

Applying a Human Rights Lens to Poverty and Economic Inequality: The Experience of the South African Human Rights Commission

Federal Law Review
2023, Vol. 51(3) 296–314
© The Author(s) 2023



Article reuse guidelines:
sagepub.com/journals-permissions
DOI: 10.1177/0067205X231188637
journals.sagepub.com/home/flr



Sandra Liebenberg*  and Bradley Slade** 

Abstract

The Constitution of South Africa, 1996, is committed to redressing poverty and inequality. This is evident in its inclusion of a range of justiciable socio-economic rights along with a strong substantive right to equality and non-discrimination. The South African Human Rights Commission is a state institution established by the *Constitution* to support constitutional democracy. It has wide-ranging powers to investigate, monitor and protect human rights, including an express constitutional mandate in relation to socio-economic rights. This article examines how it has sought to apply its constitutional and legislative mandates to various manifestations of poverty and economic inequality in South Africa. It focuses on three broad areas of the Commission's work with a view to identifying its achievements as well as some of the key challenges it has faced. Based on this analysis, the article concludes by reflecting on the broader implications of the experience of the Commission for fourth branch institutions, specifically national human rights institutions, that apply a human rights lens to poverty and economic inequality.

Accepted 17 February 2023

I Introduction

South Africa is a nation scarred by deep patterns of poverty¹ and intersecting racial, gender and class inequalities.² Poverty in South Africa has strong racial and gender

1. Approximately 25 per cent of the population live below the food poverty line of R624 (\$41.75) per person per month, and 55.5 per cent below the upper-bound poverty line of R1335 (\$89.30) per person per month. Statistics South Africa, *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (22 August 2017) 14–26. For the inflation-adjusted three poverty lines in South Africa, see Statistics South Africa, *National Poverty Lines* (9 September 2021).
2. Statistics South Africa, *Inequality Trends in South Africa: A Multidimensional Diagnostic of Inequality* (14 November 2019) 34.

We are grateful for comments on prior drafts of this article by Ros Dixon, Beth Goldblatt, Shanelle van der Berg, Gideon Basson, and participants in the virtual symposium on Fourth Branch Institutions and Economic Inequality held on 3 December 2021. The helpful comments of two anonymous referees are also acknowledged.

* HF Oppenheimer Chair in Human Rights Law, Faculty of Law, University of Stellenbosch.

** Associate Professor, Department of Public Law, Stellenbosch University.

dimensions.³ The overwhelming majority of those at the bottom of the income and wealth pyramid are black, with black women being the most disadvantaged.⁴

These patterns of poverty and income inequality in South Africa have deep roots in the history of land dispossession and systemic discrimination on the grounds of race in all spheres during the colonial and apartheid eras. The stubborn persistence of poverty and economic inequality in the post-apartheid era has also been attributed to insufficiently inclusive and redistributive economic policies as well as systemic corruption and ‘state capture’.⁵

The redress of historical injustices⁶ and the transformation of conditions of poverty and inequality lie at the heart of South Africa’s 1996 post-apartheid *Constitution* (‘the *Constitution*’).⁷ The Bill of Rights in the *Constitution* is renowned for its holistic inclusion of civil and political, economic, social, cultural and environmental rights, all of which are enforceable by the courts.⁸

Another key institution with an important role in relation to the Bill of Rights is the South African Human Rights Commission (‘the Commission’). The Commission was established as one of six ‘State institutions supporting constitutional democracy’ in Chapter 9 of the *Constitution*.⁹ It consists of eight commissioners who are appointed by the President on the recommendation of the National Assembly.¹⁰ The independence and impartiality of the Commission is both constitutionally and statutorily guaranteed.¹¹ The Commission, along with the other chapter 9 institutions, are accountable to the National Assembly, and must report to the Assembly at least once a year on their activities and the performance of their functions.¹² The Commission is currently accredited as an A-rated institution by the Global Alliance of National Human Rights Institutions (‘GANHRI’),¹³ indicating that it is fully compliant with the

-
3. Statistics South Africa, *Men, Women and Children: Findings of the Living Conditions 2014/15* (29 March 2018) 14–7.
 4. According to Oxfam South Africa, the average white male CEO earns the same as 461 black women in the bottom 10 per cent of earners. Oxfam South Africa, *Reclaiming Power: Women’s Work and Income Inequality in South Africa* (Web Page, November 2020) <<https://www.oxfam.org.za/wp-content/uploads/2020/11/oxfam-sa-inequality-in-south-africa-report-2020.pdf>>.
 5. See, eg, P Bond, *Elite Transition: From Apartheid to Neoliberalism in South Africa* (University of KwaZulu-Natal Press, 2005). On state capture and corruption: see Commission of Inquiry Into State Capture, ‘The Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State’, *All Reports* (Web Page) <<https://www.statecapture.org.za/#>>.
 6. See Part II below for elaboration.
 7. *Constitution of the Republic of South Africa 1996* (South Africa) (‘The *Constitution*’).
 8. *Ibid*, s 38, 172.
 9. *Ibid* s 184. The other ‘Chapter 9 institutions’ are: The Public Protector; 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.
 10. The *Constitution* (n 7) ss 193(4)-(5); The *South African Human Rights Commission Act No 40 of 2013* (‘SA Human Rights Commission Act’) s 5. The conditions and processes for the removal of a member of a Commission from office are stipulated in s 194 of the *Constitution*.
 11. The *Constitution* (n 7) ss 181(2)-(3); The *SA Human Rights Commission Act* s 4.
 12. The *Constitution* (n 7) s 181(5). In addition to the annual report on activities to the National Assembly, section 18 of the *SA Human Rights Commission Act* imposes further reporting requirements on the Commission in respect of its functions and investigations.
 13. United Nations Office of the High Commissioner for Human Rights and GANHRI, *Chart of the Status of National Institutions* (22 July 2022).

Principles Relating to the Status of National Human Rights Institutions ('the Paris Principles').¹⁴

This article analyses and evaluates the Commission's efforts to apply a human rights lens to manifestations of poverty and economic inequality in South Africa.¹⁵ It commences by analysing the constitutional normative foundations of the Commission's mandate to address poverty and economic inequality as questions of fundamental human rights. It proceeds to describe the specific powers and functions of the Commission, and the extent to which its findings are legally binding under South African law. Thereafter, it analyses three specific areas of the Commission's work: (1) its monitoring mandate in respect of socio-economic and environmental rights in terms of section 184(3) of the *Constitution*; (2) its activities in the spheres of land reform, housing and related basic services and (3) its initiatives to link poverty and economic inequality through its equality and non-discrimination mandate. These three areas have been selected because of their close alignment with the central themes of this article.¹⁶

The article concludes by reflecting on what the experience of the South African Human Rights Commission reveals concerning the contribution that fourth branch institutions (particularly national human rights institutions) can make in bringing a human rights perspective to bear on questions of poverty and economic inequality. It argues that national human rights institutions are well-placed to illuminate the structural drivers of poverty and economic inequality and their disparate impacts on groups experiencing systemic discrimination and disadvantage. However, their effectiveness in this area depends on several factors, including developing a clear vision and strategy and multi-disciplinary staff capabilities. It also requires building a network of relationships with a range of government and civil society stakeholders.

