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“SDG 1 and the Rule of Law”

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SDG 1 and the Rule of Law

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I. “Ending poverty in all its forms everywhere” – What can social protection contribute to reaching SDG 1?

It is no coincidence that the eradication of extreme poverty is still on the top of the list of the goals on which the United Nations have agreed in September 2015. Although, at least on a global scale, the first Millennium Development Goal (MDG 1) which aimed at halving the proportion of people living in extreme poverty has been achieved, the number of people falling under this category is still far too high: The World Bank assumes that in 2012 approximately 897 million people (13 % of the world’s population) lived on less than \$1.90 a day, mainly in South Asia (34,5 % of the total population) and in Sub-Saharan Africa (43,4 %).¹ Therefore the United Nations formulated a new, very ambitious poverty reduction schedule which is now part of the *2030 Agenda for Sustainable Development*: Sustainable Development Goal 1 stipulates that extreme poverty shall be completely eradicated within the next 15 years (SDG 1.1). In this way the United Nations responded to a general point of criticism concerning the MDG-concept which has been voiced mainly from a human rights perspective: Even in the (from the outset unlikely) case that all MDG targets would have been achieved, only a part of the human population would have been enabled to actually enjoy the human rights corresponding with the respective MDGs.² Or, to put it differently: According to the approach of the MDGs, it has been taken into account *ex ante* that in the case of the successful meeting of targets, basic human rights (such as the rights to food, to health or to housing) are still being infringed on countless occasions. In this regard, MDG 1 (“reducing by half the proportion of people living in extreme poverty”) is the most distinctive example: The target has been considered to be reached, even though nearly one billion people still live in extreme poverty.

¹ World Bank Group, *World Development Indicators 2016* (Washington DC: World Bank, 2016), p. 59.

² On that and on further points of critique cf. Ph. Alston, *Ships Passing in the Night. The Current State of the Human Rights and Development Debate seen through the lens of the Millennium Development Goals*, 25 *Human Rights Quarterly* (2005), 755, at 762 *et seq*; M. Engelhardt, *The Millennium Development Goals and Human Rights at 2010 – An Account of the Millennium Summit Outcome*, 2 *Goettingen Journal of International Law* (2010), 1129, at 1135. See for a detailed discussion of the relationship between human rights and the MDGs P. J. Nelson, *Human Rights, the Millennium Development Goals, and the Future of Development Cooperation*, 35 *World Development* (2007), 2041, and the articles in M. Langford, A. Sumner & A. E. Yamin (eds.), *The Millennium Development Goals and Human Rights: Past, Present and Future* (Cambridge: Cambridge University Press 2013).

Therefore in a joint statement the Special Procedure Mandate Holders of the Human Rights Council had urged the international community to formulate a new development agenda which has “human rights for all at its heart” and which first and foremost aims at eliminating inequalities and the “huge deficits and disparities in the enjoyment of human rights around the globe”.³ Magdalena Sepúlveda who was the United Nations Special Rapporteur on extreme poverty and human rights until June 2014 has used even stronger words. In her view human rights – despite their importance for improving the lives of people living in poverty – have not been adequately reflected in the MDGs; and more than that, the “existing legal obligations and norms have been largely overlooked in current development policy”.⁴ She therefore advocated a post-2015 development agenda which is underpinned by and premised on human rights. Above all, reducing inequality in the enjoyment of rights should be a central and cross-cutting goal of the new agenda. Moreover, she encouraged states to ensure that both social protection and access to justice is given the adequate recognition and prioritization in the successor document to the MDG-Declaration.

Obviously, the authors of the 2030 Agenda have taken these criticisms to heart. The new document contains a separate goal which deals exclusively with the global problem of increasing inequality both within and among countries (SDG 10); access to justice is part of SDG 16 and social protection is even addressed in four out of the 169 targets (SDGs 1.3, 3.8, 5.4 and 10.4). But what is most important from the human rights perspective: The goals are now formulated in such a way that the requirement “Leave no one behind” – which has been the central message of the report of the *High-Level Panel of Eminent Persons on the Post-2015 Development Agenda* (HLP)⁵ – is recognized as a cross-cutting objective of the new agenda. This becomes particularly apparent if one looks at the SDGs 1-6 whose content is closely linked to the catalogue of universally accepted social rights.⁶ As a general rule it can be stated that the SDGs can be regarded as a considerable progress compared to the MDGs, as they accept inclusivity as a key-concept of the development process⁷ and, as a result, reflect – much more than its predecessors – the need to invest more holistically and comprehensively in the social sector to address the challenges of poverty and social exclusion.⁸

³ Submission by Special Procedure Mandate Holders of the Human Rights Council to the President of the General Assembly's Special Event “Towards achieving the millennium development goals”, of 25.09.2013, available at: <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13845&LangID=E>>.

⁴ Submission by the UN Special Rapporteur on extreme poverty and human rights, *The Post-2015 Development Agenda: Prioritising people living in poverty through goals on inequalities, social protection and access to justice*, of 23.04.2013; available at: <<http://www.ohchr.org/Documents/Issues/EPoverty/Post205SubmissionSR23April2013.pdf>>.

⁵ High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, *A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development* (New York: United Nations Publications, 2013).

⁶ The most important examples are SDGs 1.1 (By 2030, eradicate extreme poverty for all people everywhere ...), 1.4 (By 2030, ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services ...), 2.1 (By 2030, end hunger and ensure access by all people, in particular the poor and people in vulnerable situations, including infants, to safe, nutritious and sufficient food all year round), 2.2 (By 2030, end all forms of malnutrition ...), 3.2 (By 2030, end preventable deaths of newborns and children under 5 years of age ...), 3.3 (By 2030, end the epidemics of AIDS, tuberculosis, malaria and neglected tropical diseases ...), 3.8 (Achieve universal health coverage, including financial risk protection, access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines and vaccines for all), 4.1 (By 2030, ensure that all girls and boys complete free, equitable and quality primary and secondary education ...), 5.1 (End all forms of discrimination against all women and girls everywhere) and 6.1 (By 2030, achieve universal and equitable access to safe and affordable drinking water for all).

⁷ See also Overseas Development Institute, *Projecting progress. Reaching the SDGs by 2030* (London: ODI, 2015), pp. 12, 43.

⁸ K. Hujo & G. Koehler, *The Sustainable Development Agenda. From Inspiration to Action*, UNRISD Brief 06, September 2006.

Poverty is a multidimensional phenomenon, and there are a multitude of approaches which have already been adopted or which are discussed to address this challenge.⁹ Today there is, however, a broad consensus that besides economic growth and investments in human development (in particular in education and health) social protection is one of the core ingredients of any poverty reduction strategy, as it protects the extremely poor from destitution and the vulnerable against risks which have serious consequences for their well-being (external shocks, e.g. localized droughts, floods, or commodity price volatility, as well as individual risks, such as illness or joblessness).¹⁰ But there is not only strong evidence that social protection policies significantly reduce the prevalence of poverty, they also contribute to improving social cohesion and – by securing household incomes and pushing up private consumption – to increasing productivity. This is the reason why social protection now is explicitly mentioned in the 2030 Agenda, too: According to SDG 1.3 states shall “(i)mplement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable”. In this context also SDG 3.8 is worth mentioning which says that governments should “Achieve universal health coverage, including financial risk protection (...) for all”, furthermore SDGs 5.4 and 10.4, which emphasize the importance of social protection policies in achieving gender justice and more social equality.

