CAN ECONOMIC GROWTH TRANSLATE INTO ACCESS TO RIGHTS? CHALLENGES FACED BY INSTITUTIONS IN SOUTH AFRICA IN ENSURING THAT GROWTH LEADS TO BETTER LIVING STANDARDS

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1 Introduction

In the contemporary development discourse, economic growth is perceived to be "the major instrument for promoting the well-being of the people." (SENGUPTA, 2008, p. 40). Therefore, the advent of economic growth in a country is generally followed by the expectation that the standard of living of its population will be improved. However, in several countries, economic growth does not filter down to the masses in the form of access to rights. In these countries, poverty, illiteracy, hunger, lack of health care, and unmet basic needs are the features of everyday life for millions of people. The achievement of development, understood in terms of economic growth, is not followed by the enjoyment of the right to development (RTD), which entails the realisation of civil, political, and socio-economic rights (SENGUPTA, 2006).

Notwithstanding the exception of autocratic China, where strong growth has to some extent led to increase in welfare of the poor (ZHANG, 1993; ROZELLE, ZHANG, HUANG, 2000, XINHUA NEWS AGENCY, 2006; MONTALVO and RAVALLION 2010; WANG, 2011), this paper argues that constitutional democracy, or constitutionalism characterised by separation of powers, coupled with independent monitoring institutions and justiciable socio-economic rights provides an enabling environment for economic growth to reach the grassroots level in the form of human rights realisation. The paper investigates challenges faced by democratic institutions in translating economic growth into access to rights in South Africa, where although economic growth and constitutionalism are realities, the translation of growth into the realisation human rights for the poor remains insufficient.

This paper first explores the relationship between rights economic growth

and human rights realisation. Second, it examines constitutionalism, democratic institutions, and the socio-economic environment in the South African context. This section also demonstrates that growth has not yet resulted in the full realisation of human rights. Third, it assesses challenges faced by democratic institutions mandated to ensure the realisation of human rights. The fourth section concludes with recommendations for translating economic growth into access to rights.

2 The relationship between rights and economic growth

The relationship between rights realisation and economic growth becomes immediately apparent when one looks at the nature of the obligations imposed by the key international human rights instruments focusing on socio-economic rights. The International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, Article 2(1) of the ICESCR obliges member states:

> *To take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*

The treaty envisages that the rights contained therein are not to be realised overnight, but are progressively subject to the resources at the disposal of state parties. Thus, the role of resources available to the state is acknowledged as pivotal in realising the rights in the Covenant. This paper argues that economic growth is key to generate the resources necessary to realise the rights and will next discuss the importance of that relationship.

2.1 The instrumental importance of economic growth for rights

The 1990 UNDP Human Development Report (HDR) is considered the first major attempt to evaluate a correlation between growth and the standard of living in countries (RANIS, 2004). The HDR set out to "capture better the complexity of human life," which was to be done by providing a "quantitative approach to combining various socio-economic indicators into a measure of human development" (UNDP, 1990). In doing so, the UNDP's approach marked a departure from the dominant economic approach whose "excessive preoccupation with GNP growth and national income accounts has… supplanted a focus on ends by an obsession with merely the means" (UNDP, 1990). The dominant approach achieved its human development index using such indicators as life expectancy, literacy, and GDP as components of the index. However, this approach lacked measures of political freedom and income inequality.

As pointed out above, there is no doubting the role of economic growth – translating into increased revenue for the state – in realising rights, albeit progressively (UNDP, 2003). However, it is not just the growth that is important to decrease poverty levels, but the nature of such growth. The growth has to be sustainable. This is not

only necessary for the progressive realisation of rights, but also because individuals in poverty are vulnerable to recession (MCKAY; VIZARD, 2005).

Another key factor in securing the progressive realisation of rights is the distributional pattern of growth. For instance, in the 1970s and 1990s, Brazil and Pakistan, respectively, experienced fast but extremely unequal growth that resulted in little poverty reduction and increased the level of inequality (EASTERLY, 2001). These instances support the case that unless growth is distributed or shared through all income levels of the population, there will be no human development manifested through the achievement of rights. For example, as a result of oil revenues, Indonesia is said to have experienced a strong growth pattern, distributed among the poor and the wealthy, for thirty years prior to the 1997 crisis. The Indonesian government's commitment to shared growth over this period translated into remarkable poverty reduction in rural areas (TIMMER, 2005).

It is important to reiterate that while there is now a clear correlation between growth and an improvement in the people's standard of living, growth does not automatically translate into access to rights and therefore poverty reduction. As stated above, the nature of the growth is a crucial factor. For growth to translate into access to rights (and therefore to reduce poverty), it must have a particular distributional pattern. This means growth must be distributed among all income levels of society, particularly those living in poverty (EASTERLY 2001; MCKAY and VIZARD, 2005). The existence of effective institutions, both governmental and independent, to curb corruption and mismanagement in the state, can ultimately ensure that resources generated by the growth are used in a manner that prioritises the poor.

2.2 The instrumental importance of rights for economic growth

The three most significant rights instrumental to economic growth are the rights to health, food and education. These rights place several obligations on the state. First, the state must ensure that there is no interference in the exercise of these rights by an individual. Second, where individuals are unable to access these rights, the state is required to provide access to these rights. Third, the state is obliged to create awareness around the rights.

