(Conference Draft)

"The Protection and Promotion of a People's Right to Mineral Resources in Africa: International and Municipal Perspectives"

Johan D. van der Vyver*

2017 Law and Development Conference

Cape Town, South Africa
September 2017

* I.T. Cohen Professor of International Law and Human Rights, Emory University School of Law; Extraordinary Professor in the Department of Private Law, University of Pretoria

SYNOPSIS

This paper will highlight the repeated resolutions of the United Nations proclaiming the "inalienable right of all states freely to dispose of their natural resources in accordance with their national interests" as an inherent aspect of sovereignty [for example GA Res 626 (1952)], with occasional reminders that developing countries were in need of encouragement "in the proper use and exploitation of their natural wealth and resources" [for example ESC Res 1737 (1973)]. Although these resolutions were adopted in the context of the decolonization policy of the United Nations and were mainly aimed at denouncing the exploitation of the mineral resources of African countries by colonial powers [GA Res. 2288 (1967), para 3], the emphasis of international law relating to the natural resources over time also emphasized the right to self-determination of peoples. As early as 1958, the General Assembly, in a resolution through which the Commission on Permanent Sovereignty over Natural Resources was established, stated that the "permanent sovereignty over natural wealth and resources" of States is "a basic constituent of the right to self-determination" [GA Res 1314 (1958)].

The African Charter on Human and People's Rights similarly provides: "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it" [art 21(1)]. This provision featured prominently in several judgments of courts of law, such as the one of the South African Constitutional Court in the case of *Bengwenyama Minerals (Pty) Ltd & Others v Gemorah Resources (Pty) Ltd & Others*, 2011 (3) BCLR 229 (CC) and of the African Court of Human and People's Rights in the case of *Social and Economic Rights Action Centre (SERAC) v Nigeria*, (2001) AHRLR 60 (ACHPR 2001) Communication 155/96.

In view of these directives of international law, the paper will critically analyze the South African Mineral and Petroleum Resources Development Act 28 0f 2002, which deprived landowners of the ownership of unexplored minerals and petroleum products and proclaimed mineral and petroleum resources to be "the common heritage of all the people of South Africa" with the State as the custodian thereof.

A. INTERNATIONAL DIRECTIVES OF PROPRIETY

In 1933, when the treatment of Jews in Germany was questioned in the League of Nations, Joseph Goebbels, who was to become the *Reich* Minister of Propaganda, responded: "A man is master in his own home."[1] But in the world we live in today, the master of the house can no longer simply have it his way. The *Draft Declaration on Rights and Duties of States* adopted by the International Law Commission in 1949, accordingly provides:

> Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law.[2]

Or, as succinctly stated by Lord Millet in the British House of Lords with reference to atrocities committed by President Pinochet against the people of Chile toward the end of the twentieth century: "[T]he way in which a state treated its own citizens within its own borders had become a matter of legitimate concern to the entire international community."[3] The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) proclaimed in similar vein: "It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights."[4]

However, the Goebbels assessment of state sovereignty is still in this day and age professed by political leaders and in constitutional systems of many countries of the world. In Zimbabwe, for example, a constitutional amendment authorizing the compulsory acquisition by the Government of farms owned by white farmers only, without compensation, and without access of the farmers to courts of law to contest the taking of their property by the state,[5] was condemned by The Southern African Development Community (SADC) Tribunal (a) for having deprived the white farmers of their agricultural land without compensation, (b) because the takings amounted to racial discrimination, and (c) for denying the landowners access to a court of law to contest the

---

[1] *See* Robert Badinter, *International Criminal Justice: From Darkness to Light*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1931, at 1932 (eds.) Antonio Cassese, Paola Gaeta & John R.W.D. Jones (2002).

[2] Draft Declaration on Rights and Duties of States (1949), art. 14, *reprinted in* UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION, 165-67 (5th ed. 1996).

[3] *R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex Parte Pinochet Ugarte (Amnesty International & Others Intervening) (No. 3)*, [1999] 2 All E.R. 97, 177 (H.L.).

[4] *Prosecutor v. Duško Tadi* (Jurisdiction), Case No. IT-94-1-A, par. 58 (Oct. 2, 1995).