In recent years, a number of emerging countries have made remarkable progress on combating extreme poverty by developing and expanding their social protection systems. The examples most frequently mentioned in this context are Mexico and Brazil with their famous cash transfer programs (*Oportunidades* and *Bolsa Família*). Another example is Thailand, which has increased the proportion of the population with access to basic health services from 40 % to 95 % in recent years. Last but not least, China should be mentioned, with its impressive success in rolling out retirement pension provision nationwide. However, these impressive achievements should not obscure our view of the wider global situation. The figures compiled by the ILO in its *World Social Protection Report 2014/15* show, that in many regions of the world, the vast majority of people still have to cope without such protection.¹¹ Indeed, around 73 % of the world’s population is forced to live without adequate social protection coverage. Just 48 % of all people over retirement age receive a regular pension. Furthermore these pension levels are often not adequate. Only 12 % of jobless workers worldwide receive unemployment benefits. For basic health care, the situation is even worse: the figures show that across low-income countries, more than 90 % of the population remains without any right to access essential health care.

⁹ For an overview see e.g. St. C. Smith, *Ending Global Poverty: A Guide to What Works* (Basingstoke: Palgrave Macmillan, 2005); J. Sachs, *The End of Poverty: Economic Possibilities for Our Time* (New York: Penguin Press, 2005); P. Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It* (Oxford: Oxford University Press, 2007); A. V. Banerjee & E. Duflo, *Poor Economics. A Radical Re-thinking of the Way to Fight Global Poverty* (New York: PublicAffairs, 2011); D. Hulme, *Global Poverty: Global governance and poor people in the Post-2015 Era* (2nd ed., Abingdon: Routledge 2015).

¹⁰ M. Cruz, J. Foster, B. Quillin & Ph. Schellekens, *Ending Extreme Poverty and Sharing Prosperity: Progress and Policies*, World Bank Group Policy Research Note 2015/03, 1, 66. See also the Report of the Special Rapporteur on extreme poverty and human rights to the UN General Assembly of 11.08.2014, A/69/297, para. 2: “Implementation of the right to social protection through the adoption by all States of social protection floors is by far the most promising human rights-inspired approach to the global elimination of extreme poverty. In essence, those floors are guarantees of basic income security and access to essential social services for the whole population. No other operational concept has anything like the same potential to ensure that the poorest 15 to 20 per cent of the world’s people enjoy at least minimum levels of economic, social and cultural rights.”

¹¹ International Labour Office, *World Social Protection Report 2014/15: Building economic recovery, inclusive development and social justice* (ILO 2014).

This article will focus on the question of what role the rule of law – particularly social protection law – has (or could have) in the fight against extreme poverty. First an introduction to the content of the right to social security and to the rights-based approach to social protection will be given (II. 1.- 2.). This will be followed by a short analysis of the specific problems which arise with regard to the implementation of this basic human right (II.3).

II. The role of social protection law in the legal systems of low- and middle-income countries¹²

1. Social protection in constitutional law and international law

If we look for a legal answer to the global challenge of extreme poverty then social protection law – and in particular the human right to social security – deserves special attention. The right to social security¹³ is explicitly guaranteed by numerous constitutions of the world. The wording used varies in scope and level of detail:¹⁴ Some provisions are quite concise and do not contain more than simply the statement that every person or citizen has the right to social security, whereas other constitutions – particularly those of some Central and South American countries¹⁵ – contain more detailed versions. In quite a lot of countries one can find provisions which classify social protection as a constitutional objective, directive or guiding principle of state policy, either in addition to the individual right of citizens to social security or social assistance¹⁶ or as sole provision on social protection issues.¹⁷ It is not unusual for such constitutions also to include an indication that this objective is subject to the availability of the necessary financial resources. Some Constitutions impose a duty on the State to realize the right to social security, but do not include a corresponding individual right which could be

¹² Ch. II. 1 and 2 are largely based on M. Kaltenborn, ‘The Human Rights-Based Approach to Social Protection’, in: K. Bender et al (eds.), *Social Protection in Developing Countries. Reforming Systems* (Abingdon: Routledge, 2013) pp. 53–62; id., *Social Rights and International Development – Global Legal Standards for the Post-2015 Development Agenda* (Heidelberg: Springer, 2015), pp. 32 *et seq.*, 82 *et seq.*, 95 *et seq.*

¹³ See generally on the right to social security M. Scheinin, ‘The Right To Social Security’, in A. Eide et al (eds.), *Economic, social and cultural rights. A textbook* (2nd ed., Leiden: Nijhoff, 2001), p. 211; L. Lamarche, ‘Social security as a human right’, in D. Brand & S. Russell (eds.), *Core obligations: Building a framework for economic, social and cultural rights* (Antwerp: Intersentia, 2002) p. 89; E. Riedel (ed.), *Social Security as a Human Right. Drafting a General Comment on Article 9 ICESCR - Some Challenges* (Heidelberg: Springer, 2007); M. Windfuhr, *Armut, soziale Menschenrechte und das Recht auf soziale Sicherheit*, 2 *Zeitschrift für Menschenrechte* (2008), 81; A. Nussberger, ‘Right to social security, International protection’, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2009), available at: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e987?rskey=dDbnLN&result=1&prd=EPIL>>; L. Scruggs et al, ‘Implementation of the Human Right to Social Security around the World. A Preliminary Analysis of National Social Protections Laws’, in L. Minkler (ed.), *The State of Economic and Social Human Rights. A Global Overview* (Cambridge: Cambridge University Press, 2013), p. 117; M. Krennerich, *Social Security – Just as much a Human Right in Developing Countries and Emerging Markets*, 47 *Verfassung und Recht in Übersee* (2014), 105.

¹⁴ International Labour Office, *Social security and the rule of law. General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization*, Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution). Report III (Part 1B). Doc. ILC.100/III/1B. (ILO 2011), para. 236 *et seq.*

¹⁵ For instance Bolivia, Brazil, Chile, Colombia, Ecuador and Mexico.

¹⁶ Examples for this approach are Cambodia, China, Colombia, Egypt, El Salvador, Honduras, Indonesia, Kenya, Mexico, Nepal, Nicaragua, Panama, South Africa, Venezuela, Vietnam and Zimbabwe.

¹⁷ For instance Cuba, Gambia, Ghana, India, Morocco, Namibia, Pakistan, Philippines, Sri Lanka, Swaziland, Uganda and Tanzania.

enforced before the courts. The Constitution of Tanzania (1977, rev. 1995) is a good example for such an approach: On the one hand, according to Art. 11 (1), “(t)he state authority shall make appropriate provisions for the realization of a person’s right to ... social welfare at times of old age, sickness or disability and in other cases of incapacity” and as stipulated in Art. 7(2), it is “the duty and responsibility of the Government, all its organs and all persons or authorities exercising executive, legislative or judicial functions to take cognizance of, observe and apply” this provision. But, on the other hand, Art. 7 (2) states that the provisions of this part of the Constitution are “not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law or judgment complies with the provisions of this Part of this Chapter.”¹⁸

Such constitutional guarantees can provide – regardless of their concrete design and their legal enforceability – an important tool in the development of a social protection system for both state actors and civil society. Constitutional mandates can be used by government when dealing with Parliament or with civil society actors, as they provide powerful grounds for argument when initiating new programs or keeping certain reform processes on track. Conversely, Parliament can also cite these constitutional guarantees in demanding action from the government. The establishment of the right to social security in the Constitution is, however, even more important for the right-holders (and potential claimants). They can – often with the assistance of NGOs, trade unions, or the media – invoke their constitutionally guaranteed rights in cases where those are not sufficiently met by the government and administrative authorities. Thus, constitutionally guaranteed social protection rights may provide an important basis for argument in negotiations on the redesign of certain programs, as well as in complaints about a lack of implementation of these programs.