As stated above, the enjoyment of these rights has an impact on growth. To ensure productivity and sustainable growth, people must be healthy, have adequate food, and be educated. According to UNDP, economic growth cannot be sustainable without enjoyment of a better standard of living (UNDP, 2003).

Studies confirm the importance of higher schooling levels, increased life expectancy, better maintenance of the rule of law and lower fertility rates (related to female empowerment), as being key determinants of economic growth (BARRO, 1996). Each of these findings has been confirmed by many empirical studies. Education stands out as having the strongest impact on labour productivity. For example, in the area of agriculture, data from Ghana, Malaysia and Peru shows that a farmer's schooling is responsible for annual increase in output of 2% to 5% (RANIS, 2004). Furthermore, it is estimated that in Indonesia there was an increase in wages of 1.5% to 2.7% for each additional school built per 1,000 children (DUFLO, 2001).

3 The South African context

3.1 South Africa and constitutionalism

Constitutionalism entails a system of government characterised by separation of powers between the executive, the legislature, and the judiciary. It is a system where democratic elections, accountability, good governance, and respect for human rights characterise the government's activities. According to Fombad (2011), constitutionalism "encompass[es] the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations" (FOMBAD, 2007, p. 7). Thus, key indicators of constitutionalism include: the constitutional protection of freedoms and fundamental rights in a bill of rights, the separation of powers, an independent judiciary, the judicial review and the presence of independent institutions to monitor democracy (FOMBAD, 2007).

According to the preamble of the South African Constitution (1996), the Constitution was adopted "to heal the divisions of the past, and to establish a society based on democratic values, social justice and fundamental human rights," as well as to "improve the quality of life of all citizens and free the potential of each person." Hence, it is characterised as a "transformative constitution" (KLARE, 1998). Klare defines transformative constitutionalism as:

> *[A] long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.*
>
> (KLARE, 1998, p. 150).

The South African constitutionalism is characterised by separation of powers between the executive, in charge of implementing the law; the legislature, which makes the law; and the judiciary, in charge of enforcing the law. Not only is the judiciary independent, but judges are also obliged to consider international law and may consult foreign law when interpreting the Bill of Rights (section 39 of the Constitution). This provision enables the court to apply international treaty law that South Africa is not a party to at the domestic level.

Furthermore, Chapter 9 of the Constitution establishes independent monitoring institutions to support constitutional democracy. These institutions are the Public Protector the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the

Auditor-General, and the Electoral Commission. Their objectives are to ensure government accountability and respect for human rights. These institutions also provide the necessary checks and balances needed for economic growth to trickle down to the masses.

However, this constitutional arrangement is insignificant for many because of the high levels of poverty and inequality in the country. According to Sibanda, South African constitutionalism has failed to ensure social justice, which is linked to its neoliberal ideology and as such cannot improve the lives of the poor (SIBANDA, 2011). Echoing Pieterse's view, Sibanda believes that judges hide their preference for "political structures and rights discourses associated with classic liberalism … and accordingly condoning the inequalities occasioned, reinforced and sustained by the unfettered operation of classical liberal economic and social structures." (SIBANDA, 2011, p. 489). Put differently, judges follow neoliberal tenets in the constitutions, which renders fundamental rights impotent in the face of social injustice.

However, the problem does not lie in the neoliberal features of the Constitution, rather, as Klare argues: "[T]he South African Constitution, *in sharp contrast to the classical liberal documents*, is social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission." (KLARE, 1998, p. 153, emphasis added).

In the same vein, Pieterse portrays the South African Constitution as a fundamentally social-democratic model, different from the traditional, liberal model of constitutionalism which is not conducive to social justice, (PIETERSE, 2005, p. 156) and as such leads to the "achievement of certain tangible results or outcomes" (BRAND, 2009, p. 2-3).

The constitutional model found in South Africa is more likely to translate economic growth into human rights realisation for the poor. As Justice Langa's view states: "Without proper respect for the rule of law [embodied in the South African constitutionalism], legal guarantees of human rights cannot be effectively implemented and remain relatively meaningless [and that] respect for the rule of law is also of central relevance to economic development" (LANGA, 2011, p. 448). This view is also shared by Ghai who believes that the path to the realisation of the RTD goes absolutely through constitutionalism at national level (GHAI, 2006). This is because a strong separation of powers, the existence of independent monitoring institutions, and a justiciable bill of rights comprising socio-economic rights constitute an enabling environment for economic growth to filter down to those living in poverty.

Nevertheless, for economic growth to translate into human rights realisation in a constitutional democracy, the state, as the duty-bearer must adopt rights-informed legislations and social policies that follow a distributional pattern of focusing on the poor (MCKAY; VIZARD, 2005), and ensure the availability of financial and human resources for the implementation of such policies. Moreover, it is in a climate of constitutionalism that a vibrant media and civil society thrive, and in turn these actors help to monitor government activities.

3.2 The South African socio-economic context

Besides establishing a strong constitutionalism, South Africa secured itself a place amongst the economically and politically influential nations on the international plane. It is a member of the G20 group of nations and belongs to a bloc of fast growing developing economies comprised of Brazil, Russia, India and China, known as BRICS. Major donors are pulling out of South Africa as they regard the country as a middle-income country with a GDP Per Capita of $11,100 in 2011, up from $10,900 in 2010 and $10,700 in 2009 (CIA, 2012). These figures suggest that South Africa's economy has been expanding at relatively fast pace. To ensure that this growth trickles down to the poor, the government adopted numerous policies informed by the 1994 African National Congress (ANC) Manifesto that pledges to improve the standard of living for all in the country, including those living in poverty. These policies include the 1996 Reconstruction and Development Programme (RDP), the 1996 Growth, Employment and Redistribution (GEAR), the Accelerated and Shared Growth Initiative- South Africa (ASGI-SA) (2004-2014), and the 2010 New Growth Path (NGP).