II Constitutional and Legislative Normative Framework

The *Constitution* establishes a strong normative framework for guiding the Commission's activities in the areas of poverty and economic inequality. Thus, the preamble of the *Constitution* proclaims that it was adopted to establish a society based on 'social justice', and to 'improve the quality of life of all citizens and free the potential of each person'.¹⁷ The founding values of the *Constitution* include 'human dignity, the achievement of equality and the advancement of human rights and freedoms', '[n]on-racialism' and 'non-sexism'.¹⁸ A basic value and principle governing public

14. *National institutions for the promotion and protection of human rights*, GA Res 48/134, UN Doc A/RES/48/134 (20 December 1993).

15. The methodology of our research has entailed a detailed review of the reports and other outputs of the Commission, academic literature, reports by non-government organisations and government publications. All reports referenced in this article are available on the Commission's website: <https://www.sahrc.org.za/index.php/publications>. In addition, we obtained helpful information from the Commission's staff and various non-government organisations that have worked closely with the Commission. We are thankful for their willingness to assist us in our research. The arguments and evaluations in this paper are our own and should not be attributed to the Commission, its staff or any other organisation. One of us, Sandra Liebenberg, was directly involved in the initial phases of conceptualising the Commission's section 184(3) mandate discussed in Part IV.A below.

16. It should be noted, however, that the Commission has undertaken extensive interventions in other closely related fields such as the rights to education, health care and food as well as focussing on the rights of specific groups such as children, persons living with disabilities, older persons and foreign nationals.

17. The *Constitution* (n 7) Preamble.

18. The *Constitution* (n 7) ss 1(a)–(b).

administration is that '[p]eople's needs must be responded to', and that services must be provided fairly and equitably.¹⁹

The inclusion of a comprehensive set of economic, social and cultural rights in the South African Bill of Rights represents the most obvious constitutional commitment to the eradication of conditions of poverty. These include rights relating to a healthy environment, access to land, housing, health care services, food, water, social security, education, language and cultural rights.²⁰ All these rights are judicially enforceable, and the South African courts have developed a sophisticated body of jurisprudence on these rights.²¹

Furthermore, the redress of socio-economic disadvantage and economic inequality is facilitated by the strong commitment to substantive equality in section 9 of the Bill of Rights. This commitment is strengthened by an interdependent reading of section 9 and the various socio-economic rights.²² The Constitutional Court has affirmed the close interrelationship between socio-economic rights and the right to equality and non-discrimination.²³

Section 9(1) states that equality 'includes the full and equal enjoyment of all rights and freedoms'.²⁴ It also expressly makes provision for affirmative action (or 'restitutionary equality') to 'protect or advance persons, or categories of persons, disadvantaged by unfair discrimination'.²⁵ The Constitutional Court has held that all organs of state, and the judiciary, have a positive duty to protect and promote the achievement of equality.²⁶ According to Moseneke J:

[O]ur Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession and indignity within the discipline of our constitutional framework.²⁷

Legislation has also been passed to prohibit unfair discrimination and promote equality in employment²⁸ and in all other sectors of the economy and society.²⁹ The *Promotion of Equality and*

19. The *Constitution* (n 7) ss 195(d)–(e).

20. Key provisions protecting environmental and socio-economic rights in the South African Bill of Rights are: The *Constitution* (n 7) ss 24, 25(5), 26–27, 28(1)(c), 29, 31–32, 35(2)(e).

21. Sandra Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta & Co, 2010) 23–78.

22. Sandra Liebenberg and Beth Goldblatt, 'The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution' (2007) 23(2) *South African Journal on Human Rights* 335.

23. *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505; *Mahlangu v Minister of Labour* 2021 (2) SA 54 (Constitutional Court) ('*Mahlangu*').

24. The *Constitution* (n 7) s 9(1).

25. The *Constitution* (n 7) s 9(2).

26. *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (Constitutional Court) [24].

27. *Ibid* 15 [25].

28. *Employment Equity Act 1998* (South Africa) ('*Employment Equity Act*').

29. *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (South Africa) ('*PEPUDA*').

Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA') prohibits both the State and private parties from discriminating unfairly on a range of listed³⁰ and unlisted grounds.³¹ PEPUDA also makes provision for 'socio-economic status' as a potential prohibited ground of discrimination.³² Although it has the formal status of a 'directive principle', nothing prevents litigants instituting action on this ground, or courts from determining that it is included within the listed or unlisted grounds of prohibited discrimination in PEPUDA.³³ The South African courts have confirmed that discrimination can occur on an intersection of grounds, including poverty or social class.³⁴

The above matrix of constitutional provisions, legislation and jurisprudence demonstrates that poverty and economic inequality are issues of fundamental human rights in South Africa.

Despite the innovative review and remedial models developed by the South African courts to enforce socio-economic rights and substantive equality, courts are institutionally constrained actors. Their engagement with issues of poverty and economic inequality is constrained by the particular facts and relief sought in litigation, and the separation of powers doctrine.³⁵ By contrast, a national human rights institution ('NHRI') such as the South African Human Rights Commission has a broader mandate to monitor and promote human rights. These mandates empower the Commission to be proactive in researching, investigating, and monitoring the structural drivers of poverty and economic inequality. It can also engage with a broader range of governmental and civil society actors rather than being confined to the parties to litigation. The following section analyses in further detail the specific mandate and powers of the Commission and their legal status.

III The Mandate and Powers of the Commission

In terms of section 184(1) of the *Constitution*, the Commission has three basic mandates: to promote, protect and monitor the realisation of human rights in South Africa.³⁶ To enable the Commission to fulfil the mandates as set out in section 184(1), it is empowered in terms of section 184(2) 'to investigate and report' on the observance of human rights.³⁷ Where human rights have been violated, it is empowered to 'take steps to secure appropriate redress'.³⁸ It also has the power to

30. Paragraph (a) of the definition of 'prohibited grounds' in s 1 of PEPUDA lists the following grounds: 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'. These grounds correspond with those listed in s 9(3) of the *Constitution*.

31. Paragraph (b) of the definition of 'prohibited grounds' in s 1 of PEPUDA provides as follows: 'any other ground where discrimination based on that other ground - (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)'.

32. Section 1 of PEPUDA defines 'socio-economic status' as including 'a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications'.

33. PEPUDA (n 29) ss 34(1)–(2).

34. *Social Justice Coalition and Others v Minister of Police and Others* 2019 (4) SA 82 (High Court); *Mahlangu* (n 23). See Gideon B Basson, 'Poverty as a Ground of Unfair Discrimination in Post-Apartheid South Africa' (LLM Thesis, University of Stellenbosch, 2022).

35. In the context of socio-economic rights jurisprudence, the Constitutional Court has repeatedly affirmed these constraints: see, eg, *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (Constitutional Court), [36]–[38]; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (Constitutional Court), [46]–[68].

36. The Strategic Plan of the Commission is linked to these three mandates: see *SAHRC Strategic Plan 2020-2025* (21 March 2022) [3.2].

37. The *Constitution* (n 7) s 184(2)(a).

38. *Ibid* s 184(2)(b).