Still, even those states without any explicit reference to the right to social security in their constitutions are obliged to adopt social protection policies since the right to social security has found general recognition in international law. As one of the basic social human rights, it is, *inter alia*, included in the *Universal Declaration of Human Rights* of 1948 (Art. 22), and – as binding treaty law – in the *International Covenant on Economic, Social and Cultural Rights* of 1966 (ICESCR¹⁹, Art. 9). Moreover, the treaty law of the ILO is an important source of international social protection law. In particular, the *Social Security (Minimum Standards) Convention No. 102* of 1952²⁰ entails detailed requirements in this regard by setting up a minimum percentage of persons covered by the social protection schemes, a minimum level and duration of benefits and a maximum qualifying period for the entitlement to benefits. Although it contains wide margins of flexibility (it e.g. allows the Member States to gradually attain universal coverage), the obligations overall arising from ratification of the Convention are quite extensive, with the result that only a rather small number of States – so far 53 countries, among them the industrialized nations in particular – have yet agreed to undergo monitoring of these social standards by the supervisory institutions of the ILO.

For the countries in the Global South the ICESCR is of much greater significance, as nearly all member states of the UN are meanwhile parties to this fundamental human rights treaty.²¹

¹⁸ A similar structure with regard to the right to social security is used in Art. 8 (2), 15 (d) of the Constitution of Bangladesh (1972, reinst. 1986, rev. 2014).

¹⁹ 993 UNTS 3.

²⁰ Convention No. 102, 210 UNTS 131; cf. also A. Nussberger, ‘Evaluating the ILO’s Approach to Standard-Setting and Monitoring in the Field of Social Security’, in E. Riedel (ed.), *Social Security as a Human Right. Drafting a General Comment on Article 9 ICESCR—Some Challenges* (Heidelberg: Springer, 2007), pp. 103, 108.

²¹ 164 state parties and 6 signatory states (as of July 2016), see <<http://indicators.ohchr.org/>>.

Therefore, besides the obligations resulting from regional human rights law²² or from other globally relevant human rights conventions²³, the provisions of the ICESCR provide the main source of social rights obligations for these countries. However, in contrast to the other social rights enshrined in the Covenant, the provision on the right to social security in Article 9 of the ICESCR is rather brief: “*The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.*” Further guidance on the potential consequences of this obligation is provided by *General Comment No. 19*, which was issued by the Committee on Economic, Social and Cultural Rights (CESCR) in 2008.²⁴ Although the General Comments of this Committee do not have direct legal effect, their importance should not be underestimated: So far they represent the most important source for the interpretation of the Covenant and are therefore commonly used in the academic literature as a starting point for continuing analysis.²⁵ *General Comment No. 19* highlights first that the open wording of Art. 9 ICESCR suggests a broad interpretation of the term “social security”. Measures potentially covered by this term include contributory or insurance-based schemes (such as social insurance), non-contributory schemes (such as universal or targeted social assistance [cash-transfer] schemes) as well as other forms of social security, including privately run schemes, self-help measures and community-based or mutual schemes.²⁶ In the following, the *General Comment* enumerates and elaborates on the single branches of social protection included in the norm. According to paras 12–21, the following sectors are covered: health care, sickness (cash benefits provided to those incapable of working due to ill-health), old age (social security schemes providing benefits to older persons), unemployment and employment injury, family and child support, paid maternity leave, income support to persons with disabilities, as well as benefits to survivors and orphans.

In order to substantiate the individual statutory obligations of the states arising from the right to social security, the authors of the *General Comment* adopt earlier works of the Committee on other social rights by distinguishing three different levels of obligations: the *obligations to respect, to protect and to fulfil*. *Obligation to respect* means, that individuals may not be impeded in their endeavors, that no barriers may be erected hindering their access to activities protected by an economic or social right. The *obligation to protect* means, that measures must be taken to ensure, that third parties do not prevent individuals from enjoying the rights of which they are holders. And under the *obligation to fulfill* it is compulsory for the states to

²² Art. 9 Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights of 1969 (OAS Treaty Series No. 69); Art. 30 Arab Charter on Human Rights of 2002 (International Human Rights Reports 12 [2005], p. 893); Art. 13 f) Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa of 2003 (OAU Doc. CAB/LEG/66.6). The African Charter on Human and Peoples’ Rights from 1981 (1520 UNTS 217) does not explicitly guarantee the right to social security. Art. 30 of the ASEAN Human Rights Declaration of 2012 (see <<http://aichr.org/documents/>>) has merely the status of soft law.

²³ The right to social protection can be found e.g. in Art. 11(1)e, 14(2)c Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1249 UNTS 13), Art. 26 Convention on the Rights of the Child (CRC, 1577 UNTS 3), Art. 27 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW, 2220 UNTS 3) and Art. 28(2) Convention on the Rights of Persons with Disabilities (CRPD, 2515 UNTS 3).

²⁴ Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19 on the right to social security (Article 9) of 4.2.2008, E/C.12/GC/19.

²⁵ Cf. Ch. Tomuschat, *Human Rights. Between idealism and realism* (2nd ed., Oxford: Oxford University Press, 2010), p. 190; E. Riedel, ‘Committee on Economic, Social and Cultural Rights (CESCR)’, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2010), paras 11–14, available at: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e765?rskey=KujFyG&result=1&prd=EPIL>>.

²⁶ CESCR, General Comment No. 19 on the right to social security (Article 9) of 4.2.2008, E/C.12/GC/19, paras 4, 5.

take steps with a view to actually providing individuals with the benefits, which the right concerned embodies. Regarding the development of social protection systems, the latter level of obligations – the *obligation to fulfill* – is of special significance as it requires the states

“to adopt the necessary measures, including the implementation of a social security scheme, directed towards the full realization of the right to social security” (para. 47).

Like other social rights guaranteed in the ICESCR, the right to social security is qualified by the *principle of progressive realisation* as mentioned in Art. 2 para. 1 ICESCR. Accordingly, each state party is obliged

“to take steps, individually and through international assistance and co-operation, ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means ...”

Thus, one can distinguish in the field of social human rights between those states that, due to their economic strength, are already able to guarantee their citizens the required protection, and those that are not (yet) able to do so. This distinction is also emphasised in *General Comment No. 19* on the right to social security (in para. 4, 66). However, this does not mean that the government of a poorer state may absolve itself from any responsibility: Firstly, there is an explicit obligation to undertake at least preliminary steps towards a progressive realisation of social rights. Since states have to exhaust *all* resources available to them, they are not allowed to pursue national economic or social policies which do not have as a priority the adoption or maintenance of measures aiming to reduce poverty and to contribute to the implementation of social rights – such policies appear unlikely to be justifiable. Secondly, the CESCR highlighted in its *General Comment No. 3*

“that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.”²⁷

General Comment No. 19 also refers to this concept of minimum core obligations. The states parties have to

“ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education” (para. 59a).

In addition, states have to adopt a national social security strategy and a related national plan of action (para. 59d). According to the views of the CESCR, each state – irrespective of its economic possibilities – is required to fulfil at least these minimum core obligations in the field of social security.