In 2004, after realising that the GEAR did not yield the expected results, the government decided to launch the (2004-2014) Accelerated and Shared Growth Initiative-South Africa (ASGI-SA) to supplement GEAR. An important component of ASGI-SA was the industrial strategy known as Broad Based Black Economic Empowerment (BBBEE) characterised by the training and integration of black entrepreneurs in the business sector through access to credits and other facilities. Though the BBBEE had created many black entrepreneurs, it was also been criticised for creating a new elite, instead of advancing democracy and bringing resources to the poor (MAKHUNGA, 2008, p. 52 and 55). In fact, various policies did not produce positive results because of endemic corruption and mismanagement especially at local government level. (AUDITOR-GENERAL SOUTH AFRICA, 2012).

Notwithstanding the aforementioned and subsequent policies, South Africa remains one of the most unequal societies. This is illustrated by the following data: the Development Indicators from 2010 show that 49% of persons in South Africa live below a poverty line of R524 per month (approximately 75 US dollars per month) (THE PRESIDENCY, 2010, p. 23). The official unemployment rate in South Africa was 25% (excluding discouraged work-seekers) in 2010 (THE PRESIDENCY, 2010, p. 20-21). Moreover, the unemployment rate for youth in the age group of 15-24 years was 51% (NATIONAL PLANNING COMMISSION, 2011, p. 11). Furthermore, the gini coefficient, a widely used measure of inequality of income or wealth distribution, has risen from 0.68 in 1996 to 0.73 in 2001 (SAHRC, 2010). The Theil Index, which measures inequality within and between groups, while indicating a decline in between-group inequality, shows that inequality within race groups has increased (SAHRC, 2010). For instance, almost two-thirds of all jobless people are below the age of 35, the majority of whom are black youth (NATIONAL PLANNING COMMISSION, 2011, p. 11). In this vein, the statistic published recently by the National Planning Commission show that in the country, the "poorest 20% of the population earns about 2.3 percent of national income, while the richest 20%

earns about 70% of the income" (NATIONAL PLANNING COMMISSION, 2011, p. 9). This led to the comment that "South Africa's levels of income inequality are amongst the highest in the world" (LIEBENBERG; QUINOT, 2011, p. 443). From this evidence, the SAHRC draws the conclusion that this lack of progress in reducing poverty and inequality in South Africa "has a direct impact on the progressive realisation of economic and social rights enshrined in the Constitution" (SAHRC, 2010). This happens in the midst of a constitutional democracy and raises the question of the role of the constitutional institutions in ensuring that economic growth reaches the poor in the form of access to rights. Put differently, this raises questions of the challenges faced by these institutions in fulfilling their mandate. These questions will be the focus of the following section.

4 Challenges to translating economic growth into access to rights

It is in the context of South Africa's constitutional democracy, characterised by the separation of powers, that challenges to translating economic growth into access to rights will be examined. These challenges can be divided into three categories: first, challenges faced by the government, second, those linked to the separation of powers, third, and those faced by the chapter 9 institutions in discharging their mandate.

4.1. Challenges faced by the executive branch of the government

First, given South Africa's three levels of government -- the national, provincial and local governments -- there are numerous challenges faced in the realisation of human rights. These include: incapacity to co-ordinate poverty-reduction programmes between various government departments and the three spheres of government (LIEBENBERG, 2000). Related to this, and due to lack of consultation, government is often incapable of appropriately identifying the needs of communities, which is compounded by the communities' lack of awareness and therefore not utilising available programmes to improve their lives (HELEBA, 2011; LIEBENBERG, 2000). Furthermore, in order to help those at the lowest rung of the poverty ladder, government at local level has an indigence policy, requiring persons to register in order to receive certain basic services for free. However, because the policy requires people to present themselves as poor, people often feel ashamed to do this and end up paying for basic services such as water and sanitation and electricity that they would otherwise receive at no cost (HELEBA, 2011). Access to justice is a related problem -- for instance a South African study showed that despite the constitutional provision subjecting all evictions to a court order, only 1% of all evictions in the country go through a court (LANGFORD, 2009, p. 95). In fact, those who know their rights often lack the means to acquire a lawyer who can assist them. Langa correctly in points out that "[l]egal representation remains beyond the financial reach of many South Africans and it is true that more money ensures better representation" (LANGA, 2006, p. 7).

Second, the lack of skill, corruption, and lack of accountability of government officers, especially at municipal level, presents a barrier to the government's ability to

turn economic growth into human rights realisation. (AUDITOR-GENERALSOUTH AFRICA, 2012). According to the Auditor General, only 5% of municipalities achieved clean audits during the fiscal year 2011-2012. This is due to, among other things, the "lack of consequences for poor performance and transgressions at more than 70% of the [municipalities] and [a] lack of minimum competencies of officials in key positions (most evident in the financial discipline) at 72% of [municipalities]" (AUDITOR-GENERALSOUTH AFRICA, 2012). These findings are particularly worrisome as municipalities are at the frontline of service delivery, and therefore, the level of government at which economic growth is transformed into rights realisation. Consequently, there is a need to capacitate civil servants at local, provincial, as well as national levels and -- more importantly -- ensure their accountability.