‘carry out research’³⁹ and ‘to educate’.⁴⁰ Reports on the observance of human rights are generally issued in terms of the Commission’s promotion and monitoring mandate, and are generally advisory in nature.⁴¹

As noted above, the Commission has the power to take additional measures to ensure appropriate redress where human rights have been violated. Such measures include instituting litigation, undertaking enquiries and hearings, and forms of alternative dispute resolution such as mediation. A key question in this context is whether the Commission has the power to make recommendation or issue directives that are legally binding on relevant organs of state or private parties. Relying on the seminal judgement of the Constitutional Court of *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* (‘EFF’),⁴² in which the Court held that the remedial action of another Chapter 9 institution, the Public Protector, were legally binding unless set aside by a court,⁴³ the Commission holds the view that it also has the power to make binding recommendations to redress human rights violations.⁴⁴

The question as to whether the Commission has the power to issue binding recommendations was left open in *Solidarity v The Minister of Labour and Others* (‘Solidarity’),⁴⁵ as the case dealt with recommendations issued by the Commission in a research report. The Commission argued, and the court accepted, that its recommendations in this context were intended to be only educative and advisory in nature. In other words, they were not intended as binding directives emanating from its mandate to seek redress for a human rights violation. In contrast, in the case of *South African Human Rights Commission v Agro Data CC*,⁴⁶ the Commission argued that its directives arising from this particular investigation were binding as there were made pursuant to its mandate to secure redress for human rights violations. The High Court rejected this argument, reasoning that the Commission’s constitutional and legislative powers were distinguishable from the Public Protector’s power to order remedial action. The court ultimately held that the Commission did not have the power to issue binding directives or recommendations. South Africa’s apex court, the Constitutional Court, has not yet had occasion to pronounce on the binding effect of the Commission’s directives.

The Commission frequently conducts investigations into human rights violations. These investigations are normally followed by a report with clear recommendations aimed at ensuring that there is appropriate redress.⁴⁷ The Commission has also on several occasions successfully

39. Ibid s 184(2)(c).

40. Ibid s 184(2)(d).

41. Section 13(1)(a)(i) of the *SA Human Rights Commission Act* (n 10) expressly confers a mandate on the Commission to make recommendations to organs of state for the adoption of progressive measures ‘for the promotion’ of human rights.

42. 2016 (3) SA 580 (Constitutional Court).

43. Ibid [56], [68], [70], [73], [81]–[82].

44. See, eg, South African Human Rights Commission, *Final Report of the Gauteng Provincial Inquiry into the Sewage Problem of the Vaal River*, 17 February 2021, 116 (‘Vaal River Report’), where the Commission states that its directives are binding on the Respondents and that any party aggrieved by its findings and directives ‘is entitled to challenge same in court through the process of judicial review’. This Report and its wide-ranging recommendations to various organs of state emanated from an extensive investigation by the Commission into the causes and human rights impacts of sewage pollution of a major South African river.

45. (2020) 41 ILJ 273 (Labour Court).

46. (2022) ZAMPMBHC 58 (2 March 2022) (High Court). For a discussion of this decision, see, Bradley V Slade, ‘Clarifying the Power of the South African Human Rights Commission to take Steps to Redress the Violation of Human Rights: A Discussion of *South African Human Rights Commission v Agro Data CC* [2022] ZAMPMBHC 58’ (2023) 44 *Obiter* (forthcoming).

47. See, for instance, the recommendations directed at various state department in the Vaal River Report (n 44).

approached the courts to protect the human rights of vulnerable groups.⁴⁸ Sometimes, the courts have required the Commission to monitor compliance with court orders vindicating the rights of victims. The Commission fulfils these monitoring duties by analysing state reports, and through conducting site visits and interviews.⁴⁹

The Commission has also collaborated with other Chapter 9 institutions. An example is the joint investigation with the Public Protector into the widespread unrest in the Alexandra township in April 2019 that was sparked by systemic maladministration and complaints about the delivery of basic municipal services. In its final report, the Commission made wide-ranging findings on human rights issues affecting the residents of Alexandra,⁵⁰ while the Public Protector directed its remedial action towards addressing various administrative dysfunctions in the delivery of basic municipal services.⁵¹ The Commission recently conducted a site-visit to assess the progress made following its initial report. The Commission noted that it had not received any reports from relevant organs of state regarding their plans to address the ongoing human rights violations, and that no real change could be seen in Alexandra in relation to service-delivery issues impacting negatively on socio-economic rights.⁵²

This illustrates that the extent to which the Commission's investigative recommendations are implemented depends on collaboration by relevant government departments and the social pressure that can be brought to bear by the media, affected communities, and non-governmental organisations.⁵³ The information and recommendations generated through such an investigation can also be used in evidence should the Commission itself or other stakeholders initiate litigation relating to the subject-matter of the investigation.⁵⁴

As is evident from this analysis, the Commission has an extremely broad constitutional and legislative mandate pertaining to human rights. In 2021, the Commission received R 191 739 000⁵⁵ from the National Treasury through the Department of Justice.⁵⁶ Although the allocation from the National Treasury is often (but not always) supplemented by donations, the Commission has noted that '[r]esource limitations amidst a very broad constitutional mandate for the Commission are always a significant restraint'.⁵⁷ The following section examines selected interventions of the Commission in three areas closely related to the themes of poverty and economic inequality.

48. For a summary of these cases, see the Commission's Strategic Plan 2020–2025 (n 36) 9–12.

49. See, eg, *South African Human Rights Commission v Minister of Home Affairs* 2014 11 BCLR 1352 (High Court).

50. South African Human Rights Commission, *Final Report of the Gauteng Provincial Inquiry into Alexander Township Total Shutdown*, 9 July 2021.

51. Public Protector, *Report on a Joint Investigation between the South African Human Rights Commission and the Public Protector South Africa into Allegations of Poor Socio-economic Conditions, Lack of Essential Services, its Potential Prejudice and Impact on Fundamental Human Rights in the Township of Alexandra by Certain Organs of State*, Report 16 of 2021/22.

52. Masego Mafata, 'Nothing has changed in Alexandra, says Human Rights Commission', *GroundUp*, 15 February (News Report, 2022) <<https://www.groundup.org.za/article/sa-human-rights-commission-says-nothing-has-changed-alexandra/>>.

53. On the network of relationships critical to building the legitimacy and consequent effectiveness of national human rights institutions: see Rachel Murray, 'National Human Rights Institutions: Criteria and Factors for Assessing their Effectiveness' (2007) 25(2) *Netherlands Quarterly of Human Rights* 189, 211–219.

54. The Commission's powers to assist complainants to litigate or to litigation in its own name or on behalf of a person or class of persons are contained in s 13(3) of the *SA Human Rights Commission Act* (n 10).

55. Approximately \$15 217 381 Australian dollars as at 6 July 2023.

56. South African Human Rights Commission, *Annual Financial Statements for the year ended 31 March 2021*, 46.

57. South African Human Rights Commission, *Annual Report 2019–2020* 11; South African Human Rights Commission, *Annual Trends Analysis Report 2020–2021*, 101.

IV Selected Interventions of the SA Human Rights Commission

A Monitoring Socio-Economic Rights: The Section 184(3) Mandate

Section 184(3) of the *Constitution* confers an express mandate on the Commission in relation to socio-economic and environmental rights. This provision reads:

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

As is evident, section 184(3) does not specify the purpose of this annual request for information from relevant organs of state. The question of the purpose and implementation of this mandate has been a subject of much academic and civil society debate.