Apart from the hard law obligations states have entered into under the ICESCR (or other human rights treaties) there are also several soft law requirements which have to be taken into account in this context. Probably the most important document in this regard is the *Social Protection Floors Recommendation* (SPF-Recommendation), which has been adopted by the ILO in June 2012.²⁸ In response to the global economic and financial crisis of 2008, the ILO – in conjunction with the World Health Organization (WHO) – had launched the so-called *Social Protection Floor Initiative*. Various reports have been written, which identified the difficulties faced by many developing countries and emerging economies in providing social protection, especially for informal sector workers and vulnerable social groups. On the basis of these reports the General Conference of the ILO adopted the *SPF-Recommendation*. According to this document, which received almost unanimous support both from the developed

²⁷ CESCR, General Comment No. 3 on the nature of States parties obligations (Article 2, par.1) of 14.12.1990, E/1991/23.

²⁸ Recommendation concerning National Floors of Social Protection (SPF Recommendation), ILO Recommendation 102.

countries and from the governments of the Global South, ILO members are urged, as a first step, to establish basic social security guarantees, including access to essential health care and basic income security for all residents of their countries (this is what is meant by the term “social protection floor”). Moreover, as a second step, they have to extend these basic social security guarantees into more comprehensive strategies. The Recommendation does not specify how these systems are to be structured. It is a matter for states themselves to decide which policy approach they wish to adopt. Possible options include health and pension insurance schemes funded from contributions, based on Bismarck’s social insurance model, or state-funded basic social insurance programs which we know from UK’s Beveridge model. In some countries, even a combination of the two models can be found. Public employment programs, private protection schemes and new formats such as micro-insurance may also have a role to play.

The *SPF-Recommendation* has been endorsed by various other international organizations, for instance UNICEF, UNDP and the Food and Agriculture Organization (FAO), as well as by the G20 heads of government and the European Union. Recently, the ILO also launched a joint initiative with the World Bank²⁹, whose social policy engagement until then had mainly been confined to selected and time-limited assistance programs (so called social safety nets). This Initiative sends a clear signal that organizations, which had previously held quite divergent positions on global social policy issues, are now increasingly willing to work together on developing long-term poverty reduction solutions. The explicit reference to the Social Protection Floor-approach in the 2030 Agenda (SDG 1.3 calls for the adoption of “social protection systems ..., including floors”) might constitute another significant step towards the realization of global social security.

2. Poverty alleviation and the rule of law – a rights-based approach to social protection

In the practice of development cooperation, linking poverty reduction programs with social rights – such as the right to social security – is achieved mainly by so-called “Rights-based Approaches to Development”.³⁰ In its policy paper of 2003, the UN Development Group (UNDG) summarized the central human rights principles which are to be followed by the different UN organizations when conceptualizing and implementing their programs and projects.³¹ Besides the *principles of universality* and *inalienability of human rights*, special emphasis is laid on their *indivisibility* and *inter-dependence*: Indeed, the realization of one right often hinges on the implementation of another – this applies to political and social rights

²⁹ <http://www.ilo.org/global/topics/social-security/WCMS_378991/lang--en/index.htm>.

³⁰ Cf., *inter alia*, F. Reyntjens, ‘The growing role of human rights in development cooperation’, in D. Van Den Bulcke (ed.), *Recent trends in international development* (Antwerp: College for Developing Countries, 1988), p. 143; P. Gready & J. Ensor (eds.), *Reinventing Development? Translating Rights-based Approaches from Theory into Practice* (London: Zed Books, 2005); S. Seppänen, *Possibilities and Challenges of the Human Rights-Based Approach to Development*, 17 The Erik Castrén Institute Research Reports (2005); S. Hickey & D. Mitlin (eds.), *Rights-Based Approaches to Development: Exploring the Potential and Pitfalls* (Sterling VA: Kumarian Press, 2009); V. Gauri & S. Gloppen, *Human Rights Based Approaches to Development. Concepts, Evidence, and Policy*, World Bank Policy Research Working Paper 5938 (2012); W. Vandenhole, ‘Overcoming the promotion-protection dichotomy: human rights-based approaches to development and organizational change within the UN at country level’, in P. Gready & W. Vandenhole (eds.), *Human Rights and Development in the New Millennium* (Abingdon: Routledge, 2014), p. 109. For detailed information on the rights based approach to development cooperation see also <http://hrbaportal.org/>.

³¹ United Nations Development Group, *The Human Rights Based Approach to Development Cooperation. Towards a Common Understanding Among UN Agencies*, 2003, available at: <<http://hrbaportal.org/the-un-and-hrba>>.

alike, as illustrated by the example given by the UNDG: In certain cases the realization of the right to health depends on effective realization of the right to education or the right to access to information. *Equality* and *non-discrimination* are further principles to be followed as cross-organizational and cross-sector guidelines for UN development cooperation.

The *principles of participation*³² and *accountability*³³ are of particular importance for rights-based development policies. According to the *principle of participation*, all persons affected, in particular the poorest, most marginalized and vulnerable groups of society, shall be empowered to articulate their interests and expectations towards state agencies or development agencies operating in the countries respectively, and to contribute to the decision-making processes. This requires not only the largest-possible extent of transparency during all stages of program implementation, but also financial and technical assistance to the relevant local civil society groups.³⁴ Moreover, proponents of a rights-based approach consider the judicial implementation of social rights – as reflected in the *principle of accountability* (or *justiciability*) which is a core element of the concept of the “rule of law”³⁵ – equally important: It is pivotal to enable rights-holders (in particular the poorest groups of society in the case of social rights) to claim their rights before independent control bodies such as national courts, and to enforce them eventually.³⁶ First, this requires adequate information for rights-holders about the scope of their rights and existing control mechanisms – which is an issue that is again closely connected to the claim for assistance to local civil society groups. Then, it requires strengthening of central and local control mechanisms: Control does not need to be exercised necessarily through court structures replicating the Western model. Instead, quasi-judicial, administrative or informal-traditional control mechanisms can be used, provided effective implementation of social rights is not hampered by these structures. National human rights institutions can support this process by taking over a monitoring function. Finally, the legal obligations to be respected by either public authorities or – in the case of privatization of social services – respective enterprises and NGOs have to be formulated in a clear and detailed manner in national legislation. This is a further prerequisite for giving rights-holders the possibility to claim their rights effectively.

If development-related reform programs are implemented with regard to these principles, it will become evident that a rights-based approach can indeed provide significant value added in comparison to a development cooperation design which lacks such a conceptual focus.³⁷ However, it cannot be excluded that practical problems arise: For instance, if a state disposes of very limited resources, it might decide to allocate them to the implementation of only one particular social right to the detriment of other social rights. Since all human rights are indivisible and therefore equal, the rights-based approach fails to provide answers to these con-

³² B. Hamm, *A Human Rights Approach to Development*, 23 *Human Rights Quarterly* (2001), 1005, at 1018.

³³ H.-O. Sano, ‘Does Human-Rights Based Development make a Difference?’, in M. E. Salomon, A. Tostensen & W. Vandenhoele (eds.), *Castling the Net Wider: Human Rights, Development and New Duty Bearers* (Antwerp: Intersentia, 2007), pp. 63, 72.

³⁴ Office of the High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-based Approach to Development Cooperation* (New York: United Nations, 2006), p. 26, available at: <<http://www.ohchr.org/Documents/Publications/FAQen.pdf>>.