Third, in addtition to the corruption and incapacity of government officials to deliver services, another significant challenge faced by the country is the AIDS pandemic, which weakens the labour force and affects the efficiency of the country's social security systems (TSHOOSE, 2010). In addressing these challenges, the government adopted the Local Government: Municipal Systems Act, 2000. The act aims, among other things, to: "[P]rovide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic up liftment of local communities, and ensure universal access to essential services that are affordable to all."

However, the high number of services delivery protests that have gripped the country since 2005 shows that the progress achieved by this legislation is not enough to ensure basic services for all.

Fourth, economic growth is often a result of the private sector's investment, which despite creating jobs, aims first and foremost to make money, ensuring better lives for all is not the first priority. Nevertheless, according to the South African Constitution, "[a] provision in the Bill of Rights binds a natural or a juristic person, if and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right" (section 8 of the Constitution). Accordingly, even companies should comply with that duty imposed by the Bill of Rights. For this to happen, the state has to make sure that companies comply with their responsibilities and obligations to protect and promote human rights.

Though the private sector can, to some extent, improve the living standards for those who can afford to buy its goods, the liberalised market does not improve human rights for the poor. This was seen in Africa in the 1980s when, under the rule of free market, the international financial institutions imposed the Structural Adjustment Programme, which lead to privatisation and resulted in lack of education, reduced access to health care and food, and other social ills (SHAH, 2010). It could be argued that the recent economic meltdown characterised by high levels of unemployment, hunger and poverty in Europe and America shows that free market economics policies need substantial revision. Furthermore, free market policies lead to the expansion of the private sector, which becomes more powerful than states and has a reputation for violating, or at least participating in the violation of, human rights. (See *SERAC vs. NIGERIA*, 2001; *DOE vs. UNOCAL*, 2001; *PRESBYTERIAN CHURCH OF SUDAN vs. TALISMAN ENERGY*, 2001; BENETT, 2002).

4.2. Challenges linked to the separation of powers: how the courts 'waste away' the rights of the poor

According to section 165 of the Constitution, "the judicial authority is vested in the courts," mandated to "apply the law and the Constitution impartially without fear, favour or prejudice." South African courts are among those that "have rescued [socio-economic rights] from controversies over legitimacy, legality and justiciability" (LANGFORD, 2009, p. 91). In doing so, the Constitutional Court, in particular, has handed down important socio-economic rights judgements that are characterised by "the clarity of the judicial reasoning and reliance on explicit constitutional rights" (LANGFORD, 2009, p. 91).

The right to housing (section 26 of the Constitution) was adjudicated in the seminal case of *Government of Republic of South Africa and Others vs. Grootboom and Others*, 2000. In this case, a poor community living in shacks had been evicted from a privately-owned property after having applied to the government for low-cost housing. Because they lacked housing, they occupied a nearby sports field and set up makeshift structures. The Cape High Court called upon the government to provide shelter to the applicants based on section 28 (1)(c) of the Constitution, which provides for children's rights to housing. When the matter reached the Constitutional Court, it held that the government's housing program was in breach of section 26 (2) of the Constitution, providing for the right to housing. The question before the court was to investigate whether the legislative and other measures taken by the state to realise the right were "reasonable." The court held:

> *A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public measures could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.*
> (GROOTBOOM, para. 41).

To meet the standard of reasonableness, the court stated that the government programme had to be comprehensive, well-coordinated, and capable of responding to the needs of the needy and most vulnerable (paras. 38-39). The programme should also be flexible and make appropriate provision to meet short, medium, and long-term needs (para. 43 and 46). Moreover, considering the government's challenges, the court acknowledged that the right to housing shall be realised progressively. Accordingly, it noted that "accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time" (para. 45).

In this case, although the state had invested money and resources, and taken legislative and other measures within its capacity to achieve the progressive realisation of the right to housing, it nevertheless failed the reasonableness test for failing to ensure that the housing programme "provide[s] relief for those in

desperate need" (para. 64 and 68). Those in desperate need are not to be ignored in the interests of an programme focused overall on medium and long-term objectives (para. 66). This means the housing programme must appropriately, and as a matter of urgency, cater for those who have no roof over their heads. Ultimately, the court ordered the government to provide temporary housing to the affected families.

This case is interesting to assess the extent to which economic growth can trickle down to the poor in the form of access to rights. Indeed, opponents to the incorporation of human rights into development initiatives often argue that the human rights discourse does not pay sufficient attention to cost (MCKAY; VIZARD, 2005), or to the need to prioritise some choices and act progressively or in sequence. Nevertheless, the court in *Grootboom* clearly emphasised the need to ensure a progressive realisation. In other words, the court recognises that the realisation of human rights entails choices and sequencing and also acknowledges the need to consider the availability of resources in terms of budgets.

Even though the *Grootboom* judgment was not speedily implemented, and Irene Grootboom, the principal applicant died homeless, this judgement was the first one to highlight the positive duty of the state to realise socio-economic rights and to give direction on how the courts could enforce these rights. It also led to the adoption of a housing assistance programme for those in desperate need in August 2003: the Housing Assistance in Emergency Circumstances, Chapter 12, National Housing Code (LIEBENBERG, 2006, p. 178).

