequality which directly affect women's right to development.<sup>139</sup> Without any further background to the investigation, it is worth noting that the CGE further recommended that the municipal officials be sent for gender sensitive training. Sadly, the Municipality took the recommendations with a pinch of salt, and as reported, it intends to go all the way, even to the Constitutional Court, for a judicial review of the Report. In this endeavour, it is supported by another Chap 9 institution: the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (Cultural Commission)<sup>140</sup> which is also determined to protect by all means the right to "culture" which it views as being eroded by the CGE. The two institutions (the Municipality and the Cultural Commission) are clouded by an attitude that show the lack of understanding of their fundamental roles and undermine the constitutional strength of the CGE. They fail to understand the fine distinction that exists between the promotion of the rights and the measures that need to be adopted to facilitate such endeavour. This becomes of great concern, especially for the spheres of government (for examples, Municipality) that are at the helm to ensure the provision of opportunities to women who continue to be subject to discrimination and inequalities despite the progress made to date. The Cultural Commission is also misconceiving its mandate by failing to

<sup>137</sup> Hicks & Masefako (2011) at 15.

<sup>138</sup> Charter L "Bursaries for virgins scheme sees municipal officials sent for gender equality training" 20 June 2016. Available at <http://www.dispatchlive.co.za/bursaries-for-virgins-scheme-sees-municipal-officials-sent-for-gender-equality-training/> (accessed 23 June 2016).

<sup>139</sup> Merten M "Virginity testing: Gender Equality Commission bans 'maiden bursaries'". Available at <http://www.dailymaverick.co.za/article/2016-06-16-virginity-testing-gender-equality-commission-bans-maiden-bursaries/#.V3Av0fl97IU> (accessed 25 June 2016).

<sup>140</sup> See s181(1)(c) with its functions embedded in 185, of the Constitution.

examine closely the fine print of the Report which is derived from the criteria that are used in order to qualify for a bursary.

Thus, it remains to be seen whether the Report will be finally taken on judicial review<sup>141</sup> but this attitude delays progress in addressing issues, like gender equality (basic human right), and ultimately impedes women's right to development.

#### 4 CONCLUSION

This article has demonstrated that despite the rhetoric surrounding the exact nature, or the contours and concerns about the relevance, of the right to development within the human rights framework, most writers tend to agree that the right does indeed exist, that there is a link between human rights and development, and that the right to development ultimately can contribute immensely to the realisation of human rights. Internationally and regionally, there is the argument that this right has secured its position within the human rights framework. Regionally, the Chap 9 institutions are important for achieving the objectives of the Protocol and other relevant regional instruments in respect of women's development. However, this article disagrees with the argument that the right to development will lessen the focus on existing human rights.

Key to the realisation and promotion of the rights in the Bill of Rights in the South African context, is the implementation of the right to development. In fact, the right to development will cement the comprehension that the fulfilment of human rights will lead to the development of women, in particular. The SAHRC and the CGE are pivotal and adequate vessels for ensuring that this task is achieved. These bodies were not intended to exercise the same power as the government, but have strong investigative, promotional and monitoring powers – as observed *Bhe* and *Welkom and Harmony*.

Extensive research by these institutions, particularly of the indirect infusion of the right to development into other rights because this is not explicit in the Constitution, has to be undertaken. Such research will enable the transmission of national information to the grassroots level to create awareness about women's rights, and that will generate the level of confidence to combat their vulnerability. The forging of relations with various stakeholders, such as, national and local departments and community based organisations by means of the establishment and implementation of short and long term goals will be key to ensuring the effective translation of these institution's constitutional powers into substantive reality, by addressing the various barriers to women's right to development. A concise programme of action and collaboration by these institutions and all relevant stakeholders to identify priority areas, such as, girls' education or lack thereof and social conditions in rural areas (especially) that curtail women's development which are key indicators of development, is important.

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<sup>141</sup> Chartel (2016).

On the other hand, the concerns regarding accessibility to, and lack of enforcement by the two institutions, are justified. However, these bodies have made progress and there is ample evidence to substantiate this point. Based on their constitutional mandate, these bodies should be best suited to be the “beacon of hope” in enabling the realisation of women’s right to development. As such, these institutions have to eliminate the “lone voice” and strive towards a united voice to facilitate change that will enhance greater accountability and transparency in respect of the way in which women’s right to development is perceived. Ultimately, disclaiming the existence and importance of the right to development will eventually result in the deprivation of women’s right to development in South Africa.