³⁵ See e.g. Y. Hasebe & C. Pinelli, Constitutions, in: M. Tushnet, Th. Fleiner & Ch. Saunders (eds.), *Routledge Handbook of Constitutional Law* (Abingdon: Routledge, 2013), p. 9, p. 14 et seq.

³⁶ *Ibid.*, 24.

³⁷ M. Robinson, ‘What Rights Can Add to Good Development Practice’, in Ph. Alston & M. Robinson (eds.), *Human Rights and Development. Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2005) 25, 37; Sano (*supra* note 33) 63, 68; R. Archer, ‘Linking Rights and Development: Some Critical Challenges’, in S. Hickey & D. Mitlin (eds.), *Rights-Based Approaches to Development: Exploring the Potential and Pitfalls* (Sterling VA: Kumarian Press, 2009), pp. 21, 26.

flict situations.³⁸ Further difficulties occur when judicial systems (courts, enforcement bodies, lawyers) in particular countries are still too weak to guarantee an effective implementation of social rights.³⁹ Altogether, rights-based approaches certainly have important contributions to make to (reform) programs in development politics, because they both provide additional legal support to their political legitimacy and assign specific, at best even justiciable, rights and obligations to the stakeholders of development processes. However, rights-based approaches are not suitable to replace the “fine-tuning” of the set-up and implementation of political programs: The human rights system provides merely a framework, both on international and national level – on the one hand, by setting legal boundaries to be respected in all political decision making processes (including reform processes), and on the other hand, by stipulating legal principles and instruments supporting the realization of political programs and providing assistance to the respective persons concerned to directly improve their individual living conditions.

The basic ideas of the concepts that were developed in international development cooperation with regard to a rights-based approach are transferable to the implementation of new social protection schemes (or the reform of already existing schemes) in emerging economies and developing countries. In contrast to other social rights, the right to social security generally requires the development of larger and long-lasting organizational structures: Old age and health insurance schemes as well as country-wide social assistance programs call for a comparably high degree of institutionalization and need adequately trained staff for their administration. However, the complexity, significant for institutions of social protection, should not be held as an excuse to deprive affected citizens of their right to participation. To the contrary, a rights-based approach implies the guarantee of a high degree of participation on all national levels of implementation that are relevant for the right to social security – from the legislative process to concrete program design (generally done at the ministerial level) up to the onsite application to the individual case. It is therefore necessary to have in place, from a legal perspective, sufficiently structured access to information and participation.⁴⁰ These structures should be open to interested civil society actors, such as political parties, trade unions, NGOs, as well as to citizens concerned with the handling of their individual case.

From a human rights perspective, the adoption of appropriate accountability mechanisms is equally important for the implementation of the right to social security:⁴¹ In order to detect and remove inadequate or defective implementation of social protection schemes, monitoring mechanisms need to be established that are transparent to civil society.⁴² Moreover, there need to be clear rules and functioning institutions that enable individuals to claim their rights. It is noteworthy that this does not only apply to the substantive entitlements in the respective social protection programs, but also to participation and other procedural rights – an issue often overlooked. The *SPF-Recommendation* provides a concise understanding of the qualitative requirements these procedures have to fulfil (para. II.7). According to para. II.7 of the Recommendation the governments have to ensure that “impartial, transparent, effective, simple, rapid, accessible and inexpensive complaint and appeal procedures” are in place, which “should be free of charge to the applicant”. *General Comment No. 19* sets forth comparably

³⁸ Seppänen (*supra* note 30), p. 53.

³⁹ C.M. Ljungman, ‘A Rights-Based Approach to Development’, in B. Mikkelsen (ed.), *Methods for Development Work and Research* (2nd ed., London: Sage Publications, 2005), p. 213.

⁴⁰ M. Sepúlveda & C. Nyst, *The Human Rights Approach to Social Protection* (Ministry for Foreign Affairs of Finland, Erweko Oy 2012) 54, at 58; available at: <<http://www.ohchr.org/Documents/Issues/EPoverty/HumanRightsApproachToSocialProtection.pdf>>.

⁴¹ *Ibid.*, 60, 62.

⁴² Para. 19 *SPF-Recommendation*.

precise conditions regarding control procedures in case of violations of the right to social security. In para. 77 it reads:

“Any persons or groups who have experienced violations of their right to social security should have access to effective judicial or other appropriate remedies at both national and international levels. ... National ombudspersons, human rights commissions, and similar human rights institutions should be permitted to address violations of the right. Legal assistance for obtaining remedies should be provided within maximum available resources.”

All these requirements which derive from a rights-based approach presuppose a legal, preferably statutory, framework of the individual social protection programs. *General Comment No. 19 on the Right to Social Security* recommends that social protection systems should be “established under domestic law” (para. 11). The *SPF-Recommendation* is even more clearly on this issue (para. II.7):

“Basic social security guarantees should be established by law. National laws and regulations should specify the range, qualifying conditions and levels of the benefits giving effect to these guarantees.”

Specific laws that fall under the category of “social protection” or “social security” can be found in nearly every country, worldwide. However, the level of regulation in this area varies greatly. While both developed and also some countries in the Global South have all sectors of social security covered by a differentiated set of rules, there are still several states where only a small percentage of the population (often state employees) enjoy a legally guaranteed social security provision. Many countries have systems in place that provide pensions based on contributions and are usually regulated by law. It must be noted, however, that in low- and middle-income countries the scope of coverage is usually limited to selected groups of workers in the rather small, formal economy.⁴³ Such old-age protection systems are often based on statutory provisions. To a more limited extent, some low and middle income countries also offer social health services on a statutory basis. Examples which have gained prominence in recent discussions on universal health coverage are the health insurance laws of Ghana⁴⁴, Thailand⁴⁵, India⁴⁶, and China⁴⁷. When it comes to social assistance, however, far fewer legal regulations exist; notable exceptions are the social assistance laws, for instance, of South Africa⁴⁸, Chile⁴⁹ and Brazil⁵⁰.

Why is it so important to have legal systems in place? Magdalena Sepúlveda and Carly Nyst have rightly observed that

“(t)he most successful experiences of social protection systems are those grounded in legal instruments that create an entitlement to social protection benefits, ensure the permanence of these initiatives, and give rights-holders the legal ability to invoke their rights. The success of systems in countries such as Brazil and South Africa is due in part to the existence of specific legal provisions ensuring the individual’s right to social protection and defining the standards which regulate the involvement of all stakeholders. ... In the absence of a well established le-

⁴³ International Labour Office, *Social protection floors for social justice and a fair globalization*, Doc. ILC.101/IV/1 (ILO, 2012), para. 22.

⁴⁴ National Health Insurance Act 2003 (Act 650), 2012 (Act 852).

⁴⁵ National Health Insurance Act (B.E. 2545) (2002).

⁴⁶ Particular mention should be made of the Rashtriya Swasthya Bima Yojana (RSBY) which is a health insurance scheme for the Below Poverty Line families based on the Unorganized Workers Social Security Act (2008).

⁴⁷ Basic Medical Insurance based on ch. 3 of the Social Insurance Law of the People's Republic of China (2010).

⁴⁸ Social Assistance Act (No. 13 of 2004).

⁴⁹ Law establishing a Social Protection System in charge of serving families in extreme poverty (“Chile Solidario”, Law No. 19.949 of 2004).