Besides *Grootboom*, the Constitutional Court took giant steps in promoting socio-economic rights through cases it adjudicated. For example, it ordered the government to immediately remove the barriers that hinder the distribution of Nevirapine in public hospitals for the sake of protecting mother-to-child transmission of HIV/AIDS (*The Minister of Health and Others vs. Treatment Action Campaign and Others* 2002), and protected the right to social security (section 27 of the Constitution) for "everyone," including permanent residents in the country (*Khosa vs. Minister of Social Development* (2004)). In addition, the right to basic services, such as water (*Residents of Bon Vista Mansions vs. Southern Metropolitan Local Council* [2002]; *Mazibuko vs. City of Johannesburg and others* [2008]) and electricity (*Joseph vs. City of Johannesburg* (2010), were enforced by the Constitutional Court. The right to sanitation was recently enforced by the Western Cape High Court (*Ntombentsha Beja & others vs. Premier of Western Cape & others,* (2010). This judicial responsiveness to socio-economic needs has arguably enabled South Africa's relative growth to trickle down to the poor in the form of access to rights.

However, a closer look at the adjudication of socio-economic rights reveals that courts are hindered in their action by challenges linked to separation of powers. The separation of powers doctrine allocates specific tasks and responsibilities to each arm of government. In this scheme, lawmakers enact the laws, the executive implements the legislation, and the task of the judiciary is to enforce the laws. The judiciary refuses to take a decision that is not (in principle) within its area of competence, and will defer the matter to other branches of government that have more expertise on the matter (LIEBENBERG, 2009). In Mclean's words, "the [c]ourt is mindful of its role in a transitional democracy, and extremely cautious about overstepping the mark in

any way" (MCLEAN, 2009, p. 210). According to Brand, in such circumstances, the court uses the "[J]udicial strategy of deference, of deferring to the other branches of government those questions that they feel incapable of deciding, or with respect to which they feel democratically illegitimate, or which they feel threaten their institutional integrity or security, or require them to violate principles of separation of powers" (BRAND, 2011, p. 618).

However, instead of ensuring citizens' well being, the doctrine of separation of powers may lead to their disempowerment, especially when the courts decline to adjudicate questions that call on them to check on other branches of government and hold them accountable for their actions. This has been the case in socio-economic rights adjudication. In South Africa, the practice of judicial deference that forsakes the poor is used quite frequently by the courts (for a thorough analysis of judicial deference, see MCLEAN, 2009; KAPINDU, 2010).

This kind of judicial deference by the Constitutional Court "wastes away the rights of the poor" (BILCHITZ, 2010). Brand notes that "[t]he employment by courts of the strategy of deference results in courts refusing to decide issues claimants place before them, which sometimes results in their claim being rejected]" (BRAND, 2011). Davis is of the view that the courts miss the opportunity to ensure social justice, but go backward in entrenching "traditional legal techniques," which cannot lead to poverty eradication. (DAVIS, 2010, p. 93).

For Sibanda, notwithstanding the rights-realisation ideas included in the South African transformative constitutionalism, the efficiency of the courts in addressing poverty is hindered by "the prevalence of a liberal democratic constitutional paradigm in South African constitutional discourse" (SIBANDA, 2011, p. 486). In other words, the liberal ideology in the South African Constitution hinders the courts' ability to bring justice to the poor in turning growth into human rights realisation. This view; however, cannot be squared with Klare's, who argues that the South African Constitution is completely different from the non-distributive classical liberal documents.

Notwithstanding Klare's optimism, it is our contention that the transformative and redistributive character of the Constitution has been tarnished by judicial deference. The court is expected to interpret and give content meaning to the rights in the Constitution, not to abrogate "its very role which is to adjudicate fundamental rights" (BILCHITZ, 2010, p. 595).

It could be argued that judicial deference is a violation of Section 167 (4) (e) of the Constitution that compels the Constitutional Court to decide whether "Parliament or the President has failed to fulfil a constitutional obligation." This mandate of the court to ensure the enforcement of the state's constitutional obligations was underlined in *Grootboom* (para. 94).

Therefore, deferring matters to the executive and Parliament in a context where the Constitutional Court is obliged by the Constitution not to do so is very problematic. Even when the cases involve specific technical issues, the courts should seek the necessary expertise and avoid judicial deference, which is the consecration of "liberal hegemon[y]" characterised by a large state bureaucracy that excludes the poor from the democratic process on the ground that the state has the necessary

expertise to solve problems (SANTOS; AVRITZER, 2007). However, it could be argued that deference basically benefits the poor that constantly elect the ANC at national and provincial levels. In other words, the ANC mandate from the grassroots level shall resolve the matter to the benefit of the poor. Unfortunately, this does not always happen, and the high numbers of service delivery protests, along with the explosion of socio-economic rights and evictions litigations in the country, show that judicial deference has been failing the poor.

From this perspective, Brand argues that judicial deference in socio-economic rights cases turns poverty into a technical matter that is depoliticised and becomes almost impossible to be solved by the court and the applicant (BRAND, 2011). This defers the matter to the executive or legislative branch of government and illustrates the "top-down" approach to socio-economic transformation, which is non-participatory and keeps the poor at the margin of development. This approach stands in sharp contrast with development studies and economics discourses, which contend that "sustainable and viable socio-economic transformation is only possible with broad participation by a range of social actors other than the state in development processes" (BRAND, 2011, p. 633). From this perspective, it could be argued that economic growth will not filter down to the poor in the form of human rights if the courts use judicial deference to encourage a "top-down" approach for the distribution of growth.