[5] Constitution of Zimbabwe (Amendment No. 17, 2005).

expropriation of their properties, in each instance in violation of the Treaty of the Southern African Development Community to which Zimbabwe was a party.[6] The High Court of Zimbabwe declined to enforce the judgment of the SADC Tribunal, because in Zimbabwe the Constitution is the supreme law of the land,[7] the constitutionality of the "land reform program" reflected in the Constitution of Zimbabwe (Amendment No 17, 2005) Act has been upheld by the Supreme Court of Zimbabwe,[8] and "notwithstanding the international obligations of the Government, . . . registration and enforcement of that judgment would be fundamentally contrary to the public policy of this country."[9]

The "international obligations of the Government" that took second place in this judgment are those proclaimed in Article 27 of the Vienna Convention on the Law of Treaties, which provides that a party to a treaty "may not invoke provisions of its own internal law as justification for failure to carry out an international agreement,"[10] and perhaps more directly to the point, Article 32 of the Protocol to the Treaty of the Southern African Development Community through which the SADC Tribunal was established, proclaiming that "Decisions of the Tribunal shall be binding upon the parties to the dispute . . . and enforceable within the territories of the States concerned,"[11] and which imposes on Member States the obligation to "take forthwith all measures necessary to ensure execution of the decisions of the Tribunal."[12]

B. INTERNATIONAL LAW DIRECTIVES RELATING TO MINERAL RESOURCES

A very special instance of internal sovereignty within the borders of a State relates to exclusive control of the sovereign State over its natural wealth and resources. The United Nations has repeatedly proclaimed the "inalienable right of all states freely to dispose of their natural wealth and resources in accordance with their national interests" as an inherent aspect of

---

[6] *Mike Campbell (Pvt.) Ltd. & Others v. The Republic of Zimbabwe*, Judgment No. SC 2/2007, [2008] SADCT 2 (Nov. 28, 2008), available at http://www.saflii.org/sa/cases/SADCT/2009/1.pdf

[7] Constitution of the Republic of Zimbabwe (1980), art. 3.

[8] *Mike Campbell (Pvt.) Ltd. & Another v. Minister of National Security Responsible for Land, Land Reform & Resettlement & Another*, Const. Appl. 124/06, Judgment No.SC 49/07, [2008] ZWSC 1 (Jan. 22, 2008), available at http://www.saflii.org/zw/cases/ZWSC/2008/1.pdf.

[9] *Gramara (Pvt.) Ltd. & Another v. Government of the Republic of Zimbabwe & Others*, HC 33/09, [2010] ZWHHC 1, at p. 16 (Jan. 26, 2010), available at http://www.saflii.org/zw/cases/ZWHHC/2010/1.pdf.

[10] *Vienna Convention on the Law of Treaties, 1969*, art 27, U.N. Doc. A/CONF. 39/27 (1969), 1155 U.N.T.S. 331.

[11] Protocol on Tribunal and Rules of Procedure Thereof, art 32(3) (Aug. 27, 2000), available at http://www.sadc-tribunal.org/docs/Protocol_on_Tribunal_and-Rules_thereof.pdf.

[12] *Id*., art 32(2).

sovereignty,' [13] with occasional reminders that developing countries were in need of encouragement "in the proper use and exploitation of their natural wealth and resources."[14] Article 1(2) common to the human rights covenants of 1966 did emphasize that the right of all peoples to freely dispose of their wealth and resources has to be exercised "without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and internationals law."[15]

However, the emphasis of international law on the sovereign right of States over their natural resources was debated and decided in the context of colonialism, and more precisely to emphasize that the proper use and exploitation of natural wealth and resources belong to the colonized peoples and not to the colonial powers. In 1967, the General Assembly decided that the "inalienable right" to natural resources and the right to dispose of those resources in territories subject to colonial rule belonged to the peoples of the colonized territories, [16] and stated:

> The colonial Powers which deprive the colonial peoples of the exercise and the full enjoyment of those rights, or which subordinate them to the economic or financial interests of their own nationals or of nationals of other countries, are violating the obligation they have assumed under . . . the Charter of the United Nations.[17]

The rules of international law proclaiming the sovereign right of States over natural resources thus applies to conflicts between State A and State B and not to the rights of governments *vis-à-vis* its nationals or persons within its national domain. Those decisions are therefore not applicable in South Africa.