⁵⁰ Organic Law of Social Assistance (LOAS, Law No. 8742/1993) and the Programme Bolsa Familia, based on Law No. 10836/2004 and Decree 5209/2004.

gal framework, programmes are more vulnerable to political manipulation, and the long-term involvement of State authorities in all stages of the programme cannot be guaranteed. ...⁵¹ To achieve the programmes' desired effects in the area of poverty reduction, the sustainability and duration of social protection systems must be a main focus. As a consequence, statutory programmes should generally have preference over programmes that operate without a legal basis. This is important primarily in times of political change. Certain social protection systems might not be as politically valuable to a new government as it was to the previous one. If the beneficiaries, however, are able to identify actors who bear responsibilities in allocating the entitlement that they receive, it can, at least to a certain degree, be ensured that political changes do not jeopardise the existence of such a protection system. An additional argument that speaks for a legal framework is the fact that statutory provisions on social protection contribute to better predictability and transparency of the benefits.⁵² Furthermore, a law passed in the regular parliamentary procedure would most likely provide a guarantee against unjustified discrimination in the design and implementation of the perspective benefit plans. By presenting bills to the public, discussing it thoroughly in civil society (including the media), and then debating it in Parliament in detail, it can be ensured that the legitimate interests of the relevant social groups or parties will not be overlooked. While a legislative procedure cannot guarantee that discrimination in the design of a policy does not occur, this procedure can, however, increase transparency in political decisions such as the design of new social protection programmes. Finally, it should be taken into account that an effective, corruption-free implementation of social protection programmes requires that governments also have instruments at their disposal to enforce the relevant provisions. The promotion of compliance with social security rules can therefore best be achieved by establishing an appropriate legal framework where penalties and other enforcing measures are clearly defined.

3. The implementation of the right to social security

As already mentioned the right to social security is an integral part of international human rights law as well as guaranteed by several constitutions in the Global South. However, as the figures of the ILO have made unequivocally clear, it must be stated that in many low income and (lower) middle income countries there is a rather worrying implementation gap. According to Philip Alston, the new Special Rapporteur on extreme poverty and human rights

“in recent years, the process of including economic and social rights in constitutional provisions has proceeded apace ... But there remains a fundamental paradox because, at the same time ... (m)any of the States whose Constitutions recognize economic and social rights have not translated that recognition into a human rights-based legislative framework”.⁵³

Constitutional provisions, statutes and other legal rules have to be implemented, otherwise they will not become effective. If a social right, such as the right to social security, is enshrined as a basic right in the constitution of a country, this does not necessarily result in each case in an improvement of the social situation of the right-holders. Much depends on whether the constitutional structure, the socio-economic background and the country's political culture provide a supportive environment for the realization of such a right. When legislative measures aiming at the establishment of country-wide social protection programs already have been taken, implementation deficits can also occur. But as the government already has

⁵¹ Sepúlveda & Nyst (*supra* note 40), p. 26 *et seq.*

⁵² L. Bassett, S. Giannozzi, L. Pop & D. Ringold, *Rules, Roles and Controls: Governance in Social Protection with an Application to Social Assistance*, Social Protection and Labor Discussion Paper 1206 (2012).

⁵³ See Human Rights Council (HRC), 32nd session, Agenda item 3, Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/32/31, advance edited version of 28.04.2016, para.4, available at: <<http://www.ohchr.org/EN/Issues/Poverty/Pages/AnnualReports.aspx>>.

decided to adopt a legal framework it may be reasonably assumed that there exists also a political will to put the respective statutory and sub-statutory provisions into actual practice. Therefore, on the one hand, it is highly unlikely, that such a legal framework has no practical effect at all, but on the other hand, it also would be naïve to assume that – as a general rule – the legal provisions will entirely and immediately be implemented.

In their recently published book “Closing the Rights Gap – From Human Rights to Social Transformation” LaDawn Haglund and Robin Stryker differentiate between several models for social rights realization, amongst others (a) the “multistage spiral model” whose main focus lies on the different phases which new norms have to go through when they are implemented in a state’s society, and (b) the “policy legalization model” which analyzes the role of litigation in ensuring social rights compliance. In the following these two models, which both highlight the role of specific actors in the transformation process – the (I)NGOs on the one hand, and the courts on the other hand – , are briefly introduced with a view to explore their potential for closing the “right to social security-gap”.

a) The Multistage Spiral Model

Thomas Risse, Stephen C. Ropp and Kathryn Sikkink developed a theoretical conceptual model, named „spiral model“, to explain norm socialization and hereby the fulfilling of international human rights norms within a domestic framework.⁵⁴ Starting point of the spiral model (Phase 1, *repression and activation of network*) is a repressive situation in which the domestic societal opposition has no chance to challenge the government and oppose against human rights violations. If the international community can – by a cooperation of domestic human rights organizations with international non-governmental organizations (INGOs) – obtain sufficient information about the human rights conditions in the state, it can put the norm-violating state on the international agenda. This serves to raise international public attention about the norm-violations. Often the targeted state responds with denial, claims national sovereignty to deny any norm-violating situation in its territory and seeks to fight off international pressure (Phase 2, *denial*). Having international pressure continuing and escalating, the targeted state aspires to pacify international criticism and concedes minor, cosmetic changes (Phase 3, *tactical concessions*). But coincidentally, the norm-violating state hereby not only concedes the validity of international human right norms but also facilitates social mobilization. The domestic network is activated and empowered, and the domestic societal opposition gains strength. At the end of this phase, norm-violating governments are no longer in the position to oppress the domestic opposition but domestic and international networks, in particular INGOs, now pressure the government if any (serious) human right violation occurs. By progressively respecting international human rights norms, the targeted state starts engaging in a public dialogue with both domestic organizations and wedded international organizations on how to improve the domestic human rights situation. Subsequently, the validity of international human rights norms is no longer controversial but leads to a consensual behavior and dialogue of the different domestic societal groups by communicating, defining and lastly starting to implement human rights in the domestic legal framework (Phase 4, *prescriptive status*). Finally, the continuing pressure of domestic organizations linked with international organizations – associated as domestic-transnational-international networks – leads to a permanent

⁵⁴ Th. Risse, St. C. Ropp & K. Sikkink (eds.), *The Power of Human Rights. International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999); Th. Risse, St. C. Ropp & K. Sikkink (eds.), *The Persistent Power of Human Rights. From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013).

compliance of the former norm-violating state with international human rights norms (Phase 5, *rule-consistent behavior*). In total, the spiral model seeks to describe a process by which international human rights norms affect domestic structural change by the linked activities of domestic NGOs and INGOs. Pivotal are INGOs which not only identify and denounce human right violations in a first step but also initiate and carry on the process of putting pressure on the targeted state on the part of civil society.⁵⁵

In principle, the spiral model without doubt may help to close a “rights gap” by pressuring states both on a domestic and international level. But the approach cannot be similarly applied to all types of human rights. Although the spiral model might be successful by denouncing violations of certain fundamental human rights, such as the prohibition of torture or trafficking in human beings, it, however, shows considerable weaknesses with regard to the concept of social security. First, INGOs may have problems to obtain adequate, sufficient information about violations of the right to social security and thus to denounce these violations in the public. INGOs regularly engage in publicly well-known and tangible matters; only a few (I)NGOs (e.g. OXFAM⁵⁶, the International Council on Social Welfare⁵⁷, HelpAge International⁵⁸ and – as a platform for several NGOs – the Global Coalition for Social Protection Floors⁵⁹) focus on the right to social security. Therefore, it might be difficult for (I)NGOs to initiate and cooperate within civil society networks and face the (initially) overweighing pressure of the repressive, denying state. Secondly, the concept of social security in a whole is shaped by various historical, political, social and cultural aspects, and needs to be embedded and understood in the respective domestic societal system. As a consequence, any pressure on aspects of the right to social security from the international community, in particular INGOs, requires strong domestic support from the early beginnings to initiate the phases of the spiral model and to lead to norm socialization. This support, however, may suffer from serious weaknesses in light of the initially repressive situation. Against this background it is rather unlikely that the realization of the right to social security in countries of the Global South will primarily result from the efforts of national and international civil society groups.