The late Prof Christof Heyns was a leading proponent of the inclusion of this provision in the 1996 Constitution.⁵⁸ In an article published in 1999, he provided a detailed account of his interpretation of the section 184(3) mandate and how it should be operationalised. In essence, he envisaged the mechanism functioning as a ‘domestic reporting procedure’, mirroring the procedure under the UN human rights treaties, specifically the UN Committee on Economic, Social and Cultural Rights (‘CESCR’).⁵⁹ In Heyns’s conceptualisation, the Commission’s role would be complementary to that of the courts, and constitutes a form of ‘soft’ enforcement mechanism. He summarised its value as follows:

At the heart of reporting as an enforcement mechanism lies the fact that it creates a duty of justification on the one side and a system of monitoring on the other; a system of introspection and inspection.⁶⁰

He envisaged that the section 184(3) mechanism would stimulate organs of state to undertake a systematic stocktaking of the progress they had made over the preceding year in giving effect to the socio-economic rights obligations falling within their mandate. Relevant organs of state would submit annual reports to the Commission according to reporting guidelines prepared by the Commission in relation to each of the seven socio-economic rights referred to in section 184(3).⁶¹ Heyns argued that opportunities should also be provided for civil society organisations to submit information to the Commission⁶² and for a process of oral hearings and ‘constructive dialogue’ between relevant government officials and representatives of the Commission.⁶³ At the conclusion of the process, the Commission would produce a publicly available report assessing the progress made by the relevant organs of state and incorporating recommendations. This report would also be submitted to Parliament.⁶⁴

58. Danie Brand, ‘Socio-economic Rights in South Africa: the “Christof Heyns clause”’ in Frans Viljoen, Charles Fombad, Dire Tladi, Ann Skelton and Magnus Kilander (eds), *A Life Interrupted: Essays in Honour of the Lives and Legacies of Christof Heyns* (Pretoria University Law Press, 2022) 460.

59. Christof Heyns, ‘Taking Socio-Economic Rights Seriously: The Domestic Reporting Procedure and the Role of the South African Human Rights Commission in Terms of the New Constitution’ (1999) 32 *De Jure* 195.

60. *Ibid* 207.

61. *Ibid* 215–217.

62. *Ibid* 222–223.

63. *Ibid* 221–222.

64. *Ibid* 221.

Heyns thus envisaged that, through the section 184(3) mechanism, the Commission could undertake a ‘systematic and comprehensive approach’ to monitoring socio-economic rights realisation.⁶⁵ In this respect, its role would be distinct from the more case-specific, reactive role of courts in adjudicating socio-economic rights.⁶⁶

The Commission produced nine comprehensive section 184(3) reports broadly following the methodology proposed by Heyns.⁶⁷ The last of the reports linked explicitly to the section 184(3) mandate covered the period 2012–2013.⁶⁸ In this report, the Commission stressed the importance of ‘continuous assessment and monitoring’ to the achievement of the progressive realisation of socio-economic rights over time.⁶⁹ This in turn required a monitoring system that ‘will provide government, and in particular Parliament, with a *comprehensive* picture in terms of the observance of human rights while ensuring the Commission is *pro-active* in terms of making recommendations and securing appropriate redress where human rights are being violated’.⁷⁰

As at the date of conducting research for this article, the Commission was still sending annual requests to provide information to government departments. However, the responses received are not publicly available (for example, posted on its website), nor has the Commission followed its prior practice of producing a comprehensive public report based on the responses received. Instead, five other subsequent reports are listed on the Commission’s website under the heading, ‘Section 184(3) Reports’. These consist mainly of policy research briefs pertaining to specific rights or themes or, in the case of one report, the implementation of recommendations made in a previous investigation on the right to water and sanitation.⁷¹

The challenges encountered by the Commission in sustaining the more comprehensive approach it initially followed in implementing its section 184(3) mandate can be attributed to several factors. Firstly, a lack of resources and capacity has undoubtedly played a major role, particularly given the breadth of the Commission’s mandate.⁷² In 2021, only two researchers were employed in its economic and social rights sub-unit within the Research Department. Secondly, the section 184(3) mandate itself

65. Ibid 208.

66. See Brand (n 58) 462. For broadly similar views on the Commission’s role in fulfilling its s 184(3) mandate, see Dwight G Newman, ‘Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda’ (2003) 19(2) *South African Journal on Human Rights* 189, 194. One of us argued that this monitoring mandate could also be used to identify violations of socio-economic rights with a view to the Commission exercising its further powers to make legislative and policy recommendations and seek redress for the victims: see Sandra Liebenberg, ‘Violations of Socio-economic Rights: The Role of the South African Human Rights Commission’ in Penelope Andrews and Stephen Ellmann (eds), *The Post-Apartheid Constitutions: Perspectives on South Africa’s Basic Law* (Witwatersrand University Press and Ohio University Press, 2001).

67. All these reports are available online at: <https://www.sahrc.org.za/index.php/sahrc-publications/section-184-3-reports>. The methodology followed by the Commission involved the distribution of questionnaires (referred to as ‘protocols’) to relevant organs of state. The responses from organs of state were supplemented with publicly available quantitative data and other information collected through interviews and other secondary sources. Based on these sources, the Commission compiled comprehensive reports including, amongst others, recommendations directed to the relevant government departments. These recommendations ranged from the adoption of new legislation and policies, improving implementation of existing legislation and policies, to strengthening co-ordination between government departments or spheres of government, improving statistical data collection, and designing a roadmap for improving access to the relevant rights. See Tseliso Thipanyane, ‘The SA Human Rights Commission’ (1998) 3(1) *Economic and Social Rights Review* 11.

68. South African Human Rights Commission, 9th section 184(3) Report on Economic and Social Rights, 2012–2013.

69. Ibid 9.

70. Ibid 9–10 (emphasis in original).

71. See Brand (n 58) 465.

72. See Newman (n 66) 210.

is drafted in very broad terms covering a broad array of potential organs of state.⁷³ Thus, in principle, ‘relevant’ organs of state would include departments in the national, provincial and local spheres of government,⁷⁴ with mandates related to the seven listed socio-economic rights.⁷⁵ A third challenge has been the lack of consistent co-operation from government departments, for example, through delayed or non-responses to the Commission’s questionnaires.⁷⁶ This has led to the Commission having to resort to the use, or threatened use, of its subpoena powers.⁷⁷ Fourth, the Commission has been criticised for producing reports that have been essentially outdated and overtaken by events. Consequently, certain of the assessments and recommendations contained in the section 184(3) reports were of limited practical value in stimulating changes in government policy or providing support for civil society campaigns.⁷⁸ Finally, the role of civil society in the monitoring process has been the subject of controversy, particularly in relation to the Commission’s refusal to make the government’s responses to the Commission’s questionnaires directly available to the public.⁷⁹

The scaling back of the initial ambitions for the section 184(3) process suggests that the Commission has not developed a coherent vision nor a practicable model for its implementation. Monitoring the progressive realisation of socio-economic rights requires considerable multi-disciplinary skills and capacity to implement effectively. Although the Commission has co-operation agreements with non-government organisations with considerable research expertise in economic and social rights monitoring,⁸⁰ it has been unable to translate these methodologies into a practical, sustainable model for the implementation of its section 184(3) mandate.