---

[13] See, eg, GA Res 626, 7 UN GAOR Supp (No 20) at 18, UN Doc A/2361 (1952); GA Res 1515, 15 UN GAOR Supp (No 16) at 9, UN Doc A/4684 (1960); GA Res 1803, 17 UN GAOR Supp (No 17) at 15, UN Doc A/5217 (1962); GA Res 2158, 21 UN GAOR Supp (No 16) at 29, UN Doc A/6316 (1966); GA Res 3016, 27 UN GAOR Supp (No 30) at 48, UN Doc A/8730 (1972); GA Res 3171, 28 UN GAOR Supp (No 30) at 52, UN Doc A/9030 (1973); and see also Res 88 on *Permanent Sovereignty over Natural Resources* of the Trade and Development Board, UN Doc A/8715, Rev 1 (1972), endorsed by the General Assembly in GA Res 3041, 27 UN GAOR Supp (No. 30) at 55, UN Doc A/8730, para 16 (1972).

[14] See, eg, ESC Res 1737, 54 UN ESCOR Supp (No 1) at 1 (1973); GA Res 626, 7 UN GAOR Supp (No 20) at 18, UN Doc A/2361, para 3 (1952); GA Res 1803, 17 UN GAOR Supp (No 17) at 15, UN Doc A/5217, para 6 (1962); GA Res 2158, 21 UN GAOR Supp (No 16) at 29, UN Doc A/6316, para 3 (1966).

[15] International Covenant on Civil and Political Rights, 1966, art 1(2), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, 1966, art 1(2), 993 U.N.T.S. 3.

[16] GA Res 2288, para 2, 22 UN GAOR Supp (No 16) at 48, UN Doc A/6716 (1967).

[17] GA Res 2288, para 3.

Over time, though, the emphasis of international law relating to natural resources shifted from designating the right to self-determination over natural resources as an integral part of state sovereignty to proclaiming that this was more specifically a component of the right to self-determination of peoples, thereby attaching to this right a very special human rights connotation A people in this context denotes persons united by a common ethnic or cultural, religious, or linguistic extraction—for example, being a member of the Zulu tribe, the Roman Catholic Church, or an Afrikaans speaking community. As early as 1958, the General Assembly, in a Resolution through which the Commission on Permanent Sovereignty over Natural Resources was established,[18] stated that the "permanent sovereignty over natural wealth and resources" of States is "a basic constituent of the right to self-determination."[19] In 1967, the General Assembly decided, that the "inalienable right" to natural resources and the right to dispose of those resources in territories subject to colonial rule belonged to the peoples of the colonized territories, [20] and stated:

> The colonial Powers which deprive the colonial peoples of the exercise and the full enjoyment of those rights, or which subordinate them to the economic or financial interests of their own nationals or of nationals of other countries, are violating the obligation they have assumed under . . . the Charter of the United Nations.[21]

The same principle is foundational to Article 21(1) of the African Charter on Human and Peoples' Rights which provides:

> All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.[22]

In the 2001 *Ogoni Decision*, the African Commission on Human and Peoples Rights (ACHPR) traced the historical basis of this provision back to colonialism, "during which the human and material resources of Africa were largely exploited for the benefit of outside powers."[23]

---

[18] GA Res 1314, 13 UN GAOR, Supp (No 18) at 27, UN Doc A/4090 (1958).

[19] See also Declaration on the Granting of Independence to Colonial Countries and Peoples, para 2, GA Res 1514, 15 UN GAOR Supp (No 16) at 66, UN Doc A/4684 (1960); Declaration on the Right to Development, para 1(2), GA Res 41/128, 41 UN GAOR Supp (No 53) at 186, UN Doc A/41/53 (1986); and see further GA Res 2288, 22 UN GAOR Supp (No.16) at 48, UN Doc A/6716 (1967).

[20] G.A. Res. 2288, para 2, 22 U.N. GAOR Supp. (No. 16) at 48, U.N. Doc. A/6716 (1967).

[21] *Id*, para 3.

[22] The African Charter on Human and Peoples' Rights, art 21(1), OAU Doc CAB/LEG/67/4/Rev 5 (27 June 1981).