b) The Policy Legalization Model

The main actors which are in charge of implementing social rights legislation are the government and its subordinated administrative authorities whose activities are (or at least should be) controlled by the courts. In recent years the influence of the courts (that is in the first place the Constitutional or Supreme Courts) on social and health policy decisions in countries of the Global South has been subject to extensive research.⁶⁰ One prominent example is the “policy

⁵⁵ Th. Risse & K. Sikkink, The socialization of international human rights norms into domestic practices, in Th. Risse, St. C. Ropp & K. Sikkink (eds.), *The Power of Human Rights. International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999), pp. 1, 17 et seq., in particular 33.

⁵⁶ <<https://www.oxfam.org/en/tags/social-protection>>.

⁵⁷ <<http://www.icsw.org/>>.

⁵⁸ <<http://www.helpage.org/>>.

⁵⁹ <<http://www.socialprotectionfloorscoalition.org/>>.

⁶⁰ See e.g. F. Coomans (ed.), *Justiciability of economic and social rights. Experiences from domestic systems* (Antwerp: Intersentia, 2006); R. Gargarella, P. Domingo & Th. Roux (eds.), *Courts and social transformation in new democracies. An Institutional Voice for the Poor?* (Farnham: Ashgate, 2006); M. Langford (ed.), *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press 2008); S. Liebenberg, *Socio-Economic Rights. Adjudication under a transformative constitution* (Claremont: Juta, 2010); A. Eli Yamin & S. Gloppen (eds.), *Litigating Health Rights. Can Courts Bring More Justice to Health* (Cambridge MA: Harvard University Press, 2011); D. Bonilla Maldonado (ed.), *Constitutionalism in the Global South. The Activist Tribunals of India, South Africa and Colombia* (Cambridge: Cambridge

legalization model” which has been presented by Varun Gauri and Daniel M. Brinks in their edited volume “Courting Social Justice”.⁶¹ The main focus of their research is on the impact which social rights litigation has on policy design and implementation – a process which can be described as “legalization of policy”. Based on a five-country comparative study (empirical studies have been carried out in Brazil, India, Indonesia, Nigeria, and South Africa) they have tried to calculate the number of cases where systemic enforcement of social rights – i.e. enforcement resulting in policy change – has taken place, and to estimate the number of persons who (directly or indirectly) have benefitted from the implementation of these decisions. Their research shows that social rights litigation and judicial involvement in policy development can serve as a complement to democratic processes, and that their model has iterative effects because outcomes at one stage (e.g. successful court proceedings) may influence conditions for further policy legalization at other stages (e.g. perceived utility of litigations strategies).⁶² Gauri and Brinks come to the conclusion that, on the whole, the effects of social rights legalization can be regarded as – at least to a limited extent and under certain conditions⁶³ – positive because social and economic resources are redistributed to those who need them. This, however, applies in particular to the middle and lower-middle classes whereas, according to their findings, the poorer and more vulnerable people do not belong to the typical beneficiaries of such litigation.

Although it has been rightly pointed out, that “the volume concludes with somewhat more hopefulness than may be warranted by the empirical evidence”⁶⁴, the approach of Gauri and Brinks can be regarded as one of the most ambitious attempts to analyze the impact of social rights litigation.⁶⁵ Other studies are also based on a comparative approach but primarily give an overview of the court cases that have recognized the justiciability of social rights.⁶⁶ Still other authors try to systematically analyze the political dynamics of litigation, not only focusing – as in the “policy legalization model” – on the number of people which are affected by court decisions, but also taking into consideration other aspects of impact, for instance the question *how* (or how much) people are affected by the litigations.⁶⁷ In this context, particular mention should be made of the research of Siri Gloppen. In her analysis of the transformative power of courts⁶⁸ she has shown that the social rights litigation process and success of such laws suits depend on four main factors: (1) the extent to which people whose rights are violated are able to voice their claims in a court, (2) the court’s responsiveness to these claims (which means that the court is willing to recognize the claim as a legitimate matter for a legal decision), (3) the judges’ capability to give legal effect to the claims that are voiced, and (4) the political authorities’ compliance with the judgement (both directly and in terms of subse-

University Press, 2013); E. Durojaye, *Litigating the Right to Health in Africa. Challenges and Prospects* (Farnham: Ashgate, 2015).

⁶¹ V. Gauri & D. M. Brinks (eds.), *Courting social justice. Judicial enforcement of social and economic rights in the developing world* (Cambridge: Cambridge University Press, 2008).

⁶² L. Haglund & R. Stryker, ‘Introduction: Making Sense of the Multiple and Complex Pathways by which Human Rights Are Realized’, in L. Haglund & R. Stryker (eds.), *Closing the Rights Gap – From Human Rights to Social Transformation* (Oakland, CA: University of California Press, 2015), pp. 1, 12.

⁶³ These conditions are described by Gauri & Brinks (*supra* note 61, p. 306) as “(a) a well-developed policy-infrastructure with latent capacity ..., (b) a constituency on the particular issue with substantial legal capacity, and (c) substantial support for the claims being made from politically consequential actors, either governmental or social”.

⁶⁴ H. Silverstein, *Review of “Courting Social Justice”, 7 Perspectives on Politics* (2009), 687, at 688.

⁶⁵ S. Gloppen & M. J. Roseman, ‘Introduction: Can Litigation Bring Justice to Health’, in Eli Yamin & Gloppen (*supra* note 60), pp. 1, 8.

⁶⁶ Langford (*supra* note 60).

⁶⁷ Gloppen & Roseman (*supra* note 65), p. 10.

⁶⁸ S. Gloppen, ‘Courts and Social Transformation: An Analytical Framework’, in Gargarella et al (*supra* note 60), pp. 35, 42 et seq.

quent legislation and policies). For each of these stages one can identify a number of conditioning factors which influence the courts’ transformation performance (such as the litigants’ resources to articulate their claims and to mobilize legal aid, practical and cultural barriers to the access to the courts, the legal culture and the structure of the legal system, the social rights sensitization and the social background of the judges, and – last but not least – at the compliance stage the political culture [legalism, balance of power, political will] and the implementation capacity, primarily in terms of economic and administrative resources).⁶⁹

What all these studies, however, have in common is a nearly complete lack of references to litigations which relate to the right to social security. Mostly the authors (as e.g. Gauri and Brinks) concentrate their research efforts on the right to health and the right to education, others also include case material regarding the rights to housing, to food or to water. There is just one quite well known exception – the *Khosa case*⁷⁰ which has been the background for new legislation on the access to social assistance for people who are not citizens of South Africa but permanent residents. The Constitutional Court found the old legislation which excluded non-citizen residents from the benefits to be inconsistent with Art. 27 (1) of the Constitution, which affirms the right of all persons to have access to social security and assistance, and with Art. 9 (3), which prohibits unfair discrimination by the state organs.⁷¹ This case is sometimes cited to demonstrate that social protection issues can also be a matter of judicial proceedings which result in policy changes. But the fact that there are, apart from this example from South Africa, very few reports about judicial proceedings in developing countries as well as in emerging economies, which have – besides the specific consequences for the individual litigant – also considerable political impact on the development of the country’s social protection system, makes it doubtful whether the courts are really able to play an important, socially relevant role for the implementation of the human right to social security.