Certain academic commentators have argued that the international reporting and progressive realisation model for section 184(3) is misconceived and proposed an alternative less resource-intensive institutional model.⁸¹ Klaaren has proposed a model premised on the primary goal of section 184(3) being to promote access to information relating to socio-economic rights — a so-called ‘information promotion model’.⁸² He locates this model within new governance frameworks aimed at promoting participation, learning and innovation.⁸³ According to this model, the Commission’s section 184(3) mandate in respect of socio-economic rights would complement its

73. See the broad definition of ‘organ of state’ in s 239 of the *Constitution*.

74. The *Constitution* (n 7) s 239(a).

75. Brand criticises the Commission for not adopting a decision to focus on only one or two rights in a given year or being more selective in the choice of organs of state to engage with in a particular year: Brand (n 58) 464.

76. Newman describes ‘institutional inertia’ on the part of government departments in co-operating with the Commission in its efforts to carry out its s 184(3) mandate: (n 66) 209–210.

77. South African Human Rights Commission, 9th section 184(3) Report on Economic and Social Rights, 2012 - 2013 (n 68) 10–11. Recourse to subpoena powers arguably fuels government resentment and resistance to co-operating with the Commission thereby undermining the goals of constructive engagement and learning identified by Heyns as important to the success of the section 184(3) mandate. See Heyns (n 59) 210.

78. Newman (n 66) 205–8.

79. Thipanyane (n 67) 12; Christof Heyns ‘Update on the SA Human Rights Commission: Switching on the NGO Monitor Screens’ (1998) 1 (2) *Economic and Social Rights Review* 13; Danie Brand and Sandra Liebenberg, ‘The Second Economic and Social Rights Report’ (2000) 2 *ESR Review* 4; Debbie Horsten, ‘The Role Played by the South African Human Rights Commission’s Economic and Social Rights Reports in Good Governance in South Africa’ (2006) 9 *Potchefstroom Electronic Law Journal* 1, 14–15; Brand (n 58) 465.

80. The Commission has, for example, collaborated with the independent research think-tank, Studies in Poverty and Inequality Institute (SPII). SPII has developed an innovative Socio-Economic Rights Monitoring Tool: *SPII* (Web Page) <<https://spii.org.za/research-and-advocacy/the-socio-economic-rights-monitoring-tool/>>.

81. Jonathan Klaaren, ‘A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights’ (2005) 27(2) *Human Rights Quarterly* 539.

82. *Ibid* 556–7.

83. *Ibid* 558–61.

mandate under access to information legislation. Newman has proposed a similar networked model of information gathering and monitoring involving greater civil society involvement in the monitoring process and ‘micro-studies’.⁸⁴ However, the theoretical and practical implications of these alternative models remain undeveloped.

The Commission is not making optimal use of the potentially potent constitutional tool created by section 184(3) of the Constitution to monitor the progressive realisation of socio-economic rights in South Africa on a regular basis. The process of information gathering, analysis, evaluation and the making of targeted recommendations enables the Commission to systematically track progress in the realisation of socio-economic rights over time. Through this process, the Commission could highlight the human rights dimensions of poverty and inequality and promote the mainstreaming of human rights norms and values in public policy-making processes.⁸⁵ The Commission’s section 184(3) mandate could also serve as a central node for civil society mobilisation around socio-economic rights and facilitate direct engagement between government officials and impoverished communities.⁸⁶ This would contribute to the deepening of participatory democracy in South Africa, another central constitutional value.⁸⁷

The following part examines the Commission’s interventions in an area closely linked to the structural causes of economic inequality in South Africa — the unequal distribution of land and other forms of property, housing and related services.

B Land and Property, Housing and Basic Services

I *Land and Property*. Colonial and apartheid legislation and policy systematically dispossessed black people of land and housing, thereby entrenching deeply skewed patterns of land ownership as well as tenure insecurity in respect of land and housing.⁸⁸ The Bill of Rights obliges the State to take proactive legislative and other measures to achieve equitable access to land, land restitution and reform, and tenure security.⁸⁹ In addition, the State is obliged to take reasonable measures, within its available resources, to achieve the progressive realisation of everyone’s right to have access to adequate housing.⁹⁰ Evictions and demolitions of housing made without a court order in which all the ‘relevant circumstances’ are considered are expressly prohibited.⁹¹ An enabling constitutional framework therefore exists for pursuing redistributive measures in the areas of land, property and housing.

84. Newman (n 66) 210–14.

85. On the role of NHRIs in ‘ensuring that human rights are mainstreamed in public bodies and that a culture of human rights is developed’, see Murray (n 53) 210.

86. Rachael Adams, ‘The Role of the South African Human Rights Commission in Ensuring State Accountability to Address Poverty’ in Ebenezer Durojaye and Gladys Mirugi-Mukundi (eds), *Exploring the Link between Poverty and Human Rights in Africa* (Pretoria University Law Press, 2020) 255, 270–273.

87. See *Doctors for Life International v Speaker of the National Assembly* (2006) 6 SA 416 (Constitutional Court), [90]–[117]; *Occupiers of 51 Olivia Road Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* (2008) 3 SA 208 (Constitutional Court) [9]–[23].

88. Tembeka Ngcukaitobi, *Land Matters: South Africa’s Failed Land Reforms and the Road Ahead* (Penguin Books, 2021).

89. The *Constitution* (n 7) ss 25(5)–(9).

90. The *Constitution* (n 7) ss 26(1)–(2).

91. The *Constitution* (n 7) ss 26(3).

However, there have been serious systemic failures in the post-apartheid government's programme of land restitution and redistribution.⁹² The unresolved land question in South Africa is deeply implicated in the entrenched patterns of poverty and inequality sketched in the introduction. As the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change headed by Former President, Kgalema Motlanthe, noted, 'land redistribution is a key element to reducing wealth inequality'.⁹³ This politically fraught issue has also led to an unsuccessful initiative by the ANC to amend section 25 of the Bill of Rights (the constitutional property clause) to make provision for the possibility of nil compensation for expropriation of land.⁹⁴

Tenure security is particularly important in addressing poverty and economic inequality. As the High Level Panel Report noted, '[t]here is a fundamental correlation between vulnerable forms of tenure and the geography of spatial inequality and poverty that remains entrenched in South Africa'.⁹⁵ The Commission has undertaken various initiatives in the areas of land reform, focussing on the promotion of tenure security for historically disadvantaged groups and communities.⁹⁶ These reports also provide broader insights into the realisation of related socio-economic rights such as housing, food and water.

In 2018, the Commission embarked on an inquiry into the impact of rural land use and ownership patterns.⁹⁷ This inquiry was specially aimed at examining the impact of existing patterns of rural land use and ownership on, amongst others, socio-economic rights and equality.⁹⁸ The Commission recognised that land reform, particularly in rural areas, has the potential to address unemployment and poverty. However, it went further by noting that land reform on its own was insufficient, and that a comprehensive strategy was required to address the viability of rural economies, including housing, health care, and education, amongst others.⁹⁹ Despite this acknowledgment, the recommendations in the relevant report are focused primarily on land reform.¹⁰⁰

The Commission has also directly addressed the racial disparities in land ownership in South Africa. For instance, in its submission to the Ad Hoc Parliamentary Committee to amend section 25 of the Constitution to allow for expropriation without compensation, the Commission noted that the 'existing economic structure ... is largely in the hands of a white minority', and that the skewed

92. Ngcukaitobi (n 88) 109–132. See also *Mwelase v Director-General for the Department of Rural Development and Land Reform* (2019) 6 SA 597 (Constitutional Court); *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) ch 3 <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf> ('Report of the High Level Panel').