[23] *Social and Economic Rights Action Centre (SERAC) v Nigeria*, (2001) AHRLR 60 (ACHPR 2001), Communication 155/96, 15th Annual Report, par 56).

In a recent ground-breaking decision, the ACHPR decided that an indigenous community (the *Endorois*) which was displaced from their ancestral land in Kenya almost half a century ago

constituted a distinct people within the meaning of Article 21(1) of the African Charter on Human and Peoples' Rights and that their right to "freely dispose of their wealth and natural resources" has been violated.[24] It is respectfully submitted that the decision of Froneman, J in *Bengwenyama Minerals (Pty) Ltd & Others v Gemorah Resources (Pty) Ltd & Others* was in conformity with the international-law approach by affording preference to an interest in obtaining prospecting rights to an ethnic community that occupied the land where the search for minerals were to be conducted.[25]

C. THE MINERAL AND PETROLEUM RESOURCES ACT, 2002

South Africa is a mineral rich country and probably a leading mining country in the world as far as the variety and quantity of minerals produced are concerned. Over the years regional legislation was adopted to regulate the exploration and mining of particular categories of minerals. In 1991, the legislature enacted the Minerals Act 50 of 1991 to consolidate those laws into a single mineral law regime for the whole country. The Minerals Act afforded to the concept of "mineral" a broad meaning to include "any substance, whether in solid, liquid or gaseous from, occurring naturally in or on the earth, in or under water or in tailings and have been formed by or subjected to a geological process, excluding water, but including sand, stone, rock, gravel and clay, as well as soil, other than topsoil."[26] In common parlance, the concept of minerals is confined to substances such as gold, diamonds, coal, chrome, uranium, manganese, platinum and the like.

---

[24] *Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, 9 *International Legal Materials* 858 (2010); and see Margaret Beukes, "The Recognition of 'Indigenous Peoples' and the Right as 'a People': An African First", 35 *South African Year Book of International Law* 216-39 (2010).

[25] *Bengwenyama Minerals (Pty) Ltd & Others v Gemorah Resources (Pty) Ltd & Others*, 2011 (3) BCLR 229 (CC).

[26] Minerals Act 50 of 1991, sec 1(xviii).

In the common law the owner of land was owner of everything in the land in accordance with the rule *cuius est solum ad caelum et ad inferos* (ownership of land includes everything above the property up into the heavens and below to the centre of the earth). While minerals were not extracted from the land, they formed part of the land and were therefore owned by the owner of the land. Once they were extracted from the land, the minerals became a distinct legal object separate from the land and could consequently become the property of a person other than the landowner.

Since early times, the State has assumed a power to regulate the exploration and mining of minerals. The State's power of regulation must not be confused with the notion of "eminent domain" of English law or the exercise of "police powers" in American law. These concepts are imbedded in remnants of the feudal system under which the Queen or the State assumed ownership of the land and therefore owned mineral and petroleum resources in or on the land. In South African law, the State was not the owner of minerals but merely exercised control over the exploration and mining of minerals. The State in the exercise of such regulatory powers was primarily concerned with the maintenance of safety measures and protection of the environment.

The Minerals Act 50 made provision (a) for the issuing by the State of a prospecting permit, and (b) for a power of the State to afford the right to mine for minerals. These rights could only be granted to the mineral rights holder, or to a person that had acquired written consent of the mineral rights holder to explore the minerals. A prospecting permit and mining rights were now subject to the granting of such rights by the State.

On 1 May 2004, the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), entered into force. The MPRDA transformed the state of South African mineral law quite considerably. It abolished the existing mineral law, introduced a new system relating to the exploration and mining of minerals, and made special provision for the transition from the old to a new order. The ownership of minerals that vested in the landowner was abolished. Section 3(1) of the MPRDA now proclaims: "Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof."