In those countries where already well-elaborated social protection systems and corresponding legal frameworks exist, judicial decisions may have influence on the interpretation and further development of certain provisions. Sometimes they extend beyond that by revealing equality gaps in the design of the legal framework and thus providing orientation for reform measures including the adaption of the necessary legal regulations.⁷² But the majority of countries in the Global South still have to develop their social protection systems.⁷³ Here the right to social security – no matter, whether it is based on constitutional law or on applicable international law – can be of major importance for the adoption of new policies and laws, as it provides not only a legal but also strong political argument for the government to engage in activities resulting in concrete social protection policies and programs. It is, however, unlikely that in

⁶⁹ Ibid.

⁷⁰ *Khosa and others v. Minister of Social Development and others, Mahlaule and another v. Minister of Social Development*, 2004 (6) SA 505 (CC).

⁷¹ Ibid.

⁷² A typical example for such a “transformative” social protection case is the decision of the German Federal Constitutional Court of 18 July 2012 on the benefits provided under the Asylum Seekers Benefits Act (1 BvL 10/10; BVerfGE 132, 134 = NJW 2012, 3020). The Court has imposed upon legislation to ensure that these benefits are not in conflict with the guarantee a subsistence minimum that is in line with human dignity. As a consequence amendments of this law came into force three years later (Law on the Improvement of the Legal Status of Asylum Seekers and Tolerated Foreigners of 23. December 2014, BGBl. I p. 2439).

⁷³ Cf. also HRC (*supra* note 53) para. 46: “(T)he literature does not pay much attention to the existence of implementing legislation designed to promote realization of a specific right as a human right, whether or not there is constitutional recognition. In countries like South Africa, there is very extensive legislation ... designed to promote or implement economic and social rights and this often plays a key role in constitutional litigation. But in most other countries, such legislation seems to be rare, certainly outside of the education and health sectors.”

these countries the courts will give decisive impetus to the adoption of new programs or legislation in this very complex policy area.

III. Conclusions

Fighting extreme poverty by means of social protection is a complex matter which requires the commitment of a multitude of actors. Amongst others, civil society groups as well as (public) control institutions (the courts and human rights commissions) have an important contribution to make in the processes of setting up and implementing social protection programs. Therefore neither the “Spiral Model” nor the “Policy Legalization Model” which have been discussed above (II. 3) should be neglected when thinking about strategies to close the “right to social security-gap” in the Global South. Both models also support the rights-based approach to social protection as they provide the main instruments to meet the participation demands respectively accountability requirements of this concept (see above II. 2).

It would, however, be misleading to predominantly rely on these two groups of actors. There can be no doubt that the key impetus has to come from the parliaments and government authorities: They have the primary responsibility in this regard, for only they can adopt the relevant policies and corresponding legislation in their countries. Their task is – as the Special Rapporteur on extreme poverty and human rights has quite rightly stated – to establish a “recognition, institutionalization and accountability framework” (RIA framework), which means that (a) legal recognition has to be accorded to economic and social rights; (b) that appropriate institutions have to be established in order to promote and facilitate realization of the rights; and (c) that measures have to be taken which promote governmental accountability.⁷⁴ Accordingly, the most important components of a “closing the rights gap”-strategy are legislative measures aiming at the implementation of the constitutional and/or international guarantees:

“The legal framework can, at least partially, empower or disempower and legitimize or delegitimize those who advocate respect for economic and social rights. Thus, even those who argue that the battle over economic and social rights will inevitably be won or lost in the political arena would be well advised not to neglect the recognition, institutionalization and accountability dimensions. This is not for a moment to suggest that the many other dimensions of economic and social rights-related advocacy are unimportant. The argument is that most, if not all, of them will be less effective if the RIA framework is not in place as a matter of State policy.”⁷⁵

But there is also another “actor” whose responsibility for the realization of social rights should not be underestimated: the international community. Development cooperation – which is an important pillar of the (revitalized) “Global Partnership for Sustainable Development” (SDG 17) – plays a key role in the fight against poverty, not least with a view to strengthening institutions and building structures which enable the adoption of efficient social protection programs. SDG 17.9 urges states to

“(e)nhance international support for implementing effective and targeted capacity-building in developing countries to support national plans to implement all the Sustainable Development Goals, including through North-South, South-South and triangular cooperation.”

⁷⁴ HRC (*supra* note 53) para 21.

⁷⁵ *Ibid.*, para 69.

The governments of several donor countries already have recognized that social protection should become an integral part of their overall development aid efforts.⁷⁶ It is also worth mentioning that meanwhile several International Organizations are increasingly involved in this field⁷⁷ and that social protection also has become a subject matter for South-South learning activities.⁷⁸ These developments on the international stage give some cause for cautious optimism: If it proves possible to substantially strengthen social protection systems in the Global South within the next few years – with the help of the international community, but also in due consideration of the “recognition, institutionalization and accountability framework” –, then there is a real chance that the right to social security can be realized also for the poorer and most vulnerable groups of the world population. What is more: This would be an important – if not even the crucial – step to achieve SDG 1.1., the eradication of extreme poverty for all people everywhere.

⁷⁶ See e.g. <<http://www.oecd.org/dev/inclusivesocietiesanddevelopment/social-protection.htm>>; USAID, *Vision for Ending Extreme Poverty*, 2015, p. 22 *et seq.*, <https://www.usaid.gov/sites/default/files/documents/1870/Vision-XP_508c_1.21.16.pdf>; <http://ec.europa.eu/europeaid/sectors/human-development/social-protection_en>; <http://www.bmz.de/en/what_we_do/issues/soziale_sicherung/deutsches_engagement/index.html>. This engagement – just to mention one point in addition – is for most donor countries ultimately based on a legal obligation: The state parties to the ICESCR have extraterritorial obligations with regard to social rights such as the right to social security; see Principle 33 *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, available at: <<http://www.etoconsortium.org/en/library/maastricht-principles/>>; cf. also O. de Schutter, A. Eide, A. Khalfan, M. Orellana, M. Salomon & I. Seiderman, Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, (2012) 34 *Human Rights Quarterly* 1084; M. Langford, W. Vandenhole, M. Scheinin & W. van Genugten (eds.), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (Cambridge: Cambridge University Press, 2013); Kaltenborn (*supra* note 12), p. 45 *et seq.*

⁷⁷ Particularly noteworthy are – besides the International Labour Organization which is the main actor in this field (<<http://www.ilo.org/global/topics/social-security/lang--en/index.htm>>) – UNICEF (<http://www.unicef.org/socialpolicy/index_socialprotection.html>), WHO (<<http://www.who.int/healthsystems/berlin/en/>>), FAO (<<http://www.fao.org/social-protection/en/>>) and the World Bank (<<http://www.worldbank.org/en/topic/socialprotectionlabor>>).

⁷⁸ <<http://www.worldbank.org/en/news/press-release/2015/11/09/china-hosts-south-south-forum-on-social-protection>>; <<http://www.ipc-undp.org/south-south-learning-%E2%80%93-knowledge-management-and-sharing>>; <http://www.ilo.org/secsoc/information-resources/WCMS_SECSOC_16037/lang--en/index.htm>.