Moreover, judicial deference essentially calls upon the executive and the legislature to fix the problem that they initially failed to address, and which led to the litigation in the first place. The end result is that the claimant has no option but to remain impoverished, despite economic growth. This is so because the executive that could not ensure that growth trickles down to the poor is asked by the court to remedy the situation, which it is unable or unwilling to do.

However, categorising South African courts as mere deferring institutions could be wrong. The flexibility of the South African separation of powers doctrine was highlighted by P Chaskalson in the case of *Executive Council Western Cape Legislature & Others vs. President of the Republic of South Africa & others* (1995). When confronted with difficulties, South African courts have often moved away from judicial deference to use what Brand calls the "judicial prudence" approach (BRAND, 2011, p. 633), characterised by a broad consultation of other branches of government, institutions, experts, dialogue with the parties, and even members of the public who may not have an interest in the case. (*Blue Moonlight Properties 39 (Pty) Ltd vs. Occupiers of Saratoga Avenue* (2009; *ABSA Bank Ltd v Murray* (2004); *Cashbuild (South Africa) (Pty) Ltd vs. Scott* (2007); *Lingwood vs. The Unlawful Occupiers of R/E of Erf 9 Highlands* (2008)).

There is room for improvement in the functioning of the South African courts. They can use the model of apex courts as seen in Colombia, Argentina, and India, where the involvement of experts is broadened to assist the court with technical issues.*

*See, for example, the Colombian Constitutional Court decision T-760/2008, the Argentinian Supreme Court in *Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/dãnos y perjuicios (danãderivados de la contaminatiónambiental del Río Matanza-Riachuelo)* and the Indian Supreme Court case of *People's Union for Civil Liberties v Union of India* (Writ Petition [Civil] 196 of 2001) *Right to Food Campaign)*.

However, most importantly, our courts shall always be ready to ensure compliance with the Constitution and the law "impartially and without fear, favour or prejudice" (section 165 of the Constitution). In this vein, whenever the state does not comply with the law of the land, it is the constitutional duty of the court to say so and issue appropriate remedies (*TAC* case, para 99). Failure of the courts to use this approach hinders their ability to adequately address the needs of the poor. The readiness of the courts to clearly give a substantive content to the law and call on the state to comply will enhance the prospect for translating economic growth into access to rights.

Lastly, it could also be argued that the judiciary in enforcing such laws as the Extension of Security of Tenure Act, 1997 (ESTA) whose objective, *inter alia*, is to make it difficult to evict people from farms, may have brought about unintended consequences. The argument could be that by enforcing this objective of the act, the courts have facilitated the displacement of South Africans from farms and benefited illegal or undocumented migrant workers. Nevertheless, we wish to point out that ESTA gives effect to section 26(3) of the South African Constitution which prohibits evictions without a court order. Section 26(3) protects "everyone" in South Africa. And "everyone" includes, for instance, migrant workers from beyond South African borders. However, only legal or documented migrant workers benefit from this protection. Thus, any displacement of South Africans by undocumented migrant workers from outside South Africa would be against the law, and the judiciary should not be complicit in this.

4.3 Challenges faced by independent monitoring institutions

As previously alluded to, Chapter 9 of the South African Constitution establishes independent institutions to support its constitutional democracy. Although these institutions have specific mandates, all of them aim to check the government, by keeping it accountable, and turn South Africa into a society characterised by social justice (MURRAY, 2006). In fulfilling their mandates, these institutions examine the implementation of human rights, engage the government, the legislature, and civil society to ensure that all the rights in the Constitution become a reality. These institutions are vital for South Africa's constitutional democracy.

However, these institutions face serious challenges in the execution of their duties and responsibilities. The first challenge is linked to their independence. In this respect, though the appointment and dismissal of office holders under Chapter 9 of the Constitution (with the exception of the Commissioners on the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities), requires the support of the majority of members of Parliament (sections 193 & 194 of the Constitution), the dominant ruling party, the ANC, enjoys majority in Parliament and can therefore rubber-stamp the appointment or dismissal of whomever it pleases. Murray observes that in a situation of total domination by one political party like in South Africa, "super majorities for appointment and dismissal are rendered ineffective in securing inter-party support because the governing party can choose the incumbents of

the Chapter 9 institutions" (MURRAY, 2010, p. 133). In this context, it becomes difficult to differentiate between the government and officeholders under Chapter 9 of the Constitution who are sometimes perceived as the cronies of the ANC. In fact, the perception of this situation was visible during the 2004 elections when several members of the Commission for Gender Equality appeared on the ANC party lists (MURRAY, 2006).

Moreover, the leniency of the former Public Protector, Lawrence Mushwana, to the ANC was exposed in 2005 through the oil gate party funding scandal. In this case the oil company known as IMVUME made a payment of R11 million to the ANC, which payment the Public Protector refused to investigate on the ground that "he could not follow the money as his mandate did not extend to oversight of non-state entities such as Imvume and the ANC" (FAULL, 2011).

There is a need to ensure the independence of Chapter 9 institutions and one way of achieving this is to ensure that officeholders of the institutions do not concurrently serve in political parties. If Chapter 9 institutions officeholders also hold offices in political parties, they should simply resign or decline appointment to Chapter 9 institutions (PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA, 2007; LANGEVELDT, 2012, p. 2).