The key question that emerged from subsequent litigation was whether or not the changes brought about by the MPRDA amounted to expropriation of the "old order" rights of a

landowner and/or of the holder of mineral rights. For purposes of the present survey this is not particularly important.[27] Suffice it to say that the High Court, North Gauteng decided that it did amount to expropriation,[28] the Supreme Court of Appeal begged to differ,[29] and the Constitutional Court, while deciding that the facts in the case before it did not amount to an expropriation declined to proclaim "definitely, that expropriation is in terms of the MPRDA incapable of ever being established.[30] Constitutionality of the MPRDA does authorise the expropriation of mineral and petroleum resources and/or the prospecting and mining rights relating to mineral and petroleum resources, but this does not mean that those rights can be expropriated without compensation. The MPRDA expressly provides that "[a]ny person who can prove that his or her property has been expropriated in terms of any provision of this Act may claim compensation from the State."[31] It is perhaps also important to note that South Africa on 20 September 1994 ─ that is within less than five months of the political transition in South Africa ─ entered into a bilateral investment treaty with the United Kingdom which provided amongst other things:

> Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that party on a non-discriminatory basis and against prompt, adequate and effective compensation.[32]

For the purposes of this survey it is important to note, though, that the MPRDA was enacted in view of the constitutional obligation of the State to make provision for and to enforce remedial action programs.[33] The Constitutional Court on several occasions emphasized the need for

---

[27] As to the ramifications of the MPRDA in general, see Johan D van der Vyver, "Nationalization of Mineral Rights in South Africa", 45.I *De Jure*, 125-142 (2012).

[28] *Agri South Africa v Minister of Mineral and Energy*, [2011] 3 All SA 296 (GNP) (28 April 2010); and see Peter Leon, "Creeping Expropriation of Mining Investments: An African Perspective", 27.4 *Journal of Energy & Natural Resources Law* 597, 620-21 (2009); PJ Badenhorst & NJJ Olivier, 'Expropriation of 'Unused Old Order Rights' by the MPRDA: You Have Lost It!", 75 *Journal of Contemporary Roman-Dutch Law* 329-43 (2012).

[29] *Minister of Minerals and Energy v Agri South Africa* (*Centre for Applied Legal Studies as amicus curiae*), Case No. 485/11 [2012] ZASCA 93, para 4 (31 May 2012).

[30] *Agri South Africa v Minister of Minerals and Energy & Others*, 2013 (4) SA 1, 2013 (7) BCLR 727, para 74 (18 April 2013).

[31] MPRDA, Schedule II, Item 12(1).

[32] *Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa for the Promotion and Protection of Investments*, para 5(1) (entered into force on 20 Sept 1994); and see Leon (note 28) 601-02.

[33] Constitution of the Republic of South Africa, 1996, sec 9(2) (mandating "legislative and other measures designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination").

measures to bring about substantive equality in South Africa,[34] and decided that the MPRDA was enacted "amongst other things to give effect to those constitutional norms."[35] The MPRDA was designed to "make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources,"[36] and re-affirmed "the State's commitment to reform to bring about equitable access to South Africa's mineral and petroleum resources."[37] The objects of the MPRDA include a commitment to "substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from exploitation of the nation's mineral and petroleum resources."[38] The constitutionality of the MPRDA is therefore beyond dispute.[39]

itIt is important to emphasize, though, that "the people of South Africa" whose "common heritage of mineral and petroleum products" have been guaranteed by the MPRDA with the State as is not the Gupta Family.

D. Concluding Observations

Over the years, South Africa has made great advances in promoting the educational and economic advancement of its peoples on the basis of justice and equality. The creation of housing, job opportunities, medical services, educational facilities, and land redistribution, have been quite spectacular. Since 1947, the South African government has been engaged in providing sub-economic homes for the residents of informal housing on the outskirts of the towns and cities. Following political change in the country in 1994, the Government has done its utmost to secure employment of members of the previously disadvantaged population groups in commerce, industry and the professions with intent to reflect in the not too distant future the demography of the country across the entire spectrum of the economic aspects of life. Land re-allocation with a view to equitable distribution along racial lines is a high priority in the restructuring of the

[34] *Minister of Finance & Another v Van Heerden*, 2004 (3) SA BCLR 229, para 25-31 (CC).

[35] *Bengwenyama Minerals (Pty) Ltd & Others v Gemorah Resources (Pty) Ltd & Others*, 2011 (3) BCLR 229, para 3 (CC).

[36] MPRDA, Long Title.

[37] MPRDA, Preamble.

[38] MPRDA, sec 2(c).