93. *Ibid* 42.

94. With regard to compensation in the expropriation context, see Andre J van der Walt, *Constitutional Property Law* (Juta, 2011) 503–520; Bradley V Slade 'Towards a Clearer Understanding of the Difference between the Obligation to Pay Compensation and the Validity Requirements for an Expropriation' (2019) 33(1) *Speculum Juris* 1; *Report on the High Level Public Inquiry on the Impact of Rural Land Use Ownership Patterns on Human Rights* (2019) 26–27 ('Rural Land Inquiry Report').

95. Report of the High Level Panel (n 92) 258.

96. See, eg, South African Human Rights Commission, *Final Report on the Inquiry into Human Rights Violations in Farming Communities* (2003); South African Human Rights Commission, *Report on the Progress made in terms of Land Tenure Security, Safety and Labour Relations in Farming Communities since 2003* (2008).

97. Rural Land Inquiry Report (n 94).

98. *Ibid* 4–7.

99. *Ibid* 26.

100. *Ibid* 29–30.

property ownership patterns due to colonial and apartheid laws and policies laws have remained largely intact.¹⁰¹

It is thus clear that the Commission regards the land reform programme — particularly restitution and redistribution — of central importance to achieving substantive economic equality in South Africa.¹⁰² However, the Commission has made clear that it considers the poor implementation of relevant legislation to be the primary cause for the slow pace of land reform, rather than the actual provisions in section 25 of the Constitution relating to expropriation and compensation.¹⁰³ It has also emphasised that the land reform programme should include systemically disadvantaged groups such as women, First Nations and people living with disabilities; meaningful engagement with land reform beneficiaries; and the provision of sufficient post-distribution support.¹⁰⁴

The Commission's interventions in the sphere of land reform have sought to highlight how unequal access to land constitutes a critical structural driver of poverty and economic inequality in South Africa. However, it has not made specific recommendations on how land reform can help redress broader patterns of wealth and asset inequality in South Africa.¹⁰⁵

2 Housing and Basic Services. South Africa's apartheid history combined with the operation of the land and housing market has resulted in deep spatial patterns of unequal and inferior access to housing and basic services.¹⁰⁶ Almost 30 years since the end of legal apartheid, impoverished black people still tend to be concentrated in informal settlements or low-income housing on the peripheries of South Africa's towns and cities.¹⁰⁷ They also bear the brunt of insufficient and poor quality basic services such as water, electricity and sanitation.¹⁰⁸ The Commission has undertaken a range of investigations, research projects and policy submissions pertaining to housing and basic services.

In 2014, the Commission produced a seminal report synthesising its research, hearings and monitoring activities pertaining to the rights of access to sufficient water and sanitation.¹⁰⁹ It noted that a range of systemic problems facing local governments had a profound impact on municipalities' ability to deliver basic municipal services, particularly water and sanitation. These systemic governance failures had a disproportionate negative impact on vulnerable and marginalised groups, such as women and children.

101. South African Human Rights Commission, *Submission to the Joint Constitutional Review Committee regarding Section 25 of the Constitution* (2018) 3 ('Submission on Section 25'). See also: South African Human Rights Commission 'Research Brief on Race and Inequality' (2017) 15.

102. *Ibid* Submission on Section 25, 4.

103. *Ibid* 10.

104. *Ibid* 17–20.

105. Rural Land Inquiry Report (n 94) 26.

106. Margot Strauss 'A Historical Exposition of Spatial Injustice and Segregated Urban Settlement in South Africa' (2019) 25(2) *Fundamina* 135.

107. See *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others* [2021] 4 All SA 69 (High Court) [95]–[102].

108. Jackie Dugard, 'Urban Basic Services: Rights, Reality and Resistance' in Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi (eds), *Socio-Economic Rights in South Africa: Symbols or Substance?* (Cambridge University Press, 2014) 275.

109. South African Human Rights Commission, *Report on the Right to Access Sufficient Water and Decent Sanitation* (2014) 61.

This report was followed in 2015 with an investigative report on housing and municipal service delivery.¹¹⁰ The Commission emphasised that housing as a human right implied not only the provision of bricks and mortar structures, but also enabled access to other rights such as health and education, as well as economic opportunities.¹¹¹ It drew express linkages between poor service delivery to disadvantaged communities and its negative impact on ‘economic integration and ... the ability of families to maintain livelihoods’.¹¹² In its economic and social rights monitoring reports, it has noted the trend to locate housing developments for low-income communities on the outskirts of towns and cities.¹¹³

The Commission has directed several recommendations to state departments within all spheres of government that relate to creating an effective policy framework for emergency and temporary accommodation, low-income rental accommodation and the upgrading of informal settlements.¹¹⁴ It has also recommended that the relevant state departments put in place proper planning, monitoring and evaluation processes, particularly in relation to budgetary allocations for housing and related services.¹¹⁵ The Commission has also criticised failures in the implementation of government’s programme for the delivery of free basic services such as water, electricity and sanitation.¹¹⁶ It observed that government’s free basic services programme is vitally important for poverty alleviation, and has made a number of important recommendations for improving the implementation of this programme.¹¹⁷

Our analysis shows that the Commission is proactive in investigating, researching, and monitoring access to housing and basic services in South Africa. Its reports contain clear recommendations, and it also monitors the implementation of its own recommendations in certain instances.¹¹⁸ Through these investigative reports and the accompanying civil society, academic and media engagement, the Commission also helps educate the public on how the failure to provide basic rights, such as water and sanitation, ‘entrench[es] cycles of poverty and inequality’.¹¹⁹ However, its work in this sphere has tended to focus more on unequal access to specific socio-economic rights rather than directly on the patterns of economic inequality in South Africa.

This lack of direct attention to economic inequality as a human rights issue has been partially addressed through the Commission’s equality mandate, to which we turn next.

C Engaging with Economic Inequality through the Commission’s Equality Mandate

As noted in Part II, the State has enacted legislation to give effect to the constitutional right to equality and non-discrimination in section 9 of the *Constitution*. In terms of PEPUDA,¹²⁰ the Commission has specific powers and functions to assist complainants in instituting proceedings in

110. South African Human Rights Commission, *Investigative Hearing Report: Access to Housing, Local Governance and Service Delivery* (2015) (‘Housing Report 2015’) 7.

111. *Ibid.* 8.

112. *Ibid.* 16.

113. See, eg, South African Human Rights Commission, 7th Report on Economic and Social Rights, (2006–2009) 155.

114. Housing Report 2015 (n 110) 89–91.

115. *Ibid.* 93.

116. *Ibid.* 44–46.

117. *Ibid.* 50–51.

118. South African Human Rights Commission, *Water and Sanitation Research Brief: Monitoring the Implementation of the Commission’s Recommendations from its 2014 Report on Access to Water and Sanitation* (March 2018).

119. *Ibid.* 8.