Further on the issue of independence, in April 2012, the Minister of Higher Education and Training accused the Public Protector Madonsela of being selective in her investigation as many members of the government were investigated (OPPELT, 2012, p. 5). It could be argued that this unnecessary pressure on the Public Protector aims to remind and warn her that she will need a majority of the ANC in order to be reappointed to the office. This threat to the Public Protector is uncalled for, because the ANC (with the support of its alliance partners) is the ruling party under which "patronage, tender manipulation, lack of control, flouting procurement processes" and other forms of corruption have flourished (OPPELT, 2012, p. 5). Increased investigation of members of the ruling party by the Public Protector has brought on petty accusations against the office of the public protector. The ruling party has recently stated: "Madonsela's decision to attend a political party rally was ill-considered, as it opens her office to perceptions of political bias" (OPPELT, 2012, p. 5). This petty accusation of bias should be viewed as a threat because Madonsela is a woman who attended a National Women's Day event, which happened to have been organised by the main opposition, the Democratic Alliance. As correctly observed by Oppelt, if there was a real a bias in Madonsela's work, the ANC would have happily pointed it to her by now. Such threats may hinder the independence of the Public Protector, who may close her eyes to the ruling party's mischief.

The second challenge faced by Chapter 9 institutions has to do with their ability to monitor human rights violations within the three spheres of government: national, provincial, and local (NEWMAN, 2003). For instance, in the *Grootboom* case, when the Constitutional Court called upon the Human Rights Commission to monitor state's compliance with its decision (para 97), the Commission complied and reported back to the Court. However, the Commission's report was not broad enough, as it focused only on the order of the court linked to the particular

community whose conditions had given rise to the case. It did not examine the court's broader order urging the state to develop and implement a rational housing policy (NEWMAN, 2003; PILLAY, 2002). In such circumstances, the monitoring has some failings and state's failure to implement human rights may not be noticed.

The third challenge faced by Chapter 9 institutions has to do with the ignorance of the public at large. People do not know where these institutions are located or when and how to approach them. For instance, members of the society are not aware of the role of the Public Protector and consequently do not bring cases of corruption or human rights violation to her attention (MADONSELA, 2010). Furthermore, those who are aware do not bring cases or avoid the role of whistle-blowers for fear of reprisal or victimisation (MADONSELA, 2010).

The Human Rights Commission also struggles to ensure civil society participation in the collection of information and the formulation of recommendations, which are needed to prepare the report (LIEBENBERG, 2006). Similarly, the much-needed civil society participation in advocacy and supervision of the commission's recommendations is also lacking (LIEBENBERG, 2006). The unproductive relationship between the Commission and civil society was summarised in these words: "The form and especially the regularity of their interaction is less than satisfactory. They only meet intermittently as and when there is a need – at seminars, to celebrate Human Rights Day, upon request to compile a report of a hearing, or to assist with an investigation" (DEMOCRACY AND GOVERNANCE RESEARCH PROGRAMME OF THE HUMAN SCIENCES RESEARCH COUNCIL, 2007, p. 36).

Even the Parliamentarians do not understand the work and functioning of Chapter 9 institutions. As a result of this, Parliament is not "making full use of the [Chapter 9] institutions to complement its oversight of the executive and to brief members of Parliament on various matters of public interest on which the institutions may have reported" (LANGEVELDT, 2012, p. 3). In resolving this problem, Parliament set up an Office on Institutions Supporting Democracy to be in charge of harmonising Parliament work with Chapter 9 institutions (LANGEVELDT, 2012, p. 3). Though this process is on going under the leadership of the Deputy Speaker of Parliament and the Office referred to above, its progress is slow, as indicated by the example of the South African Human Rights Commission (LANGEVELDT, 2012, p. 3). The Commission constantly complains of lack of co-operation with Parliament which does not respond adequately to its recommendations and reports (LANGEVELDT, 2012, p. 3).

There is a strong need to raise awareness and educate people on the role and value of accessing Chapter 9 institutions. Amongst other means of raising awareness, media such as television, radio, and social networks can be used to communicate developments in Chapter 9 institutions (LANGEVELDT, 2012, p. 4).

The fourth challenge hindering Chapter 9 institutions is related to capacity. These institutions are overburdened by the large number of complaints resulting from the high levels of corruption and other malpractices in the country. Not only do these institutions lack resources to tackle corruption and ensure that growth reaches the poor, their mandate and powers limit their efficiency. This is aptly explained by Oppelt in these terms: "Like the auditor-general, whose annual reports offer distressing

insights into weak government financial systems [the Public Protector Office] can only make recommendations. And like the auditor-general, the public protector acts as a mere sentinel to failing administration." (OPPELT, 2012, p. 5).

In fact, besides the auditor's general office, which is financially self-sufficient as a result of audit fees it charges, the other Chapter 9 institutions have low operating budgets. Therefore, it is important to increase the amount of money allocated to these institutions and, crucially, to standardise their budgets to eradicate the perception that these institutions are answerable to government departments that pay their bills (LANGEVELDT, 2012, p. 1).

As far as their mandate is concerned, these institutions have an express mandate to monitor government activities and, therefore, cannot take decisive action like the judiciary or other branches of the government. In fact, they have very few teeth to fulfill their mandate efficiently. Langeveldt observes: "They do not have the power to take disciplinary action against government officials. Their role is purely investigatory and administrative" (LANGEVELDT, 2012, p. 1).