[39] *Agri South Africa* (note 28) para 39, and see also Van der Walt, *Constitutional Property law* 439-40 (3rd ed 2011).

country. The MPDRP—as we have seen— is evidently part of these strategies of restorative justice designed to extinguish the injustices of the past is.

However, in spite of all good intent, South Africa is fighting a losing battle.

Many reasons can be advanced for the negative prospects of the future. For example, corruption in government, with a Head of State whose lust for power, wealth and sex is quite disgusting and who excels in violations of the Constitution and defiance of the rule of law. South Africa has furthermore become the haven of crime. Since 1994, more than 4,000 white farmers have been murdered in the country, and it has recently been established that the numbers of fatalities are on the rise.[40] It is estimated that approximately 500,000 rape cases take place in the country every year. Women's groups estimated that a woman is raped in South Africa on average every 26 seconds. The South African Police Service disagrees; it estimates that a woman is raped on average every 36 seconds. Car high-jacking, housebreaking and theft, plundering of business enterprises, and destruction of property as part of protest rallies seem to be a national sport in the country. It has been established that home owners in South Africa spends more money than in any other country in the world to safeguard themselves against crime.

It might also be noted that the constitutional directives based on the right to self-determination of cultural or ethnic, religious and linguistic communities,[41] and mutual respect for "the other",[42] as a means to create what Archbishop Desmond Tutu called "a rainbow nation" has also faded in recent years while group related rivalries again escalated. This was in a sense predictable. Following the initial euphoria that prevailed after the abolition of apartheid and the establishment of democratic rule in the country, it soon emerged that a vast majority of the poor are still poor, of the uneducated are still uneducated, and of the unemployed still unemployed. It is true that many Africans gained tremendous benefits from remedial action initiatives of the government. It

[40] The Transvaal Agricultural Union has established that in the period 1 January to 26 July 2017 there have been 246 incidents causing 47 deaths, and estimated that the number of farmers being murdered in 2017 might exceed those of all previous years. See *Die Beeld*, 27 July 2017 p. 2.

[41] Constitution of the Republic of South Africa, 1996, secs 31 and 235. The Constitution furthermore makes provision for a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (*Id*., secs. 181(1)(c) and 185-86); and see the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002.

[42] Under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, sec. 10(1) "no person may publish, propagate, advocate or communicate words . . . against any person, that could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred."

has in fact been established that as far as the increase of multi-millionaires is concerned, South Africa ranks among the top four countries in the world; and those multi-millionaires are almost exclusively Africans who benefitted from remedial action programs. But those who did benefit constitute a relatively small percentage of the disadvantaged peoples of South Africa; and unfortunately the ones who benefit from the government-sponsored remedial action seem to pocket it all, become stinking rich, and make no contribution to the many people who—for whatever reason—cannot reap the benefits of the program.

I shall not dwell upon these tragic components of the current South African living conditions. It will suffice to say that the expropriation of white farms without compensation and the nationalization of mining and commercial enterprises are not the answer and would indeed be unconstitutional. There is, however, one overriding problem which is seldom addressed: the absence of family planning and the concomitant population explosion within particularly less privileged and developing communities. The government authorities simply cannot keep up with the ever increasing demand for basic education, housing, job opportunities, and commendable living conditions.

On 15 May 2012 Judge Navanethem Pillay, at the time United Nations High Commissioner for Human Rights, touched upon the same problem from a slightly different angle when she delivered the annual Helen Kanzira Lecture at the Centre for Human Rights of the University of Pretoria.[43] The focus of her lecture was on the work of her Office to combat the frequency of maternal mortality in developing communities. She emphasized that the disabling or death of women during childbirth was found to be "a direct product of discrimination against women," and pleaded for the empowerment of women in relation to sexual and reproductive rights, including family planning. She was constrained to admit that efforts of her Office to bring this about are quite often obstructed by deep-seated stereotypes.

The same, I would suggest, applies to the problem of basic education, housing, job opportunities, and commendable living conditions in developing communities. Economic and social advancement, the promotion of gender equality within the social construct, and the empowerment of women with regard to sexual and reproductive rights, are the most effective

[43] Pillay "Valuing Women as Autonomous Beings: Women's Sexual and Reproductive Health Rights" (University of Pretoria, 15 May 2012).

means of contraception and a *sine qua non* for the eventual advancement of les privileged population goups.