120. PEPUDA (n 29).

an equality court, to investigate and to monitor the equality plans of government and the private sector to promote equality.¹²¹ However, these mandates are contained in the chapter of PEPUDA dealing with the positive duty of the State and non-State actors to promote equality.¹²² At the date of writing, this chapter had not yet been brought into operation. An Amendment Bill to PEPUDA¹²³ is currently before Parliament. Significant proposed amendments include expanding the definition of ‘equality’ to include the ‘equal right and access to resources, opportunities, benefits and advantages’.¹²⁴ In addition, amendments are proposed to the positive duties in chapter 5 aimed at lessening the administrative burdens on the State, public bodies and constitutional institutions.¹²⁵

However, despite the uncertain status of its mandate under PEPUDA, the Commission has engaged extensively with the right to equality and non-discrimination through its general constitutional and legislative mandates in terms of the SA Human Rights Commission Act. The *Equality Report of 2017/2018* (‘Equality Report’) represents the Commission’s most direct and comprehensive engagement with issues of economic inequality (‘vertical inequality’) in South Africa.¹²⁶ It noted that vertical economic inequality in South Africa was directly related to structural patterns of discrimination on grounds such as race, gender and disability. The reciprocal interlinkages between discrimination on specific grounds and economic inequality were explicitly recognised in the report.¹²⁷

The Equality Report documented the deepening of poverty in South Africa in recent years, and its disproportionate impact on groups subject to traditional grounds of unfair discrimination, including on the basis of race, gender, geographic location, age and disability status.¹²⁸ For example, it recorded that approximately 64 per cent of the Black African population and 40 per cent of the Coloured population were poor, compared to a mere 6 per cent of the Indian/Asian population group and just 1 per cent of the White population group.¹²⁹ The report also noted the extremely high levels of income and wealth inequality in South Africa amongst and within population groups and genders.¹³⁰ It observed that wealth equality was greater *within* the Black African population group than in comparison to any other racial group.¹³¹

In light of these trends, it concluded that there was an urgent need for ‘radical economic transformation’ to redress these patterns of poverty and inequality.¹³² It cautioned that the objective of radical transformation should be defined as substantive socio-economic equality, and

121. Ibid ss 25–28.

122. Ibid chapter 5.

123. Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill, B-2021 (‘PEPUDA Amendment Bill’).

124. Ibid s 1 (b).

125. Ibid ss 4–10.

126. South African Human Rights Commission, *Equality Report 2017/18 Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa* (2018) (‘Equality Report’).

127. Ibid 22.

128. Ibid 17.

129. Ibid.

130. Ibid 19–20. The report notes that in 2015, South Africa’s Gini co-efficient value for *income* inequality was 0.68. In relation to *wealth* inequality, the Commission cites research that shows that 10 per cent of South Africans own 90–95 per cent of all wealth in the country, and that the Gini co-efficient for wealth inequality in South Africa is ‘incredibly high at approximately 0.95%’ (citing A Orthofer *Wealth Inequality in South Africa: Insights from Survey and Tax Data* RED13x3 Working Paper 15 (2016) 23).

131. Ibid 20 (citing Orthofer).

132. Ibid 19–20.

transformation should be pursued through ‘rights-based (as opposed to purely economic or utilitarian) means’.¹³³ The report called for a ‘radical shift’ in government’s socio-economic policy from focussing exclusively on the bottom deciles of society to paying urgent attention ‘to redistributing extreme wealth accumulated by the very few at the top decile of society’.¹³⁴ It made a number of recommendations to advance this objective such as the adoption of redistributive fiscal policy choices, and avoiding regressive taxes such as increased Value-Added Tax.¹³⁵ It called upon the National Treasury to report to the Commission within 3 months of the release of the report on measures to increase tax revenue so as to advance substantive socio-economic equality, whilst minimising any detrimental impact on the rights of the poor.¹³⁶ It also recommended that the non-contributory social grant system be expanded to accommodate able-bodied, poor adults — including unemployed youth — who do not currently qualify for a specific social grant or social security.¹³⁷

Another key recommendation in the Equality Report was that the Employment Equity Act should be amended to target socio-economic need and disadvantage *within* the groups of black people, women and persons with disability.¹³⁸ These are the three ‘designated groups’ that the legislation requires employers to advance through affirmative action measures.¹³⁹ It also recommended the collection of data disaggregated by ethnic origin, language and disability, as well as by socio-economic indicators.¹⁴⁰ Other findings and recommendations related to the improved implementation of Broad-Based Black Economic Empowerment legislation and programmes; special measures specifically designed to promote substantive access to and equality in the higher education sector; improving equitable access to land and the need for the private sector to make a greater contribution to the transformation of the labour market and the economy more broadly.

The release of the Equality Report appears to have given the Commission greater confidence to engage with issues of economic inequality and the policy measures needed to redress it. After its release, the Commission submitted a parallel report¹⁴¹ to the UN Committee on Economic, Social and Cultural Rights (‘CESCR’) during the review of South Africa’s initial report under the International Covenant on Economic, Social and Cultural Rights.¹⁴² In this submission, it highlighted that South Africa’s gross wealth inequality was of ‘equal, if not greater concern’ to its income inequality levels. It requested the CESCR to recommend that the South African government take cognise of its recommendations in the Commission’s various annual Equality Reports, and in particularly the abovementioned Equality Report of 2017/18.

The Commission’s submission as well as strong civil society parallel reports focussing on issues of economic justice made a substantial contribution to the Concluding Observations (‘COBS’) eventually adopted by the CESCR. The COBS contained robust recommendations pertaining to

133. Ibid 20.

134. Ibid 26.

135. Ibid. 26–27.

136. Ibid 27.

137. Ibid.

138. Ibid 39. The definition of ‘designated groups’ is in s 1 of the *Employment Equity Act* (n 28).

139. Ibid ss 12–27.

140. Equality Report (n 126) 39.

141. SAHRC, *National Human Rights Institution Report regarding the South African Government’s Reply to the List of Issues*, Submitted to the United Nations Committee on Economic, Social and Cultural Rights for consideration at the 64th Session, 24 September–12 October 2018 (‘SA Human Rights Commission Parallel Report’).

142. International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

issues of resource mobilisation, fiscal policy and austerity measures in South Africa.¹⁴³ These COBS have in turn been extensively cited in media articles, civil society campaigns on budget justice, and critiques of the fiscal consolidation programme embarked upon by the government.¹⁴⁴ The Commission also submitted a parallel submission on the follow-up report of the South African Government in which it drew attention to the fact that government had not, as recommended by CESC, developed a composite index on the cost of living in order to benchmark social benefits consistent with the requirement to ensure an adequate standard of living to all.¹⁴⁵ It also submitted that government should adopt a rights-based composite costs of living index which is ‘capable of steering policy to address both poverty and inequality’.¹⁴⁶ Finally, it requested the CESC to recommend that the government adopt ‘a concrete, costed and time-bound plan for the urgent introduction of a UBIG [universal basic income grant]’.¹⁴⁷ In its assessment of South Africa’s follow-up report issued on 10 November 2021, the CESC assessed South Africa’s progress both on the composite index on cost of living and access to social assistance for adults between 18 and 59 years as ‘insufficient’.¹⁴⁸

In addition to research reports, the Commission also investigates complaints received regarding violations of the rights in the Bill of Rights, including the right to equality and socio-economic rights. Its *Annual Trends Analysis Report 2020–2021* noted that the right to equality and socio-economic rights (specifically access to healthcare services, food, water and social security) remained amongst the top five complaints of rights violations.¹⁴⁹ It also noted an increase in complaints during the national state of disaster during the Covid-19 pandemic related to labour relations, human dignity, education and housing. It highlighted the particularly severe aspect on children during this period due to the closure of schools, unequal access to transport and data and the suspension of school nutrition programmes.¹⁵⁰ In the context of complaints relating to the right to equality, the Commission recorded with ‘grave concern’ that discrimination on the grounds of race consistently remained the most prevalent complaint received.¹⁵¹ As noted in part II, PEPUDA makes it possible for complaints of unfair discrimination to be instituted on the ground of ‘socio-economic status’ or on an intersection of grounds (for example, gender and socio-economic status). However, the Commission’s analysis of equality complaints per ground of discrimination does not reveal any complaints received on the ground of socio-economic status — either alone or in combination with other grounds.¹⁵²

143. UN CESCR, *Concluding Observations on the Initial Report of South Africa* UN Doc E/C.12/ZAF/CO/1 (29 November 2018), [17]–[18].