Nevertheless, these institutions are empowered to investigate and even take matters to courts when necessary. Therefore, their weakness is not linked to their lack of power but, to the fact they do not use the power derived from their authority efficiently (PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA, 2007). In fact, when the power of the Public Protector was used efficiently through investigation, it yielded positive results such as the dismissal of two ministers and the suspension of a police commissioner for misconduct by the President of the Republic (BAUER, 2011).

5 Conclusion

The aim of the paper was to investigate the challenges faced by South African democratic institutions in turning growth into access to rights. To attain this objective, the paper looked at three main issues. First, it focused on the relationship between rights and economic growth. Second, it examined the South African context. Third, and finally, it examined some challenges faced by democratic institutions to translating economic growth into access to rights.

On the first issue, the paper demonstrated that there is a relationship between rights and economic growth. It was shown that growth is instrumental for rights realisation and that the converse is also true. In this perspective, the increase of resources as a result of growth is an enabling factor that should allow the state to comply with its role as a duty bearer of rights. The paper also showed complementarity between rights-based and economic approaches to human development. It concluded that either approach on its own is inadequate to achieve human development.

On the second issue, focusing on the South African context, the paper demonstrated that the country is a democracy with strong features of constitutionalism. It also showed that the economy has blossomed and that the country is now considered as a middle income economy. Nevertheless, notwithstanding the adoption of pro-poor policies, there is much more to be done for the growth to fully reach the poor in the form of access to rights.

Third, it was argued that South Africa's constitutional model provides an enabling environment for growth to translate into rights realisation for the poor. However this can only happen if the democratic institutions set up in terms of Chapter 9 of the South African Constitution to monitor implementation of human rights are effective. The myriad of challenges facing not only these Chapter 9 institutions, but the courts and government were highlighted. The main challenges revolve around the lack of capacity, and skill as well as accountability of public servants at the government level. As for the courts, the impact of their role is diluted by sometimes deferring various issues related to the well-being of the poor to the executive and legislature. Chapter 9 institutions' main barriers include the lack of general awareness by the public, human and financial capacity and the general perception that they are extensions of the ruling party.

To enhance the prospects of translating growth into access to rights, the challenges identified above should be attended to decisively. This can be done through capacity building and accountability of public servants at government level; the judiciary should take its responsibility and be ready "to interpret the Constitution without outside interference and to invalidate government action that infringes on the constitutional values" (GORDON; BRUCE, 2006, p. 30). Citizens at large must be educated about Chapter 9 institutions, which must be allocated more human and financial resources. Finally, the perception that officeholders of Chapter 9 institutions are mere extensions of the ruling party can be removed by ensuring that officers in these institutions are not related to political parties in any way.

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2001 Presbyterian Church of Sudan vs. Talisman Energy, Case No. 01 City. 9882, pending in the US District Court for the Southern District of New York.

African Commission

2001 Communication 155/96 SERAC & Another vs. Nigeria, ACHPR.

RESUMO

Ao longo dos últimos anos, a África do Sul experimentou um crescimento econômico que normalmente deveria ter sido filtrado para os pobres na forma de acesso a direitos. Embora na China autocrática o crescimento tenha aumentado o bem-estar dos pobres, este artigo sustenta que o constitucionalismo caracterizado pela separação dos poderes com freios e contrapesos, acompanhado por instituições de monitoramento dos direitos humanos tais como existem na África do Sul, oferece o ambiente propício para que o crescimento alcance os pobres. No entanto, isso não acontece na África do Sul. O artigo investiga, portanto, os desafios enfrentados pelas instituições democráticas no sentido de fazer com que o crescimento atinja as bases em termos de direitos humanos.

Nessa investigação, o artigo analisa a relação entre direitos e crescimento econômico, examina o contexto sul-africano e mostra que o constitucionalismo não conseguiu transformar o crescimento em direitos para os necessitados, para depois avaliar os obstáculos enfrentados pelas instituições democráticas na busca de traduzir o crescimento em acesso a direitos.

PALAVRAS-CHAVE

Crescimento – Direitos socioeconômicos – África do Sul – Desenvolvimento e direitos humanos – Poder judiciário

RESUMEN

En los últimos años Sudáfrica vivió un crecimiento económico que, normalmente, debería haberse filtrado hacia abajo, hacia los sectores más pobres, en la forma de acceso a derechos. A excepción de la China autocrática, donde el crecimiento mejoró la calidad de vida de los sectores más pobres, en el presente trabajo se argumenta que el constitucionalismo caracterizado por la separación de poderes, con equilibrio de poderes, junto a instituciones que velan por los derechos humanos, como sucede en Sudáfrica, generan un ambiente propicio para que el crecimiento llegue a los más pobres. Sin embargo, esto no sucede en Sudáfrica. El artículo investiga los problemas enfrentados por las instituciones democráticas para garantizar que el crecimiento llegue a las bases, en términos de derechos humanos.

El presente estudio, analiza la relación entre derechos y crecimiento económico, examina el contexto sudafricano y muestra que el constitucionalismo no consiguió transformar el crecimiento en derechos para los más vulnerables, luego de evaluar los obstáculos enfrentados por las instituciones democráticas para traducir crecimiento en acceso a los derechos.

PALABRAS CLAVE

Crecimiento – Derechos socioeconómicos – Sudáfrica – Desarrollo y derechos humanos – Poder judiciario