144. See, eg, Mark Heywood ‘UN Finds that Austerity Measures Implemented in SA “May Further Worsen Inequalities”’ *Daily Maverick* (News Article, 19 February 2019) <<https://www.dailymaverick.co.za/article/2019-02-19-un-committee-finds-austerity-measures-implemented-in-sa-may-further-worsen-inequalities/>>; Sandra Liebenberg ‘Austerity in the Midst of a Pandemic: Pursuing Accountability through the Socio-economic Rights Doctrine of Non-retrogression’ (2021) 37(2) *South African Journal on Human Rights* 181.

145. South African Human Rights Commission, *Parallel Report to South Africa’s Responses to the Concluding Observations and Recommendations Follow-Up Procedure issued by the Committee on Economic, Social and Cultural Rights* (August 2021) [4].

146. *Ibid* [4.1]–[4.5].

147. *Ibid* [4.9]. See also SAHRC *Basic Income Grant Policy Brief* (March 2018).

148. UN CESCR, Letter to Permanent Mission of South Africa to the United Nations Office at Geneva and other international organisations in Switzerland, 10 November 2021, 2021-104/CESCR/FU.

149. South African Human Rights Commission, *Annual Trends Analysis Report 2020–2021*, 49–50.

150. *Ibid* 50.

151. *Ibid* 53–4.

152. *Ibid* 54–6.

The Commission's interventions in terms of its equality mandate demonstrates the role that NHRIs can play in applying a human rights lens to poverty and economic equality. The Commission's *Equality Report of 2017/2018* was well-researched and contained several targeted recommendations directed to some of the key structural determinants of poverty and inequality. It did not shy away from interrogating the government's social and economic policies. For example, it highlighted the role that fiscal policy could play in redressing economic inequality. Its interventions in this sphere were influential in the review of South Africa's initial report by the CESCR. These interventions also dovetailed with increased civil society and academic interest in South Africa on the relationship between economic policy and human rights. However, the lack of complaints received by the Commission on discrimination on the grounds of socio-economic disadvantage suggests that it could do more to educate the public on the potential of this ground to help redress poverty-related discrimination.¹⁵³

V Conclusions

Our analysis demonstrates that the Commission has engaged directly with issues of poverty in South Africa through its section 184(3) mandate as well as its investigatory hearings and reports, and the receipt of complaints related to socio-economic rights. It has also sought to identify the underlying structural causes of poverty and socio-economic disadvantage through its activities in the sphere of land reform, housing and related services. Finally, it has engaged directly with issues of economic inequality through its *Equality Report of 2017/2018* and its submissions to the UN CESCR.

The experience of the South African Human Rights Commission illustrates the potential of fourth branch institutions, especially NHRIs, to illuminate the human rights dimensions of poverty and inequality. They are well-placed through their monitoring and investigative mandates, to demonstrate how poverty and economic inequality undermines an array of human rights, and disproportionately affect groups who experience systemic discrimination and disadvantage. Through their outreach and educative work, such institutions can also play a valuable role in educating local communities on public finance and its influence on various social and economic rights. In this context, they can build the capacities of communities to participate in decision-making at various levels, but particularly in the sphere of local government. Finally, through their protective mandate, they can assist individuals and groups obtain redress for human rights violations, particularly in relation to socio-economic rights and the right to equality and non-discrimination. In the exercise of all these mandates, it is helpful to have a strong constitutional and normative framework to guide the work of the relevant national human rights institution. In this respect, the South African Human Rights Commission has the benefit of a strong constitutional normative framework, incorporating socio-economic rights and a strong commitment to substantive equality.

However, to intervene effectively in areas of social and economic policy, national human rights institutions need to develop a clear vision and strategic plan. As we have demonstrated, the Commission has been unable to sustain its initial efforts to monitor and assess, on a regular and comprehensive basis, the realisation of socio-economic rights in terms of its section 184(3) constitutional mandate.¹⁵⁴ This is attributable at least partially to a clear vision and sustainable plan to implement this mandate.

153. See Report of the UN Special Rapporteur on extreme poverty and human rights, Olivier De Schutter, *Banning discrimination on grounds of socioeconomic disadvantage: an essential tool in the fight against poverty* UN doc. A/77/157 (13 July 2022).

154. Part IVA above.

Moreover, as the experience of the South African Human Rights Commission illustrates, most of NHRI's interventions in areas of poverty and economic inequality will be in the form of non-binding policy and legislative recommendations arising from their monitoring, research, and investigative mandates. As Murray argues, the effectiveness of the legally non-binding interventions of NHRIs will depend on the extent of their legitimacy in the eyes of government and the broader public.¹⁵⁵ This legitimacy requires building a collaborative network of relationships with government, legislatures, communities, civil society organisations and other statutory or constitutional bodies.¹⁵⁶

Particularly when seeking to intervene in areas of social and economic policy, NHRIs are likely to face resistance by powerful public and private decision-makers who regard economic policy as beyond the remit of a human rights institution. In this context, it is vital that their reports and recommendations are grounded in credible research methodologies and are of a high quality. This will in turn require the employment of a staff complement with multi-disciplinary expertise in social policy, statistics and economics alongside traditional human rights competencies. A sound media and communications strategy will also be required to build public understanding and acceptance of the NHRI's role in this sphere.¹⁵⁷ NHRIs may have relatively more success in engaging with questions of unequal access to socio-economic rights linked to traditional grounds of discrimination such as race, gender, and disabilities. However, as emerging scholarship is demonstrating, discrimination on the grounds of socio-economic status and vertical economic inequality has significant human rights implications.¹⁵⁸ It is thus imperative that NHRIs are accorded adequate human and financial resources to build their capabilities in this vital area.

This analysis of the work of South African Human Rights Commission has illustrated the variety of ways in which NHRIs can engage with issues of poverty and economic inequality. The Commission's work has undoubtedly contributed to framing poverty and economic inequality as critical human rights issues in South Africa. However, much work remains to be done in developing effective human rights-based strategies to address some of the key structural drivers of poverty and economic inequality in South Africa.

ORCID iDs

Sandra Liebenberg  <https://orcid.org/0000-0001-7432-2131>

Bradley Slade  <https://orcid.org/0000-0001-8855-1269>

155. Murray (n 53) 211.

156. Ibid 211–15.

157. Ibid 218–19.

158. See, eg, Basson (n 34); Rosalind Dixon and Julie Suk, 'Liberal Constitutionalism and Economic Inequality' (2018) 85 *The University of Chicago Law Review* 369; and Gillian MacNaughton, Diane F Frey and Catherine Porter (eds) *Human Rights and Economic Inequalities* (Cambridge University Press, 2021).